



Client Handbook

Trusts

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Contents:

1. Introduction
2. Background
3. Creation of a Trust
4. Types of Trusts
5. Terms of a Trust
6. Governing Law and Place of Administration of the Trust
7. Duties of a Trustee
8. Beneficial Owner and reporting obligations for Trustees
9. Certifications and Private Registers for Trusts
10. Investment Trusts regulated by DFSA

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1. Introduction

- 1.1 This handbook gives an overview of trusts under the Trust Law DIFC Law No. 4 of 2018 (the "Trust Law") and outlines the requirements for trusts under the Trust Law and other relevant DIFC legislation.
- 1.2 Please note that the information provided in this handbook is based on the requirements of the Trust Law. Should there be any inconsistency between this handbook and the relevant DIFC legislation, the DIFC legislation shall prevail.

2. Background

- 2.1 The Trust Law applies to express trusts (charitable or non-charitable). The law governs the duties and powers of trustees¹, relations among trustees and the rights and interests of beneficiaries (Article 9(1)).
- 2.2 The Dubai Financial Services Authority ("DFSA") regulates Investment Trusts under the Investment Trust Law, DIFC Law No. 5 of 2006, as well as the powers and duties of trustees of Investment Trusts (please refer to Part 10 on Investment Trusts regulated by DFSA).
- 2.3 A trust is a legal relationship created by a settlor², when assets are placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. The trust will be governed by a trust instrument (such as a trust deed), which outlines the terms of the trust including its duration, beneficiaries and the powers of the trustees, etc.
- 2.4 The key characteristic of a trust is that it allows legal ownership and beneficial interest to be separated:
 - (a) the trustee(s) become the legal owner(s) of the trust property as far as third parties are concerned; and
 - (b) the beneficiaries can expect the trustees to manage the trust property for their benefit.
- 2.5 Key terms related to a trust are:

¹ This is a reference to trustees of private trust.

² either during the settlor's lifetime or upon their death

- (a) a *beneficiary* is the person entitled to benefit under the trust;
- (b) a *settlor* is the person who sets up a trust and transfers the trust property to the trustee(s) for the benefit of the beneficiaries; and
- (c) a *trustee* is the legal owner of the trust property and is able to deal with the trust property.

3. Creation of a Trust

3.1 A trust can be created under Articles 33 – 35 of the Trust law in writing³ when:

- (a) the settlor has capacity⁴ and indicates their intention to create a trust;
 - (b) the trust:
 - (i) is a charitable trust with solely charitable purposes in accordance with the Trust Law; or
 - (ii) has a definite beneficiary that can be identified now and in the future⁵; and/or
 - (iii) is a non-charitable purpose⁶ trust in accordance with the Trust Law which is sufficiently certain⁷, lawful and not contrary to public policy in the DIFC;
- and:
- (iv) has purposes that are sufficiently certain; and
 - (v) has terms that are for the benefit of its beneficiaries or support its purpose; and
- (c) a trustee is appointed, who must:

³ i.e. through a trust instrument such as a trust deed or will

⁴ The settlor must have the requisite mental capacity and the capacity to transfer the property of the trust to the trustee

⁵ often referred to as a conventional trust

⁶ It can include both charitable and non-charitable purposes as long as it is not solely charitable purpose(s), in which case it will be a charitable trust

⁷ to allow the trust to be carried out

- (i) hold property for the benefit of a beneficiary or for a purpose;
 - (ii) have duties to perform in respect of the trust and the beneficiaries; and
 - (ii) not be both the sole trustee and the sole beneficiary;
- (d) property is transferred to a trustee by:
- (i) the settlor⁸;
 - (ii) from another trust; or
 - (iii) the owner of the property declares that they will hold the property as trustee; and
- (e) the trustee must:
- (i) hold property for the benefit of a beneficiary or for a purpose;
 - (ii) have duties to perform in respect of the trust and the beneficiaries;
 - (ii) not be both the sole trustee and the sole beneficiary.

3.2 In order to create a valid trust, the settlor must indicate an intention to create a trust⁹. However the only intentions that can be considered are those that are admissible as proof in a judicial proceeding. In addition a settlor must have the required mental capacity to create a trust¹⁰.

3.3 In order to create a revocable or testamentary trust, the settlor must have the capacity to make a will and in order to create an irrevocable trust, the settlor must have capacity during his lifetime to transfer the property free of trust¹¹.

3.4 Article 34(1)(c) of the Trust Law requires a trust to have a definite beneficiary, unless it is a charitable trust or a trust for another valid non-charitable purpose. While some beneficiaries will be capable of being definitely ascertainable at the time the trust is created, Article 34(2) also recognises that others may only be ascertained in the future. The definite beneficiary requirement does not prevent a settlor nominating a class of

⁸ either during the settlor's lifetime or upon their death through a will or some other means

⁹ Article 34(1)(b)

¹⁰ Article 34(1)(a)

¹¹ free of any encumbrances

persons as beneficiaries. Class designations are valid as long as the membership of the class will be finally determined during the lifetime of the trust.

4. Types of Trusts

Charitable Trusts

- 4.1 A charitable trust is a trust created only for charitable purposes. Article 38(1) of the Trust Law states that a charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health or art, the protection of the environment, or any other purposes which are beneficial to the general public. If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary¹², the Court may select one or more charitable purposes or beneficiaries in accordance with the settlor's intention¹³. The Court has a similar power where the charitable purpose becomes unlawful, impossible or impracticable to achieve¹⁴, to vary or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's intentions (Article 38(3)). Please refer to the Trust Law for more details on the requirements for charitable trusts.

Non-Charitable or Purpose Trusts

- 4.2 Purpose trusts can be validly established for the benefit of a number of persons or purposes (charitable and/or non-charitable) or a mix of both, subject only to legality and public policy considerations. This means they can be used in a commercial, philanthropic or family estate planning context or even in a mix of all three.
- 4.3 The settlor may appoint a 'protector' of a purpose trust who exercises various supervisory or protective powers in relation to the trustee's administration of the trust. The settlor can appoint themselves, a beneficiary or any third party (other than the trustee) as the protector. A purpose trust must have at least one 'enforcer' who is separate from the trustee and has the duty to enforce the trust in relation to its non-charitable purposes¹⁵.
- 4.4 The only person with the standing to enforce a purpose trust is the enforcer and if for whatever reason, there is no enforcer or no enforcer who is able and willing to undertake

¹² or a means by which a particular charitable purpose or beneficiary may be selected

¹³ to the extent it can be ascertained (Article 38(2))

¹⁴ under the doctrine of *cy-près*

¹⁵ The enforcer can be a family or individual's trusted adviser or a council or committee of enforcers can be established.

the task, the trustee may apply to the Court and the Court will appoint one. Please refer to the Trust Law for more details on the requirements for Non-Charitable or purpose trusts.

5. Terms of a Trust

5.1 Article 9(2) of the Trust Law states that the following provisions of the Trust Law prevails over the terms of a trust instrument:

- (a) the requirements for creating a trust;
- (b) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (c) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy in the DIFC, and is possible to achieve;
- (d) the power of the Court to modify or terminate a trust in accordance with the Trust Law;
- (e) the effect of a protective trust as provided in Part 6;
- (f) the power of the Court under Article 56 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (g) the effect of an exculpatory term under Article 79;
- (h) the rights under Articles 82 of a person other than a trustee or beneficiary;
- (i) periods of limitation for commencing a judicial proceeding;
- (j) the power of the Court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
- (k) exclusive jurisdiction of the Court under Articles 19 and 20.

5.2 A trust can only be varied without the involvement of the Court if the trust deed expressly provides that the trust can be varied or states that the trust or a power exercisable under the trust is revocable in whole or part¹⁶. A trust is irrevocable unless the terms of the trust expressly state that it is revocable¹⁷. Please refer to Article 40 of the Trust Law for more

¹⁶ Article 40(1)

¹⁷ Article 40(2)

information on varying or revoking a trust, including the Court's power to vary the terms of the trust.

5.3 A trust is terminated under Article 43 of the Trust Law if:

- (a) all the beneficiaries consents to the termination¹⁸;
- (b) the trust expires or is revoked under its terms;
- (c) there is no beneficiary or person who can become; or
- (d) the trust no longer has a purpose to achieve or the purpose of the trust becomes unlawful or impossible to achieve.

6. Governing Law and Place of Administration of the Trust

6.1 Part 2 of the Trust Law deals with Governing Law and the place of administration of the trust. It allows the Settlor to select the law that governs the meaning and effect of the terms of the trust¹⁹. The jurisdiction selected does not need to have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property is physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime.

6.2 Where the governing law is not specified in the trust instrument, the Trust Law allows the governing law to be implied from the terms of the trust or the jurisdiction that had the closest connection with the trust at the time of its creation. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. This approach is consistent with the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, which was signed on 1 July 1985.

6.3 The Trust Law (Article 12(1)) also allows the governing law to be changed to or from the jurisdiction of the DIFC if the trust instrument allows it. Where the governing law is changed to the DIFC, the trust will be considered a DIFC trust²⁰.

¹⁸ Provided that none of the beneficiaries is a minor or has a legal disability

¹⁹ Article 11(1)

²⁰ Article 12(2)

6.4 The trust's principal place of administration can be determined by the trustee if this is not provided for in the trust instrument.

7. Duties of a Trustee

7.1 Part 8 of the Trust Law sets out the powers and duties of trustees. Article 59 confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith, with due diligence²¹ and to the best of their ability and skill. The Trust Law trustee's duties are set out in the Law subject, in some cases, to the specific provisions of the trust instrument. Article 59 also confirms that a trustee does not have a duty to act until they have accepted²² the trusteeship.

7.2 The Trustee has a number of duties under Article 60, including the duty to:

- (a) administer the trust solely in the interest of the beneficiaries or in furtherance or support of the purposes of the trust;
- (b) act with prudence; and
- (c) keep qualified beneficiaries reasonably informed about the administration of the trust.

7.3 In addition, a Trustee must not²³ under Article 60(2):

- (a) directly or indirectly profit from their trusteeship;
- (b) allow another person to profit directly or indirectly from the trusteeship; or
- (c) enter into transactions (on its own behalf) with the trustees or relating to the trust property that may result in profit.

7.4 Where 7.3 above applies, a beneficiary affected by the transaction can apply to the Court to void the transaction, unless:

- (a) the transaction was authorised by the terms of the trust;
- (b) the transaction was approved by the Court;

²¹ To act with the due diligence of a prudent person.

²² The procedure for accepting a trusteeship is found at Article 51.

²³ Except with the approval of the Court or as permitted in the Trust Law

- (c) the beneficiary consented to the trustee's conduct or ratified the transaction; or
- (d) the court action was not brought within 3 years²⁴.

7.5 While a trustee has a general duty to administer the trust in accordance with its terms and purposes, the purposes and particular terms of the trust may occasionally conflict. If such a conflict occurs due to of circumstances that were not anticipated by the settlor, it may be appropriate for the trustee to apply to the Court under Article 40(8) to modify or terminate the trust. Under Article 37(2), the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

7.6 The leading decision in English trust law the validity of exemption clauses and duties of trustees is *Armitage v Nurse [1997] EWCA Civ 1279*. In this case, the Court of Appeal held that in English law trustee exemption clauses can validly exempt trustees from liability for all breaches of trust except fraud. Counsel in that case submitted that the 'irreducible core' duties of a trustee include:

- (a) a duty to inquire into the extent and nature of the property and the trusts²⁵;
- (b) a duty to obey directions in the settlement unless the deviation is sanctioned by the Court²⁶;
- (c) a duty to account for his stewardship of the assets under his control; and
- (d) a duty to carry on the business of the trust with the degree of prudence to be expected of a hypothetically reasonably prudent man of business²⁷.

In the leading judgment, Millett LJ observed:

"I accept the submission ... that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the

²⁴ Refer to Article 77 for the time limit to bring an action

²⁵ see *Hallows v Lloyd* (1888) 39 Ch D 686, 58 LJ Ch 105; *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260 and *Wyman v Paterson* [1900] AC 271, 69 LJPC 32

²⁶ see *Harrison v Randall* (1851) 9 Hare 397 and *Royal Brunei Airlines Sdn Bnd v Tan* [1995] 3 All ER 97

²⁷ see *Speight v Gaun* (1883) 9 App Cas 1, and *Whiteley, Re, Whiteley v Learoyd* (1886) 33 ChD 347

minimum necessary to give substance to the trusts, but in my opinion it is sufficient. As Mr Hill pertinently pointed out in his able argument, a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.”

7.7 The due performance by the trustee of its obligations is achieved, in the event of dispute, by either the Court or by arbitration²⁸. The Court does not have a role as a continuing supervisor of trust administration except in special circumstances²⁹. Rather, various parties associated with the trust may approach the Court for its opinion, advice and direction as to the affairs of the trust³⁰ (Article 20), or, in the event of trustee misconduct or relationship breakdown, for orders (including removal as trustee) to bring the default to an end³¹. As emphasised in *Letterstedt v. Broers* [1884] UKPC 1³², in the exercise of this jurisdiction the Court is concerned to secure as far as possible the orderly and due administration of the trust rather than to punish persons associated with the trust, although the Court does have power to make adverse orders in appropriate cases.

8. Beneficial Owner and Reporting obligations for Trustees

8.1 Article 60(6) of the Trust Law sets out the duties of a Trustee with respect to beneficial ownership, which requires the trustee to:

- (a) take reasonable steps to identify the ultimate beneficial owners of any party to the trust that is a body corporate³³, including the settlor, enforcer, protector, beneficiaries and any other person exercising effective ultimate control over the trust³⁴;
- (b) keep records of the names and contact details of the agents and services providers engaged by or on behalf of the trust;
- (c) disclose its status as a trustee to financial institutions and Designated Non-Financial Business or Profession when engaging services on behalf of the trust;

²⁸ if the trust instrument provides for arbitration.

²⁹ Please refer to Article 18(2) for the circumstances.

³⁰ Article 20

³¹ Articles 54 and 74.

³² other references include (1884) 9 App Cas 371, [1884] UKPC 18

³³ Please refer to the detailed [Guidance on Identifying Ultimate Beneficial Owners under the UBO Regulations](#) issued by the Registrar, for assistance in identifying the ultimate beneficial owners of body corporates.

³⁴ Note that the trustee will necessarily already have the details of individuals who are the settlor, enforcer, protector and beneficiaries of the trust and therefore the reference in Article 60(6) of the Trust Law is only to body corporates.

- (d) maintain accurate and up-to-date records of the information in (a) and (b) above for a period of 6 years after it stops being the trustee of the trust; and
 - (e) to provide the information in (a) and (b) above to the DIFC Registrar of Companies (the "Registrar") if the Registrar issues a notice.
- 8.2 Any information that the Registrar obtains under (e) above will be collected and processed only for the purpose of complying with applicable laws or to regulate money laundering and terrorism financing, unlawful organisations and sanctions compliance in the DIFC. In addition the Registrar will only disclose any information at the request of a regulator, law enforcement agency or other government authority prescribed by legislation.
9. Certifications and Private Registers for Trusts
- 9.1 The Trust Law does not require trusts³⁵ to be registered with the Registrar. However, Part 8 of the Operating Regulations issued under the Operating Law, DIFC Law No. 7 of 2018, enables the trustee of a DIFC trust to apply to the Registrar to:
- (a) to record a trust on a separate register established and maintained by the Registrar, which will only be accessible to the trustee;
 - (b) issue a certificate relating to the beneficial ownership or control of the trust or the status of the trustee (if the trustee is registered or incorporated in the DIFC) based on the information notified to the Registrar; and/or
 - (c) issue a document to certify or determine the operation or nature of any DIFC law on the trust or the trustee (if the trustee is registered or incorporated in the DIFC) for the purposes of the law of any other jurisdiction.
- 9.2 The fee for providing the above services is \$100 per service. In addition the Registrar may recover any expenses or fees it incurs in providing the above services from the trustee.
- 9.3 If you wish to use this service please email roc.helpdesk@difc.ae who can assist you with such requests.
10. Investment Trusts regulated by the DFSA

³⁵ Note that trusts that fall under the Investment Trusts, DIFC Law No. 5 of 2006 are regulated by the Dubai Financial Services Authority ("DFSA")

- 10.1 The DFSA regulates trusts that are established for purposes related to financial services under the Investment Trust Law³⁶, which applies to investment trusts used as a vehicle for a Collective Investment Fund. The DFSA also regulates Trust Service Providers (persons providing trust services as a business) and Fund Trustees (persons acting as the Trustee for a Collective Investment Funds).
- 10.2 The DFSA regulates the activity of providing Trust Services under Rule 2.23 of the General Module of the DFSA Rulebook, where a person (by way of business):
- (a) provides services with respect to the creation of an express trust;
 - (b) arranges for a person to act as a trustee in respect of any express trust;
 - (c) acts as trustee in respect of an express trust;
 - (d) provides trust administration services in respect of an express trust; or
 - (e) acts as a protector or an enforcer in respect of an express trust.
- 10.3 However Rule 2.3.4(2) of the General Module states that an individual does not provide trust services by way of business where he or she is acting as trustee, enforcer or protector³⁷ in respect of less than three trusts.
- 10.4 In addition, Rule 2.3.5(2) of the General Module further clarifies that a private trust company or a family fiduciary structure does not provide trust services by way of business if it:
- (a) carries on such an activity exclusively for the purposes of providing services to a Single Family³⁸; and
 - (b) does not solicit trust business from, or provide trust services to any person outside of the Single Family or the Single Family Office³⁹.

³⁶ DIFC Law No. 5 of 2006

³⁷ or where he or she is arranging for a person to act as trustee

³⁸ has the meaning given to that term under the DIFC Single Family Office Regulations (or such other Regulations governing family offices in the DIFC)

³⁹ has the meaning given to that term under the DIFC Single Family Office Regulations (or such other Regulations governing family offices in the DIFC)

10.5 Please contact the DFSA in relation to investment trusts, trust service providers and fund trustees.

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