

# The Dubai International Financial Centre Trust Law

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## Abstract

While the common law trust (or fiscal benefits derived from it) is under sustained attack in the jurisdiction of its birth, in the emerging international financial centres the need for and encouragement of the use of trusts is growing apace. Perhaps the most ambitious and comprehensive effort to transplant the trust concept into new ground is that in progress in the Dubai International Financial Centre. That effort is being pursued using a combination of sources, some of which are novel and some already well-tryed. Some comparisons with Bahrain's 2006 trust law help to illustrate this point.

## Preliminary

With commendable as well as disarming frankness, senior officials of the Dubai International Financial Centre (DIFC) sometimes explain the basis of the Centre's statutory and regulatory framework thus: 'We've borrowed from the best to be the best'. While the crown of supremacy amongst international financial centres is likely to be hotly contested for some length of time, the borrowing that has gone on, and the thinking behind it, is certainly evident in the provisions of the DIFC's Trust Law, DIFC Law No.11 of 2005.

Read end-to-end those provisions are very much in the mould of an archetypal offshore financial centre trust statute. The Trust Law is in a more streamlined

form than, for example, the Cayman Islands Trust Law (2007 Revision), no doubt in part because the latter is grounded on an inheritance and not an adoption of English common law institutions, including the legacy of the 1925 property and trust legislation. Nonetheless, the Trust Law is an attempt to legislate comprehensively for the use of DIFC trusts as modern family wealth management and transmission vehicles of a kind which has long been available in other financial centres and used by Middle Eastern families.

The sources that the DIFC turned to in framing this legislation are in certain respects just as surprising as they are revealing. Even more so is the marked contrast between the DIFC Trust Law and the other major trust legislation initiative in the Gulf that followed it, the Bahrain Financial Trust Law 2006,<sup>1</sup> a contrast that needs to be highlighted in any case in which a trust structure wholly or partly constituted under the laws of one or another of these jurisdictions is contemplated.

To illustrate these and related points, this article will focus on three central features of the DIFC Trust Law:

- provisions concerning trustee duties, accountability and removal;
- The Trust Law's anti-forced heirship regime and
- reserved powers provisions.

As noted in more detail below, all three have a particular significance in the context of Middle Eastern settlors, and perhaps especially those who are Arab

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1. The DIFC has a separate Investment Trust Law, DIFC Law No. 5 of 2006, which is specifically directed to the creation and operation of trusts in the area of collective investment schemes.

Muslims, but it is clear that the Trust Law is intended to cater for the needs of a wider market, including the substantial number of non-Muslim expatriates who already have or will in future acquire property in the Gulf region.

What the Trust Law was not specifically designed to accommodate is Shari'a law-based family permanent endowments known as *waqfs* (although there is another highly significant DIFC initiative which relates directly to such endowments).<sup>2</sup> That is not to say that the Trust Law cannot provide a framework for what have been understood, at least by Western advisors and their Muslim clients, to constitute Shari'a-compliant trusts. This is however a subject with a number of controversial aspects one of which, of particular significance for the purposes of the Trust Law's anti-forced heirship provisions, will be referred to below.

### Trustee duties, accountability and removal

The eleven sections and sixty-nine articles of the Trust Law comprise a set of 'default' rules, which govern trusts subject to it 'except as otherwise provided in the terms of the trust'. Articles 10(1) and (2) provide that the Trust Law governs the duties and powers of and relations amongst trustees and the 'rights and interests of a beneficiary',<sup>3</sup> except to the extent that the trust instrument provides otherwise. The qualifications on this relatively high degree of freedom of disposition are set out in Article 10(2), which in a real sense entrenches various principles as a 'core' set of rules. These include the following:

- the duty of a trustee 'to act in good faith and in accordance with the purposes of the trust';
- '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';
- the jurisdiction of the DIFC court to modify or terminate a trust in accordance with the Trust Law;
- 'the power of the Court under Article 44 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high';
- the effect of an 'exculpatory term' as governed by Article 64 and
- 'the power of the Court to take such action and exercise such jurisdiction as may be necessary in the interests of justice'.

The immediately following Article, 11, stipulates that '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'. Note that this provision, although presumably wide enough to enable the DIFC court to apply the principles developed by the English court in the exercise of its inherent supervisory jurisdiction over trusts, at least to the extent they are consistent with the provisions of the Trust Law, makes no specific reference to the common law and principles of equity as developed by the English courts.

That last point reflects something that is fundamental to understanding the Trust Law. Some of the provisions quoted above, and others referred to below, may at first sight jar a reader practising in a jurisdiction where the English law of trusts is the, or a, primary source of trust legislation. Amongst other things they make specific provision for matters that many common law jurisdictions leave to be regulated by the general law of trusts, and do so in terms that do not mirror well-known English authorities. The reason for this is that Articles 10 and 11, and indeed the majority of the basic provisions of the Trust Law, are drawn from the American Uniform Trust Code ('UTC'), a project of the

2. The *waqf* is not a trust although there are some parallels to be drawn between the two; they do not extend to the possibility of making capital distributions out of property subject to a *waqf*, which essentially involves the dedication of income-producing property to purposes recognized as legitimate under Shari'a law. A recent DIFC initiative to establish a corporate body known as *Waqf Trust Services* is an important innovation in the area of *waqfs* as permanent family endowments, which may encourage greater symmetry in the administration of *waqfs* and trusts.

3. The term 'beneficiary' is widely defined in paragraph 3 of Schedule 1 to the Trust Law and probably extends to the objects of discretionary dispositive powers and persons who are potential objects of such powers.

National Conference of Commissioners on Uniform State Laws.

The UTC reached its present form in 2005, broadly at the same time as the DIFC Trust Law was promulgated, and is strongly influenced by the Restatement of Trusts (2nd and 3rd) and the 1986 California trust statute (Division 9 of the California Probate Code). It has been adopted by a minority of the American states (approximately one-third), and not always in the same terms as the model code which the Trust Law follows. It has given and will in future give rise to a body of US state law decisions, which seem likely to be relevant to the interpretation and application of the Trust Law, as do decisions under the 1994 Uniform Prudent Investor Code, a related project which seeks to codify trustee responsibilities with respect to the management and investment of trust property and which has been adopted in some two-thirds of the American states.

So here is what at present stands as a unique hybrid: a common law jurisdiction carved out of a Shari'a law emirate and federal union, where in matters of personal status such as succession the Shari'a remains paramount, with a trust statute largely based on an American model and which will fall to be applied by a judiciary steeped in the common law as developed in England and British Commonwealth jurisdictions.

The corresponding provisions of the Bahrain Financial Trust Law are of less certain provenance and meaning, at least in the context of a family wealth settlement. Article 13 enumerates nine categories of trustee obligations including the following:

- to 'perform his duties in good faith . . . and to take all necessary action as the nature of the case, the current practice, or the will of the parties, may require';
- to abide by the terms and conditions of the trust instrument and 'perform his obligations honourably and honestly and exert in such performance the care of a careful person' and
- to 'invest the trust property in a manner that does not conflict with the terms and conditions of the Trust Instrument'.

In addition, Article 5 of the Bahrain law provides that a trust shall be void 'and the situation shall be restored to what it was before the creation of the trust' if the object and purpose of the trust violates the law, 'or public order (i.e., public policy) or public morality'. Apart from the difficulty of ascertaining the precise scope of at least the first and last of these provisions, in a general sense they and other provisions referred to below seem more keyed to the position of a trustee of a commercial or collective investment scheme trust than a family settlement.

To illustrate some practical implications of the approach adopted in the DIFC Trust Law as applied to family settlements it is helpful to consider two matters. The first is disclosure to beneficiaries of trust documents and information, and the second is what may happen if matters reach the stage where removal of the trustee(s) of a DIFC trust is sought.

### **Disclosure**

Confidentiality is just as important to Middle Eastern families as it is, for example, to families in the Far East. One aspect of this is the extent to which those who are or may become beneficiaries of a trust structure may obtain information concerning it, including on the threshold question of their precise status as present or potential beneficiaries. The framers of the Trust Law did not adopt the UTC approach of effectively entrenching the right of a beneficiary of an irrevocable trust both to be told of the existence of the trust and to disclosure of information relating to its administration (UTC Sections 105 and 813). Instead, Article 52 of the Trust Law (headed 'Duty to inform and report') stipulates as follows:

- '(1): Subject to the terms of the trust and any order of the Court, a trustee shall, on application in writing by a beneficiary, disclose to the applicant all documents which relate to or form part of the accounts of the trust';

- Article 52(2) goes on to provide that a trustee 'shall not be required to disclose to any person any document', which (a) discloses trustee deliberations as to the manner in which a trustee power or discretion has been exercised or a trustee duty performed, (b) discloses the reasons for any particular exercise of such power or discretion or performance of duty or (c) relates to any such proposed exercise or performance;
- however, Article 52(3) provides that 'notwithstanding the terms of the trust' the Court may declare 'that in particular circumstances of the trust its terms do not render the trustees sufficiently or appropriately accountable to the beneficiaries or any of them' and in consequence of making such a declaration the Court may 'extend or restrict the rights of all or any beneficiaries to information regarding the trust'.

The result is not a precise implementation of the principles examined in *Schmidt v Rosewood* [2003] 2 AC 709 or more recently (as regards trustee deliberations and letters of wishes) in *Breakspear v Ackland* [2008] EWHC 220, [2008] WTLR 777. Articles 52(1) and (2) appear to be based on the disclosure provisions of Section 25(a)–(d) of the Trusts (Jersey) Law 1984 relating to records of trustee deliberations and trust accounts but *without* the overriding qualification that the ability of trustees to refuse disclosure of them is 'subject to the terms of the trust and subject to any order of the court'. The Trust Law provisions as to disclosure of trust accounts and documents relating to them achieve substantially the same result as Section 25(d) of the Jersey Act, and perhaps do so in clearer terms; however, the broad jurisdiction conferred by Article 52(3) of the Trust Law does not by its terms extend to a case where trustees have properly considered whether to disclose records of their deliberations and have resolved not to do so.

Notwithstanding that limitation, trustees of a DIFC trust would probably be well advised to bear in mind the observations of Briggs J. in *Breakspear* concerning letters of wishes and deliberations to which a letter of

wishes (or an oral communication of the settlor's intent) is relevant. In particular, they will need to have regard to Briggs J.'s views that (a) although the process of such deliberations is 'inherently confidential', once a settlor has provided a letter of wishes and constituted the trust, the decision whether to preserve, relax or abandon the confidentiality that attaches to a letter of wishes (or oral communication of intent) is one for the trustees and in a proper case the court; (b) that it is illegitimate for the settlor to seek to fetter the trustee's discretion (and the court's ability to intervene) by imposing conditions as to confidentiality and (c) in a proper case, such as where the trustees are asking the court to sanction a particular exercise of a dispositive discretion, disclosure may be ordered because the content of trustee deliberations may be directly relevant to the question they have asked the court to decide. See [2008] EWHC 220 at paras 54–73 of the judgment.

To the extent that the Bahrain Financial Trust Law deals with the question of disclosure of trust information, the way in which it does is related to the scope of a trustee's obligations referred to above. Article 13.7 of the Bahrain Law (under the heading 'Obligations of the Trustee') provides that the trustee is obliged to

Notify the Settler [sic], the Protector of the Trust and the Beneficiary, of any matter that has tangible effects on the value of the Trust Property or on investing the Trust Property.

This appears to create a continuing obligation on the trustee to apprise the named parties of such matters, presumably in a timely manner so that they may consult or take such action as thought fit in the circumstances. It is clearly supplemented by Article 25 ('The Right to Question the Trustee'), the terms of which are:

Any one of the Settler, the Protector of the Trust, the Beneficiary or [the Bahrain Monetary Agency] has the right to question the Trustee. He must allow them to access the accounts, documents and records of the Trust, and must submit to them audited annual

accounts within the first three months of the following year, unless the Trust Instrument or a subsequent agreement or the nature of dealing with the Trust Property require otherwise.

It is not clear whether the qualification at the end of this article relates only to the provision of audited accounts or that and the obligation to allow access to the accounts, documents and records of the trust. In any case, it does not appear that the Article 13 notice obligation can be overridden by the terms of the trust; neither in the Article itself nor elsewhere in the legislation is there a provision to this effect. Nor does it seem at all likely that a trust instrument could oust the Bahrain Monetary Agency's right to question the trustee. In contrast, the Dubai Financial Services Authority, which has the power to make rules under the Trust Law, has no similar direct role under the Trust Law in questioning or monitoring trustees or individual trusts created in the DIFC.

### **Removal of (and other remedies in relation to) DIFC trustees**

Most modern trust instruments made under the law of one or another offshore financial centre will contain express provisions enabling the settlor or another party to remove/replace an incumbent trustee. However, and perhaps in practice most often where the settlor is no longer on the scene (and his or her formally cordial relationship with the trustee has not been sustained as between trustee and beneficiaries), it may be necessary to resort to whatever statutory or inherent jurisdiction the court has over trustee removal.

Removal proceedings are often fraught with difficulty,<sup>4</sup> particularly from the point of view of the beneficiaries, or the faction of them, seeking removal.

Such proceedings are likely to be hard-fought; the old golden rule in *Letterstedt v Broers* (1884) 9 App Cas 371 PC, at 386–387, especially that where there is friction impeding the due administration of the trust 'the trustee is always advised by his counsel to resign, and does so', looks more than a little quaint in an era where professional trustees may have commercial interests in retaining office.<sup>5</sup> Moreover, circumstances in which trustees effectively cling to office often go further than purely financial considerations in terms of perceived risk of damage to reputation, belief in fulfilling the settlor's intention or sheer bloody-mindedness (sometimes aided and abetted by advocates).

Difficulties of these or of other kinds (including the sheer expense of contested removal proceedings) might lead one to wonder whether there should be some remedy short of removal that could be suited to circumstances where the court might be inclined to intervene but not to the extent of an immediate and complete displacement of an incumbent trustee.

Articles 42 and 59 of the Trust Law certainly extend the range of options open to the court and litigants alike where removal proceedings are brought. They are drawn almost in their entirety from Sections 706 and 1001(b) of the UTC. Article 42(2) deals explicitly with the grounds for a removal application and provides that the 'settlor, or enforcer [being the person whose appointment validates a non-charitable purpose trust constituted under Article 29 of the Trust Law<sup>6</sup>], a co-trustee or a beneficiary may request the Court to remove a trustee, or a trustee may be removed by the Court on its own initiative' on any one of four alternative grounds:

- commission of a breach of trust (unlike the provision made in the UTC the breach need not be 'serious');

4. A note by Michael King of counsel in the April 2008 ACTAPS newsletter gives a succinct statement of the relevant law and current practice.

5. Some new life may have been breathed into the old rule in *Newall v Lewis* [2008] EWHC 910 (Ch), where Briggs J. (in the context of a costs argument relating to removal proceedings that had been compromised) at paras 49 and 55 referred to 'the fact that experienced counsel had considered it appropriate to plead the serious breaches of duty found in the particulars of claim would of itself be a material factor tending to assist the claimants in demonstrating that their loss of confidence [in the incumbent trustees] was well-founded'.

6. An Article of the Trust Law based on the Bahamas Purpose Trust Act 2004 and the Trusts (Jersey) Law 1984 as amended.

- lack of cooperation amongst trustees, which substantially impairs the administration of the trust;
- because of unfitness, unwillingness or persistent failure of the trustee to administer the trust, 'the Court determines that removal of the trustee best serves the interest of the beneficiaries' or
- substantial change of circumstances or a request for removal by all the beneficiaries, 'and the Court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available'.

For the most part, these grounds do not depart from principles developed under the English court's inherent jurisdiction over trusts. However, Article 42(3) provides that pending a final decision on an application to remove a trustee, 'or in lieu of or in addition to removing a trustee', the court may order relief under Article 59 (headed 'Remedies for breach of trust', but in the present context clearly not limited to cases where a breach of trust has been proven).

The armoury of remedies provided by Article 59 is large; the Commissioners on Uniform State Laws' commentary on UTC Section 1001 makes it clear that they were intended to be so as well as flexible although it also makes clear that 'the availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity'. Apart from relief by way of injunction, an order to account and/or monetary compensation, the Court may:

- order a trustee to perform a trustee duty in such manner as the Court directs;
- 'suspend the trustee';
- 'reduce or deny compensation to the trustee';
- subject to affording protection to a third party who has dealt with the trustee, 'invalidate an act of the trustee, impose a lien or a constructive trust on

- trust property or trace trust property wrongly disposed of and recover the property or its proceeds';
- 'appoint a special fiduciary to take possession of the trust property and administer the trust' (while 'special fiduciary' is not defined in the Trust Law itself in the UTC it means a receiver with broad powers);
- 'order any other appropriate relief'.

In contrast, Article 36.2 of the Bahrain Financial Trust Law enables the settlor, protector or beneficiary of a trust to request the Dispute Resolution Committee (a tribunal constituted pursuant to Article 35) to remove a trustee if he becomes 'unable to exercise the powers and perform the duties of office' provided for in the trust, or fails to fulfil a qualifying condition for trusteeship 'or if he was in grave breach of his obligations under this Law or under the Trust Instrument. This shall be without prejudice to the right of the aggrieved to get compensation'.

### Anti-forced heirship provisions

Articles 12 and 14–17 of the Trust Law bring the DIFC within the line of jurisdictions, which have followed the lead given by the Cayman Islands in the Trusts (Foreign Element) Law 1987 (as subsequently amended in 1995 and now consolidated in Part VII of the Trusts Law 2007 Revision). Before turning to the specific provisions made it is necessary to say something concerning their context, which makes these particular provisions so unusual and potentially important.

Outside the DIFC and throughout the Gulf region, including all of the GCC states, the Shari'a law of inheritance, largely untouched by legislative reform, continues to govern succession to the estate of a deceased Muslim. The orthodox Shari'a does not recognize the concept of the law of domicile as the governing law of succession, nor any distinction between movable and immovable property.<sup>7</sup> The Sunni Shari'a succession rules provide for a system

7. The principles are examined at length in the Pakistan judgment (written in English) in *Yusuf Abbas v Ismat Mustafa* 1968 PLD Kar. 480.

of forced heirship in which, where there is an heir or heirs entitled to share in the deceased's estate, testamentary freedom is limited to one-third of the estate, the balance passing to the forced heir(s). There are differences between the Sunni and Shi'a rules but broadly their effect is to create a class of protected or fixed-share heirs, including the deceased's husband, wife or wives and children, and two further categories of heirs comprised of more remote relatives, including those who were heirs under the pre-Islamic Arabian customary law.

The question whether these rules give rise to indefeasible rights on the part of the heirs, such that they cannot be defeated by a lifetime disposition into trust or otherwise, is controversial. There are good reasons (in this writer's view) for thinking that they do *not* confer indefeasible rights during the settlor/donor's lifetime. These include the absence of any specific Quranic prohibition on such dispositions, the Shari'a law's lack of a clawback system similar to that of the other forced heirship regimes, and the relative freedom a Muslim donor has to make lifetime gifts if of full age and capacity. The only well-established qualification on the last two factors is the Shari'a 'death illness' rule, which applies the testamentary one-third restrictions to gifts (and in certain cases other transactions) made in the last year of a person's fatal illness.

However, the reality is that the Shari'a succession rules are part of an Islamic code for living,<sup>8</sup> or an aspect of overriding religious duty, one which many Muslim settlors wish to honour despite the possible fragmentation of their estate the succession rules can work in the case of a large family. Other Muslim settlors however may take (and many have taken) the view that the maintenance of a family business or substantial accumulation of wealth after their death calls for a departure from those rules.

How safe do the DIFC anti-forced heirship rules render a DIFC trust from attack by an individual with a foreign law forced heirship claim? The issue

is untested in the DIFC Court but the approach of the Trust Law is to adopt the bulk of the provisions in Sections 89–93 of the Cayman Trust Law (2007 Revision) and Sections 4 and 7 of the Bahamian Trusts (Choice of Governing Law) Act 1989 (as subsequently amended). It does so without making any distinction whatsoever between the Shari'a succession rules and other forced heirship systems. Thus:

- Article 14(1) provides that all matters arising in regard to a trust, which is for the time being governed by the laws of the DIFC shall be determined in accordance with DIFC laws, subject to a number of exceptions in Article 14(2) corresponding to those in Section 90 of the Cayman Trusts Law and Section 7 of the Bahamian Trusts law;
- Article 15—without limiting the generality of Article 14(1)—stipulates that no DIFC trust shall be void, voidable, liable to be set aside or defective in any manner by reference to a foreign law, nor is the capacity of a settlor in relation to the trust or disposition of property into trust liable to be questioned by reason of the fact that a foreign law prohibits or does not recognize the concept of a trust, or that the trust or disposition defeats any rights conferred under foreign law 'by reason of a personal relationship to the settlor or by way of heirship'.
- Article 16 ('Heirship rights') further provides that an 'heirship right conferred by foreign law in relation to the property of a living person shall not be recognised' as affecting the ownership of immovable property in the DIFC or movable property wherever situated, or constituting an obligation or liability for any purpose.
- Article 17 prohibits the recognition or enforcement of any foreign judgment 'insofar as it is inconsistent with Articles 15 and 16'.

On the face of it the anti-forced heirship framework provided by the Trust Law is as robust, in terms of

8. See Nasir, *The Islamic Law of Personal Status* (3rd ed.) at p. 2, Section 2 'Early Legislation'.

protection against foreign law claims, as are the laws of the offshore jurisdictions on which it is based. These of course can be accounted a substantial success given the lack of reported successful challenges to trusts constituted under them (see *Lemos v Coutts* (1992–93) CILR 460 CA, esp per Kerr J.A. at 506). Nonetheless, where a DIFC trust holds assets outside the DIFC, even if in practical terms they are effectively next door in Dubai or elsewhere in the UAE, it is likely that there will be a number of structuring issues as to whether the assets should remain there and/or to deepen their and the trust's connection to the DIFC, e.g. by ensuring that the trust is administered from the DIFC. These of course depend very much on the circumstances of the individual case.

The Bahrain Financial Trusts Law contains no similar anti-forced heirship provisions. Articles 38, 39 and 41, respectively, contain (a) provisions governing the ownership of trust property after termination of the trust, (b) the 'devolution of the trust legacy' upon the death of 'the Settler or the Beneficiary', which is 'to the heirs of each of them, unless the Trust Instrument provides otherwise' and (c) a provision applying the Bahrain Civil Law to matters not specifically regulated by the Financial Trusts Law 'but with due regard to the nature of the Trust'.

Exactly what a 'trust legacy' may comprise is obscure but the combined effect of these articles may be to apply the Shari'a law of succession to it if there is no gift over or on new trusts on the death of the person with a vested interest and that person was a Muslim.

### Reserved powers

It was to be expected that a DIFC trusts law would make provision for settlor reserved powers, for at least three reasons:

- A significant number of settlors of DIFC trusts are likely to be from non-trust civil law or Shari'a law jurisdictions, to whom the establishment of an inter vivos trust over family/family business assets may

represent a wholesale change from patriarchal or informal ownership arrangements. Some degree of continuing control over trust assets on the part of the settlor may be necessary or desirable.

- Other competing financial centres have legislated for reserved powers [most recently Guernsey in the Trusts (Guernsey) Law 2007, which is now in force].
- The influence of American trust law, which historically gives very broad scope for settlor powers in revocable trusts, is or given the other provisions of the Trust Law is as likely to be felt in the DIFC as it was in the Caribbean jurisdictions which enacted reserved powers legislation, particularly given the role of the UTC in the development of the Trust Law.

The way in which such provision has been made in the Trust Law does not completely follow the UTC or indeed follow very closely any other particular model. In Article 68(2) of the Trust Law, which is in fact headed 'The Protector', it is provided that 'the trust instrument may confer on the settlor or on the protector any power', and there follow eight specific examples of powers that may be conferred, which are stated to be without prejudice to the generality of the authority to confer any power. None of the examples is controversial; they range from changing the forum of administration of the trust to appointing or removing trustees to excluding beneficiaries.

While there is no specific reference to the settlor having power to revoke the trust, give binding directions to the trustee in connection with the holding or sale of trust property or to restrict the exercise of trustee powers or discretions [cf. section 14(1) of the Cayman Trusts Law 2007 Revision], there is nothing in the broad terms of Article 68 or elsewhere in the Trusts Law, which indicates that a DIFC trust cannot incorporate such provisions.

The Bahrain Financial Trust Law gives the settlor the right to reserve powers to himself (Article 7), although no specific examples of possible reserved powers are given. That may be an omission of some



consequence because the settlor's reserved powers are made subject to the rule that any such reservation does not 'prejudice the independence of the Trustee provided for in Article 11 of this Law'. Article 11 is in these terms:

The Trustee must be independent of the Settler, and must exercise the powers and duties as defined in the Trust Instrument and this law, without interference or guidance from the Settler. The Trust shall be void if the Trust Instrument provided otherwise.

It would seem that this requirement simply rules out the possibility of a settlor being able to give binding directions to the trustee as to the exercise of trustee powers and discretions, and very possibly also any right on the part of the settlor to veto trustee decisions. Beyond that, e.g. whether the settlor can reserve the right to remove and replace a trustee, it is difficult to say exactly what the bounds of the prohibition in Article 11 are. The consequence of infringing it is that the trust itself will be 'void' and not merely that the settlor's interference will be of no effect, so that any reservation to the settlor of powers that might trespass on the trustee's independence could be risky in the extreme. It might be possible to formulate a trust in such a way that certain powers are exclusively conferred on the settlor to

the exclusion of anyone else but that (a) is not a guarantee of compliance with the broad terms of Article 11 and (b) runs an obvious risk of stepping outside the very concept of a trust and into dangerous territory.

## Conclusion

The DIFC Trust Law is one part of the structure being put in place to make the DIFC a major international financial centre. A good indication of the DIFC's overall objective in promoting the Trust Law and other laws and regulations relating to the same general subject of family wealth management may be found in DIFC Consultation Paper No. 3 of 2008, which relates to the DIFC's single family office initiative and is soon to be followed by DIFC private trust company legislation.

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

Clearly, there are enough families in the Gulf region who fall within that bracket to make it worthwhile for the DIFC's development of the trust concept to continue, and there is every sign that it will.