

The DIFC Foundations Law 2017

Paolo Panico*

Abstract

The Dubai International Financial Centre (DIFC) has launched a public consultation leading to the enactment of a Foundations Law. Foundations are a typical civil law institution. The DIFC legislation builds upon the legislative experience of the first two decades of this century, where private foundations have been introduced in many common law jurisdictions. The DIFC Foundations Law reflects the main features of common law foundations as well as some aspects of the Dutch *stichting*. It contains some unique features, such as 'firewall' asset protection provisions, the doctrine of mistake and the *Hastings-Bass* rule, and the conversion of a company into a foundation.

'The Dubai International Financial Centre (DIFC) was built on an idea. The idea that an inviting oasis of opportunity could spring forth from the desert sands of Dubai, providing global investors and issuers of capital with a regional capital market set in an international environment they could be comfortable with. From this idea, the DIFC was born'.

The statement above was made by Michael Hwang SC, Chief Justice of the DIFC Courts, on 1st November 2008.¹ A description of the DIFC as an 'inviting oasis of opportunities' is even more fitting nine years later.

In the second half of 2017 public consultations have led to a revamp of the Companies Law, followed by an overhaul of the Trusts Law as well as the enactment of a new Foundations Law.²

The DIFC Foundations Law 2017 builds upon the legislative experience of 'common law foundations' which is consistent with the legal environment of the DIFC. At the same time, with a typical syncretistic approach, it relies on some aspects of the legal tradition of civil law foundations, not only the Germanic model embedded in the Liechtenstein Law of Persons and Companies (*Personen- und Gesellschaftsrecht*, PGR) in force since 1926, but also the Dutch practice of the *Stichting Administratiekantoor* (STAK).³

The DIFC Foundations Law 2017 builds upon the legislative experience of 'common law foundations' which is consistent with the legal environment of the DIFC

Some provisions in the DIFC Foundations Law 2017 find a correspondence in the private foundations legislation of some other leading financial centres while other aspects of the DIFC statute expressly depart from some widely adopted legislative solutions. In addition to that, the DIFC Law includes some unique features that have no equivalent in the foundation law of any other jurisdictions.

* Paolo Panico, Private Trustees SA, 92 Rue de Bonnevoie, L-1260 Luxembourg. Tel: +352 27489731.

1. M Hwang, 'The Courts of the Dubai International Financial Centre – A Common Law Island in a Civil Law Ocean' <<http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/>> accessed 22 October 2017.

2. The draft DIFC Foundations Law 2017 was in a substantially definitive form at the time of writing. Its entry into force is expected shortly after this issue goes to print.

3. For a brief summary of the three models of private foundations cf P Panico, 'Private Foundations and Trusts: Just the Same but Different?' (2016) 22 T&T 1, 132–39.

Definition—capital—property

The notion of a foundation is usually not defined in the legislation enacted in many common law jurisdictions, starting from the forerunner of such legislative experiences, the St Kitts Foundations Act 2003. On the other hand, Article 10 of the DIFC Foundations Law 2017 provides a definition that emphasizes the corporate nature and the legal personality of foundations:

- 10 (1) A Foundation is a body corporate with a legal personality separate from that of its Founder(s) and any other person.
- 10 (2) The property of a foundation is not held by it upon trust for any other person.

This definition sets out the main features that distinguish a foundation from a trust, ie the fact that a foundation is a legal person and that as a result it owns its endowed property in its own right.

In this respect, the DIFC Foundations Law 2017 does not follow the traditional notion of a foundation as a dedicated fund appropriated to a specified purpose, or *Zweckvermögen*, in accordance with the Germanic tradition embedded in Article 552 1 of the Liechtenstein PGR, as amended in 2009:⁴

A foundation within the meaning of this Section is a legally and economically independent special-purpose fund which is formed as a legal entity (juristic person) through the unilateral declaration of will of the founder. The founder allocates the specifically designated foundation assets, stipulates the purpose of the foundation, entirely non self-serving and specifically designated, and also stipulates the beneficiaries.

The definition above can be traced to the original distinction between two classes of legal persons, corporations (*Korporationen*) and foundations (*Stiftungen*), elaborated by the German scholar Friedrich Carl von Savigny in 1840, where the former are characterized by the activities of their members while the latter are defined by the appropriation of their property to a purpose.⁵

Even though a DIFC foundation is not defined as a ‘dedicated fund’ in accordance to the German pandectist doctrine, the two requirements of ‘capital’ and ‘objects’, are necessary for the creation of a foundation.

The specification of an initial capital is one of the mandatory items that have to be included in the Charter of a DIFC Foundation.⁶ The initial capital is defined under Article 27(1) as the capital endowed upon the foundation to establish it. No minimum capital is required by law, unlike in the classic civil law foundation jurisdictions, such as Liechtenstein⁷ and Austria.⁸ This is a good idea as it avoids an unnecessary formality. Other common law or mixed jurisdictions have taken a similar approach.⁹ This is to be preferred to the corresponding provision in Jersey, where quite surprisingly ‘[a] foundation need not have an initial endowment’.¹⁰

The foundation property must be appropriated to the furtherance of objects, which under Article 12(1) of the DIFC Law:

- a. must be certain, reasonable and possible; and
- b. must not be unlawful or contrary to public policy in the DIFC.

A foundation may be established for objects, or purposes, that are exclusively charitable or that are

4. The foundations law of Liechtenstein, which had been originally enacted on 19 February 1926 as Title 5, Section 2 of the PGR, has undergone a total overhaul under the Law of 26 June 2008 on the Amendment of the Persons and Companies Act, which came into force as of 1st April 2009. The official English version is quoted in this article.

5. FC von Savigny, *System des heutigen Römischen Rechts* (Veit und Comp 1840).

6. DIFC Foundations Law 2017, art 19(2)(c).

7. Liechtenstein, PGR, art 552 13(1)–30,000 CHF, USD, or EUR.

8. Austria, *Privatstiftungsgesetz* 4, EUR 70.000.

9. Foundations (Guernsey) Law 2012, s 2; Seychelles, Foundation Act 2009, s 8 (requirement for minimum initial assets of USD 1).

10. Foundations (Jersey) Law 2009, art 7(1). So long as a Jersey foundation has no endowment, it lacks one of the defining features under the laws of the jurisdictions where the concept was originally developed. This may be an obstacle to its international recognition outside Jersey.

nor charitable or to provide benefits identified in its constitutional documents (Charter and By-laws). To this effect the DIFC Law follows the same approach as in other common law jurisdictions.¹¹

An issue in relation to ‘private purpose foundations’ in civil law jurisdictions is the application of some form of ‘beneficiary principle’ similar to the one that causes many instances of non-charitable purpose trusts to be invalid under English law.¹² The definition of a Liechtenstein foundation above makes express reference to a purpose that has to be ‘entirely non self-serving and specifically designated’. This appears to require that the objects of a foundation ultimately amount to some form of benefit for human beneficiaries. On this basis the Liechtenstein Supreme Court ruled that a foundation with the following object is invalid and has no legal personality:¹³

Investment and management of movable assets of all kinds. The holding of participating interests and other rights as well as the carrying out of related transactions.

This approach may cause problems if a foundation has to be used as an ‘orphan entity’ in a corporate arrangement. The issue is ruled out under the FIFC Foundations Law insofar as:¹⁴

It is sufficient [...] for the Charter to provide that a Foundation is to hold property selected in accordance with its By-laws.

Similar provisions can be found in the foundation legislation of other common law jurisdictions.¹⁵

At the same time, the ‘uncertainty of object’ that may be fatal to a trust if it is not possible to ascertain at least a class of beneficiary at the time of its creation, is ruled out in relation to DIFC foundations. Article 12(1)(c) of the law includes a broad provision

allowing that a person or class of persons to receive benefits may be determined in accordance with the By-laws. An equivalent provision exists under Jersey law.¹⁶ It implies that the By-laws may specify the criteria for the inclusion of a person in the class of beneficiaries or simply confer a power of appointment on some officers of the foundation. In any event, any property that cannot be otherwise appointed on the winding up and dissolution of a foundation passes on to the DIFC Authority.¹⁷

Recipients—depository receipts—default recipient

Another salient difference between a foundation and a trust is the legal nature of beneficial interests. Foundations were originally developed in the civil law tradition, which ignores the English notion of equity. Accordingly, the beneficiaries of civil law foundations do not have the same equitable interests of trust beneficiaries, which in some cases may have the appearance of rights in rem to the trust property and justify a reference to ‘equitable’ or ‘beneficial ownership’. The private foundations legislation enacted in many common law jurisdictions attempts to expressly draw this distinction.¹⁸

To this effect, the DIFC Foundations Law 2017 does not make use of the term ‘beneficiaries’, which would be the same as under the Trusts Law, but refers to ‘qualified recipients’. Article 28(1) indicates that the By-laws may provide for the distribution of property to qualified recipients. The phrase is further defined under Article 29(2):

The DIFC Foundations Law 2017 does not make use of the term ‘beneficiaries’, which would be the same as under the Trusts Law, but refers to ‘qualified recipients’

11. Foundations (Jersey) Law 2009, art 5; Isle of Man, Foundations Act 2011, s 7.

12. P Panico, ‘Private Purpose Foundations: from a Classic “beneficiary principle” to Modern Legislative Creativity?’ (2013) 19 T&T 6, 542–50.

13. FL-OGH 17.07.2003, CG 2002.262-55.

14. DIFC Foundations Law 2017, art 12(4).

15. Bahamas, Foundations Act 2004, s 4(1); Seychelles, Foundations Act 2009, s 7(1)(b).

16. Foundations (Jersey) Law 2009, art 5(4).

17. DIFC Foundations Law, art 21(3) and 72(3).

18. For example: Foundations (Jersey) Law 2009, art 25(1)(a): A beneficiary under a foundation has no interest in the foundation’s assets.

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 if 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;
- f. a default recipient.

Incidentally, it may be noted that the nomination of ‘qualified recipients’ is a matter for the foundation’s By-laws and not for the Charter. To this effect, the DIFC Foundations Law 2017 follows the approach of virtually all private foundation jurisdictions and defines a foundation’s ‘Constitution’ in terms of two separate documents: the Charter and the By-laws.¹⁹ The former is a public document which may be accessed at the DIFC Registrar of Companies, where foundations are registered, and must contain some mandatory items.²⁰ **The provisions relating to qualified recipients and the distribution of foundation property are dealt with in the By-laws, which are an internal documents that is not subject to any filing or publicity.** However, unlike under Jersey law, where the corresponding document is styled as ‘regulation’ and is compulsory,²¹ a DIFC Foundation may opt to include in the Charter the matters that would be otherwise reserved to the By-laws and therefore have only one constitutional document.

The various categories of qualified recipients that may be created in relation to a DIFC Foundation are evocative of the detailed list of beneficiaries under Liechtenstein law, following the 2009 review. More precisely, the class described under paragraph 29(2)(a) of the DIFC Foundations Law corresponds to the ‘Entitled Beneficiaries’ under Article 552 6(1) of the Liechtenstein PGR, in its current version. The classes under paragraphs 29(2)(c) and (d) correspond to the ‘Prospective Beneficiaries’ under Article 552 6(2) of the Liechtenstein statute. These correspond to contingent beneficiaries under trust law and have to be distinguished from the pure objects of discretionary powers, or ‘Discretionary Beneficiaries’ under Article 552 7 of the Liechtenstein PGR, who have no claim to a specific benefit until the discretion vesting in the relevant foundation officers has been exercised to that effect. The same mechanism can be put in place pursuant to Article 29(2)(c) of the DIFC Law.

For the avoidance of doubt, and similarly to the legislation of other common law jurisdictions, a qualified recipient has no right to or interest in the property of the foundation other than a right to payment of amounts under the foundation documents or in relation to depository receipts.²²

Similarly, the qualified recipients of a DIFC foundation have no implied or default rights under the law. Article 10(4), which corresponds to a provision under Manx law,²³ specifies that:

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

A feature of trust law that was transposed into the foundations legislation of many common law jurisdiction is the inherent jurisdiction of the court on all

19. DIFC Foundations Law 2017, art 18.

20. DIFC Foundations Law 2017, art 19(2).

21. Foundations (Jersey) Law 2009, art 11—A foundation must have regulations.

22. DIFC Foundations Law 2017, art 29(3).

23. Isle of Man, Foundations Act 2011, s 29(2).

fiduciary offices, which entails the protection of qualified recipients when the distribution to which they are entitled is not provided. Article 29(4), which builds upon an equivalent provision in other common law jurisdictions,²⁴ provides that:

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.

This provision must be read in conjunction with Part 7 (Articles 42–49) of the DIFC Law, which confer on the DIFC Courts jurisdiction on foundations on the same footing as the courts of the other leading common law jurisdictions that have enacted foundation legislation.

In addition to these interests, which bear a resemblance to the corresponding ones under the Germanic tradition of civil law foundations as well as the recent legislative experiences of some common law jurisdictions, the DIFC Foundations Law 2017 contains provisions that are directly inspired by the Dutch practice of the *Stichting Administratiekantoor* (STAK). This technique, which has been widely practised in the Netherlands and Belgium since the 19th century, consists in the issue of notes, sometimes referred to as ‘certificates’ or depository receipts, in relation to the foundation assets. The foundation retains full ownership of the relevant assets (such as shares in an underlying company) but all the economic benefits (such as dividend payments) are passed on to the noteholders.

The DIFC Foundations Law 2017 contains provisions that are directly inspired by the

Dutch practice of the Stichting Administratiekantoor (STAK)

Despite the relevance of this practice for Dutch foundations, in particular with respect to the governance of family businesses, no detailed statutory provisions can be found under Dutch law. An elaborate regulation of this arrangement was introduced under the Luxembourg bill on ‘patrimonial foundations’, which was lodged with Parliament in 2013 but, inexplicably, has not yet been voted.²⁵

The Luxembourg draft legislation was taken as a model for Article 30 of the DIFC Foundations Law 2017, which regulates the issue of depository receipts:

30(1) A Foundation may issue securities, including depository receipts, representing specific rights to payment quantified by reference to specific parts of the property owned by the Foundation or relating to other rights or interests, whether present or future, to which the Foundation is or might be entitled. [.]

30(3) The Foundation retains full ownership of the property and full entitlement to the rights or interest in any property in respect of which it has issued securities under Article 30(1).

30(5) In case of securities issued in connection with shares or other securities held by the Foundation, the Foundation shall retain any voting rights that may be attached to the securities it owns, unless the terms and conditions of the securities concerned expressly provide otherwise.

It may be noted that the issue of ‘fiduciary certificates’ (*Treuhandzertifikate*) to the beneficiaries used to be possible under Liechtenstein law. More precisely, Art 567(4) of the PGR contained an express provision to this effect but was repealed under the foundation law reform of 2009 and no similar provision was enacted under the new law.

24. Foundations (Jersey) Law 2009, art 25(2); Isle of Man, Foundations Act 2011, s 30.

25. Luxembourg, Bill n. 6595 on ‘patrimonial foundations’, filed on 22 July 2013.

A 'default recipient' must be identified in the foundation's constitutional documents to appoint any remaining property when a foundation is wound up and dissolved.²⁶ Unlike a 'qualified recipient', who may be granted rights in relation to the foundation and may request information from the foundation officers,²⁷ a 'default recipient' is not entitled to information about the foundation and has no rights in respect of it.²⁸ Nonetheless, the Charter and By-laws may provide for specific rights and entitlements for the 'default recipient'.

Article 21(3) of DIFC Foundations Law 2017 provides that:

If

- (a) no default recipient is named in the Charter or By-laws; or
- (b) any such default recipient no longer exists, any property of a Foundation existing at its termination shall, unless Charter or By-laws provide otherwise, become property of the DIFCA (Dubai International Financial Centre Authority).

This provision, which is matched by Article 72(3) of the Law, corresponds to 36(3) of the Austrian Private Foundations Law (*Privatstiftungsgesetz*) which designates the Republic of Austria as default beneficiary of last resort. A different approach was taken in Liechtenstein, where Art 552 8(3) of the PGR provides that in the absence of a valid nomination the founder is deemed to be 'ultimate beneficiary', which is likely to imply that the foundation property will ultimately devolve to the founder's estate.

Founder and reserved powers

A major attraction of foundations, as opposed to trusts, to founders with no common law background

is the founder's ability to retain significant powers. The incorporated nature and legal personality of a foundation ensures that its 'existence' cannot be challenged in the same way as a trust may be disregarded as 'sham'. Furthermore, the legislation of the 'classic' civil law foundation jurisdictions, such as Liechtenstein and Austria, includes express provisions allowing the founder to retain the right to amend the foundation's constitutive documents or to 'revoke' (ie terminate) the foundation.²⁹ These are not default powers: they vest in the founder only if they are expressly reserved under the foundation documents.

Article 26 of the DIFC Foundations Law emphasizes the exceptional nature of such founder's powers. Paragraph 26(1) states, as a general rule, that a founder may not reserve to himself any power to amend, revoke or vary the Charter or By-laws or to terminate the foundation. This provision, which is evocative of the foundations law of Belize, the only jurisdiction which expressly prohibits the reservation of founder's rights,³⁰ is qualified by the following paragraph 26(2), which permits the following arrangements:

A Founder may reserve the following powers:

- a. a power to amend, revoke or vary the terms of the Charter or By-laws, or both of them, in whole or in part;
- b. [...] a power to amend, revoke or vary the objects of the Foundation, in whole or in part; and
- c. a power to terminate the Foundation.

Provided that the power to amend, revoke, vary or terminate, as the case may be, is detailed in full in the Charter, and provided that these powers are only reserved

- i. for a period not exceeding the duration of a Founder's life, if he is a natural person; or

26. DIFC Foundations Law 2017, art 21(1) and art 72(1) and (2).

27. DIFC Foundations Law 2017, art 56.

28. DIFC Foundations Law 2017, art 21(3).

29. Liechtenstein, PGR, art 552 30(1); Austria, *Privatstiftungsgesetz*, 33 and 34.

30. Belize, International Foundations Act 2010, s 35(5). A founder shall not retain, possess or acquire the power to dissolve a foundation or amend a foundation charter.

- ii. for a period not exceeding fifty (50) years from the date of establishment of the Foundation, if the Founder is a legal person,

and thereafter any such powers so reserved shall lapse, notwithstanding the terms of the Charter.

This provision was influenced by section 11 of the Foundations (Guernsey) Law 2012, which is drafted in a nearly identical way. It builds upon a characterization of founder's powers under Liechtenstein and Austrian law as 'quintessentially personal' (*höchstpersönlich*) to their holder. Accordingly, these powers lapse with the demise of the founder, if he is a natural person, and cannot exceed a maximum duration of 50 years if the founder is a legal entity that may potentially exist for an unlimited duration. Accordingly, Liechtenstein law expressly provides that the founder's reserved powers may not be assigned or bequeathed.³¹ No express provision to this effect exists under the DIFC Foundations Law but it may be inferred from the wording of Article 10(5), which in turn corresponds to an equivalent provision under Manx law,³² specifying that:

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

The word 'rights' appears to refer to claims or other entitlements, such as those which may be granted to 'qualified recipients', whereas the functions that a founder may reserve to himself are correctly described as 'powers'. This distinction is essential in a common law context, as it is the case in the DIFC, but is lost in the language of civil law foundation legislation, where both beneficial interests and founder's powers are described as 'rights' (in German *Rechte*).

The 'quintessentially personal' nature of the founder's powers implies that the role of 'founder' is not

automatically acquired by whomever contributes assets to a foundation after its creation. This is expressly contemplated under the DIFC Foundation Law, which distinguishes the 'founder' from a 'contributor'. A similar distinction exists under the Isle of Man Foundations Act 2011, which distinguishes between the 'founder' and a 'dedicator'. In other words, although Article 27(3) of the DIFC Law provides that following the endowment of the initial capital, further property may be endowed upon the foundation by any person if the Charter so permits, Article 27(5) specifies that:

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).

A similar provision exists both in the civil law and in the common law experience of private foundations, as is evidenced by both Austrian³³ and Jersey law.³⁴

A further endowment of property after the establishment of a DIFC foundation may offer some degree of confidentiality in cases where this is a sensitive issue. The mandatory contents of an application to register a foundation under Article 17(2) of the DIFC Law are as follows:

- a. the name of the proposed Foundation
- b. the address of the proposed Foundation's registered office in the DIFC
- c. the full name, nationality and address of each Founder
- d. the full name, nationality and address of each of the proposed members of the Council of the proposed Foundation
- e. the Charter of the proposed Foundation
- f. if applicable, the name and business address of the proposed Registered Agent in the DIFC.

31. Liechtenstein, PGR, art 552 30(1).

32. Isle of Man, Foundations Act 2011, s 29(3).

33. Austria, Privatstiftungsgesetz 3(4).

34. Foundations (Jersey) Law 2009, art 19.

The Charter, in turn, must contain among other matters a description of the initial capital.³⁵

All the elements above constitute the ‘Register’ which has to be maintained by the DIFC Registrar of Companies in relation to foundations³⁶ and, as such, may be accessed for public inspection.³⁷ As a result, the founder’s identity and the initial capital are public information.

To preserve the privacy of the family arrangement that come into being by virtue of DIFC foundation, a relatively small initial endowment may be followed by subsequent additions by the same founder or by another ‘contributor’. The DIFC Foundations Law expressly contemplates a ‘person exercising a power’ (whether or not fiduciary) to transfer or make other disposition of property to a foundation on behalf of the founder. Such a power holder is expressly mentioned in the context of Articles 50(1) and 51(1), which relate to the remedies available when a disposition of property is defective because of a mistake or inadequate deliberation. Unlike under Liechtenstein law,³⁸ no provisions exist under the DIFC Foundations Law to regulate the case where the founder is a nominee and the foundation documents provide for founder’s reserved powers.

Apart from the reservation of express powers of amendment or termination, the founder may retain an influence over the foundation by being a member of the foundation council³⁹ or a guardian.⁴⁰

The foundation officers—council, guardian, registered agent

As any legal person, a DIFC foundation functions by means of its officers. As a minimum, a foundation must have a council, which performs an equivalent

role to the board of directors of a company, and in addition to that it may have one or more guardians and a registered agent.

Under Article 22(1) of the DIFC Foundations Law, a foundation must have a council to administer its property and carry out its objects. Council members may be individuals or bodies corporate⁴¹ and there are no restrictions in terms of nationality, residence, or professional qualification. To this effect the DIFC Foundations Law differs from the foundation laws of Jersey,⁴² which requires the appointment of a locally licensed professional as ‘qualified member’ of the council, or Guernsey,⁴³ where the appointment of a locally licensed registered agent is mandatory if no council member meets this professional requirement.

In fact, even though a DIFC foundation must have at all times a registered office in the DIFC, where it may be served all communications and notices,⁴⁴ the actual administration may take place outside the DIFC, as is expressly mentioned under Article 32(2) of the Law, providing that a foundation shall carry on its activities ‘in the DIFC and elsewhere as permitted by law’, and is implied under Article 13(1)(c), which provides that any matters relating to the administration of a foundation, ‘whether the administration be conducted in the DIFC or elsewhere’, is to be exclusively determined in accordance with DIFC Law.

The council members of a DIFC foundation are subject to the usual standards of care that are required of fiduciary officers: under Article 22(8) they must:

- a. act honestly and in good faith with a view to the best interests of the Foundation; and
- b. exercise the care, diligence and skill that reasonably prudent persons would exercise in comparable circumstances

35. DIFC Foundations Law 2017, art 19(2)(c).

36. DIFC Foundations Law 2017, art 37(2).

37. DIFC Foundations Law 2017, art 37(3).

38. Liechtenstein, PGR, art 552 4(3).

39. DIFC Foundations Law 2017, art 22(3).

40. DIFC Foundations Law 2017, art 23(3).

41. DIFC Foundations Law 2017, art 22(3).

42. Foundations (Jersey) Law 2009, art 2(4)(a) and art 23.

43. Foundations (Guernsey) Law 2012, s 12(1).

44. DIFC Foundations Law 2017, art 32(1).

These duties are expressly described as ‘fiduciary in nature’.⁴⁵ Of course, such fiduciary duties are owed to the foundation as a legal person and not to its ‘qualified recipients’, whose entitlement is comparable to a claim in specific performance which does not command any fiduciary obligations. Consistently with the fiduciary nature of their office, and similarly to the situation of the other leading common law foundation jurisdictions,⁴⁶ the council members of a DIFC foundation may not be relieved of liability for fraud, willful misconduct, or gross negligence.⁴⁷

The term ‘guardian’ was originally introduced in the St Kitts Foundations Act 2003, the forerunner of common law private foundations legislation,⁴⁸ to designate a supervisory function similar to a trust protector. Accordingly, pursuant to Article 23(7) of the DIFC Foundations Law, the guardian of a DIFC foundation must take reasonable steps to ensure that the council of the foundation carries out its functions. Accordingly, the guardian has the power to require the council to account for the way in which it has administered the foundation’s property and has acted to further the foundation’s objects.⁴⁹ Similar to a trust protector, the guardian may be granted under the foundation By-laws a power to approve or disapprove specific actions by the foundation council.⁵⁰

Article 23(10) of the DIFC Foundations Law provides that:

Except to the extent that the By-laws provide otherwise, a Guardian may sanction or authorize any action taken or to be taken by the Council that would not otherwise be permitted by the By-laws if the Guardian considers that it is appropriate to do so.

This power, which is conferred on the guardian of a DIFC foundation along similar terms to those of an equivalent provision relating to the guardian of a Jersey foundation⁵¹ and the ‘enforcer’ of an Isle of Man foundation,⁵² may prove to be useful if a transaction is required but the council is not formally empowered to carry it out, or is not sure that it falls within the scope of the foundation’s objects. **The guardian’s consent may be a more effective solution than an application for court directions, which is always possible in relation to a DIFC foundation.**⁵³ The provision above may be compared to section 58A of the BVI Trust Ordinance, as amended in 2003, which provides for an officer who may approve a variation of trust with no court application.

The appointment of a guardian is mandatory if a DIFC foundation has a charitable object or a specified non-charitable object.⁵⁴ On the other hand, under Article 23(2) of the DIFC Law,

A Foundation may, but need not, have a Guardian in respect of an object to provide some or all of its property to a person or class of persons:

- a. whether or not immediately ascertainable; or
- b. ascertained by reference to a personal relationship.

These provisions, which correspond to the ones relating to an ‘enforcer’ under Manx law,⁵⁵ differ from the approach enacted in Jersey, where the appointment of a guardian is always mandatory,⁵⁶ and Guernsey, where a guardian must be appointed whenever there is a purpose in respect of which there are no beneficiaries and when a foundation has

45. DIFC Foundations Law 2017, art 22(9).

46. Foundations (Jersey) Law 2009, art 24(2); Isle of Man, Foundations Act 2011, s 26(1); Foundations (Guernsey) Law 2012, s 28(3).

47. DIFC Foundations Law 2017, art 25(2).

48. St Kitts, Foundations Act 2003, Part IV.

49. DIFC Foundations Law 2017, art 23(8).

50. DIFC Foundations Law 2017, art 23(9).

51. Foundations (Jersey) Law 2009, art 14(7).

52. Isle of Man, Foundations Act 2011, s 14(11).

53. DIFC Foundations Law 2017, art 45(2).

54. DIFC Foundations Law 2017, art 23(1).

55. Isle of Man, Foundations Act 2011, s 14(2) and 14(3).

56. Foundations (Jersey) Law 2009, art 14(1) The regulations of a foundation must provide for the appointment of its guardian.

‘disenfranchised beneficiaries’, ie objects of discretionary powers with no right to information.⁵⁷

There are no restrictions in terms of nationality, residence, or professional qualification to be a guardian of a DIFC foundation. The founder or a body corporate may hold the office.⁵⁸ However, the same person may not be at the same time a guardian and a member of the foundation council.⁵⁹ This incompatibility rule is meant to ensure a separation of duties with a view to an effective foundation governance. It exists along comparable lines in Liechtenstein⁶⁰ and Austria⁶¹ as well as in identical terms in Guernsey.⁶² The provisions relating to the guardian of a DIFC foundation were influenced to some extent by those applicable to the equivalent officers of Jersey and Isle of Man foundations (the latter being styled as an ‘enforcer’). However, the DIFC Foundations Law did not follow the more generous approach under Jersey and Manx law, which allows the founder or a licensed service provider to hold at the same time the offices of guardian and council member,⁶³ an arrangement that would raise some doubts as to the effective independence of a foundation from the person of its founder.

A DIFC foundation may, but need not have, a registered agent.⁶⁴ Unlike the council members and the guardian, the registered agent, if appointed, must be a ‘qualified person’, ie a licensed professional registered with the Dubai Financial Services Authority. The appointment of a person other than a ‘qualified person’ as registered agent is void and may lead to a fine.⁶⁵

The appointment of a registered agent may help preserve the confidentiality of a DIFC foundation’s financial arrangements. Foundations have the same obligations as companies in the DIFC in relation to

the preparation and filing of annual accounts. The relevant provision of the DIFC Companies Law 2017, which was part of the same general overhaul of the DIFC Laws, apply *mutatis mutandis* to foundations.⁶⁶ In essence, the foundation council must keep accurate accounting records and prepare annual accounts within six months of the end of the financial year. Pursuant to Article 35(3) of the DIFC Foundations Law:

A Foundation shall within thirty (30) days after the accounts have been approved by the Council:

- a. if it has not appointed a Registered agent, file a copy of its annual accounts with the Registrar; or
- b. if it has appointed a Registered Agent, provide a copy of its annual accounts to its Registered Agent.

Asset protection and ‘firewall’ legislation

Similar to the private foundations legislation of some leading international financial centres,⁶⁷ the DIFC Foundations Law includes some asset protection provisions that are crafted after the corresponding ‘firewall’ legislation of offshore trust law. The original model for such ‘firewall’ provisions is the Cayman Islands Trusts (Foreign Element) Law 1987, now Part VII of the Cayman Islands Trusts Law (2017 Revision). The main features of the ‘firewall’ provisions may be described as follows:⁶⁸

Similar to the private foundations legislation of some leading international financial centres,⁶⁷ the DIFC Foundations Law includes some asset protection provisions

57. Foundations (Guernsey) Law 2012, s 10(1).

58. DIFC Foundations Law 2017, art 23(3).

59. DIFC Foundations Law 2017, art 22(6) and art 23(6).

60. Liechtenstein, PGR art 552 11 and 27.

61. Austria, Privatstiftungsgesetz 23(2). It should be borne in mind that the incompatibility rules in Austria are much further reaching and extend to beneficiaries and their advisors.

62. Foundations (Guernsey) Law 2012, s 10(5).

63. Foundations (Jersey) Law 2009, art 14(3); Isle of Man, Foundations Act 2011, s 14(7).

64. DIFC Foundations Law 2017, art 24(1).

65. DIFC Foundations Law 2017, art 17(4) and sch 3.

66. DIFC foundations Law 2017, art 35(1) making direct reference to DIFC Companies Law 2017, art 35 and arts 127–31.

67. Foundations (Jersey) Law 2009, art 32; Isle of Man, Foundations Act 2011, s 37 and 38; Foundations (Guernsey) Law 2012, s 37.

68. For a detailed discussion of offshore ‘firewall’ legislation, cf P Panico, *International Trust Laws* (2nd edn, OUP 2017), ch 11.

- i. a list of matters are exclusively reserved to the governing law;
- ii. by way of derogation, some matters are deferred to foreign law;
- iii. any claims based on heirship rights or rights arising by virtue of a personal relationship under a foreign law are disregarded;
- iv. foreign judgments purporting to enforce heirship claims or claims arising by virtue of a personal relationship are not recognized or enforced.

Articles 13 to 16 of the DIFC Foundations Law 2017 follow closely the 'firewall' model originally enacted under Cayman Islands trust law. Article 13(1), which corresponds to the first paragraph of section 90 of the Cayman Islands Trusts Law, lists the matters that are to be exclusively determined in accordance with DIFC Law:

Subject to Article 13(2), all matters arising in regard to a Foundation or in regard to any disposition of property to or by a Foundation, including questions as to:

- a. the capacity of the Founder or Contributor;
- b. any aspect of the validity of the disposition or interpretation or effect thereof;
- c. the administration of the Foundation (whether the administration be conducted in the DIFC or elsewhere) including questions as to the powers, liabilities and rights of the officers of the Foundation and their appointment and removal; or
- d. the existence and extent of powers, conferred or retained, including powers of variation of the Charter or By-laws or dissolution of the Foundation, and the validity of any exercise thereof,

Shall be determined in accordance with the laws of the DIFC without reference to the laws of any other jurisdictions with which the Foundation or disposition may be connected.

The following Article 13(2) corresponds to the second paragraph of section 90 of the Cayman

Islands Trusts Law and includes the matters that must be deferred to foreign law as they relate to the determination of a valid title to property and the power to dispose of it, the formalities for the disposition of property, the law applicable to a succession, and the law of the place of incorporation of a company.

Article 14(1) of the DIFC Foundations Law, which corresponds to section 91 of the Cayman Islands Trusts Law, protects a foundation against claims based on a foreign law, particularly in relation to heirship rights or rights arising by virtue of a personal relationship:

Without limiting the generality of Article 13(1), no disposition of property to a Foundation that is valid under the laws of the DIFC is void, voidable, liable to be set aside or defective in any manner by reference to a foreign law; nor is the capacity of any Founder in relation to the Foundation or disposition to be questioned nor is the Foundation or any other person to be subjected to any liability or deprived of any power or right, by reason that:

- a. the laws of any foreign jurisdiction prohibit or do not recognise the concept of a foundation;
- b. the disposition void or defats any rights, claims or interest conferred by a foreign law upon any person by reason of a personal relationship to a founder or any other person related to the foundation or by way of heirship rights or contravenes any rule of foreign law or any foreign judicial or administrative order, arbitration award or action intended to recognize, protect, enforce or give effect to any such rights, claims or interest;
- c. the foreign law or foreign judicial or administrative order or arbitration award imposes any obligation or liability on a founder, foundation or any other party in relation to the foundation or the property of the foundation.

An equivalent provision can be found in the private foundation legislation of other common law jurisdictions, following the corresponding trust law

‘firewall’.⁶⁹ The DIFC formulation attempts to achieve an even higher degree of generality by the inclusion of paragraph 14(1)(c), which has no equivalent in the other leading foundation statutes.

‘Heirship rights’ are defined under Article 15 of the DIFC Foundations Law while a ‘personal relationship’ is defined in very broad terms in the Schedule 1 to the Law.

Article 16 of the DIFC Law completes the ‘firewall’ by providing that a foreign judgment shall not be recognized or enforced insofar as it is inconsistent with Articles 14 and 15. This provision is crafted after section 93 of the Cayman Islands Trusts Law. Some degree of flexibility provided under Guernsey law,⁷⁰ which allows the Royal Court to determine whether the enforcement of a foreign judgment safeguards the purposes of a foundation, the interests of its beneficiaries, or its proper administration, but at the same time introduces some element of uncertainty, was not followed under DFC law.

In addition to the ‘firewall’ provisions above, which are primarily intended to fend off the attacks on a DIFC foundation by the heirs of a founder or contributor or by divorcing spouses, the DIFC Foundations Law 2017 includes some provisions that are more specifically addressed to creditor protection.

Article 14(2) protects the validity of a transfer of property to a foundation notwithstanding the founder’s or contributor’s bankruptcy or insolvency. A similar, yet more ‘aggressive’, provision can be found in the Cook Islands foundation law⁷¹ and is in turn directly derived from the well-known asset protection regime under the International Trusts Act 1984, as amended in 1989. However, Article 14(3) of the DIFC Foundations Law introduces a proviso to the effect that:

Notwithstanding Article 14(2), where the Court determines that, at the time when the property was transferred to a Foundation, a Founder or Contributor, as applicable, was insolvent or intended to defraud any creditor of a Founder or Contributor, as applicable, it may declare that the transfer of property was void to the extent of the creditor’s claim.

This provision admits a ‘Pauline action’ by a creditor of a founder or a contributor, who can demonstrate that the endowment upon a foundation was intended to frustrate his claims. As is typical in most instances of asset protection trust legislation, the burden of proof is on the creditor⁷² and he must lead evidence to the effect that the endowment was specifically intended to defeat his claim, and not generally meant to defraud creditors in general. If such state of affairs is successfully proven,⁷³ the endowment is not altogether void but is ineffective to the extent necessary to satisfy that particular creditor’s claim. In other words, no other creditor will be able to rely on the same court order but will have to bring a separate lawsuit and lead the appropriate evidence. This is a significant departure from the harsh, extremely ‘creditor-friendly’ approach of most common law jurisdictions, which dates back to the Statute of Elizabeth I of 1571⁷⁴ and allows to set aside any transactions generally or presumptively intended to ‘delay, hinder or defraud creditors’.

Mistake and ‘inadequate deliberation’

A unique feature of the DIFC Foundations Law is the inclusion of provisions that address the issues of mistake and ‘inadequate deliberation’ in relation to a disposition of foundation property.

69. For example, Foundations (Guernsey) Law 2012, s 37(3).

70. Foundations (Guernsey) Law 2012, s 37(4)(b).

71. Cook Islands, Foundations Act 2012, s 38.

72. DIFC Foundations Law 2017, art 14(4).

73. In the absence of a specific provision to this effect, the standard of proof in relation to a DIFC foundation must be the ‘balance of probabilities’ that is normal for civil cases. Section 13B(1)(a) of the Cook Islands International Trusts Act 1984, on the other hand, imposes the higher standard of proof of criminal cases, ie ‘beyond reasonable doubt’.

74. Stat 13 Eliz I, c 5.

A unique feature of the DIFC Foundations Law is the inclusion of provisions that address the issues of mistake and ‘inadequate deliberation’ in relation to a disposition of foundation property

The relevant provisions, which are contained in Articles 50 to 52 of the DIFC Foundations Law, are a direct consequence of the restatement of the doctrine of equitable mistake and ‘improper deliberation’, also known as the ‘rule in *Hastings-Bass*’,⁷⁵ by the UK Supreme Court in the joint appeals *Futter v HMRC* and *Pitt v HMRC*.⁷⁶ Lord Walker’s judgment led to a more modern and practical formulation of the notion of equitable mistake but at the same time reduced dramatically the scope for the so-called ‘rule in *Hastings-Bass*’ by limiting the exercise of the court’s equitable jurisdiction to provide a remedy to cases where a trustee acted on the grounds of ‘improper deliberation’ in breach of its fiduciary duties.

The DIFC legislative provisions do not follow the English approach embedded in the Supreme Court judgment but the enactment of the corresponding statutory rules under the Trusts (Amendment no. 6) (Jersey) Law 2013, which followed a consolidated line of authorities predating the UK Supreme Court cases.

Article 50(2) of the DIFC Foundations Law 2017, which corresponds to Article 47E of the Trusts (Jersey) Law 1984, as amended in 2013, provides that:

The Court may [...] declare that a transfer or other disposition of property to a Foundation

- a. by a Founder or Contributor acting in person (whether alone or with any other Founder or Contributor) or
- b. through a person exercising a power is voidable and
 - i. has such effect as the Court may determine, or
 - ii. is of no effect from the time of its exercise

(3) The circumstances are where a Founder, Contributor or person exercising a power

- a. made a mistake in relation to the transfer or other disposition of property to a Foundation and
- b. would not have made that transfer or other disposition but for that mistake

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

The notion of ‘mistake’ is defined under Article 50(1)(b) of the DIFC Foundations Law in identical terms to Article 47B(2) of the Trusts (Jersey) Law and includes (but is not limited to):

- (i) a mistake as to:
 - a. the effect of
 - b. any consequences of
 - c. any of the advantages to be gained by

a transfer or other disposition of property to a Foundation, or the exercise of a power over or in relation to a Foundation or property of a Foundation

- (ii) a mistake as to a fact existing either before or at the time of a transfer or other disposition of property to a Foundation, or the exercise of a power over or in relation to a Foundation or property of a Foundation, or
- (iii) a mistake of law including a law of a foreign jurisdiction

Articles 51(2) and (3) of the DIFC Foundations Law enacts the ‘rule in *Hastings-Bass*’ along identical terms to Article 47F of the Trusts (Jersey) Law and provides that:

- (2) The Court may [...] in the circumstances set out in Article 51(3), declare that a transfer or other disposition of property to a Foundation by a Founder or Contributor (whether alone or with any other Founder or Contributor) through a person exercising a power, is voidable and

75. [975] ch 25.

76. [2013] UKSC 26.

- a. has such effect as the Court may determine or
- b. is of no effect from the time of its exercise

(3) The circumstances 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 irrelevant considerations.

Article 51(4) specifies, equally in accordance with the correspondent provision under Jersey law, that the provisions apply whether or not the circumstances set out in Article 51(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.

These provisions, which are matched by equivalent enactments under the revised DIFC Trusts Law,⁷⁷ represent an important element of clarity for the application of the doctrine of mistake and the ‘rule in *Hastings-Bass*’ by the DIFC Courts. Unlike under the DIFC Trusts Law and its Jersey model,⁷⁸ the DIFC Foundations Law contains provisions only in relation to a mistake in a transfer of property to a foundation, ie a mistake made by a founder, another contributor, or a person exercising a dispositive power on their behalf, but not in relation to a disposition of foundation property to a ‘qualified recipient’, ie a transaction made by the foundation officers in exercise of their dispositive powers.

Amalgamation, arbitration, continuation, conversion

The DIFC Foundations Law 2017 contains other unique provisions in the context of modern private foundations legislation, which are intended to facilitate the international circulation of foundations as well as the restructuring of financial arrangements.

Article 53 provides for the merger or spin-off of DIFC Foundations in the form of ‘amalgamation’ or ‘division’.

Articles 54 and 55 set out the rules for arbitration as a form of alternative dispute resolution (ADR). A major hindrance to the enforceability of an arbitration clause in a trust instrument or in the foundation constitution is the circumstance that the beneficiaries are usually not parties to the agreement. The matter is effectively dealt with under Article 54(1) of the DIFC Foundations Law, which provides as follows:

Where the Charter or By-laws of a Foundation provide that any dispute or Administrative Question arising between any of the parties in relation to the Foundation shall be submitted to arbitration, that provision shall, for all purposes under the Arbitration Law have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.

A provision to the same effect exists, although differently worded, under Guernsey law.⁷⁹ However, the model for Articles 54 and 55 of the DIFC Foundations Law are sections 91 A, 91B and 91 C of the Trustee Act 1998 of the Bahamas, which were inserted under the Trustee Amendment Act 2011 as one of the first examples of ADR legislation in relation to trusts.

The ‘continuation’ of a foreign foundation in the DIFC or of a DIFC foundation in a foreign jurisdiction is regulated under Articles 57 to 62 of the DIFC

⁷⁷ DIFC Trusts Law 2017, arts 22–27.

⁷⁸ DIFC Trusts Law 2017, arts 26 and 27 which correspond to Trusts (Jersey) Law 1984 (as amended 2013), arts 47G and 47H.

⁷⁹ Foundations (Guernsey) Law 2012, s 40.

Foundations Law. The procedure relies on the grant of a ‘charter of continuance’ along similar lines to those originally drawn by the St Kitts Foundations Act 2003, the earliest legislative framework for common law foundations, that introduced the notion of ‘articles of continuance’.⁸⁰

The ambitious and visionary nature of the DIFC Foundations Law 2017 is evidenced by Articles 66 to 69, which set out the process for a DIFC company to be ‘continued’ as a foundation. This process is evocative of the ‘conversion’ of a trust into a foundation (or vice versa) provided under Article 47 of the second Schedule to the Civil Code of Malta, which regulates legal persons including foundations.

It is difficult to grasp the conceptual leap of the ‘conversion’ of a trust into a foundation, ie of a legal relationship into a legal person. However, the same exercise appears to be more naturally conceivable between two legal entities, as under the DIFC Foundations Law. It may be noted that the

Liechtenstein PGR contained an original provision, which was preserved under the review of 2009, specifying the terms for a ‘conversion’ (*Umwandlung*) between a foundation and another entity provided with legal personality (an *Anstalt* or a *Treuunternehmen* or ‘trust enterprise’, also known as ‘trust reg.’).⁸¹ To this effect, it is worth noting that the ‘torch’ of jurisprudential creativity and vision that in the mid-1920s had permeated the Liechtenstein PGR in the original conception of its authors, Wilhelm and Emil Beck, has been passed on in our times to the drafters of the DIFC Foundations Law 2017.

It is worth noting that the ‘torch’ of jurisprudential creativity and vision that in the mid-1920s had permeated the Liechtenstein PGR in the original conception of its authors, Wilhelm and Emil Beck, has been passed on in our times to the drafters of the DIFC Foundations Law 2017

*Paolo Panico is a solicitor (Scotland) and practices as an ‘avocat’ in Luxembourg (Tableau IV). He is the Chairman of Private Trustees SA, an independent trust and corporate service provider. He has written extensively on trusts and foundations law. His book *Private Foundations. Law and Practice* was published in 2014 by Oxford University Press. E-mail: paolo.panico@privatetrustees.net.*

80. St Kitts, Foundations Act 2003, ss 39–45.

81. Liechtenstein PGR, art 570, repealed and replaced by art 552 41.