


# Emirates Law

Business & Practice



"I expect there will be significantly less disputes because the DIFC Wills Service Centre is genuinely helping non-Muslim residents register their wills in such a way that disputes are avoided."

Dr Michael Hwang,  
Chief Justice, DIFC Courts

## FROM GENERATION TO GENERATION UAE INHERITANCE LAW

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**Corporate Social Responsibility**  
Rony Eid  
Baker McKenzie Habib Al Mulla

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**Trust Overview**  
Mahmoud Selim & Farah Abed  
Pinsent Masons

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**Cybercrime & Energy**  
Rob Flaws  
CMS

# Emirates Law

Business & Practice



EMIRATES LAW



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Justice Dr Jamal Al Sumaiti  
Director General, DJI

## The Business Importance of Inheritance

It may seem strange, despite the recent issue in Dubai of new inheritance legislation and in the DIFC of a new law on the related subject of trusts, that a business law magazine such as Emirates Law Business & Practice would chose this topic as a theme for this issue. However, in the UAE inheritance is a business issue.

The first reason for this is that in common with other GCC countries, the UAE has a far higher proportion of family owned businesses than is the case in other jurisdictions. The second is that unlike many other jurisdictions, the UAE has no concept of survivorship. That means if there is no will, a husband or wife will not automatically inherit their spouse's property, and the situation is the same in the case of joint owners of property.

In addition to this as UAE inheritance law is based on Sharia law there are specific prescribed requirements on exactly which members of the extended family are entitled to a share in the deceased's estate and what that share should be, which can create problems and risk the continuation of family businesses, particularly in cases where there has been remarriage, which may mean there are potentially individuals who have inherited a share of the business but who have not been active participants in it, and may not even be members of the actual blood family. Whereas lawyers in most other jurisdictions may focus on minimising inheritance tax liability, in the UAE the focus is on a completely different risk area - inheritance shares.

We also felt that as a magazine which aims to inform and support potential overseas investors it was important for us to highlight the steps non-muslim residents of the UAE who do not want to follow the Sharia approach to inheritance of their property, need to take if they wish assets they hold in the Emirates to be passed in line with their own national laws. (It is worth noting too in this context that the position is different for muslim expatriates, regardless of what country they come from.)

Authorities in Dubai aware of the culturally diverse population we have here, have taken specific and quite innovative steps to set up a convenient route non-muslims here and in Ras Al Khaimah can use in the form of the DIFC Wills and Probate Registry to register their wills under the laws of their own country in an English language environment.

This is a tricky area but I hope you will find the interplay of Sharia, national, Emirate level and common law based freezone legislation interesting and the clear explanations of risks, mitigations and practical steps which need to be taken by Emiratis and our expatriate investor and worker communities in the articles we have included in this issue informative.

## Emirates Law

Business & Practice

ADVISING GLOBAL INVESTORS ON UAE LEGAL BEST PRACTICE

Emirates Law Business & Practice is a free quarterly printed publication reporting on recent legal developments in UAE and around the world. Articles are practitioner oriented and non-academic. The magazine covers specialist subject areas offering independent analysis by experts in their field, such as the judiciary, academics, solicitors, barristers, in-house and government lawyers. Our aim is to be an international legal magazine, making a significant contribution to legal debate. Emirates Law Business & Practice provides its readers with a wide selection of relevant law disciplines, addressing various aspects of law.

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## UAE WILLS & TRUSTS

Two recently issued trust laws are having an impact on approaches to inheritance in the UAE. Mahmoud Selim and Farah Abed of Pinsent Masons provide an overview of the changes on P8.

### P12 GENERATION TO GENERATION

Our Expert Panel explain how the complex interaction of Federal, Emirate, Freezone and Sharia law operates when it comes to inheritance of Emiratis and expatriates.



### P18 KEEP IT IN THE FAMILY

Andrew Lom of Norton Rose Fulbright explains the benefits in areas like succession planning of having a family office.

### P21 WHO'S NEXT?

Ruksana Ellahi of Al Tamimi & Company explains how inheritance works in the UAE.



### P24 FINAL PEACE OF MIND WITH DIFC WILLS

Sean Hird Director of the DIFC Wills Service explains how a Dubai law issued this year has given non-Muslim expatriates a greater sense of security.



### P26 TRUSTS AND FIRM FOUNDATIONS

Lara Barbary and John Peacock of BSA Ahmad Bin Hezeem & Associates LLP explain the additional wealth management options provided by two new DIFC laws.



### P28 UAE INHERITANCE: BY COMPARISON

Abdulla Ziad Galadari of Galadari Advocates & Legal Consultants LLP provides a concise guide to the main differences in Federal, Dubai and DIFC inheritance law.



### P31 FAMILY BUSINESS: THE NEXT STEPS

Fadi Hammadeh of Al Futtaim Group of Companies who has carried out research and written a book on family businesses in the region provides an essential guide to succession planning.



### P6 THE SUSTAINABLE SHEIKH

The environmental work of the UAE's founder Sheikh Zayed Bin Sultan Al Nahyan is remembered in the Year of Zayed and 100th anniversary of his birth.



### P39 FOCUS ON FOUNDATIONS

Ahmad Sergieh and Adele O'Herlily of Hadeef & Partners explain how the new DIFC concept of the Foundation operates.



### P45 CYBERSECURITY AND THE ENERGY SECTOR

Rob Flaws of CMS explains how working with counsel can help energy companies tackle digital risks.



**“The DIFC Wills Service Centre is a new system for succession supported through the DIFC Courts Will Registry under the English language, common law DIFC jurisdiction and in line with the Personal Status Law, Federal Law No. 28/2005.”**

**P34 PROFILE**

**DR MICHAEL HWANG, CHIEF JUSTICE, DIFC COURTS**



**P59**

#### **EMIRATES HUMAN RIGHTS**

Editor Sogol Kaveity looks at a UAE law which has tackled discrimination, hate speech and blasphemy.

**P42**

#### **LAWYER'S HUB: KIERSTEN LUCAS**

Kiersten Lucas, Partner at Stephenson Harwood Middle East LLP talks about global teamwork.



**P51**

#### **WHAT'S NEXT: UAE COMPETITION**

Dan Partovi and Farsheed Abdul-Rahman of Jones Day explain where the UAE competition regime is headed.

**P53**

#### **SAME GAME DIFFERENT RULES: FINTECH**

James Coleman, Raza Rizvi and Katrina Morrison of Simmons & Simmons explain best practice when considering a Fintech investment.



**P61**

#### **DID YOU KNOW ...THE ORIGIN OF AWQAF?**

A potted history of the Sharia equivalent to trusts.



**P48**

#### **LOOKING TO A MORE RESPONSIBLE FUTURE**

Rony Eid of Baker McKenzie Habib Al Mulla explains the new Corporate Social Responsibility or CSR legislation issued in the UAE.



**P62**

#### **REMARKABLE**

The story of Trouble a dog who was left millions in a will.



**P56**

#### **BUSINESS HUB: FADI HAMMADEH**

Fadi Hammadeh, Group General Counsel of Al Futtaim Group of Companies, talks about his time with one of the region's oldest and most influential family businesses.

**P62**

#### **DEFINITION**

Ultra vires or beyond the powers and its application in different contexts.



# The Sustainable Sheikh

In the second of a series to mark the Year of Zayed and the contribution of this UAE's founder Sheikh Zayed Bin Sultan Al Nahyan, Editorial Consultant, Claire Melvin who grew up in the UAE and saw the changes first hand, explains his environmental legacy.

The UAE of my childhood was a far less green, more arid place than the country today. Long before any of us had even heard of sustainable development or the impact trees could have on climate change, the UAE's founding father Sheikh Zayed Bin Sultan Al Nahyan had decided to try to make the desert green.

It was very visible ambition. Anyone who lived in the UAE when I was a child will remember armies of gardeners bravely watering the newly planted plants and trees.

Long before the environmental importance of using locally grown produce rather than the imported ones, thanks to Sheikh Zayed steps were also being taken in the 1970s to set up experimental agricultural stations in Al Ain and Saadiyat. My mother would come home from the shops with locally grown cucumbers from Saadiyat and amaze us with what she had found out about the work that was going on there, which meant it really was possible to grow things in the desert. However, the question remained how could anyone even think all this was possible.

## SHEIKH ZAYED'S INSPIRATION

According to Hamdi Tamman the author of the book 'Zayed Bin Sultan Al Nahyan: The Leader and the March', Sheikh Zayed had

spent time finding out about the natural features of the gulf region and while carrying out this research had discovered that 15,000 years ago, the area had been a very different place than it is today, as it had been covered with forests and greenery. However, it had then become a desert after being exposed to a long drought. Ironically, it was those very same long gone forests which had gradually transformed into oil.

Having made this discovery Sheikh Zayed decided some of the wealth being generated from that oil would be used to try to make the desert green again by increasing the numbers of trees, farms and palm orchards in the UAE.

## RECLAIMING THE DESERT

From the early days of his reign as Ruler of Abu Dhabi, Sheikh Zayed began promoting both agriculture and the protection of wildlife.

His plan was to offset desertification. A task which must have seemed impossible in those early days when the desert sands would drift into plantations and farms and stifle the crops they were trying to grow.

However, Sheikh Zayed was determined and instead of giving up, supported extensive projects to level dunes and sand hills, and cover the surfaces with mud.

He also set up green belts around the farms to protect them against the wind and help stabilise the soil.

These sorts of activities were not restricted to the country side either. Forests were also established around city borders to help reduce humidity and help protect those who lived there from sandstorms.

### AGRICULTURE

However, agriculture also needs water and one of Sheikh Zayed's most pioneering projects was the 1946 development of a water resources management system in Al Ain.

This project mixed modern technology with the traditional underground canal irrigation systems to improve the productivity of both existing agricultural land and enable the introduction of new types of produce.

In addition, to the agricultural experimentation stations set up in Al Ain and Saadiyat, in the 1970s, over 280 farms were established in Al Ain.

### TREES PLANTING

As well as encouraging the growth of salt tolerant plants one Sheikh Zayed's most enduring legacies was tree planting which began at the end of the 1960s.

This is probably one of his most visible legacies, as today there are over 100 million trees growing inside the UAE's borders. In addition, Al Ain now has over 75 modern forests which have contributed in part to it becoming known as the 'Garden City of the UAE'.

What's possibly more surprising is that today thanks to these efforts, 25% of the world's date palms are found in the Emirates.

### SUPPORT FOR WILDLIFE

Sheikh Zayed's work also included the protection and support of endangered species. For example in 1977 he banned fishing in Abu Dhabi to help prevent over exploitation.

A nature reserve was also set up in Sir Bani Yas Island as a haven for endangered species including gazelles.

He also issued directives for breeding programmes to be established at Al Ain zoo which then helped increase numbers of the endangered Arabian Oryx and rare birds such as the Arabian Houbara Bustard.

### NATIONAL INITIATIVES

What was unique about Sheikh Zayed was that he extended his concern for environmental conservation to the whole of the UAE and was determined to create the political infrastructure which would ensure there was regulation and support for environmental protection long after he was gone.

Government agencies such as the Environment Agency – Abu Dhabi (which was set up in 1996) were established to help achieve sustainable development and the Federal Environment Agency was also created to oversee environmental matters at a national level.

### INTERNATIONAL INITIATIVES

His work was not limited to the UAE only but also extended overseas as conservation initiatives such as the Abu Dhabi Global Environmental Data Initiative (ADGEDI) under his orders collected environmental data both in the UAE and abroad for use by environmentalists.

### SUSTAINABILITY

For a man born in 1918, Sheikh Zayed had what we would consider today a very modern outlook on the environment. He once stated, "On land and in the sea, our forefathers lived and survived in this environment. They were able to do so only because they recognised the need to conserve it, to take from it only what they needed to live and to preserve it for succeeding generations."

### RECOGNITION

It is hardly surprising then as a result of this work that in 1997 Sheikh Zayed was given the Golden Panda Award by the World Wide Fund for Nature (WWF) for his support for the group's work and in 2005 he was also awarded the Champion of the Earth Award by the United Nations Environment Programme, (an award which recognises outstanding environmental leaders from the public and private sectors).



### THE NEXT GENERATION

It is nice to see there have already been a number of initiatives taken in order to honour and promote this particular part of Sheikh Zayed's legacy, in this the Year of

Zayed, including the donation by Emirati farm owner Salem Al Qaidi of 100,000 local trees which are to be planted around the UAE. In addition, Zayed Sustainability Prize has been established. This annual award will celebrate the achievements of those who like Sheikh Zayed can demonstrate impact, innovation and an ability to inspire in five distinct environmental categories – namely Health, Food, Energy, Water and Global High Schools (which will award youth driven projects from a larger number of parts of the world). The closing date for this year's submission for this award will be 9 August 2018 and more can be found out about the scheme at [www.zayedsustainabilityprize.com](http://www.zayedsustainabilityprize.com) ■



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# OVERVIEW UAE TRUST LAW

**Mahmoud Selim and Farah Abed of Pinsent Masons** explain the impact of Sharia law on UAE inheritance law and family businesses, and how two recently issued trust laws in Dubai and the DIFC are reforming this area.

**A**rticle 7 of the UAE Constitution states that Sharia forms the basis of the Emirates legal system. It also directly governs intestate succession as a matter of UAE Public Policy for Muslims under Article 17 of Federal Law No. 5/1985. However, this legal framework may not easily recognise some of the arrangements families may decide to elect for in family-owned businesses. Whether an individual chooses on shore or off-shore jurisdictions to regulate their succession planning, having expert legal guidance on Sharia aspects can be the difference between their family receiving what they wish, or not.

## SHARIA INHERITANCE RULES

Inheritance is a complex Islamic legal issue and Sharia inheritance rules automatically apply a formula for the distribution of inherited assets. This applies both to commercial assets, such as shares in a family business, and personal assets.

In the UAE these rules are reflected in Federal Law No. 28/2005 (the Personal Affairs Law). In some cases, the principles of Sharia, which are to conserve and distribute wealth fairly across the generations, may actually conflict with a family's desired succession planning arrangements.

## WILLS

In line with Sharia inheritance law, a will or testament will only be applied and be valid to a third of the total estate and to specific persons provided all outstanding debts have been settled. If a will is contrary to Sharia law, it cannot be legally enforced.

As a result, arrangements which try to interfere with the passing of shares between generations, and in particular to retain the shares within the family bloodline, are likely to be open to challenge. This can create uncertainty when considering the most appropriate legal structures.

For example, in the unfortunate event of the death of a second generation family member and shareholder in a family business, some of their shares will pass by Sharia to their spouse who would not be a bloodline family member and who could decide to re-marry and have children of their own, creating more complicated scenarios. As a result, company shares could quite realistically and quite quickly pass outside of the family. In these circumstances, and to avoid this type of scenario, one possible approach is to introduce share buy-back provisions into the Articles of the company, which would instead mean these shares would have to be sold back to the bloodline family members at 'fair value'.

## ENFORCEABILITY

However, while these sorts of Articles may seem financially fair, this approach effectively cuts across the intent of Sharia inheritance which means these provisions would almost certainly be unenforceable in the UAE onshore courts.

Indeed, and no doubt to reflect the UAE onshore legal position, the standard form of constitution for an onshore company is straightforward and it is very difficult to introduce bespoke provisions even though they may suit the requirements and interests of a family business and its family member shareholders.

## OFFSHORE INVESTMENT AND THE DIFC

It is largely because of this lack of flexibility in the onshore laws and regulations that many UAE families are increasingly considering managing their businesses or locating investment assets offshore. However, this too can create administrative difficulties and may not be appealing for obvious reasons to many proud GCC nationals.

As an alternative and increasingly attractive middle ground solution is potentially the DIFC jurisdiction. Here reasonably complex company constitutions can be established containing the type of provisions families would like to see in their own family



companies. The DIFC also has a sophisticated trust regime. These provisions can include enforceable buy-back provisions where family shares fall outside the family through Sharia inheritance. Business entities wishing to taking advantage of the DIFC jurisdiction can put their holding company in the DIFC and then have onshore operational companies, which are fully owned by the holding company, acting as separate units. While this type of structure is still not common, it can go a long way towards meeting the requirements of many of the families who are having to deal with generational change and may provide the best solution at this moment in time.

#### **CHALLENGES BY HEIRS**

However, unhappy heirs, will usually challenge the validity of succession planning structures by invoking Article 361 of Federal Law No. 28/2005 which declares null and void, ab initio, any action which was carried out to circumvent Sharia rules governing intestate succession.

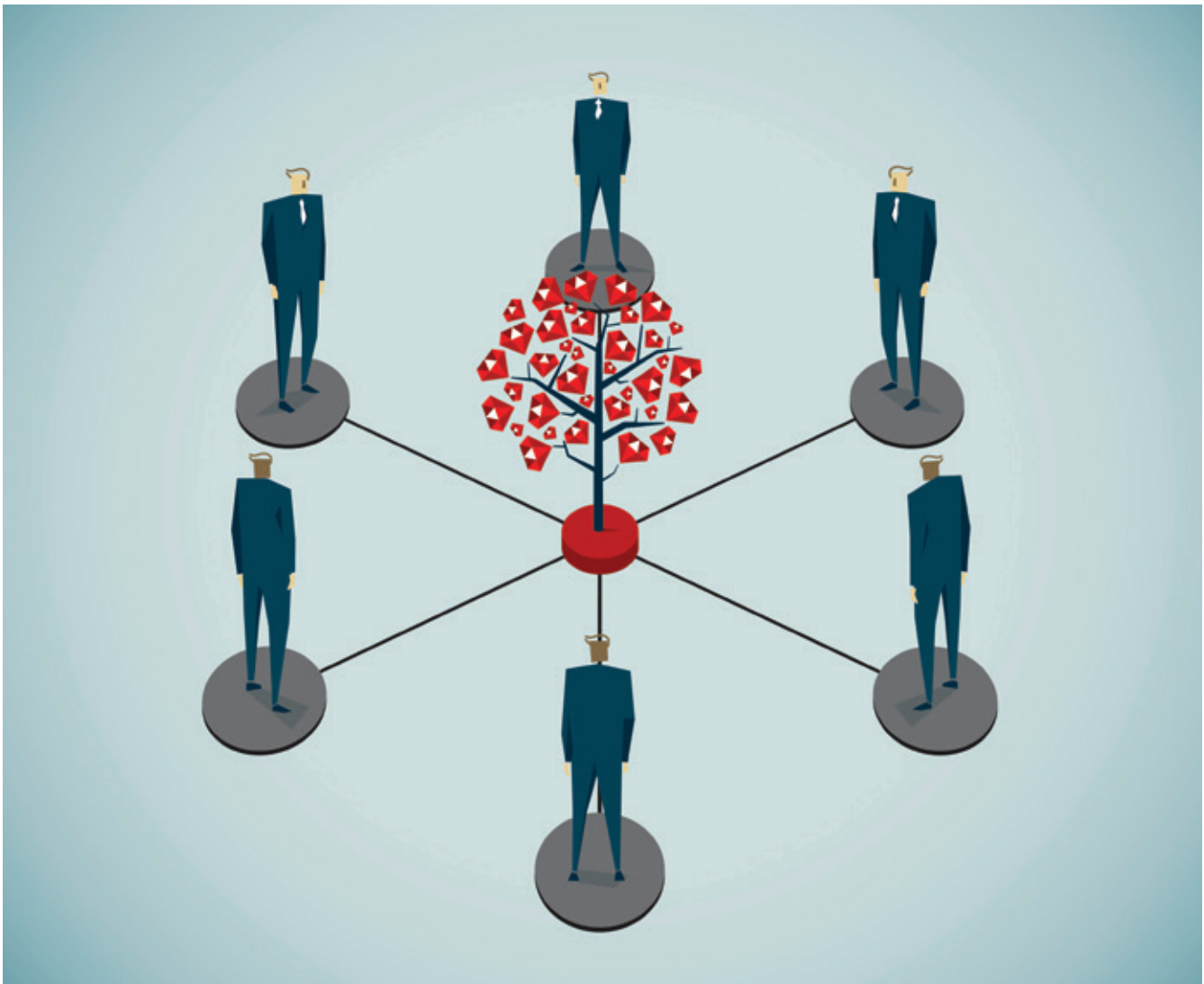
#### **REFORM**

Recognising the accumulation of family wealth in the GCC and the gap in the legal market to foster, preserve, enable and regulate these fortunes in a sustainable, time saving, cost efficient and business friendly manner, Dubai has spearheaded the way towards modernisation of the Islamic concept of family trusts by passing new Dubai and DIFC laws on this subject. In doing so, the Emirate has shown the world how, in practice, Islamic law reform can be done.

#### **WAQF**

Trusts in Islamic law are known as 'Waqf'. Literally, this means to stop, contain or preserve and is a voluntary, permanent, irrevocable dedication of an individual's wealth to a Sharia compliant cause. For a Waqf to be valid, it should be settled for a 'pious purpose'. This has been defined as anything that is good and pleases Allah and would include charity. The law of Islamic trusts was developed in the first three Islamic centuries (the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> centuries AD).





Islamic law on trusts was carried by crusaders back to Europe and the UK which led to the birth and development of the laws on trusts in both civil and common law jurisdictions. One early example of it was the establishment of Merton College, Oxford, in England in 1274.

Under Islamic law, providing for your family is an act of charity which means that a Waqf for family members (a Waqf Ahli) is permitted. Taking financial help from others is not recommended – and in certain circumstances prohibited in Islam so a Waqf Ahli endeavours to prevent descendants from becoming needy and having to rely on others, so eliminating poverty and need at its root.

It is also possible to have a charitable form of Waqf known as ‘Waqf Khayri’ which benefits areas of public welfare and particular segments of society.

With a Waqf, it is obligatory to act in accordance with the wishes of the Waqif (the settlor) as long as these are Sharia compliant, but if the Waqif does not specify any conditions, then beneficiaries should be treated equally.

This means if a Waqf is set up for the Waqif’s children, male and female children should be treated equally in terms of benefits (assuming there are no contrary conditions in the Waqf document).

After the Waqif’s own children, the Waqf should then pass to the children of his sons but not to the children of his daughters, unless stipulated otherwise. If the Waqif does not specify the person who is to be in charge of the Waqf (such as a trustee), then the beneficiaries should take charge.

A Waqf can also be included in an individual’s will. However, the assets should be no more than a third of the Waqif’s wealth, as this is the portion of the estate which can be freely dealt with under the Sharia law of wills.

#### LEGAL PERSONALITY

Contrary to common law trusts, trusts under Islamic law are legal persons which are capable of suing and being sued in their own right. Article 92(d) of Federal Law No. 5/1985 states this accordingly.

However, although trusts enjoy legal personality *sui juris*, they still require a representative *ad litem* to express their will according to Article 93 of Federal Law No. 5/1985.

#### DUBAI AND DIFC TRUST LAW

The provisions of Dubai Law No. 14/ 2017 Regulating Awqaf and Endowments in Dubai applies to all trusts which exist in the Emirate on or after the date of this law, regardless of whether or not the person who created the trust, who is also known as a settlor, is a Muslim or not.

The capacity of a settlor is determined by reference to their respective private laws which is their law of nationality as per Article 11(1) of Federal Law No. 5/1985.

The validity and construction of a Dubai trust deed is now governed by their proper law (*lex causae*), which will either be Dubai Law No. 14/ 2017 or DIFC Law No. 4/2018.



“Although the Dubai Trust Law, Dubai Law No. 14/2017 is at an early stage in its evolution and use, it provides a clear indication on the degree of flexibility it has in comparison with DIFC Law No. 4/2018 and other international trust laws.”



Unlike DIFC Law No. 4/2018, Article 6 of Dubai Law No. 14/2017 requires trusts to fall under one of the following classifications in order for to be valid:

- 1 Family endowment - where the property is held on trust for the benefit of the settlor, their children and other relatives or individuals selected by the settlor;
- 2 Charitable endowment - where the proceeds of the property held on trust is allocated to the public or a particular initiative or project, which has been set out by the settlor; or
- 3 Joint endowment - which requires the proceeds of the property held on trust to be partly allocated to the family and partly donated to a charity.

This can be contrasted with DIFC Law No. 4/2018 which does not constrict the purpose of the trust to a specific classification. Instead, a trust is held valid and enforceable in accordance with its terms to the extent that it is not contrary to public policy in the DIFC and where the purpose is sufficiently certain to allow the trust to be carried out.

In order to hold the endowed property on trust, the endowed property should be:

- 1 capable of generating benefit by law and its benefit shall not be dependent on its damage;
- 2 owned by the settlor who has the right to dispose of it by law; and
- 3 not be mortgaged.

The trust creates a fiduciary duty between the party holding the endowed property, also known as the trustee, and the beneficiary or party entitled to receive the benefit of the trust.

#### THE ENDOWMENT

In certain circumstances, a special purpose vehicle (SPV) may be formed so that the endowed property, managed by the trustee, is transferred to the SPV for the duration of the trust.

The legal effect of a trust shall come into existence once it is entered on the register and registration can only take place once the deed of endowment is issued.

Under Dubai Law No. 14/2017 a trust is only rendered valid once acceptance is obtained from the beneficiaries of the intended trust.

Where the beneficiary of a trust is a minor or has been placed under guardianship, their guardian shall be admitted to accept the trust on their behalf.

However this does not apply in circumstances where the trust is created for charitable purposes.

#### DIFC TRUST CREATION

In addition, acceptance is not required for a trust which has been created under DIFC Law No. 4/2018 and as a result a trust is created as long as the requirements for the creation of the trust are satisfied.

A trust is created under DIFC Law No. 4/2018 by a settlor, who indicates an intention to create the trust and has the capacity to do so.

The trust can either be for the benefit of a specified beneficiary or is intended for a charitable or non-charitable purpose. In addition, the trustee is unable to hold the endowed property in circumstances where they are also the sole beneficiary.

#### COMPARISON BETWEEN THE DUBAI AND DIFC TRUST LAW

Although the Dubai Trust Law, Dubai Law No. 14/2017 is still at an early stage in its evolution and use, it provides a clear indication on the degree of flexibility it has in comparison with the DIFC trust law, DIFC Law No. 4/2018 and other international trust laws.

However this is not to say that DIFC Law No. 4/2018 is going to be more favourable to a particular settlor.

When determining which law is best suitable for a particular set of circumstances, each case should be examined on its own merits and it is important to also factor in the purpose and motive behind the trust's creation.

It is also worth noting that a key aspect with both Dubai Law No. 14/2017 and DIFC Law No. 4/2018 is their safeguarding of the integrity of a trust deed from challenges to the trust on grounds of Article 361 of Federal Law No. 28/2005 (the UAE Personal Status Law). ■



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# From Generation to Generation



**With Sharia Law, Federal Law, the law of individual emirates and freezones all coming into play, UAE Inheritance Law can be complicated. Our expert panel explains its impact on Emiratis and muslim and non-muslim expatriates with property and joint ventures in the Emirates.**

**I** The UAE's approach to inheritance is very similar to that in other GCC states," explains Hussain Al Matrood of Al Tamimi & Company. "The UAE courts require the heirs to declare the full estate of the deceased. When it comes to non-muslim UAE residents, the heirs tend to only seek assistance from the UAE courts in relation to the deceased's estate within the UAE. Assets owned by the deceased outside the UAE will be subject to the laws of the country where the assets are located."

"To understand how succession and inheritance matters are regulated in the UAE, it is important to first make a distinction between the UAE Courts' jurisdiction and the DIFC Courts' jurisdiction," explains Edouard Salwan of BSA Ahmad Bin Hezeem & Associates LLP. "Each jurisdiction has a different approach to the drafting, registration and enforcement of wills in the UAE. While the UAE Courts' jurisdiction applies to individuals with assets throughout the UAE, the DIFC Court jurisdiction only applies to individuals with assets in the Emirates of Dubai and Ras Al Khaimah. So DIFC Court jurisdiction does not apply to individuals with assets in the other UAE Emirates. An individual can only opt for a certain court jurisdiction based on their religion."

"Federal Law No. 28/2005 on Personal Status (known as the Personal Status Law) which regulates wills and inheritance in the UAE Courts is based on Sharia law," Salwan states. "This law applies to both Muslims and non-Muslims. However, only non-Muslims can choose to have their inheritance governed by the laws of their home countries by drafting a DIFC Will in accordance with the DIFC Wills and Probate Registry Rules (or DIFC WPR Rules) of the DIFC Courts, which are not based on Sharia law."

"Article 17(1) of Federal Law No. 5/1985, states that where there is a formal written will 'inheritance shall be governed by the law of the deceased at the time of his death,'" explains Campbell Steedman of Winston & Strawn. "Under the Article 1(2) of Federal Law No. 28/2005, non-Muslim expatriates with assets in the UAE can make a will under the laws of their home country to govern succession of their Dubai-based assets."

## SHARIA LAW

"Sharia law is one of the legal areas which governs UAE inheritance," explains Salwan. "It is a set of principles derived from the Holy Quran and Islamic precedent known as Sunna. It provides guidance on what constitutes a valid will. Under Sharia law, Muslim individuals and non-Muslim individuals who agree to opt into Sharia law can only draft a will for up to one third of the testator's estate and only to individuals who are not considered heirs under Sharia law."

"The Personal Status Law, which is founded on Sharia law, sets out the provisions regulating wills in the UAE. Federal Law No. 5/1985 On Civil Transactions (known as the Civil Code) also provides guidance on the distribution of the estate of a decedent. In accordance with Sharia law, Article 243 of Federal Law No. 28/2005 states a will is enforceable within the limit of one-third of the testator's estate, after paying the rights thereon. The will can also be valid beyond this third, within the limits of the share of the major heir who accepted it," Salwan explains.

"Administering an estate under principles of Sharia can be a complex, lengthy process, and it allows for heirs to raise disputes which can be prolonged for indefinite periods," Campbell Steedman notes. "During this time, day-to-day management of the business in question can, in practice, be almost impossible, and the uncertainty which is created on the identity of the new

shareholders, can have an adverse effect on business operations and profitability."

## DIFC WILLS AND PROBATE REGISTRY

"The most significant reform to the operation of inheritance law in the UAE is the establishment of the Wills Service in the DIFC. Established under Resolution No. 4/2014, the establishment of the DIFC Wills and Probate Registry, and the passing of the DIFC WPR Rules which gave non-Muslims the right to choose their home country law to govern the distribution of their estate upon their death," Salwan notes. "Dubai Law No. 15/ 2017 re-affirmed the authority of the Wills Service and provided further regulations on wills for non-Muslims. The DIFC WPR Rules and Dubai Law No. 15/2017 allow non-Muslims to register wills with respect to any of their assets in Dubai and, since February 2017, with respect to their assets in Ras Al Khaimah. The option to register a will with the DIFC Courts is not available to Muslims."

"The DIFC Wills and Probate Registry serves as an ancillary body of the DIFC's Dispute Resolution Authority and was created to register wills for non-Muslims with respect to their assets," Salwan explains. "The DIFC WPR Rules were developed by reference to international best practice and are based on Common Law principles. The Registry operates under the DIFC jurisdiction and not under the UAE's mainland jurisdiction," Salwan continues. "In effect, this means that the UAE Courts will not be able to intervene in the administration of a DIFC Will or impose any provisions of Sharia law on a properly registered DIFC Will. This has the effect of securing a testator's wish to manage their inheritance in accordance with the laws of their home country."

"In December 2016, in order to extend the benefits of the WPR, the DIFC Dispute Resolution Authority entered into several

## KEY LEGISLATION

### Dubai Law No. 14/2017

This law covers awqaf and endowments in Dubai.

### Sharjah Law No. 4/2011t

This law covers awqaf in Sharjah.

### DIFC Law No. 4/2018

This newly issued law covers trusts in the DIFC.

### Federal Law No. 28/2005

This law known as the Personal Status Law details the main UAE inheritance rules which are based on Sharia law.

### Federal Law No. 5/1985

This law includes provisions on the distribution of non-muslims' estates.

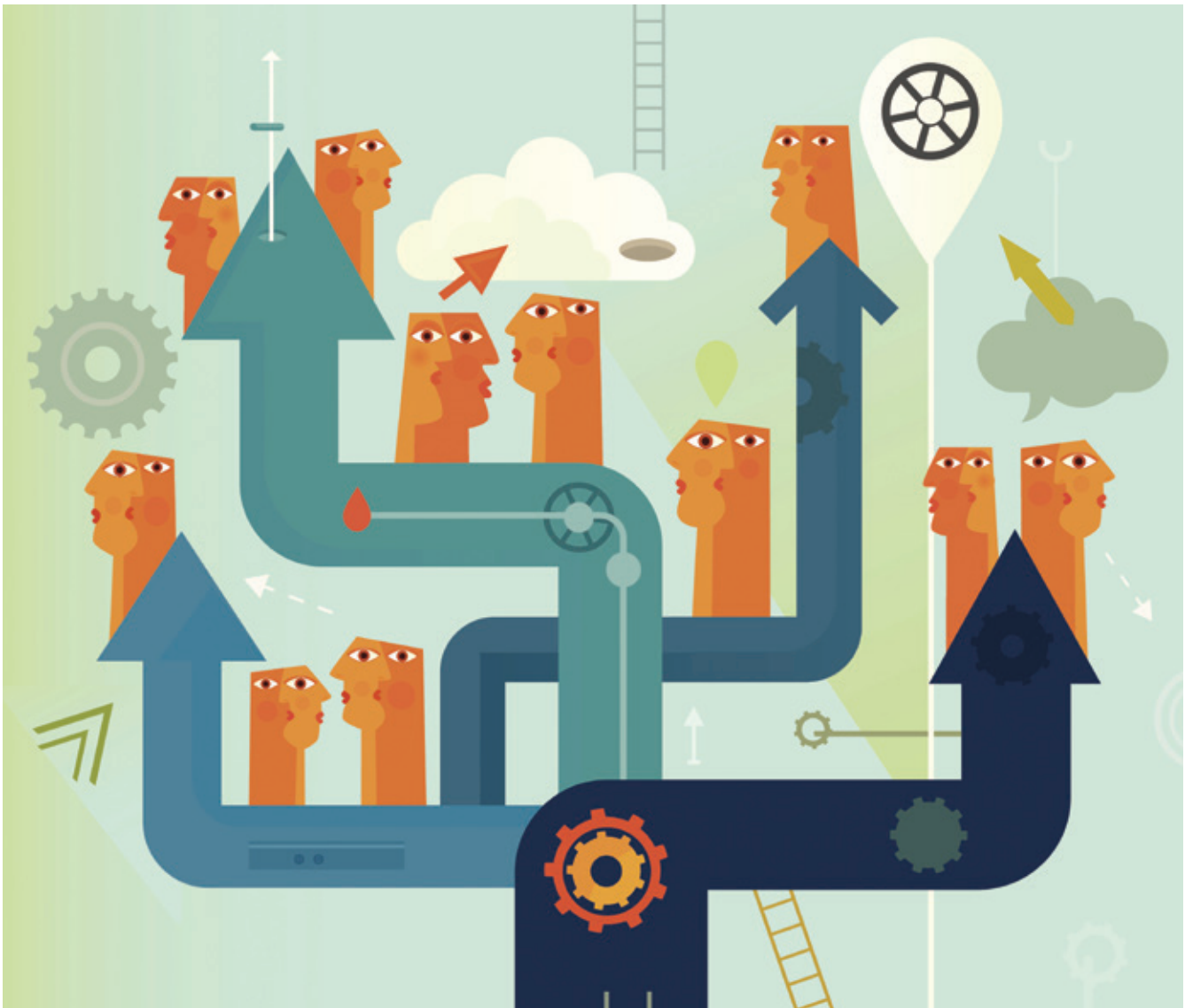
### Dubai Law No. 15/2017

This law considers the administration of non-muslim wills and their execution in Dubai.

### Dubai Resolution No. 4/2014

This law established the DIFC Wills and Probate Registry.





agreements with the Ras Al Khaimah Courts and other RAK government authorities to allow DIFC Court judgments to be directly enforced by the Ras Al Khaimah Courts," Shibeer Ahmed of Winston & Strawn adds. "As a result where the DIFC Courts have issued a probate order covering wills of non-Muslim residents and investors with assets and/or children in Ras Al Khaimah, these probate orders can be enforced directly in the Ras Al Khaimah Courts once an enforcement order has been issued by them."

#### MUSLIMS AND NON-MUSLIMS

"Inheritance laws impact Muslims and non-Muslims differently in the UAE," Salwan states. "For Muslims, inheritance matters must be dealt with in accordance with Sharia law and with Federal Law No. 28/2005. Under this law for example, where a deceased man is survived by a wife, a father, a mother and three children (one son and two daughters), the shares in inheritance will be pre-determined in a specific manner: the wife would receive an eighth of the deceased man's wealth, the mother and father would each receive one sixth of the deceased man's wealth. The remaining wealth would then be distributed so that the son receives double of what

the daughters received. The distribution of assets will differ based on the make-up of the pool of beneficiaries."

#### NON-MUSLIM DISTRIBUTIONS

"Individuals who are not registered as Muslims in the UAE have a wider range of options in selecting how they would like their assets to be distributed," Salwan states. "However, according to Article 1(2) of Federal Law No. 28/2005, the provisions of the Personal Status Law and Sharia law as set out above shall apply to non-Muslims by default, unless they choose to have their assets distributed in accordance with the laws of the country of which they are nationals and in accordance with the DIFC WPR Rules."

"In contrast to the Personal Status Law, Article 17(1) of Federal Law No. 5/1985 provides that the heritage of a deceased non-Muslim shall be governed by the law of his country of origin upon his death, and not Sharia law. The Personal Status Law and the Civil Code provide conflicting provisions on how a non-Muslim's inheritance and succession rights should be governed. Article 17(5) of Federal Law No. 5/1985 states that the law of the UAE prevails on a will issued by a foreigner covering real estate in the UAE. This

**“Finally, the DIFC WPR Rules, Dubai Law No. 15/2017 and a set of practice resolutions provide non-muslims with the right to choose their home country law to govern their will and this is done by drafting a DIFC will.”**



means that although the general rule is that either Sharia law or the law of the decedent's country of nationality applies to their estate, the decedent's real property located in the UAE is excluded from the foreign law and will be governed by UAE law."

"Although the Dubai Courts have historically made freehold property an exception to this law, and have allowed freehold property to pass through a will, it should be remembered that there is no system of precedent in the UAE, so the exception may not continue to be applied," adds Shibeer Ahmed.

"The DIFC WPR Rules, Dubai Law No. 15/2017 and a set of Practice Resolutions also provide non-Muslims with the right to choose their home country law to govern their inheritance rights and this is done by drafting a DIFC Will," Salwan continues.

#### **CONFIRMING WILLS**

"After obtaining a death certificate and registering a death with the relevant governing bodies in the UAE, an executor or a relative of the deceased can make an application for succession to a court which has the judicial authority to hear these matters," Abdulla Ziad Galadari of Galadari Advocates and Legal Consultants explains. "The courts will first clear all the deceased's estate's debts and liabilities before granting probate."

"A will drafted in accordance with Sharia law must be signed before a Public Notary and be drafted in Arabic in order to be valid," Salwan adds. "It can also be drafted in both Arabic and English as long as the translation is performed by a translator who is certified by the UAE Ministry of Justice."

"In the DIFC, under Article 9 of the DIFC WPR Rules, there are some rules that must be followed for a will to fall under Registry's remit," Salwan adds. "For example, it must be signed by a non-Muslim individual over the age of 21, be in writing, be in the English language and be executed in front of and witnessed by competent members of the Registry as well as by one other witness over the age of 21."

"The will must be signed in person before the Registry by the testator," Salwan continues. "It must also be deposited and registered with the Registry, and state that the testator intends the DIFC WPR Rules and the laws of the DIFC to apply to the testator's estate located in Dubai and/or Ras Al Khaimah."

"If the deceased has a will registered with the DIFC Wills Services, the person or persons or executor nominated in the will must make an application for Grant of Probate to the Registry," Galadari adds. "If that application is successful, the Registry will then issue a probate order which the Dubai Courts will then execute or enforce within the UAE."

#### **FOREIGN WILLS OR PROBATE**

"If there is property which forms part of the estate which is owned by the deceased outside the UAE it may be subject to laws which

are different to those in the UAE," Al Matrood adds. "In such cases typically the heirs take the inheritance certificate issued in the UAE and attempt to apply it overseas unless the deceased had a separate will there. It is worth noting in this context that GCC states are more likely to enforce inheritance certificates which have been issued by fellow GCC states, which makes distribution of the estate easier."

"Under Federal Law No. 5/1985, Federal Law No. 28/2005 and Dubai Law No. 15/2017 on the administering of wills in Dubai, a non-Muslim expatriate is entitled in practice to apply the law of their own country as long as it does not contradict UAE public policy or relate to real property," Galadari continues. "In such cases the named executor (as stated in the will, if present) or a family member of the deceased submits the death certificate to a UAE Personal Status Courts (Sharia Court) so the court can issue succession proceedings. It is also necessary to submit documents which prove the identity and eligibility of the heirs/beneficiaries, and a list of all assets owned by the deceased. If a valid will has been made in the deceased's home country and is available or a probate order has been granted by the deceased's country, the applicable law of that country and the Will must be legalised, notarised and translated before submission to the court which will consider its authenticity and validity. After these documents have been considered, the courts will then examine the deceased's estate and oversee the distribution of assets."

"However, it is important to note that consideration and execution of a will is at the court's discretion and the will must not contradict public policy," Galadari adds. "The process is different however if the deceased is a Muslim. In this case the principles of Sharia law automatically apply to the distribution of the deceased's assets in the UAE. and according to Sharia law, a person who is a Muslim is only entitled to make a will covering up to one third of their assets. In this case the testator is entitled to distribute assets to whoever they choose as long as that person is not a legal heir who has already received a share."

#### **INHERITANCE DISPUTES**

"All personal status cases, including disputes involving inheritance whether or not there is a will in the UAE are heard by the Personal Status courts," Galadari explains. "These courts are normally presided over by a single judge. Under Federal Law No. 5/1985 and Federal Law No. 28/2005 non-Muslims who are residing in the UAE may request the application of the laws of their home country in the UAE, as long as they do not contradict UAE public policy."

"When it comes to inheritance disputes, the parties may first try to resolve the dispute amicably through pre-litigation services offered by the court (e.g. family conciliation)," Galadari states. "However, if it becomes clear the dispute cannot be resolved amicably, the parties may then refer their case to the Personal Status Courts of the First Instance. If the parties are unsatisfied with the ruling which is issued by this court they then may appeal through the Court of Appeal, and further challenge the ruling before the Court of Cassation if the claim's value exceeds 200,000 AED. In cases where the deceased had a will registered with the DIFC Registry, it is however the DIFC Courts which have jurisdiction over any probate dispute."

"Dubai Law No. 14/2017 has reconfirmed this position as it states that jurisdiction to hear disputes on wills, vests with the Court in which the will was registered."





"The UAE courts often hear disputes involving disagreements on the rightful beneficiaries or heirs under a will, or on the distribution of the assets to those beneficiaries or heirs," Galadari states.

"Where the deceased is a non-Muslim who has left a will, the deceased's family may request the will be governed by the law of the deceased's home country," Galadari continues. "However, real estate will still be governed by UAE laws. In practice, the courts may under their discretion enforce the will if they do not face any opposition from any legal heirs, and as long as the will does not breach any public policy laws."

"Wills can however be disputed if a legal heir under Sharia law forced heirship can show that their rights to a UAE asset have been breached in the will of the testator," Galadari adds. "The courts may then be inclined to follow Sharia law, or try to compensate the legal heir so they end up in the same position they would rightfully have been in before distribution of the testator's assets."

#### **MENTAL CAPACITY AND POWER OF ATTORNEY**

"Another issue which can be raised in the context of wills is mental capacity," Galadari notes. "As a general rule, a testator who is mentally incapacitated cannot leave a valid will. The only exception to this is if the assets are to be left for charitable purposes. However, for such a will to be executed, the testator's legal guardian must first receive approval from the competent courts (see Article 9 of Dubai Law No. 15/2017 On the Administration of Non-Muslim Estates and Execution of their Wills in the Emirate of Dubai)."

"If a testator is mentally incapacitated prior to their death, their will will be considered invalid, as there is a possibility that they might have revoked their will, but as a result of their condition they were unable to change it," Galadari states.

"However, there is some debate on this area of the law. There are provisions that suggest that a will is valid as long as the

testator did not revoke it prior to sustaining the condition which impaired their mental capacity."

"Article 16 of Federal Law No. 11/1992 also stipulates that 'Substantive matters relating to guardianship, trusteeship and maintenance and other systems laid down for the protection of persons having no competence or of defective competence or of absent persons shall be governed by the law of the person requiring to be protected'. In addition, Article 17(3) of the same law stipulates that the substantive provisions governing testamentary dispositions and other dispositions taking effect after death are governed by the law of the state where the person making such dispositions is a national at the time of their death."

"In many common law countries, powers of attorney (POA) become void on the death or incapacity of the POA grantor," Galadari notes. "However in the UAE there is a concept of an enduring power of attorney (EPA), durable power of attorney or springing power of attorney which mean the POA does not cease to be valid if the grantor becomes mentally incapacitated or such a POA activates once the POA grantor becomes mentally incapacitated. Having a POA of this type can help the holder avoid a lengthy and time consuming process in having a relevant legal body appoint a guardian for an incapacitated individual. The appointed guardian then becomes responsible for making decisions on behalf of the individual."

"The scope of a POA's conferring power after mental incapacity can be very broad or narrow depending on the country. For example, in the UK, an EPA which mainly allowed for decisions on property or finance was replaced in 2007 by the concept of a lasting power of attorney, which saw application of a much wider scope by rectifying any omissions the EPA saw, and changes included offering more options to grantors of varying mental capacity, and the holders' right to make decisions on matters regarding health and welfare of the grantor," Galadari continues.



## TRUSTS

"Trusts are often used for inheritance vehicles in other countries, however the concept of the trust is not currently recognised onshore in the UAE by the courts and legislators," explains Al Matrood. "Instead what is used is an Islamic equivalent to the trust, the Waqf, of which there are two types, the more common charitable waqf and the non-charitable family based waqf. Each individual Emirate is responsible for its own waqf rules and regulations. However, there are currently only two waqf laws which are Sharjah Law No. 4/2011 and Dubai Law No. 14/2017. Although trusts are not recognised onshore in the UAE trust structures are available and recognised in the DIFC and ADGM financial freezones. The DIFC has also recently issued a new trust law, DIFC Law No. 4/2018."

## LITIGATION

"One other area heirs may have to consider is what happens when someone who has been involved in litigation either as a claimant or defendant dies in the course of the litigation," says Al Matrood.

"UAE law dictates that proceedings are automatically stopped on the death of one of the parties."

"However, the claimant can then amend the claim to add the deceased's heirs if they were a defendant or the heirs can decide to take up the claim, if the deceased was the claimant."

"If an heir wishes to take up a case which relates to the rights of a deceased person," Al Matrood states. "They can file a case based on their share of the deceased's estate to recover monies owed to the deceased. Typically in such situations all the heirs file the claim together. However if only one or some of the heirs file the claim, the court can either decide to award the heirs who filed the claim their proportion of the share or join the remaining heirs to the dispute."

## FAMILY BUSINESSES

"There are some areas of UAE inheritance law which can make things more complex for family businesses than may be the case in other jurisdictions," Salwan notes. "For example, in the UAE, there is no principle of survivorship. This means that, unlike other jurisdictions, if a property is owned by an owner who passes away, it will not automatically pass onto their wife. This even applies to properties with joint owners."

"Upon the death of a joint owner, ownership of the property will not automatically pass to the surviving joint owner. The same logic also applies to family owned businesses, in which case the death of the owner will not automatically lead to the business being inherited by the other family members."

"As the UAE has no concept of 'survivorship rights' the UAE courts will make the final decision on the ownership of the property - applying the principles of Sharia in furtherance of Article 17(5) of Federal Law No. 5/1985," Campbell Steedman adds.

"Non-Muslims who have joint ventures in such businesses should take care in drafting a DIFC will that would secure a right of survivorship for the surviving individual."

"In this regard, Muslims are more likely to face difficulty in continuing a family owned business than non-Muslims who have issued a DIFC will as distribution dynamics in Sharia law are pre-determined and do not leave any discretion to the testator in determining how the inheritance of the business should be passed on." ■



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# Keep It In the Family

Andrew Lom of Norton Rose Fulbright explains the benefits in areas including succession planning of establishing a family office and common models and approaches being taken by those who opt for this approach.

The demand for family offices and family office services is increasing as family members spend more time living in multiple locations, and family assets become more and more diversified by asset class and geography. Typically, the main purpose of a family office is to manage the business affairs of a family but they can also help manage other family matters too, including real estate properties, social calendars and household staff. A principal advantage of establishing a family office is that its core functions, staffing and costs can be specifically tailored to the family's particular needs. When properly structured, a family office provides continuity and at the same time adapts to new circumstances as the family grows, shrinks or changes through multiple generations. While each family, and each family office, is different, there are several common themes and considerations when establishing one.

## DAY TO DAY SERVICES AND GOVERNANCE

In different contexts, a family office can mean there is a company that holds the family's assets or a company that manages those assets and provides other services. While in some cases these companies are combined in one, very often, to limit liabilities or address certain tax or regulatory concerns, these companies are kept separate. This article discussion focuses on the service aspects of a family office and assumes the family's assets are owned by one or more separate holding companies.

In the course of managing a family's business affairs, a family office can fill a variety of roles, including everything from investment manager to accountant to law firm. In a similar way, a family may employ drivers, housekeepers, chefs, tutors and other personal staff, and the family's staff may also include experts

on art or travel, or those responsible for managing the schedule, and those responsible for the upkeep of one or more of their properties, cars, boats or airplanes. Linking the management of the personal staff with the investment and accounting functions of a family office can be a powerful tool for keeping the family budget in line with their investment assets and cash flows.

Family offices can also help harmonise and prioritise the potentially competing interests of family members from different generations or among family members within a single generation who are at different life stages (e.g. those with children, those who are single or even just those who have different career paths, lifestyles and health issues). In some family offices decision-making may be concentrated with the head of the family, while others may adopt a governance structure which seeks input from younger generations. However, care needs to be taken to make family members feel included and valued, even if not all family members exercise authority. Communication can also become important, for example if one sibling makes decisions with respect to an investment portfolio owned by several siblings, or the family's vacation residence is shared but managed in principal by one family member.

In some jurisdictions, depending on the level of investment, accounting and other professional services provided, a family office may be subject to one or more regulatory regimes. In these and other jurisdictions, a family office, on its own or in conjunction with a private trust company or other family-controlled entity, may also keep inhouse certain regulatory functions that would otherwise be provided by a bank. These functions can include trust management, 'anti-money laundering' or 'know your customer' compliance certifications, and tax reporting under CRS/AEOI rules, which can help protect family privacy.



### **MULTI-FAMILY OFFICES**

There are also cases, where several families come together in what is called a multi-family office. The advantages of this approach include cost-efficiency and aggregation of capital to access investments with larger minimum investment amounts. However, using a multi-family can potentially expose families to potential inter-family conflicts and could mean less privacy. These considerations may be especially relevant for a family looking for more personal services, such as property management and household staff. For such families, it may make sense to engage a multi-family office for investment management and accounting but also have a separate single family office for personal matters.

### **STAFFING, EXPENSES AND OWNERSHIP**

Depending on a family's size and service needs, the family office could have one or dozens of employees. These employees frequently consist of a mix of family members and professionals. On the investment side, family members can play a valuable role in directing policy, setting risk tolerances and determining asset allocations. In other areas, for example art collecting, a family member could be the resident expert. However, there are three main reasons for family involvement - it helps maintain governance over the family's assets, it allows family members with relevant talents to use them to benefit their family, and it provides training and educational opportunities for family members in their areas of interest.

On the other hand, employing a team of professionals can provide valuable expert advice and analysis on matters which are important to the family. It can also help facilitate family discussions and decision-making, and alleviate day-to-day pressure on individual family members. Professionals can be particularly important in large families. For example, if decisions about family resources are delegated to professional staff, a family office can help manage the competing expectations of the immediate family, in-laws and extended family members. Professionals can also help smaller families by providing an outsourced basis for some or all of the services that the family needs without the additional costs of a full-time staff. However, a family office that provides a broad range of potential services, potentially from multiple locations, will have expenses including employee salaries, office space, computers, record-keeping systems, insurance, and research, and depending on where the family members and family office are located, these expenses may be partially or completely tax deductible.

Family offices tend to be located near the families they serve, but when family members are spread out geographically, it may make more sense for the family office to be located where there is a high concentration of quality service providers. Families may also want to locate the family office in a jurisdiction that offers favourable regulatory or tax treatment. In addition, if an outsourced model is used, the 'family office' may be equally effective wherever it, or its







service providers, are located. As a family office generally provides services only to the family and family members, there is usually no outside source of funding for its expenses. Therefore, it is common to charge a management fee and/or investment performance fees to the family holding company, the theory being that the primary function of a family office is asset management, so these expenses should be paid by the asset base. However, if a family office provides substantial personal services, then because such services do not always benefit each family member in proportion to their assets, other funding models may be appropriate. Similarly, as most family offices exist to serve only one family, there is usually no third party to seek profits from, operating the family office. Therefore, most family offices are run at little to no profit margin. This, along with governance concerns, favours ownership of the family office by the family holding company or by senior family members. However, to the extent a particular family member has an outsize role in family governance or investment decisions, or if necessary to provide competitive compensation to certain professionals, a family office may be owned by, and operated at a profit for, such a family member or such professionals. Family office ownership is also impacted by the size of the family, how its branches develop, and if there is a separate governance structure for the family holding company. For example, one sibling with investment management experience may own and supervise the family office, but all the siblings may be able to vote on asset allocations as directors of the family holding company.

#### **SUCCESSION PLANNING AND TRANSITION MANAGEMENT**

A family office can also offer several important benefits for succession planning and transition management. These include continuity of professionals and functionaries, training opportunities for junior family members, and mechanisms to

mediate intra-family disputes. As families grow and branch out, a family office can facilitate division of assets.

Family offices and family holding companies can also be used to maintain unity of assets while catering for the different needs and attributed ownership interests of family members in different branches. This can be particularly useful if the family continues to own, and does not yet plan to sell, the original family business or source of wealth. In emergency situations, such as the sudden death of a senior family member, professional staff in a family office can also help manage the transition through a disciplined and pre-planned process. As family succession and governance plans are developed, one (often successful technique) is to identify and play to the strengths and interests of family members while supplementing these with professionals and staff as appropriate. ■



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# Who's Next?

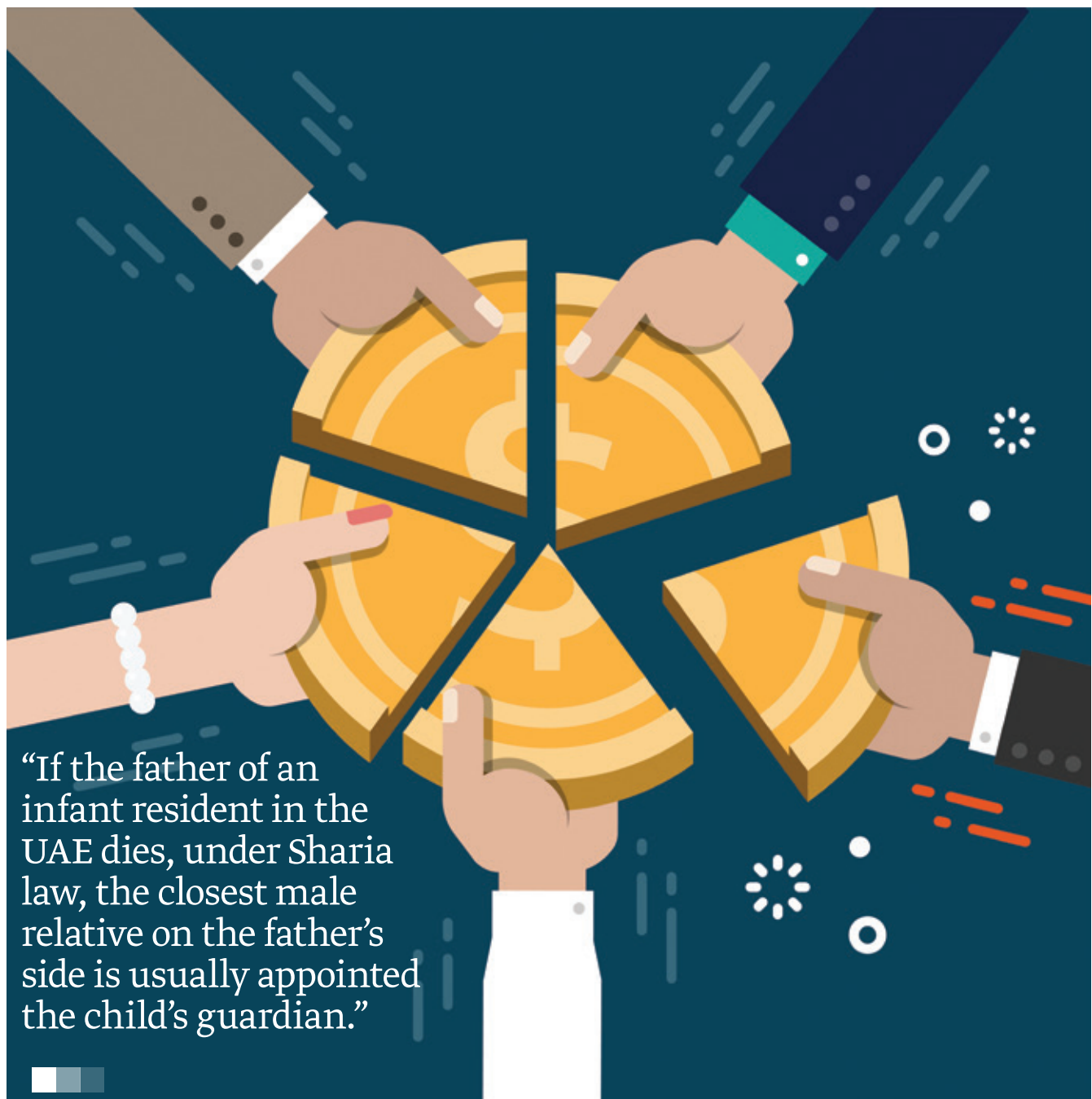
Ruksana Ellahi of Al Tamimi & Company explains how succession planning operates in the UAE.

Inheritance issues for Muslims in the UAE are dealt with in accordance with Sharia. When a Muslim dies it becomes incumbent on their family members to ensure that the wealth and property they have left behind is distributed according to Sharia Law as prescribed in the Qur'an and authentic Sunnah. After meeting the initial expenses required to give the deceased an Islamic burial, and, paying all their debts, up to one-third of the remaining estate may be spent according to the deceased dying wishes or a legal will which has been left behind, although the beneficiaries of such a will are only those who are not entitled to receive a share in the estate by Sharia. The remainder of the estate must then be distributed to all the legal heirs as defined by Qur'an and Authentic Sunnah.

## MANDATED SHARES

There are fractional shares for inheritance purposes mentioned in the Qur'an.

- 1 A 2/3 share is given to two or more daughters, two or more son's daughters, two or more sisters and two or more half-sisters.
- 2 A 1/2 share is given to one of the four sets of females mentioned above when they are alone or to the husband when his wife leaves no issue.
- 3 A 1/4 share is given to the husband when his wife leaves children or to the wife when the husband leaves no children.
- 4 A 1/8 share is given to the wife when the husband leaves children.
- 5 A 1/3 share is given to two or more of the mother's children, or to the mother in the absence of a child, or son's child or two or more brothers and sisters. This can sometimes be given to the grandfather if there are brothers and sisters.
- 6 A 1/6 share is given to the father when the deceased leaves children, or for the grandfather, or for the mother when the deceased leaves children or two or more brothers and sisters, or to the grandmother when the deceased leaves children or



two or more brothers and sisters, or to the son’s daughter when the deceased has one daughter or to one or more half sisters when there is a sister or to two or more of a mother’s children.

#### FAMILY LEVELS

The primary or immediate heirs which are classified as Level 1 family for inheritance purposes include:

- 1 the spouse (husband or a maximum of four wives);
- 2 the children (sons and daughters);
- 3 the parents (father and mother);
- 4 the grandchildren (son’s sons and daughters only).

The secondary heirs include:

- 1 the grandparents;
- 2 the brothers and sisters (in the absence of father and son only);
- 3 the uncles and aunts (in the absence of grandparents only);
- 4 the uncles and nieces (in the absence of brothers and sisters only).

#### NON-MUSLIMS

Many non-muslim expatriates living in the UAE are unaware that in the absence of a will recognised by the UAE legal system, the process of transferring their assets after their death may be time consuming, costly and complex. Complications can also occur if infant children are left behind and no guardianship arrangements which are recognised in the UAE have been put in place.

By default Sharia inheritance rules will apply to any property and a local judge would have discretion to choose a child’s guardian. If an expatriate dies without a will, UAE Federal law guides the local courts on the distribution of any assets. In some cases, the courts will apply the principles of Sharia law to the estate of a non-muslim and the mandatory rules of division between members of the deceased’s family will apply.

In practice, access to a deceased’s assets are restricted. They cannot be transferred or dealt with in any manner without direction from the local court. In some circumstances this can lead to delays and financial complications at what is a critical time.





Unfortunately, many expatriates fail to take the necessary steps to protect their family and assets. Although, they may have investments offshore in a foreign jurisdiction, they will still need to consider what will happen to their infant children, UAE bank accounts and freehold properties or shares in the UAE.

#### **BANK ACCOUNTS**

A surviving spouse will not have immediate access to money in UAE bank accounts, even if those accounts are held jointly in the name of both spouses. If there is no will, these accounts will remain frozen until instructions are received from the UAE courts and all the deceased's debts in the UAE, including even parking fines are paid. The assets will in due course be distributed by the courts in accordance with Sharia Law but this could potentially take weeks or even months. In addition, under Sharia rules the bulk of the assets which belonged to a husband may pass to specific family members and the wife will only take a proportion of the estate.

#### **GUARDIANSHIP OF CHILDREN**

If the father of an infant resident in the UAE dies, under Sharia Law, the closest male relative on the father's side is usually appointed the child's guardian. The mother retains custody subject to conditions such as not remarrying. If a wife dies in the UAE, the husband remains guardian and custodian of any minor children.

#### **UAE ASSETS**

In the case of non-muslims, the law of the jurisdiction which is the deceased is a national of can be applied if a will has been made formally. Federal Law No. 5/1985 stipulates that the law of a non-muslim's home country can be applied in inheritance matters. However, if the will refers to disposals of real estate in the UAE, Sharia rules apply, with the possible exception in cases of freehold property.

However, Federal Law No. 28/2005 allows non-muslim expatriates with assets in the UAE to make a will under the law of their home country which will govern succession of their UAE estate rather than Sharia based rules. However, this will need to be proved in a formal legal fashion before the Inheritance Court. This process can be expedited if the will has previously been translated into Arabic and notarised in the UAE.

#### **DIFC OPTION**

In 2015, the DIFC Wills and Probate Registry introduced a new route for succession and inheritance matters for non-Muslims who hold assets in Dubai which have been backed by protocols agreed with other public authorities in the Emirate. These rules broadly follow UK Law and practice, create legal certainty on inheritance of an individual's assets after death and on the appointment of a guardian for their children. This allows the individual to have testamentary freedom to dispose of their assets as they wish and peace of mind that distribution of their assets will follow those wishes. The DIFC Registry is a simple, efficient mechanism for non-Muslims to pass on their estates subject to a formal will registration process which functions as an opt-in mechanism. All probate grants are issued by DIFC Courts' judges.

#### **NON-MUSLIM WILL REGISTRATION IN THE DUBAI COURTS**

In October 2017, a new Dubai Law, Dubai Law No. 15/2017 was issued on the registration of wills by non-muslims in Dubai. This law gives legal certainty on non-muslim inheritance and appointment of guardians for their children. It is applicable to all wills and assets of non-muslims in Dubai, including those in the DIFC. This new law will enable wills or probates of non-muslims previously registered at the DIFC Courts to remain valid. ■



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# Final Peace of Mind with DIFC Wills

In 2014 the Wills Service Centre was established in the DIFC to enable non-muslims to have greater choice on how to pass on their assets. Sean Hird of the DIFC Wills Service Centre explains how a law issued last year has given them an even greater sense of security.

Until 2014, one of the major concerns for non-Muslim residents and investors in Dubai was that there was no concept of the right of survivorship in the UAE. Many of them came from countries like the UK and India and were used to common law inheritance systems, where they could choose who would receive their assets on their death or would otherwise automatically pass to their spouse. Against this backdrop, DIFC Resolution No. 4/2014 was issued to allow the establishment of the DIFC Wills Service Centre (WSC) which would enable non-Muslims who were investing and living in Dubai to pass on their assets and appoint guardians for their children in line with their wishes through a Will registration service.

## MODEL REGISTRATION SYSTEM

The DIFC Wills Service Centre (formerly known as the DIFC Wills and Probate Registry) or WSC's operation is governed by a set of Rules issued by the DIFC Dispute Resolution Authority, and known as the DIFC Wills and Probate Registry Rules. These provide a comprehensive legal framework which allows non-Muslims to choose to register a Will at the DIFC WSC in line with internationally recognised common law principles and best international practice. If the individual dies, these Rules then set out a clear administrative process governing probate of their registered Will in the DIFC Courts.

The Rules, and Part 55 of the Rules of the DIFC Courts 2014, also have a mechanism for dispute resolution and uncertainties involving registered Wills which can be brought in the DIFC Courts. The DIFC was the first jurisdiction in the MENA region to adopt this regime, demonstrating clear ambition to create legal certainty and support capital investment and economic growth, while still upholding and respecting existing succession laws and UAE public policy.

## DUBAI LAW NO. 15/2017

Dubai Law No. 15/2017 was issued on 30 October 2017 in order to fast-track enforcement of probate orders through the DIFC and Dubai Courts. It governs both the administration of non-Muslim estates in Dubai and the execution of their Wills, affirming the existing Will registration framework implemented by the DIFC. It ensures probate orders follow the same system of execution in

the Dubai Courts as is successfully used for all other DIFC Court Orders. Since the DIFC Courts were formed, over 100 Orders have already been presented to the Dubai Courts for execution through what is a simple, straightforward process.

## WILL REGISTRATION

Article 5 of Dubai Law No. 15/2017 clearly defines the ability of a non-Muslim expatriate of sound mind free from legal incapacities to distribute their assets by a Will, stating that the Will's execution takes precedence over any intestate succession and, in accordance with Article 3, Dubai Law No. 15/2017 applies to the Wills and estates of non-Muslims in Dubai including the DIFC. Reference to the legislation of the Emirate applying to real property and the determination of whether an asset is either movable or immovable aligns this Law with common law principles and clarifies that non-Muslim expatriates can register a Will disposing of real estate. Under Article 8 of Dubai Law No. 15/2017 in order for a Will to be registered the following conditions must be met.

- 1 The testator must be non-muslim.
- 2 The Will must comply with all conditions in the law.
- 3 The Will must appoint an executor and provide a method of how the estate will be administered.
- 4 The Will must be signed by the testator, or carry their seal, in the presence of two independent witnesses.
- 5 The Will must not contain any erasure, abrasion, interlining or additions.
- 6 All fees in accordance with the current legislation of the Emirate must be paid.

The testator must also own all assets to be disposed of by the Will and must not be in a state of bankruptcy or insolvency. In addition, all debts and liabilities which are associated with the estate must be paid before Will execution can take place.

In a move to create an exclusive process for the registration of Wills in Dubai, Article 33 of Dubai Law No. 15/2017 also provides transitional provisions so all non-Muslim Wills registered with the DIFC Courts prior to its implementation are considered valid and as if they were registered in accordance with this Law's provisions.

Immediately prior to this Law being issued, the DIFC Wills & Probate Registry was renamed as the DIFC Wills Service Centre



(WSC) and a new registry was formed at the DIFC Courts known as the Wills Registry for Non-Muslims at the DIFC Courts (DIFC Courts' Registry). All Wills registered at the WSC were then re-registered at the DIFC Courts' Registry.

Transitional provisions were deemed necessary to ensure consumer and legal certainty that Wills previously registered with the DIFC WSC which benefit from the sophistication of the Rules also fell within the new Law's provisions.

Prior to the Law's issue the Dubai Courts had not operated a Registry and any Wills executed in Dubai or elsewhere (including Wills notarised in Dubai or overseas) which would otherwise satisfy the registration requirements of the new Law, would not benefit from its transitional provisions.

The function of the WSC remains to provide administrative support to the DIFC Courts' Registry, ensuring all Wills registered comply with necessary legal requirements. The WSC will also continue to work closely with the DIFC Courts' Registry and support the DIFC Courts where probate orders are issued.

## WILL EXECUTION AND PROBATE

The Rules clearly set out the legal process of proving a Will. In order to administer assets of the estate held within Dubai, a Probate Order issued by the DIFC Courts will require an appointed executor to take practical steps to enforce the Order through the Dubai Courts.

Article 14 of Dubai Law No. 15/2017 has a series of executor requirements which include being legally competent, free from any declared bankruptcy, felony conviction or morality or integ-

riety related offences, and having no conflicting interest in the assets disposed of by the registered Will. The powers and duties of appointed executors are also detailed at Article 15 of Dubai Law No. 15/2017.

Article 29 of Dubai Law No. 15/2017 sets out the arrangements for judicial enforcement of registered Wills. DIFC Courts issued Probate Orders will be through the well-established procedures agreed between the DIFC and Dubai Courts which constitute a fast track route for the enforcement of all Probate Orders issued by the DIFC Courts.

Taken as a whole, the Law provides the final reassurance for non-Muslim residents and investors that their choice of inheritance arrangements will be upheld.

In effect, it ensures smooth and rapid probate for assets across Dubai – a boon for those facing the difficult transition following the death of a loved one or close relative. ■



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# Trusts & Firm Foundati

Two new laws issued this year in the DIFC should provide those looking for wealth management a more efficient options, as Lara Barbary and John Peacock of BSA Ahmad Bin Hezeem & Associates

**T**he main goal of any wealth management and succession planning is to preserve the family legacy and family owned and operated businesses. In the Gulf region, where most private businesses are family owned, the regulatory framework of succession planning which includes both civil law and Islamic law principles is particularly important. However, the DIFC which has with its own independent jurisdiction within the UAE, is also empowered to create its own legal and regulatory framework for all civil and commercial matters and when it comes to succession planning and wealth management, it provides flexible structures in the form of companies, trusts and foundations. This framework has also recently been enhanced with the implementation of two new laws - the new DIFC Trust Law DIFC Law No.4/2018, and the DIFC Foundations Law DIFC Law No.3 /2018. The aim of these new laws is to establish sound family governance structures, charitable and non-profit

structures and create an effective legal platform for local or international families and family offices to structure their business and ensure efficient succession planning.

## THE NEW TRUST LAW

The new Trust Law enhances the trust legislation which already existed in the DIFC, by providing better trust administration, and improved certainty and flexibility for trustees, beneficiaries, and settlors.

Noteworthy changes include enhanced enforcement of charitable and purpose trusts, provision for the appointment of advisory and custodian trustees and provision for relief where a party controlling restricted or reserved powers becomes incapacitated.

There are also specific provisions on the resolution of trust disputes by arbitration, which for example allow the Courts to protect the interests of unborn and incapacitated beneficiaries,



# ons

and succession planning routes with new, LLP explain.

and Courts also have the power to authorize dealings with trust property.

These amendments aim to promote better creditor protection, and private wealth and succession planning.

## FOUNDATION LAW

In addition, the new Foundation Law has set up a completely new legal structure for foundations in DIFC.

Foundations can be used for many purposes, including family wealth and succession planning, securitization of structures or long-term business holdings, and creation of charitable institutions.

They are legal entities which are created when an individual or a company contributes property for a specific purpose observing certain formalities. Unlike a company, a foundation does not have shareholders, so it is not owned by shareholders or members but is instead 'self-owned'.

A foundation's governing body is its council. What is interesting is unlike trustees, members of a foundation's council do not have any personal obligations, and the foundation's liability is limited to its objectives and the value of its assets.

However, foundations cannot carry out commercial activities, other than those necessary, ancillary or incidental to their purposes. The differing types of foundations are based on their objectives - which can be to serve exclusively charitable objects; non-charitable objects or objects which benefit persons specified by name, category, or class. This new legal structure does not require the founders to have a physical presence in the DIFC, as long as their business is to be conducted via a DIFC-based registered agent.

## KEY ELEMENTS IN THE FOUNDATION LAW

In addition, DIFC Law No.3 /2018 covers essential elements: including resolution of disputes by arbitration; mergers and division of foundations; depository receipts; accounting; audit and administration requirements. There are also provisions for the Court to relieve founders and contributors from the consequences of mistakes. Recognition of foreign foundations in the DIFC is also possible. Administrative procedures and the role of the Registrar (who will administer the law on behalf of the DIFC Authority) for the purposes of the foundation, have been aligned with administrative procedures and Registrar's power under the Proposed Companies Law.

The new Trust and Foundation Law regimes should be of interest to family businesses looking for continuance and succession planning solutions, family offices, charities and philanthropic institutions, legal advisors, and those conducting commercial or wealth management activities in or from the DIFC. ■



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Lara Barbary works in the Corporate and M&A practice in the DIFC. She specialises in transactional corporate work mainly in the energy, oil & gas, real estate, hospitality, and technology industries. She has worked on many high profile, high-value transactions for well-known international and local clients.



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# UAE Inheritance: By Comparison

In the UAE there are different inheritance regimes operating at Federal, Emirate and DIFC level. **Abdulla Ziad Galadari** of Galadari Advocates & Legal Consultants provides a concise guide to the main differences.

It was not until Federal Law No. 5/1985 or the Civil Code came into force that some clarity was provided on how inheritance law applied to non-Muslims living in the UAE. Until then, there was no clear law governing the inheritance rights for non-Muslim expatriates. Instead it was deemed most likely that Sharia Law was the applicable law governing even a non-Muslim inheritance.

The UAE legal framework is based on the Sharia laws, derived from the Quran and the Sunnah, which are the verbally transmitted records of the teachings, deeds and sayings of prophet Mohammad (PBUH). The UAE Constitution issued in July 1971, confirms Sharia law is at the forefront and governs matters which are not codified as law within the UAE. This principle is still valid to this day, and such reference to it can be found in the very first provisions of the Civil Code.

## CIVIL CODE PROVISIONS

Sharia law remains a guiding principle for inheritance and succession within the UAE. Public status matters including inheritance are classified as matters of public order under Article 3 of Federal Law No. 5/1985, and matters of this type cannot contradict or conflict with the 'fundamental principles of the Islamic Sharia'.

However, having inheritance governed by Sharia law may come as shock or an unwanted complication for non-Muslim expatriates wishing to bequeath property on death, as it soon becomes clear that the individual does not have power over their own Will when it comes to deciding who the beneficiaries will be or how their assets will be distributed.

However, the Civil Code does permit a non-muslim expatriate to apply their home country's law on inheritance matters, but Article 17(5) of Federal Law No. 5/1985 creates some uncertainty on this as it explicitly requires real estate to be governed instead by the laws of the UAE.





	FEDERAL LAW POSITION	DIFC POSITION
Applicability	The position under Federal law is applicable to Muslims and Non-Muslims in the UAE. Non-Muslims can request their succession be governed by the individual's home country law.	The DIFC Registry is only available to individuals who are non-Muslims and over 21 years of age.
How will assets be distributed?	If the deceased is intestate, principles of Sharia law apply to the division of assets. If a non-Muslim expat wishes to distribute property in accordance with his home country's law, a legally valid Will is required. An application for distribution of assets falls within the court's discretion. For Muslims, Sharia law automatically applies to inheritance.	The testator has full testamentary freedom. In order for an eligible individual to opt-in to the services provided by the DIFC Registry, a formal Will must be drafted and registered with the Registry.
Ensuring a will is valid	The Will must be drafted in compliance with the laws of the individual's home country and must also be in compliance with UAE public policy. If the Will has been made abroad it must be translated into Arabic and attested by the Ministry of Foreign Affairs. These are only necessary preconditions, discretion on deciding on the validity of the Will vests with the court.	A DIFC will must be drafted to meet the requirements under this law. Before registration of the Will, the Registry will review the Will to make sure it meets the minimum requirements of the WPR rules. A DIFC Will must be in English.
Does the law distinguish between assets?	The UAE Civil Code distinguishes between movable and immovable property. If a testator has immovable property (real estate) within the country, UAE law would govern its inheritance. The UAE Personal Affairs Law does provide an answer. Dubai Law No. 15/2017 on the Administration of Non-Muslim Estates and Execution of their Wills in the Emirate of Dubai clarifies that the laws of the UAE apply to property situated in Dubai and it is up to the courts to decide whether a property is real or movable.	The DIFC Wills and Probate Registry Rules applies to assets which are covered within a Will.
Who can be an heir or beneficiary?	A non-Muslim testator can appoint heirs as per their wishes. A Muslim testator can leave a will for up to a third of their assets to non-heirs or charity. The rest of the asset will be distributed via the Sharia hierarchy.	In the DIFC there is no restriction on who the beneficiaries of a Will can be.
How long does it take to receive a probate order?	Non-Muslims cannot be a beneficiary to a muslim's will. Illegitimate and adopted children are excluded from being heirs. It can take up to 12-18 months for the courts to review and distribute assets. During the time bank accounts (including joint accounts) are frozen, residence visa of dependents are cancelled, severance pay is withheld until the courts have issued a certificate of succession.	Probate through the DIFC is obtained within a few weeks to a month. This is dependent on the complexity of the case and may be longer if necessary.
Where does the law apply?	This law applies throughout the UAE.	The law is applicable only for assets within Dubai and/or RAK.



The Sharia based Federal Law No. 28/2005 (the Personal Affairs Law) was then passed to provide clarity on public status matters and build on the provisions found in the Civil Code. This Law reconfirmed that non-muslims were entitled to choose the law of their home country, but ultimately provided no clarity on the stance the courts would take when it came to inheritance of real estate owned by a non-muslim in the UAE. This has proved to be a major drawback in advancing the laws on inheritance for non-Muslim expatriates residing in the UAE.

### DIFC REFORMS

In an attempt to meet with the growing demands of expatriates looking for clarity on protecting their assets, the DIFC Wills and Probate Registry (now known as the DIFC Wills Services) was established in 2015 to ease the confusion surrounding inheritance by providing simple registration and enforcement of wills. The DIFC Registry is based on the principles of common law, and provides eligible individuals with the freedom to distribute their assets as they wish. Through this method expatriates can completely side step the application of Sharia Law.

### DUBAI LAW

In 2017 Dubai Law No. 15/2017 On Administration of Non-Muslim Estates and Execution of their Wills in the Emirate of Dubai (was issued in order to make the legal framework governing inheritance

rules for non-Muslims residing in Dubai clearer. Dubai Law No. 15/2017 applies only within Dubai and the DIFC. According to this new Law a Registry similar to the DIFC Registry will be set up within Dubai in which non-Muslims can register their wills without the fear of Sharia law applying to them. This new law will not affect the validity of previously registered wills in the DIFC or Dubai. A new Abu Dhabi Registry for non-Muslims has also recently been set up so having a Registry in Dubai in place will provide flexibility and grant testator relief as they will know their intentions are being protected. Although the main aim of Dubai Law No. 15/2017 is to provide some clarity on this subject and acknowledge Wills registered in Dubai and the DIFC, there is still a question of how the courts will proceed in practice to enforce Wills registered in the Dubai Registry. ■



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# Family Business: The Next Steps



Succession planning is essential if a family business is to survive.

**Fadi Hammadeh** of Al Futtaim Group and Author of ‘Family Business Continuity in the Middle East & Muslim World: Betting against the Odds’ explains the essential steps for ensuring business continuity.

**F**amily firms in the Middle East constitute a significant component of its non-oil GDP, yet family business succession in this part of the world remains largely unstudied and deeply problematic.

In the GCC alone, more than one trillion US dollars will transfer from one generation to the next in the coming decade. Family firms employ more than 70% of the region's workforce. However, peaceful generational transition is not guaranteed, due to the forced heirship rules under Sharia law and a lack of

viable, tested legal and governance frameworks specific to the region.

## **SUCCESSION PLANNING**

Succession planning is a life-long process of planning and managing that includes exposing the next generations to the business at an early age, developing teamwork among siblings or cousins, finding constructive ways for resolving conflicts peacefully, and putting in place the right family governance platform which enables a culture ☞



of effortless collaboration between the family members with the aim of achieving seamless continuity of the family business.

It is never too early to start succession planning and the earlier it starts, the higher the chances of success are. Formal, focused planning should begin at least 15 years before the actual transition, giving the family and the business ample time to adjust to the required structural changes and process demands.

Both management and ownership continuity strategies must be considered as part of this. Management continuity, involves ensuring that the family business continues to be managed by the right people, selected by the founders or the family, without undue challenge by other family members. Disagreement amongst heirs on who should manage the family firm is the most common and damaging source of conflict in family businesses. At best, it causes decision-making paralysis; at worst, it can lead to court litigation and the consequent loss of the business or the family, or both.

Ownership continuity, on the other hand involves maintaining the economic unity of the family firm and protecting it from fragmentation and dilution as it changes hands. Ownership is an absolute right and once a future heir becomes an owner, they may not possess the wisdom, maturity and foresight to protect the family firm legacy and unity the founder had or intended which will put the continuity of the family business at risk.

Succession planning generally involves the production of documents including a family business constitution, statement of family values, policies on family participation in the business, principles guiding family members' compensation, a family code of conduct relating to the business, policies on sharing financial information within and beyond the family, policies on conflict management within and beyond the family and an ownership governance model.

## SUSTAINABILITY

There are four key ingredients necessary to build a lasting succession plan:

1. **Owner's Will:** The successful initiation and implementation of any succession plan depends on the founder's will. Often, family owners willfully resist succession planning, at least initially. Some founders may view it as the beginning of the end, like planning their own funeral. So it is not unusual for owners to be overwhelmed by denial, anger, or even depression when working with advisers on succession issues. This must be overcome, as the owner's will is the condition precedent for the rest of the planning process. It can be countered with patience, by building trust and positive communication.
2. **Values:** Family values are the blood running through the veins of a family business but they must be clear, well-articulated, understood, and properly communicated. Strong values align the business and help glue its members together; a lack of values derails it.
3. **Governance:** Succession planning requires corporate governance as a fundamental precursor to its success. The governance structure of a family business must segregate the 'family' from the 'business' when necessary; enhance positive communication between family members; encourage transparency and accountability to avoid or help settle disputes; manage family members' expectations (e.g. on dividends, education, employment, compensation, exit rights or charity); and enable better access to funding and business opportunities.



This part of succession planning involves drafting a family constitution (to govern family relationships within the business) and creation of various family governance bodies (e.g. family assemblies, councils, or offices plus ancillary policies).

## LEGAL SOLUTIONS

Only 30% of all family businesses make it to the siblings' generation, 12% to cousins' generation and just 3% through to 4th generation. In civil or common law jurisdictions, ensuring that a business survives and thrives beyond the life of its founder is usually straightforward. It may be sufficient to write a will or create a trust, depending on asset complexity.

Conventional succession planning involves drafting a contractual framework to guide family asset management and facilitate smooth generational transition.

However, under Sharia law, and jurisdictions influenced by such laws, forced heirship rules make succession planning less selective. Trusts, wherein property is held by one party for the benefit of another, are also unknown in Sharia law and Sharia-based courts. Trust will not automatically be declared Sharia non-compliant, but doubts can remain on their enforceability outside the specific jurisdictions or zones in which they are established.

Subpar legal structures are further weakened by lack of awareness of the risks of poor planning, inadequate judicial systems and poor governance models which can promote conflict and work against all but the strongest family firms' will to survive. Many GCC family businesses can be organized as partnerships or sole proprietorships, which makes the chances of continuity even less promising.

Therefore, the most significant precursor for family business continuity in the Middle East is the creation of a legal platform that



can help enforce the owner's will. Drafting a family constitution or creating a state of the art governance model is meaningless unless they are legally binding and enforceable.

### POTENTIAL SOLUTIONS

There are some legal solutions family businesses in the Middle East may use. None of these is without its flaws, but they are all a better strategy than doing nothing:

1. Corporate laws: Existing regional corporate laws may provide a stopgap which can assist family firms in their quest for immortality. Depending on the jurisdiction, family business advisors may be able to incorporate such rules in their company articles of association to mitigate the risks of management paralysis and ownership fragmentation.
2. Waqf Ahli: This concept emanated from ongoing charity beyond the lifetime of the settlor (Al Waqef) referred to in the Sunnah. Al Waqf Al Ahli (family endowment) is an offshoot of charitable Waqf. It is guided by the principles of continued good deeds and that charity starts at home. By creating one of these the founder can benefit their own offspring from the fruits of assets under Waqf, and protect these assets from unscrupulous or greed of future owners. Waqf is an ingenious method for securing continuity and can be adapted to the needs of family businesses. However, many questions arise on the Waqf structure as a platform for family businesses succession planning, over which the different Islamic faiths and scholars have historically disagreed. These include permanency of Waqf, joint capacity of the settler and beneficiary, revocation of Waqf and whether or not money can be the subject of a Waqf.
3. Trusts: These allow regional families to prepare a deed that identifies the settler(s), beneficiaries, trustee(s), assets

under trust and sets out the family owners' preferences on family business management and ownership in the future.

4. Private Foundations: These are a private or charitable entity established by a founder who donates their assets to designated beneficiaries. They are the civil law jurisdiction response to the common law of trust. They can be very useful in the context of securing family business continuity.

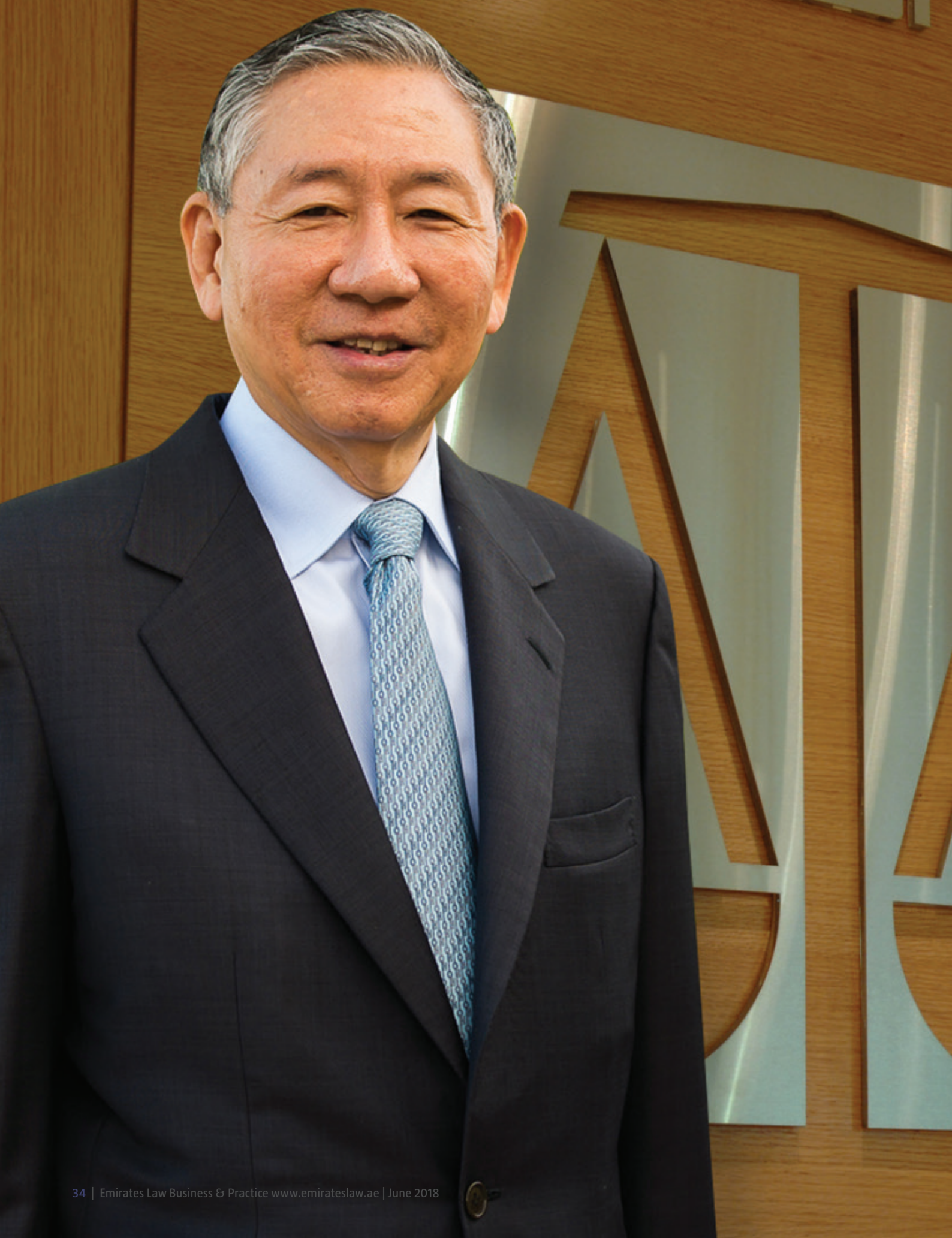
If, family business owners do not initiate and dictate sound generational transition strategies during their lifetime, forced heirship rules will make decisions for them after they are gone. Doing nothing may lead to the loss of everything. This is where legal innovation and solutions may help family business owners and their advisors plan for the worst-case scenario. ■



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Fadi Hammadeh is the General Counsel of Al Futtaim Group and is based in Dubai. As well as working in private practice he has also spent time as the Head of Legal at Dubai Properties and the General Counsel at the DIFC and MAF Group. He has carried out extensive research on family businesses and based on this work has written a book called 'Family Business Continuity in the Middle East and Muslim World: Betting Against The Odds'.









“We have established a name for ourselves as a unique institution, bold in our vision and determined in our delivery Dubai and the DIFCC are now in the premier league of international commercial courts and are mentioned in the same sentence as London and Singapore, amongst others.”

Sogol Kaveity talks to Dr Michael Hwang, Chief Justice, DIFC Courts.

**I** began my career as a law lecturer in Sydney University before returning to Singapore to work as a practising lawyer. I had a mixed practice covering litigation, company law and corporate finance, and conveyancing," Dr Hwang states. "Having expertise in a broad range of practice areas gave me a lot of experience and confidence when I went to the Bench, as I could adjust quickly to different legal situations arising from the disputes."

"I also spent about eight years as a member of the International Council of Arbitration for Sport (ICAS) the parent body of the Court of Arbitration for Sport (CAS), which has about 20 members from a range of countries and is mainly concerned with using arbitration to resolve disputes arising out of the world of sport but is also used for disputes over decisions taken at major international sporting like the Olympics, and on doping violations. I had the good fortune to serve as one of the overseers of the ad hoc arbitration panels formed for the Beijing Olympics, the Delhi Commonwealth Games and the Incheon Asian Games. This mixed experience continues to give me confidence when hearing cases in the Dubai International Financial Centre Courts (DIFCC)."

"A private lawyer's work is very different from that of a Judge, as I discovered when I was elevated to the High Court Bench of Singapore as a Judicial Commissioner in 1991. It was my proudest achievement in Singapore as you are appointed to the bench by the President, on the advice of the Prime Minister, and senior members of the legal establishment, especially the Chief Justice, which means you have the blessing of the most senior members of the Government and judiciary" Dr Hwang adds. "It gave me the experience and confidence to take on my role as Deputy Chief Justice of DIFCC in 2005 and later become Chief Justice."

"I was also proud to be elected President of the Law Society of Singapore as I was chosen by my peers in the Bar to represent them with the Government, the Bench and the public."

## YOUR WORK IN THE DIFCC

"Sir Anthony Evans, founding Chief Justice of the DIFCC, invited me to serve as his Deputy, which I didn't think twice about because the idea of working in a common law court within a civil law country was such an interesting challenge," Dr Hwang states. "I've been with the DIFCC since just after it came into legal existence in 2005, although our Court House was not ready to hear cases until 2008. The biggest single change came with Dubai Law No. 16 /2011, which granted the DIFCC jurisdiction to hear commercial disputes between two or more parties from anywhere in the world who had voluntarily opted in to submit their dispute to the DIFCC, even if they had no connection to DIFC or Dubai."

"With that one single change we immediately became a global court: our jurisdiction was no longer confined to cases which needed some connection with the DIFC. We had been steadily building up our reputation in, and acceptance by the local community in Dubai, and this law transformed us into an international commercial court, open to hear cases from anywhere in the world."

"The work of a sitting Judge in the DIFCC is not that different from that of a Judge in Singapore, but it's not the major part of my job as Chief Justice," Dr Hwang continues. "I oversee the overall administration of the DIFCC, and am the public face of the courts in our various initiatives connecting with other stakeholders in the administration of justice in Dubai, including the President and Governor of DIFC; DIFCA and DFSA; Dubai Courts; Department of Legal Affairs, and the local Bar. There is also the ever-growing engagement with judicial authorities in foreign courts as we are the most connected international commercial court in the world."

"In terms of my achievements to date at the DIFCC, they aren't mine alone they are the result of concerted efforts by the whole DIFCC team starting from Sir Anthony Evans' time in bringing this institution into being. We have a court that has achieved domestic acceptance and international recognition in a relatively short time," Dr Hwang states. "We have established a name for ourselves as a unique legal institution, bold in our vision and determined in our delivery. Dubai and DIFCC are now in the premier league of international commercial courts, mentioned in the same sentence as London and Singapore among others. We were mentioned in an article in The Economist a few months ago which drew comparison between the models of the world's top commercial courts."

"The DIFCC benefits from the wide-ranging experience of Judges from different parts of the common law world," Dr Hwang adds. "This gives our jurisprudence a welcome diversity as Counsel are ready to cite case law from different parts of the common law world, and our judgments also contain many references to civil law, as parties in our courts often choose the law of the UAE as the governing law of the dispute."

## THE COMMON LAW ISLAND IN CIVIL LAW SEA

"While we are essentially a common law court with common law laws and procedures, there are important provisions in DIFC laws with civil law origins, e.g. the UAE Federal Civil Procedure Code (Federal Law No. 5/1985) rather than common law," Dr Hwang states. "For example, common law does not recognise penalties for non-performance of contractual obligations, it merely allows compensation for actual loss rather than deterrent penalties which are greater than the highest actual likely loss. However, Article 108 of our contract law recognises the viability of penalty clauses, subject to the Court being able to moderate the amount if it feels that it is unreasonably high. There are other numerous examples too. Several cases filed in the DIFCC have also expressly chosen UAE law as the dispute's governing law. In such cases the DIFCC applies UAE Law which does not create difficulty as there are always Dubai Counsel acting as expert witnesses or members of a party's legal team to provide input to common law lawyers."

## ADAPTING TO THE DIFCC

"The Rules of Court used in DIFCC were based on the English Commercial Court rules as reformed by Lord Woolf in 1999," Dr Hwang states. "The other non-English Judges and I took a little while to adjust to them as they were different to civil procedures in other parts of the common law world. However, we soon found the basic principles of the DIFC procedural rules were essentially based on the same principles used in the Commonwealth countries like Australia, New Zealand and Singapore."

"Although there was one new rule introduced in DIFCC which was novel for nearly all our Judges, including the English," Dr Hwang adds. "This replaced the standard rules for document production in court cases. We changed from the traditional common law version to a more international and limited version of document production only used in international arbitration. I was more used to this version, known as 'the IBA Rules on the Taking of Evidence in International Arbitration', because of time practising as an international arbitrator rather than as a litigator."

## INTERNATIONAL ADVISORY WORK

"We have been able to give other would-be financial centres the benefit of our experience on what works in our jurisdiction and



what does not," Dr Hwang states. "Perhaps the most important lesson to share with emerging financial centres who want to follow our example is that our first task was establishing our reputation within the community we serve, so local institutions knew the people behind the DIFCC, were familiar with our procedures and how they were intended to work in the local context. From the start we went out of our way to engage with other parties whom we interact with in order to enable our courts to be recognised as an integral part of the community so our judgments and orders would have local enforceability not just in theory but in practice. Once local credibility was established, we extended our engagement to other courts around the world so when our judgments needed to be enforced outside the UAE, they would be well received by courts in countries they were most likely to be taken to for enforcement. We have largely achieved this by painstakingly approaching all the major commercial courts around the world to introduce ourselves as a lawfully established specialist court of the UAE with full power to issue judgments in accordance with our jurisdiction's laws. Hence our long collection of Memoranda of Guidance and Understanding signed with so many countries and jurisdictions in different parts of the globe, and in civil law and common law countries."

"We have made two kinds of agreements with other courts - Memorandum of Understandings (MOU)s which sets out in broad language the declared interests of both parties to co-operate with each other in various fields and activities and Memorandum of Guidance (MOG), where we work through recognition and enforcement policies, processes and procedures with a common or civil law foreign court. The end-product is a practical guide to aid enforceability. MOGs are not treaties, or otherwise have binding legal effect, but they do represent good faith efforts by the two courts to explain the basic laws and practices of mutual recognition of judgments in the jurisdictions. Our Court describes what happens when the judgments of the other country are brought to the DIFCC for recognition and enforcement and they describe

what will happen to our judgments at courts there. MOGs are published on both courts' websites and enriched with FAQs, so the business community and their advisors know exactly what the law is on enforcement of the foreign judgments in relation to the signing counter-party."

"The most important MOG was our first one, as at that time, there was no precedent in relationships between the courts of different countries for such a document, but we were able to persuade the English Commercial Court to sign an MOG with us in 2013 and it has subsequently proved to be a really important precedent, and has helped persuade other major courts to sign similar MOGs with us, not only in common law countries, but also civil law countries like Kazakhstan and Korea."

### THE WILLS SERVICE AND INHERITANCE

"About a quarter of Dubai's population is non-Muslim, with families, businessmen, investors and professionals who live, work and invest here – many of whom have significant wealth," Dr Hwang states. "The DIFC Wills Service Centre is a new system for succession, supported through the DIFC Courts Wills Registry under the English language, common law DIFC jurisdiction, and in line with the Personal Status Law, Federal Law No. 28/2005. Through this system, we have removed uncertainty around succession, and radically simplified the process of asset transfer on death, and of guardianship, by giving non-Muslims the freedom to have their last wishes respected through bespoke DIFC Wills."

"The Centre was a regional first and since its 2015 launch, we have registered over 4,000 wills; introduced on-line template special purpose wills; extended the proposition to include Ras Al Khaimah, and expanded our service network to property owners across the world through a partnership with VFS Global. It has become an integral part of Dubai's offer, increasing confidence and encouraging investment in our Emirate."

"We have yet to see a claim in Court relating to our DIFC Wills, but there will always be a first time," Dr Hwang continues. "I expect

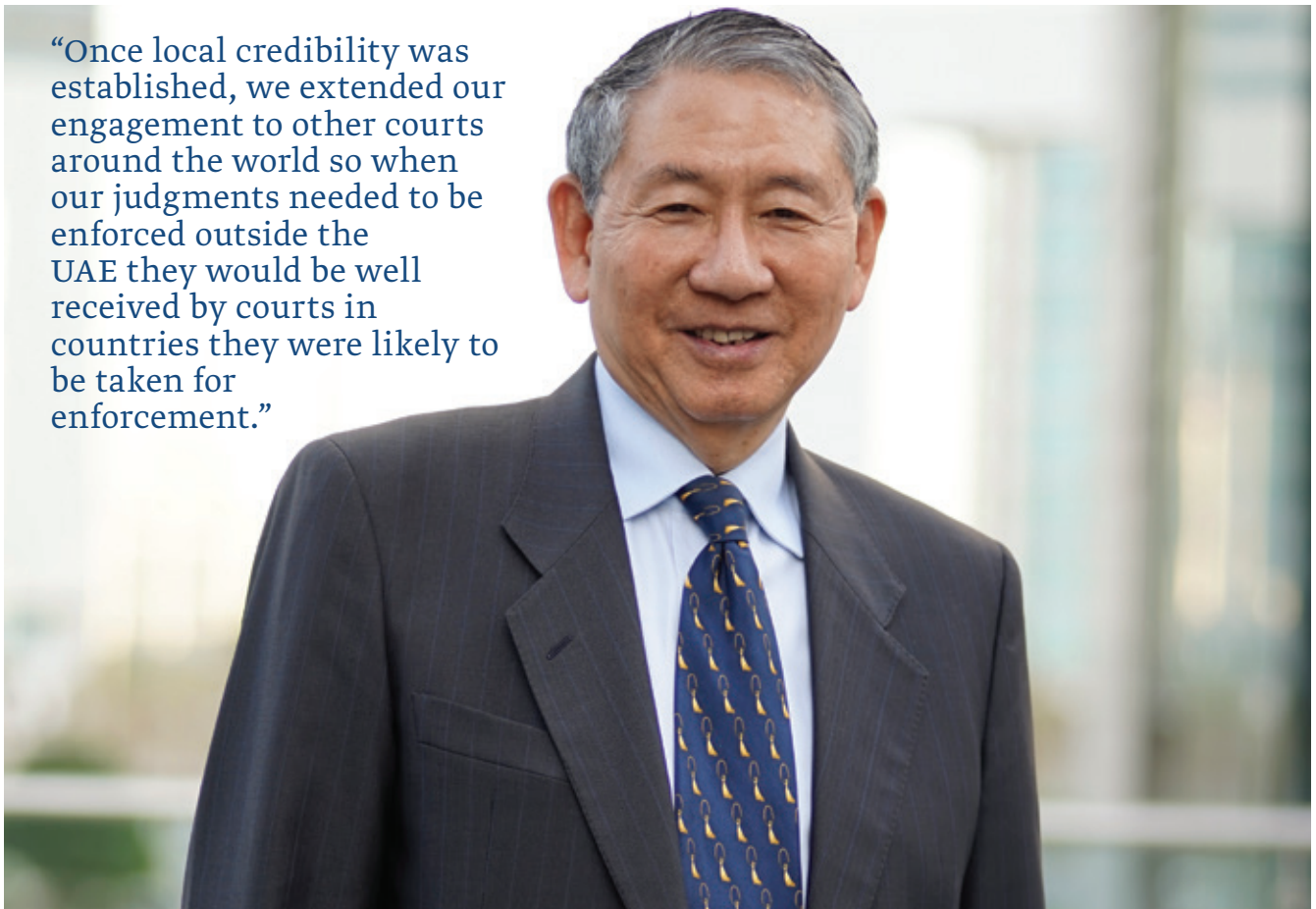


**"With that one single change we immediately became a global court: our jurisdiction was no longer confined to cases which needed some connection with the DIFC."**

**Dr Michael Hwang,  
Chief Justice DIFC Courts**



“Once local credibility was established, we extended our engagement to other courts around the world so when our judgments needed to be enforced outside the UAE they would be well received by courts in countries they were likely to be taken for enforcement.”



there to be significantly less disputes because the DIFC Wills Service Centre is genuinely helping non-Muslim residents and investors register Wills in such a way that disputes are avoided and individuals have peace of mind that their last wishes will be respected. Few, if any, errors in testamentary procedures should pass through the careful scrutiny of the highly trained staff at the Wills Service Centre who help testators fulfil all the necessary formalities required to produce a legally binding, enforceable Will which will be accepted by the DIFC Courts when probate is filed there. With eight successful probates applications in both DIFC Courts and Dubai Courts, it is clear the system is working smoothly, supporting people during a difficult time.”

#### NEW FOUNDATION AND TRUST LAWS

“I also believe the new DIFC Foundations Law and updated Trust Law should facilitate private wealth management for regional and international Family Offices, and ensure that lifetime and succession planning for families using the DIFC will have a robust legal status,” Dr Hwang notes. “In the next decade or so, statistics suggest up to one trillion dollars of assets will be transferred between second and third generations in family businesses. With this legislation in place these businesses should have superior creditor protection, backed by the greater certainty and the flexibility that common law systems provide.”

#### KEY CASE DECISIONS

“If you ask me about which DIFC court case decisions have had the longest lasting impact I would say the judgments that have upheld and extended the DIFC Courts’ jurisdiction,” Dr Hwang states. “There have been a series of landmark judgments, such as *Standard Chartered Bank v Investment Group Private Ltd*, where the Court of Appeal held the doctrine of *forum non conveniens* does not apply to

determine which court is the appropriate forum to hear and determine a case between courts of the UAE. This self-evidently includes DIFC Courts. However, DIFC Courts will still apply the *forum non conveniens* doctrine to determine if a Court of another state should have jurisdiction over a case, as in *Al Khorafi v Bank Sarasin Alpen (ME) Ltd and Bank Sarasin & Co Limited*. *Corinth Pipework v Barclays Bank* was another interesting case where our Court of Appeal confirmed it had jurisdiction to hear a claim against an entity with a presence in the DIFC even though the dispute involved the entity’s activities outside the DIFC, and is relevant to companies with a branch in the DIFC. Another key point highlighted in *Taaleem PJSC v (1) National Bonds Corporation PJSC* and *(2) Deyaar Development PJSC* was that unless evidence is produced to prove otherwise, agreeing to the Courts of Dubai or Courts of the UAE is not interpreted as excluding the DIFC Courts, as the DIFC Courts are constitutional courts of Dubai and the UAE.”

#### WHAT’S NEXT?

“The Dispute Resolution Authority’s Courts of the Future Forum started as a joint venture between DIFC Courts and Dubai Future Foundation, and has evolved rapidly since its launch in 2017,” Dr Hwang states. “As Dubai implements its smart city vision to make use of sophisticated technology to provide better public services, we at the DIFCC are thinking how best to develop our courts as a service through the integration of technologies such as artificial intelligence and Blockchain. Since the start of our five-year strategic plan in 2016, we have focused on innovation, especially through technology. The Forum provides a way to foster legaltech innovation and consider new ways of integrating technology in the administration of justice, for example through exploring the development of smart Online Dispute Resolution (ODR) services. We believe there is potential for the Forum to become a catalyst for the prototyping novel judicial technological solutions.” ■



# Focus on Foundations

There is a new concept in the DIFC: the Foundation. Ahmad Sergieh and Adele O’Herlihy of HadeF & Partners explain how it operates.

On 14 March 2018, DIFC Law No. 3/2018 known as the DIFC Foundations Law was enacted, introducing the concept of the foundation into DIFC law. The DIFC has confirmed that this law is ‘in line with the previous recommendations of its Wealth Management Working Group (which HadeF & Partners was part of)’ and is ‘the product of global benchmarking and extensive consultation with industry professionals and family business networks both regionally and globally.’

## WHAT IS A FOUNDATION?

Foundations can be used for a number of purposes, including but not limited to, private wealth management and preservation, succession planning, tax planning, charitable institutions, financial planning, asset protection, corporate structuring and creditor protection.

Unlike trusts, they are incorporated as legal entities with their own distinct legal personality. Foundations can hold assets in their own name on behalf of beneficiaries. A Foundation’s property is not held by it on trust for any other person. In addition, a Foundation does not have shareholders and has independence as it is self-owned.

The persons named in relation to a Foundation have such rights (if any) in respect of the Foundation as specified in its by-laws. The rights of a person in respect of a particular Foundation may be assigned to another person only if the by-laws of that Foundation allow this. The beneficiaries of a Foundation cannot compel a distribution since they have no interest in its assets or income.

The objects of a Foundation cannot be amended unless there is an express power to do so in the charter of the Foundation, or (under limited circumstances) by order of the court. In addition, ®



a Foundation cannot carry out commercial activities, other than those which are necessary, ancillary or incidental to its purposes.

### WHAT ARE THE KEY ELEMENTS OF THE FOUNDATION GOVERNING LAW?

DIFC Foundations are governed exclusively by the laws of the DIFC, with limited exceptions allowed where the original endowed property is outside the DIFC and the founder or contributor does not have power to dispose of it according to the law of the place where the property is situated. There are four types of categories of Foundation based on their objects, with different governance requirements applying to each. The categories are as follows:

1. those which benefit persons identified/classified by name, class or category;
2. those which are exclusively charitable;
3. those which are not charitable; and
4. those which are a combination of two or more of the above.

### GOVERNANCE CONTROLS

A key feature of a Foundation (compared to a common law trust) is the ability of the person who contributes property to the Foundation (known as the Founder) to retain a high degree of control. The Founder can amend, revoke or vary the terms of the charter, by-laws or objects of the Foundation or terminate the Foundation during their lifetime. The Foundation will also have a Foundation Council. The duties of these Councils include the following:

1. to act within powers conferred by the Foundation's constitutional documents;
2. to act honestly and in good faith in the best interests of the Foundation; and
3. to exercise the care, diligence and skill that reasonably prudent persons would exercise in comparable circumstances.

The Founder (or a body corporate) may be appointed as the Guardian to the Foundation. The Guardian must take reasonable steps to ensure that the Council carries out its functions and may require the Council to account for how it has administered the Foundation's property or acted to further its objects. It is possible to grant the Guardian the power to approve or disapprove of the actions of the Council. The by-laws may also provide for the Guardian to sanction or authorise any action taken or to be taken by the Council which the by-laws would not otherwise permit, provided such acts are in the best interests of the Foundation and the Council is acting in good faith.

### CONSTITUTIONAL DOCUMENTS

A Foundation's constitutional documents include a charter which must include details of the name, objects, initial capital, duration (if limited in time) and a declaration by the Founder requesting the Council to comply with the terms of the Charter. A Foundation may also have by-laws, although these are not mandatory. The by-laws prescribe the functions of the Council, detail the procedure for appointment, resignation and removal of the Council and Guardian (if any), the remuneration of the Council and



Guardian (if applicable), how the decisions of the Council are to be made, functions of the Council which can be delegated (if any) and specify what should happen to the property of the Foundation if it is wound up or dissolved.

### DISCLOSURE OF INFORMATION

In order to ensure the protection of information relating to beneficial ownership of private Foundations, while reducing money laundering risks, relevant information on a Foundation is provided only to the DIFC Registrar of Companies or to a registered agent who is able, on the request of the Registrar, to provide it. Such information is not placed on any public register and is not accessible to the public. The Registrar will only release such information to another body for limited, legitimate purposes.

### PROVISION OF DEPOSITORY RECEIPTS

The Foundations Law includes provisions to allow a Foundation to issue securities, such as depository receipts or certificates, representing the value of the contributed assets to the contributor. This is provided for through the issue of certificates in exchange for the contribution of assets into the Foundation by the contributor. The certificates represent the economic entitlement to the assets only.

Essentially, these certificates serve as contracts issued by the Foundation to the contributor, representing the value of the underlying assets that the contributor owns. This effectively results in a separation of the ownership of the relevant assets from their economic value. The rights conferred on certificate holders are determined by the provisions under which the certificates are issued.





## ACCOUNTING REQUIREMENTS

Company accounts, reporting and audit requirements are substantially in the same form as applicable under the DIFC Companies Law as it applies to private companies. Foundations are subject to the requirements to prepare annual accounts in accordance with accepted international financial reporting standards prescribed or approved by the Registrar; to have these accounts approved by its Council within six months of the end of the Foundation's financial year; to file a copy of the accounts with the Registrar or the registered agent, as applicable; and to keep accounting records an audit of accounts is not required.

## PRESENCE IN THE DIFC

All DIFC Foundations must have a physical presence in the DIFC, either through a registered agent, or directly. It is at the Founder's discretion whether to appoint a registered agent.

## IN BRIEF

1. A Foundation can be used in place of a trust for succession planning and offers many advantages over a trust. The use of a Foundation is similar to the situation with private trust companies, but it removes the need for an intermediate company.
2. Foundations are fast and simple to set up. The management and on-going reporting requirements of a Foundation are relatively straightforward, whereas trusts are complex, time-consuming and costly to set up.
3. A Foundation's by-laws can provide for the distribution of its property to qualified recipients. Qualified recipients can

include a person holding an entitlement specified in the Foundation by-laws to a fixed share in the property and distributable income of the Foundation. It can also include persons who are prospective recipients after a future event happens. In this way, a Foundation can provide for both current and future recipients.

4. A qualified recipient has no right to a Foundation's property except for payment of amounts which arise by virtue of the terms of its by-laws.

5. A Foundation requires no owner so provision does not need to be made for the transmission of a Foundation in succession planning.

6. The by-laws can prescribe the manner in which Foundation property may be distributed, accumulated or applied. This may be provided for in any manner which the Founder sees fit, offering a substantial degree of flexibility and control to them.

7. The by-laws may provide for the addition or removal of a person or class of persons as recipients or for the exclusion from the category of recipient of a person or class of persons, either revocably or irrevocably.

8. The Founder can retain control over the Foundation during their lifetime by appointing themselves as the Guardian. The Guardian may require the Council to account for the way in which it has administered the Foundation's property and acted to further the Foundation's objects. The by-laws may also give a Guardian power to approve or disapprove any specified actions of the Council.

9. A Foundation Council acts in an equivalent manner to a company board of directors and the by-laws can set out detailed rules governing the manner in which the Council members can be appointed and removed as well as how Council decisions are to be made and, if any decision requires the approval of the Guardian or any other person(s). This enables the Founder to have full control over the Council during their lifetime and pass control of the Foundation to the Council after their death.

10. The flexibility of a Foundation also provides a Founder with the option to structure assets for succession planning purposes, in a Sharia compliant manner to the extent required. ■



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Adele O'Herlihy advises clients on a broad range of mergers & acquisitions, private equity, corporate governance, joint ventures, corporate reorganisations and restructurings, commercial contractual arrangements and general corporate advisory matters.

# LAWYERS' HUB



## Tell us about your background?

I learned my trade as an employment lawyer in London after studying for both my law degree and Legal Practice Course there. My first job was with a leading boutique employment practice. That was a rather unconventional move for someone just starting out but it gave me a great platform. As part of a small team, I had far more responsibility for and exposure to client-facing work than most of my peers in larger firms. The technical and interpersonal skills I developed in those early years served me well in roles with some of the leading global heavyweights, including Clifford Chance LLP, before I finally found my home with Stephenson Harwood LLP in London in late 2013.

Stephenson Harwood is a unique firm in a number of ways. We have an even mix of contentious and non-contentious work across our offices,



For **Kiersten Lucas**, Partner at Stephenson Harwood it's all about global team work, whether she is advising clients, providing legal training or authoring books.

particularly in the UAE. This is rare and presents great opportunities both for our clients in terms of the service we provide and the well-rounded training our lawyers receive.

Stephenson Harwood is also now one of the biggest, if not the biggest, international firms to have remained independent. It has expanded significantly in recent years, and plans to continue that growth. I am constantly impressed with the efforts made (by all of us involved in that process) to ensure that expansion does not come at the expense of what sets us apart: our people and our culture. Stephenson Harwood also has a unique focus on the East. Over a quarter of our international workforce is based in the Middle East and Far East. The firm has a long history in Hong Kong and an established presence in Singapore, China, Myanmar and Korea.

#### **What brought you to Dubai?**

My work has always had an international flavour. Since joining Stephenson Harwood I have been at the forefront of initiatives to develop the firm's international employment practice and ensure we provide a seamless global service. For example, I have been involved in several cross-office business development initiatives and delivered onsite training for our overseas clients alongside colleagues in Dubai, Hong Kong and London. In 2016 I assumed joint management responsibility for the Dubai-based employment practice (together with London employment partner Anne Pritam), and have been successfully running client work and business development initiatives for the London and Dubai employment teams ever since. Following a long-term secondment to our Dubai office in 2016, I was asked to relocate to Dubai permanently to lead and continue to grow Stephenson Harwood's Middle East employment practice. I've been 'on the ground' here since October 2017 and am thoroughly enjoying this exciting new phase of my career.

#### **Main Areas of Work**

Stephenson Harwood's Middle East employment team is well-known and respected for delivering operational and strategic advice on all areas of UAE and freezone-specific employment law. In conjunction with trusted internal and external specialists, we also advise on the laws of several other jurisdictions (including Oman, Iraq and Saudi Arabia) and a variety of employment-linked services, including data protection and employee benefits and incentives. Although now based in Dubai, both I and Senior Associate, Emily Aryeetey, have retained our English-qualification status and continue to advise local and international clients on English employment law, data protection and incentives in parallel to our work on local laws. This means clients get the best of both worlds, and benefit from our vast experience, knowledge and understanding of international best practice. My particular personal expertise is high value litigation, restrictive covenants and protection of confidential information. I also specialise in senior executive appointments, remuneration arrangements and terminations. I regularly work as an integral part of the client teams advising financial services regulated firms and individuals on the employment law implications of their regulatory obligations and contraventions.

#### **Data Protection and GDPR**

Data protection is something that we are regularly consulted about, particularly following the introduction





of the new EU Data Protection Directive (GDPR). Earlier this year myself and colleagues in our Dubai and London employment/data protection teams were recognised by the DIFC Academy of Law as 'Specialists in DIFC Data Protection Law' for authoring the commentary on the DIFC Data Protection Law in Laws of the DIFC Vol 2. We were also recognised as 'Specialists in DIFC Employment Law' for our work in Vol 1 of the same series.

Although it is a European directive, GDPR is very relevant to global companies (including many in Dubai) as it applies extra-territorially to non-EU businesses who sell to EU-based individuals. The DIFC Data Protection Law also mirrors the previous EU Data Protection directive and we understand it may soon be updated to bring it in line with the GDPR. GCC businesses trying to grapple with GDPR should not delay in getting proper advice, particularly as GDPR introduces significantly increased fines for non-compliance (up to EUR 20m or 4% of worldwide turnover).

### Client Briefings and Training

Thought-leadership and training are core parts of the global employment team's work. In Dubai, we have been involved in some really exciting projects in the last couple of years, including exclusively delivering the Academy of Law's Certificate in Human Resources (HR) Law & Practice. Now in its third year, the course offers DIFC and onshore HR directors, managers, company owners, in-house lawyers and business managers guidance on both the legal framework and best practice when dealing with HR matters. Emily and I also regularly deliver CLPD accredited training on the DIFC Employment and Data Protection Law to the local legal community. The UAE is a fast-developing, increasingly competitive market in which business protection, employee engagement and retaining talent are high on our clients' agendas. Business protection can be a particularly vexing issue onshore, where the remedies for breach of restrictive covenants are limited and so the focus often needs to be on prevention of anti-competitive behaviours rather than punishment.

I recently had the honour of co-writing with London employment partner Kate Brearley several Chapters of the fourth edition of 'Bloch & Brearley: Employment Covenants and Confidential Information - Law, Practice & Technique' (Bloomsbury). This is a seminal text on employee competition written in collaboration with leading employment silk Selwyn Bloch QC and to which fellow London employment partner Purvis Ghani also co-wrote two Chapters with Kate. Previous editions of this book have been frequently cited with approval by the Judiciary. Although based on English law, the book contains a wealth of best practice guidance which can be applied in most jurisdictions around the globe.

### Legal Changes

It has long been rumoured that the authorities, in the DIFC and onshore, are considering whether the existing end of service gratuity regime should be supplemented (or replaced) by other forms of retirement planning, in particular pensions. We have yet to see any formal consultation or legislative changes on this but it is an area of increasing interest to our clients. We have also been working with our London-based specialist incentives partner Barbara Allen on alternative solutions for hedging employer liability for end-of-service gratuity with employee benefit add-ons such as employee savings schemes.

The other UAE legal change we are most excited about are the DIFC's proposals on its employment law. Over the past couple of



years, Stephenson Harwood (and Emily in particular) have been providing extensive advice and drafting assistance to the DIFC Authority on the planned new Law and the related consultation process.

The existing Law has been comprehensively reviewed and a number of significant changes have been proposed to bring the DIFC more closely in line with international best practice and, in particular, the approach under English employment law. Some changes are aimed at tidying-up and providing clarity on existing provisions; others create significant new rights and obligations for employers and employees.

Under the proposed new Law, end of service gratuity will no longer be forfeited automatically in cases of dismissal for cause. It will also be calculated on the basis that basic salary accounts for no less than 50% of total remuneration (including allowances, bonuses, commission and certain other payments).

The anti-discrimination regime will also be expanded significantly. Age and maternity will be added as grounds on which discrimination will be prohibited and specific penalties for discrimination will be introduced (including compensation of up to one year's salary). A relaxation of the strict Article 18 penalty regime has also been proposed along with a new legal protection for 'whistleblowers' (with fines of up to US\$30,000 for breach by employers).

Employers and employees are increasingly aware of their rights under local law and expect to be treated in line with international best practice.

Once the new Law is implemented, I would expect to see a significant increase in employees challenging the treatment they receive from their employers, particularly in terms of discrimination and whistleblowing. ■

# CYBERSECURITY AND THE ENERGY SECTOR

More than half of the cyberattacks since 2015 have been targetted at oil and gas companies. Robert Flaws of CMS explains how working with legal counsel can help energy businesses in the Middle East better protect themselves from new digital threats.

**T**he threat that a cyberattack can and will be used to control and disrupt power grids, generation facilities, or sophisticated natural resource extraction operations is a growing issue for both businesses working in the energy industry and governments in the Middle East. The high value and importance of the energy industry, makes it a target not only for cyber-criminals looking to steal data and ransom operations but also for state actors or even terrorists, whose goals may not be financial but instead to cause maximum disruption and damage to a particular country.

More than half of the recorded cases of cyberattacks since 2015 have been targeted at oil and gas companies, and these attacks are growing ever more sophisticated, as can be seen by the 'Trojan Laziok' attack in late 2016, where important data was stolen from a large number of energy companies across the Middle East.

## NEW TECHNOLOGY, NEW VULNERABILITY

The increasing level and speed of adoption of IT innovations across the energy sector has led to a situation where traditional energy infrastructure, information and communication technologies are now mutually essential and interdependent. This integration of information technology systems used for data gathering and analysis with operational technology has created new vulnerabilities which were not envisaged when this type of technology was originally built and installed. The growing rise of the 'Industrial Internet of Things' and the increasing real time connection of all sorts of new devices (such as mobile monitors, cameras and drones) has been layered on top of legacy and ever-ageing IT systems which were often designed to be protected from an entirely different type of threat.

## ENGAGING SPECIALIST LEGAL COUNSEL

Given the potential reputational, legal and financial fallout from a cybersecurity incident, engaging experienced and specialist legal counsel can help

energy companies engage in a combination of thoughtful preparation and carefully coordinated communications which will deliver substantial benefits and help minimise legal and reputational risks.

Specialist legal counsel can often help organisations raise awareness of cybersecurity across business functions to help minimise the risk of a cyber-attack.

Cybersecurity is now no longer simply an IT related issue and instead is enterprise-wide and requires an interdisciplinary approach where the entire organisation takes responsibility. Part of this approach should include the development and coordination of a comprehensive governance process in order to ensure that all areas of the business are aligned to support effective cybersecurity practices. Given their previous experiences of coordinating within different organisations, legal counsel can be a useful resource in helping to develop what will need to be a bespoke and unique process with an energy company.

In addition, any internal governance process needs to be complemented by the regular training of all stakeholders, including both internal legal departments and the wider employee network, on the most common ways those wishing to implement cyber-attacks can gain entry to businesses systems (such as phishing and phony e-mails) and what practical steps can be taken to stop these. This can help organisations apply the law to reduce internal threats from potential malicious employees and reduce the risk of an innocent employee unknowingly becoming the source of an attack.

## IT POLICIES

Another way energy companies can address internal risks is through the development of a comprehensive IT policy. This type of policy can inform employees across a number of business functions on how to deal with information technology, specific devices, web applications (including email) and electronic information as well as any personal devices they have which may come into contact with the IT infrastructure. Rather than wasting time reinventing the wheel, energy companies can usefully engage specialist legal counsel who have the experience of writing and developing these types of policy so the policy itself:

- 1 uses language that is easily understood by all employees not just technology or security specialists;
- 2 specifies what constitutes intellectual property, confidential information, sensitive business information, and other assets which the policy seeks to protect;
- 3 emphasises the importance of cybersecurity and explaining the potential risks to allow employees to understand what is at stake by using real life examples (garnered from past experience) which employees can relate to;
- 4 specifies what can or cannot be done with the business' technology, devices, web applications (including email) and electronic information;





- 5 specifies who is responsible for the policy specifically or cybersecurity generally;
- 6 specifies the hierarchy of who to contact if there are any questions or incidents as well as how to contact these people (including relevant legal and regulatory bodies where necessary); and
- 7 specifies the costs and consequences to the business and individual employees who fail to respect the policy.

In order to help ensure this policy becomes an effective tool, legal counsel can also help energy companies to regularly reinforce their policy application through update sessions and by assisting in enforcing compliance through the design of recommended audit and monitoring procedures.

### THIRD PARTIES

One of the major sources of an energy company's vulnerability to cyber-attack is through third-party services and suppliers' contracts.

In fact, the number of security incidents at companies which have been attributed to partners, suppliers and third-party vendors (particularly IT vendors) has risen consistently, year on year.

As a result, energy companies can usefully engage legal counsel to help employ safeguards at all stages

throughout their third party contracting process. This can include safeguards such as:

- 1 the development of policies designed to assess and verify a third party's cybersecurity infrastructure performance;
- 2 the development and exercise of a careful due diligence process with regards to a relevant third party;
- 3 assessing the kind of information and type of data that a third party will have access to and identifying this as confidential and protected information in the contract with that party;
- 4 ensuring the third party provides adequate representations, warranties and covenants on its cybersecurity processes in the contract (including ongoing and regular testing and improvements) so as to have a contractual recourse in case of a cybersecurity breach that is attributable to the third-party (including for any loss of or corruption to data);
- 5 giving priority to third-party service providers or suppliers which have rigorous cybersecurity policies in place, as these relationships ultimately influence a business' risk profile and, where applicable, the premium of a business' cyber insurance policy; and





- 6 assessing whether the company's own cyber insurance policy provides it with adequate coverage in the case of a cybersecurity breach which is attributable to a third party.

### CYBERSECURITY INSURANCE

Energy companies can also usefully consult with legal professionals and cybersecurity specialists to help them with the process of potentially subscribing to a cyber-insurance policy. There can be many problems with cyber-insurance policies if a seasoned legal professional has not first reviewed them. For example, the way an organisation circumscribes the definition of 'sensitive information' in a policy is very important because it might exclude some of the key assets and/or data vital to an energy company's performance.

Cyber-attacks (particularly those targeted at energy infrastructure) are sometimes state sponsored and therefore may also be excluded from any cover if the policy contains the usual 'terrorism' exclusion. In addition, exclusions must carefully be examined when dealing with a traditional policy.

### LEGAL DISCLOSURE OBLIGATIONS

Finally, if the worst comes to the worst, legal counsel

can play a vital role in guiding energy companies through the notification process. Depending on both the section of the business affected and the type of information that may have been lost or stolen, there are a huge range of diverse organisations and agencies who may need to be notified and each are likely to have separate procedures and timeframes to navigate (e.g. regulators, the police, banks, suppliers and, if necessary, also the public).

A specialist legal counsel is also often in a unique position to help organisations to decide quickly how best to respond to a breach as, given their previous experiences, they have oversight of the potential regulatory investigation and various litigation actions which might follow. In addition, communications between an energy company and their legal advisors (during both the commercially sensitive stage post cyber-attack and thereafter) are legally privileged and therefore do not have to be disclosed in court. Communications with other organisations, consultants and advisors would not attract such protection and can often result in damaging disclosures when later revealed, if they are the sole source of communication relied on to manage the fallout from any cyber-attack. Finally, legal counsel can often be of practical help when engaging with insurers, external experts and public relations specialists designed to minimise the financial and reputational fall out from this type of attack.

Navigating the cybersecurity world is not always easy. From the education of employees, to drafting of agreements with third-party service providers and suppliers, selecting a cyber-insurance policy or dealing with post incident disclosures and actions, many questions and uncertainties can arise.

Being ready is key to fighting the cyber war. With trusted legal professionals at their side, energy companies may find that addressing this risk and dealing with the cyber threat can actually be an efficient and well-designed process. ■



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# Looking to A More Responsible Future

Corporate Social Responsibility (CSR) is not a new concept to businesses in the UAE, what is new is a law which is regulating its operation as **Rony Eid** of Baker McKenzie Habib Al Mulla explains.

**T**he concept of corporate social responsibility (CSR) is far from new in the UAE. Starting simply as the idea that businesses should give back part of their profits to charity, CSR has evolved to include a more comprehensive view of companies as key players in society with responsibility towards the environment, consumers, local communities, and their employees. As this has happened, the UAE has begun picking up the pace in further formalising its commitment to social welfare by making CSR compulsory for UAE companies.

To date a large number of innovations and creative endeavours have been introduced to action novel CSR initiatives which make people's lives better, build development infrastructure and help protect the environment. Organisations in all parts of the world have also been moving towards more environmentally and

socially sustainable business practices over the last few decades, although the motivations and drivers behind CSR can differ from one country to another.

However, global trends point to cost management as the main driver for CSR, followed by customer demand and having good values. In the US, companies tend to implement CSR practices largely due to cost issues and because 'it's the right thing to do'. Whereas in the UK, increased scrutiny from stakeholders and demand from the public for greater transparency have been putting pressure on companies to become more socially and environmentally responsible. How a business is perceived to be operating is also important in many countries, China, for example, considers recruitment and retention of staff as the main driver behind CSR. However, no matter what the geographical location, businesses



tend to share the same CSR priorities, with donating to and participating in charity activities topping the list, followed closely by improving energy efficiency or waste management. Businesses are also working on reducing their environmental impact, with increasing numbers calculating the carbon footprint of their operations.

### CSR IN THE UAE

In the past, there were no laws in the UAE regulating CSR, so many private companies merely allocated a small percentage of their budget to CSR on a voluntary basis. Some initiatives were also taken with the aim of raising awareness of economic, social and environmental development challenges, and encouraging the private sector to support various community projects in the UAE. However, change is afoot, after the Ministry of Economy launched 11 initiatives in 2017 to implement the UAE's Year of Giving strategy. Cabinet Resolution No. 2/2018 on CSR was then issued in January 2018 and came into effect the day after its publication in the Official Gazette. Under this Resolution, a National Social Responsibility Fund will be established in the UAE to promote the culture of social responsibility and implement community related projects and initiatives. As a Federal administrative body affiliated to the Ministry of Economy, the Fund aims to set a regulatory framework for socially responsible practices and define the roles and responsibilities of relevant authorities to regulate and promote social responsibility to the private sector. It will have a Board of Trustees chaired by the Minister of Economy who will be in charge of setting up the board, determining its membership numbers,

their remuneration and terms, and for planning board meetings. However, the Ministry of Economy will handle the Fund's preliminary expenses.

### PLATFORM AND PRACTICES

The Fund has set up a smart social responsibility platform ([www.csruae.ae](http://www.csruae.ae)) which lists and regulates companies, beneficiaries and enterprises. This electronic platform also provides guides, examples and models on how to implement CSR practices, and shares company success.

Registration on the CSR smart platform will be compulsory for local commercial companies of all legal forms, including companies which are exempt from the provisions of UAE Commercial Companies Law (Federal Law No. 2/2015). Foreign company branches carrying out activities in the UAE and companies directly or indirectly owned, in full or in part, by Federal or local government will also have to register on the platform. However, registration will be optional for civil and professional companies, individual firms, free zone companies, and cooperative societies.

Registration on the platform will cost 1,500 AED, which is recognised as the company's contribution to and membership of the Fund, and membership of it is renewable annually. In addition, the Department of Economy in Dubai has also started to charge 'Smart Social Responsibility Platform' fees of 1,500 AED per year to each newly incorporated entity and to existing entities on renewal of their licenses.

Cabinet Resolution No. 2/2018 states that contributions to social responsibility should be given by companies and establishments as a result of their own belief and desire to contribute to the development of society by voluntarily participating in projects which are listed on the smart platform. CSR projects and practices include cash and physical contributions and adopting environmentally friendly policies at work, as well as innovative initiatives and scientific research helping to find solutions to problems and challenges faced by society.

The Fund will announce results annually, and the database will serve as a national index based on the percentage of contributions in projects and programmes.

There is no set timing for contributions to the Fund, and the Minister of Economy and the Board of Trustees of the Fund will issue the implementing regulations to execute Cabinet Resolution No. 2/2018.

### SOCIAL RESPONSIBILITY PASSPORT AND LABEL

Companies which are registered on the platform and contribute to the Fund will benefit from certain privileges and incentives such as being granted a 'Social Responsibility Passport' and a 'Social Responsibility Label'. These will be used to promote the companies and reflect the extent of their contributions to social and charitable work. These incentives will be announced by the Minister of Economy and can be used for a determined period. In order to get the Social Responsibility Label, businesses will need to contribute





at least 10,000 AED to the Fund, and at least 15,000 AED in order to obtain the Social Responsibility Passport. The Fund's Board of Trustees will determine other voluntary contributions.

#### REPORTING

Registered companies or establishments are also required to disclose their contributions to CSR through the platform for the determined period prior to renewing their registration with the relevant authorities (e.g. the Commercial Register or free zone as applicable). The disclosure must include all data and information relating to the type and size of contribution, as well as the party or parties benefiting from the contribution. Beneficiaries of contributions must also disclose the business plan of the programme or project through the platform, as well as providing updates every three months or whenever is deemed necessary. In addition, the commercial register in each Emirate may request the registration of the companies in the CSR platform as part of the renewal of their license. Although in practice, registration on the platform is already accounted for amongst the fees required to set up a new entity or to renew the license of an existing entity. Discussions are still pending between the Ministry of Economy, the Department of Economic Development and other Ministries in several Emirates on the application of the CSR resolution. Regardless of clarifications which may be still come, it is very clear that the UAE takes CSR seriously and is firmly committed to developing an integrated framework to spread the culture of giving nationally.

#### LOOKING FORWARD

At a global level there is an unprecedented and rapid growth in awareness of the importance of corporate social responsibility, and the future of many organisations may be significantly impacted by their commitment to

“Although the UAE is already recognised internationally as being the top philanthropic country by the World Giving Index the Government is still determined to move CSR from companies merely contributing to charity activities to launching well organised and mediated development activities.”



practicing the CSR concept. Although the UAE is already recognised internationally as being the top philanthropic country by the World Giving Index, the government is still determined to move CSR from companies merely contributing to charity activities to launching well-organised and mediated development initiatives. ■



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# What's Next: In Competition?



Dan Partovi and Farsheed Abdul-Rahman of Jones Day explain the next likely steps in the UAE competition regime, following the publication of what was discussed at a recent Competition Regulation Committee meeting.

**T**he Competition Regulation Committee is part of the UAE Ministry of Economy, established under Federal Law No. 4/2012 or the UAE Competition Law. Broadly speaking, it has responsibility for:

1. providing a general oversight on the UAE Competition Law;
2. formulating policies and making proposals for the protection of competition in the UAE; and;
3. studying issues and making recommendations in relation to the implementation of the UAE's competition law regime.

## PROGRESS TO DATE

Federal Law No. 4 /2012 is the UAE's first unified competition legislation. It came into force in February 2013 and now forms the primary source of competition law in the country. The key objective of the UAE Competition Law is to promote and protect competition in the UAE. In 2016, the government issued two Cabinet Resolutions to provide further guidance on the application of Federal Law No. 4 /2012. The first, Cabinet Resolution No. 13/ 2016 set out the market thresholds for establishing a restrictive agreement or dominant position under the UAE Competition Law. The second, Cabinet Resolution No. 22/2016, provided the required definitions of small and medium enterprises which are exempt from the UAE competition regime. Together, these Cabinet Resolutions set out certain pieces of vital information which are required to allow effective compliance with and enforcement of the competition regime in the UAE. They broadly completed the UAE's legislative framework on competition and allowed for the possibility of enforcement of most parts of the competition regime. It is against this backdrop that the Competition Regulation Committee has been put in place to take a central role in the practical and policy implementation of the UAE's competition regime.

Details of this year's meeting of the Competition Regulation Committee were reported in a press release which was issued

on behalf of the committee shortly after it met in March 2018. The meeting was chaired by HE Mohammed Ahmed Bin Abdul Aziz Al Shehhi, the Undersecretary of Economic Affairs at the Ministry of Economy, who stated that the meeting had discussed the UAE Competition Law generally and how it can maintain and promote competitiveness, efficiency and be more consumer focused. It was also stated that the UAE Ministry of Economy is working with different government entities, including the economic development departments and chambers of commerce to ensure compliance with the UAE Competition Law. Specific areas discussed by the Competition Regulation Committee included the development of guidelines and standards for the implementation of the UAE Competition Law; credit card companies operating in the UAE; joining the International Competition Network; and the UAE film industry

## FURTHER GUIDELINES AND STANDARDS

The Competition Regulation Committee's confirmation that it has been discussing the development of guidelines and standards for the implementation of the UAE Competition Law shows there will be further development of the UAE competition law regime in preparation for its substantive enforcement. In particular, the Competition Regulation Committee will have discretion in a range of matters and standards, for example, considering what constitutes a 'relevant market' in terms of market thresholds in the merger control regime. Therefore, the Competition Regulation Committee's statement that it is actively considering further guidelines and standards for implementing the UAE Competition Law can be seen as an indication of the seriousness of the UAE authorities to move towards active enforcement of the competition law regime.

## CREDIT CARD REGULATION

The Competition Regulation Committee has stated that it has been focusing particular attention on credit card companies operating in the UAE. It is currently coordinating with different organisations to



gather information on fees charged by credit card companies for retail outlet sales. The Competition Regulation Committee has confirmed its commitment to exploring how to control these fees and how to address monopolies in the sector by implementation and enforcement of the UAE Competition Law. Challenges to credit card fees by the Competition Regulation Committee under the UAE Competition Law, if made, would follow recent high profile cases in both North America and the European Union.

#### INTERNATIONAL COMPETITION NETWORKS

The Competition Regulation Committee has also stated that it has been reviewing its efforts to join the International Competition Network or ICN. The ICN is an international body exclusively devoted to competition law enforcement. Its membership includes various national and multinational competition authorities from around the world. It provides a forum for members to discuss competition issues and to generate recommendations, policies and practices which could potentially be implemented by individual members at a local or national level in their own jurisdictions.

#### FOCUS ON FILM

The Competition Regulation Committee also discussed the UAE's film industry and agreed to conduct a review into the state of competition in the industry.

#### THE FUTURE

The published contents of the recent meeting of the Competition Regulation Committee show there is an ongoing

appetite and readiness to be pro-active in the regulation and enforcement of competition in the UAE. The matters discussed at the meeting indicate that the Competition Regulation Committee is well advanced in considering competition concerns in different industries and potentially points to active competition regulation on the horizon across a range of industries. ■



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# SAME GAME DIFFERENT RULES: FINTECH

As the Middle East Fintech market continues to attract growing numbers of investors, James Coleman, Raza Rizvi and Katrina Morrison of Simmons & Simmons look at fintech due diligence and the areas most investors need to consider.

The global financial services sector has been profoundly touched by the rapid emergence of financial technology or FinTech start-ups which are focussed on transforming, through innovation, almost every link in the value chain. This development has been particularly visible in the UAE and wider Middle East where the regional FinTech ecosystem is rapidly maturing, supported by state policies which are focussed on economic diversification and by forward-thinking financial services regulators who are creating environments for testing innovative regulated business concepts.

Various subsets of the regional FinTech market are increasingly attracting investment interest from both regional and international investors. This investment is being driven not just by those seeking private equity and venture capital style returns but also by prescient incumbents who want to fast-track their own innovation strategies

## **M&A IS NOT THE ONLY INVESTMENT ROUTE**

Compared to other global financial centres, in particular New York and London, the regional FinTech scene is nascent. Although there are a good number of start-ups,

many of these are not yet at a stage where they have a minimum viable product or are able to demonstrate a viable business. Therefore, investors should focus particularly on what milestones the FinTech has achieved and they should have a clear business plan and vision of what value they seek from the transaction.

Strategic investors should consider if their innovation drive would be better served through collaboration arrangements, joining consortia, or otherwise through a flexible licensing-in of the technology. FinTechs with a genuine belief in their technology roadmap will often be more open to such arrangements than to outright acquisition. In terms of consortia arrangements, strategic investors (which will generally be sophisticated and highly regulated) should focus on their ability to partner with small and fast-evolving start-ups. They should take into account relative business cultures, the ability to participate in complex decision making processes and internal approaches to the management and ownership of intellectual property rights. Institutional investors who are focused on returns should undertake FinTech-appropriate due diligence involving a detailed consideration of a range of matters.



In terms of investments, outright acquisitions for the time being, will probably remain the exception to the rule and the focus is more likely to be on venture capital arrangements. These will have a lower risk profile due to lower capital requirements and will allow for more nuanced structuring on the level of control in the company (as a change in outright control is often an inhibitor to innovation).

### KICKING THE TYRES WITH FINTECH

The term FinTech is used to cover a wide array of businesses and technologies, many of which are forming sub-verticals within their broader areas.

For example, peer-to-peer platforms differ greatly from one another, and there are increasingly varied businesses in the payment sector. It is also simplistic to assume that businesses based on distributed ledger technology or robo-advisory businesses will have sufficiently common features to give those sub-verticals any real homogeneity.

In addition, as with start-ups in any sector, the business will often be more conceptual in nature and areas of the technology can often be in development and unproved. Therefore, in terms of FinTech investment, there is no 'one size fits all' approach which can be taken to due diligence.

However, there are a number of due diligence related themes which will be relevant if you wish to carry out diligence work on many FinTechs.

### 1. FOCUS ON QUALITY MANAGEMENT DUE DILIGENCE SESSIONS

A large data room is unlikely to provide an accurate picture of a business that will likely be evolving through agile teams made up of highly entrepreneurial individuals. Therefore, focused management due diligence sessions led by senior commercial, accounting and legal practitioners and in which the founders describe their technology development cycle and their approach to regulatory compliance will give a much clearer view of the risks presented by an early stage business. This should also result in a shorter due diligence process and less drag on management time.

### 2. UNDERSTAND THE REGULATORY RISKS

Many Middle East FinTech start-ups have business models which have not been focused on by regional regulators and, consequently, are not expressly regulated by them. Such regulators have, historically, focused more on regulating the 'customer facing' aspects of financial services businesses and less on related middle and back office functions, in particular those relating to data and technology.

In line with global regulatory trends, regional regulators are developing their understanding of such businesses and are starting to create regulations for them and the specific risks these business models have. This has regulatory diligence becoming a critical part of many FinTech transactions.

In the UAE, for example, Federal regulators are expected to clarify the regulatory profile of key FinTech businesses and solutions, in particular those involving digital assets (including coin offerings) and different types of payment service providers.

The DIFC has also extended the scope of financial services activities to include 'Operating a Crowd Funding Platform'.

As well as hard regulation, there is an emerging landscape of standards and certifications which are aligned with regulatory objectives involving consumer protection. One example of this are the GSMA guidelines on Remittances through Mobile Money and the GSMA certification regime which will undoubtedly impact on the mobile money and remittance space.

In order to understand the regulatory risk, a deep understanding of the current business model and direction of travel is required. This is likely to involve operating in a legal environment which is grey and where some of relevant regulation is new and untested.

In this regard, investors should have an understanding of the extent to which the target has taken advice or consulted with relevant regulatory bodies. They should also engage advisers who understand the pulse and general direction of the regulators.

Strategic investors considering majority or outright acquisitions should also consider the steps required to integrate the target from a regulatory perspective.

### 3. UNDERSTAND THE ORIGINS OF THE BUSINESS

FinTech founders often come from financial institutions or software houses. Therefore, there is a risk that underlying code or confidential information and trade secrets, may have found their way into the target from such other entities rather than being developed in-house.

Face to face interviews with the key developers can be particularly helpful in uncovering the likelihood of such risks which, in the region, are often material.

### 4. CHECK THE TARGET'S RELATIONSHIP WITH DATA

Data-related rights and obligations are changing in the region and we are seeing as a result a number of emerging data law trends which could impact a FinTech target.

These could include, data domiciliation, encryption standards and global data protection principles (GDPR) including privacy by design and the right to be forgotten.

Compromised data security can have a significant impact on the valuation of the FinTech itself, and also on the reputation of the investor. Therefore, this is an area that needs to be closely scrutinised.

Where there is a post-acquisition integration play, a separate diligence work stream around inter-operability and data cleansing is often also prudent.

### 5. ESTABLISH IF THE BUSINESS HAS LONGEVITY

Even if there is a lot of hype around a particular idea, the 'shelf-life' of underlying technology is

generally becoming shorter and less relevant as a result of the constant innovation and introduction of newer concepts. An example of this is the potential for Hashgraph to be a more efficient and scalable distributed ledger technology which could impact the hype of Blockchain.

It is therefore important to ensure that the target has a realistic ability to achieve the business lifespan and projected investment returns which are envisaged by the investor.

This type of diligence is no longer the sole domain of the Chief Technology Officer but, given the critical nature of the technology, other advisory disciplines (both internal and external) will often need to provide input on such considerations.

The various demands of FinTech acquisition mean that it has become a particularly specialised subset within the M&A landscape.

A FinTech transaction will bring together a number of different legal disciplines and will demand from its advisers not simply corporate transactional expertise, but also a clear understanding of information and communications technology and associated risks, and a broad foundation in the ever-changing financial services regulatory landscape.

In addition, it is also essential that all these different legal elements are advised on in a cohesive manner in order to ensure the success of not only the transaction itself but, more critically, the post transaction success of the FinTech business. ■



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**Fadi Hammadeh author and Group General Counsel of Al Futtaim Group of Companies, one of the region's most influential family businesses explains what it takes to ensure longevity in a family business.**

studied at Damascus University, where I obtained an LLB Law Degree. I also have an LLM in Commercial Law from Université Panthéon Assas (Paris II), an International Business Law LLM from the University of Paris I: Panthéon-Sorbonne and an LLM in English Law from the University of London. To successfully work as a General Counsel



in Dubai I believe you need a diverse educational background – a combination of regional knowledge and a good grounding in international law.

These days, however, I would describe myself as a businessman with a legal background rather than a lawyer. In 2006, I was the only lawyer studying for an MBA on the TRIAM programme which was a unique opportunity to learn at three separate universities - the London School of Economics, the New York University and HEC Paris.

This has really made a difference to the way I tackle my work. Lawyers can become fixated on what they know but while studying for my MBA I realised there is no right and wrong, instead in business it's shades of grey or differing levels of risk. Understand-

ing that is how you change from being merely a policeman to an actual business partner.

### EARLY CAREER

I began my career in 1993 as a Lawyer with the higher respected boutique El Solh Law Firm where I learnt my love of the law from the firm's founder. I spent time working in the Securitisation Department at Freshfields in Paris but my knowledge of French, Arabic and English led to me transferring to Dispute Resolution Department there, as many of the major arbitrations required knowledge of Arabic. I've also spent a little time working in Saudi Arabia.

### AL FUTTAIM'S HISTORY

At the start of 2000, I came to work in the UAE. I was a Senior Legal Advisor at Majid Al Futtaim at looking back what was a critical time for the business. Our business originally began in the 1930s and was established by the current chairman Abdulla Al Futtaim's grandfather, Hamad Al Futtaim. Initially, like many other UAE family businesses it was a small trading concern involved mainly in imports and exports, coral fishing and Haj transportation. However, the business developed as the UAE's economy developed. We have been the main Toyota franchise in the country for over 60 years. We moved into property development and Abdulla Al Futtaim became known as the King of Malls after developments like the Mall of the Emirates.

Globally, less than 30% of family businesses make it into the second generation, and only 10-20% make it to the third, we are now in our third generation. We have approximately 45,000 employees and operate eight divisions covering the automotive industry, electronics, financial services and insurance, services, real estate, construction, retail, and industrial work. From our headquarters in Dubai we operate in the GCC and wider Middle East, South East and North Asia, Australasia and Europe.

Family businesses can stagnate and end up sticking to what they know. The Al Futtaim Group isn't like that as we are continually evolving. For example, one of our most recent initiatives has included work in the healthcare sector. If you ask me what project I am most excited about, I'm not looking to the past. It is potential new areas such as artificial intelligence and digitization which most excite me.

A key to that long-term success was back in 2000 when the business split its interests to create two independent businesses with Abdulla Al Futtaim controlling the automotive and mainly retail business and his cousin Majid controlling a property development part of the business, which is now known as Majid Al Futtaim Group. With family businesses you often move from a single individual who is in control of everything in the first generation to, especially in the UAE where there are large families, potentially a hundred family members with an interest in the business) by the third generation.

That can make decision making more difficult. At this point many family businesses split off in a disorderly way. The Al Futtaim family, however wisely separated its two branches in an orderly manner and although both parts of the business are now separately governed, they have managed to maintain synergies.

### CURRENT WORK

I've been General Counsel at the Al Futtaim Group since 2006. I have also spent time as Head of Legal at the Dubai Properties and was the General Counsel at the DIFC Real Estate Development.





I provide investment, general management, legal, risk, corporate structuring and strategy advice to the group, management and shareholders. As our business has such a diverse range of interests, we structure the legal department like a law firm. My role is a lot like that of a Managing Partner. We have a team of 40 lawyers – some of whom are country specialists and others are specialists in particular practice areas. Each has their own delegated area of responsibility and must report back to others in the department on developments and risks in that area. That's how we keep up with legislative change. When you work with a UAE family business as I do you need cultural affinity with the people and the way of making a deal here. You also need a heightened sense of emotional awareness, as there are overlapping areas of family and business which may make things more emotional, so these skills and conflict management is important. The Al Futtaim family's own values have helped support the business – they are humble, respectful people who have a great deal of business integrity. They don't cut corners as they want to ensure the long term growth of the business. It is also a very collaborative, team based and non-confrontational environment to work in. However, as a family business develops and a larger number of family members are involved values are not enough, you also need a structured approach to corporate governance which enables things to be discussed in a positive way and dealt with democratically. There also needs to be a structured approach to succession planning and business continuity. I have overseen the creation of a sound corporate governance model for the Group and advised on succession planning and business continuity.

#### LEGISLATIVE DEVELOPMENTS

The UAE is a very dynamic jurisdiction, and there are new legal developments almost every month. The new UAE Companies Law, Federal Law No. 2/2015 has helped businesses of all types particularly by minimising the shareholdings needed for private companies and facilitating holding companies.

#### FAMILY BUSINESS COUNCIL - GULF

Al Futtaim Group is involved in the Family Business Council – Gulf, an organisation which is an offshoot of the international Family Business Network and was sponsored by the Ruler of Dubai.

Through my involvement with that organisation I have been involved in helping to draft two pieces of legislation which should help UAE family businesses, the Dubai Family Ownership law and the Federal Waqf Law. Both these pieces of legislation are currently under review and hopefully will be enacted soon.

#### DIFC FOUNDATION LAW

I also think the new DIFC Foundation Law (DIFC Law No. 3/2018) will be useful for UAE family businesses. In the past with trust law including that in the DIFC, some family businesses were unhappy with the fact the trustee owns the assets. The new Foundation law provides structures which are more similar to waqf as they provide self-owning structures and there is the ability to separate legal from economic form which family businesses may find useful.

#### RESEARCH WORK AND FINDINGS

My experience working in family businesses and involvement with the Family Business Council – Gulf has led me to research and write a book called, 'Family Business Continuity in the Middle East & Muslim World: Betting against the Odds'.

In the GCC 70% of the workforce is employed by family businesses and inter-generational transition is not guaranteed, particularly as it is complicated by forced heirship under Sharia law. I believe formal focused succession planning should begin at least 15 years before any transfer to allow the family business to adjust. As part of this it helps to draw up a whole range of documents including a family business constitution, policies on conflict management and sharing financial information outside the family and a family code of conduct in relation to the business. I also believe drafting a statement of family values can play a vital part in ensuring a smooth generational transition.

#### CHARITABLE WORK

Finally, many family businesses in the UAE are keen to support charitable work for religious reasons but it is often done behind closed doors. I am also a member of the governance body for a number of the Al Futtaim family's philanthropic and non for profit initiatives, as we look to institutionalise that charitable work and maximize our social footprint. In particular, we have set up a not for profit education portfolio which consists of two schools and has allowed us to invest in education and provide scholarships. ■



Editor **Sogol Kaveity** considers a UAE law which was issued in 2015 in order to combat discrimination, blasphemy and hatred, and support provisions found in the Cybercrime Law which also tackles these areas.

In July 2015, a UAE Federal law, Federal Decree Law No. 2/2015, On Combatting Discrimination and Hatred was issued and was widely welcomed. It is a law which has three separate but related aims, to tackle discrimination, prevent what was termed as 'hate speech' or speech or conduct intended to incite sedition, prejudicial action or discrimination among individuals or groups and prevent blasphemy. This law which is quite widely drafted brought with it a number of new criminal offences which cover both those carrying out these acts, and those who either incite or facilitate them.

The UAE is the home to over 200 nationalities, which makes the aims of this law, which are to promote tolerance and acceptance in the country of others and safeguard people regardless of their origin, beliefs or race, particularly important.

## CROSS OVER WITH THE CYBERCRIME LAW

This law which came into force in August 2015 was intended to supplement provisions in this area which were already contained in the Cybercrime law,

The Cybercrime law, Federal Decree Law No. 5/2012 also included provisions which were designed to tackle provocation of hatred, racism and sectarianism online and by other electronic means, and included a whole host of penalties including deportation, imprisonment and/or fines.

## WHAT IS CONSIDERED DISCRIMINATION?

Under Federal Decree Law No. 2/2015, discrimination is defined as, 'Any distinction, restriction, exclusion or preference among individuals or groups based on the grounds of religion, creed, doctrine, sect, caste, race, colour or ethnic origin.'

However, it is important to note that this law does not impact any benefit or preference granted to women, the disabled, children, the elderly or others which has been created by provisions in other UAE laws such as the Labour Law.

Under Article 6 of Federal Decree Law No. 2/2015 anyone who commits any act of discrimination in any form, by any means of expression or by any other means, can be sentenced to at least five years in prison, and/or ordered to pay a fine of between 500,000 AED and one million AED.

It is worth noting that the term 'any means of expression' which is used in the law and defined in Article of Federal Decree Law No. 2/2015 is quite a wide one and can include any words, writings, drawings, signals, filming, singing, acting or gesturing delivered in a whole host of mediums.

# EMIRATES HUMANS RIGHTS



## DISCRIMINATION PROVISIONS IN EMPLOYMENT LAW

At the time this law was issued specific anti-discrimination provisions were not been found in UAE Labour Law and discrimination was not an issue that was particularly high on the agenda. There were however a number of provisions in UAE Labour Law which did provide some protection to women workers from potential discriminatory action, for example those which provided for paid maternity leave and gave rights to nursing mothers on their return to work which were designed to help create a level playing field for women with families.

In addition, in freezones such as the DIFC, the DIFC Employment Law DIFC Law No. 4/2005 prohibited discrimination against an employee in the areas of employment or any term or condition of employment on grounds of their sex, marital status, race, nationality, religion and/or mental or physical disability.

However, although discrimination is currently prohibited in the DIFC, recently proposals to the DIFC Employment law, included proposed changes to Article 58 of DIFC Law No. 4/2005 because there is no remedy which can be used when an employer has discriminated against an individual.

Under these proposals when an employee feels they may be the victim of discrimination, it has been proposed there will be a means by which they can request information to assess if this is the case. This includes the right to submit questions to the employer in line with, as yet, unpublished guidelines which will be found in supplementary Regulations.

Under these proposals if the employer refuses to comply with this request, the employee will be able to ask the DIFC Courts to

issue an order compelling them to do so. The Court can also make a declaration or recommendation (i.e. action to be taken by the employer) or award an amount equal to the employee's annual wage as compensation.

It is proposed the compensation award can be increased to two times the employee's annual wage if the employer fails to comply with a recommendation.

The Abu Dhabi Global Market (ADGM) also issued provisions in its 2015 Employment Regulations 2015 on discrimination which applied to direct discrimination, indirect discrimination and harassment, as well as age discrimination.

However, up until the point this law was issued individuals who wanted to make a discrimination complaint in an employment context in mainland UAE would generally instead often rely on mechanisms such as claiming unfair dismissal.

### **BLASPHEMY**

Federal Decree Law No. 2/2015 also encourages respect for the divine religions, which are defined in Article 1 as including Islam, Christianity and Judaism.

Under this law those who carrying out blasphemy offences including showing contempt or offence to God, places of worship, prophets and their families or companions, holy books, places of worship (which include mosques, temples and churches) and graves or cemeteries can be prosecuted, sentenced to terms of imprisonment and fined.

Offences involving God, the prophets and their families or companions carry the heaviest penalties, as fines of up to two million AED and prison sentences of not less than five years can be levied on those found guilty of these types of offences.

It is also an offence to insult and disrespect sacred things, disrupt or prevent licensed religious observances or ceremonies by violence or threats.

### **PROVOKING HATRED**

As has been the case in a number of other countries, the UAE also aimed to tackle those inciting hatred in order to help ensure the safety and security of the population.

Federal Law No. 7/2014 Combatting Terrorist Crimes was one of the laws which was considered when this law was drawn up.

There are penalties for those who use any means of expression or other means, to instigate tribal division which is aimed at provoking hatred among individuals and groups.

Prison sentences of at least five years and fines of at least 500,000 AED can be levied on those found guilty of hate speech offences.

There are also specific offences for those who misuse religion to call individuals or groups infidels by any means in order to achieve their own interests or illegal purposes.

### **SPECIAL SENTENCING CONDITIONS**

As a result of Article 9 of Federal Decree Law No. 2/2015 special sentencing provisions apply for those found guilty of blasphemy offences under Article 5, discrimination offences under Article 6 or hate speech offences under Article 7 if the person found guilty is either a public official who carried out the offence in the course of their duties, or a religious person, person who has been assigned such a capacity or if the offence was carried out in a place of worship.

In such cases, penalties can include imprisonment of no less than 10 years and a fine of no less than 500,000 AED but no more than two million AED.

In addition, if these offences have an affect on what is described as 'public peace' penalties of no less than ten years and a fine of at least 500,000 AED but no more than two million AED will also be levied.

### **OTHER PENALTIES**

Other sanctions are also provided for under Article 18 which states that the court can order the dissolution of associations, centres, entities, organisations, leagues and groups and their branches or their permanent or temporary closure if any of the crimes listed in Federal Decree Law No. 5/2012 are commissioned by such bodies.

The courts can also order confiscation of money, property, tools or documents which could be used to carry out the offences in this law. In addition, where a foreigner has committed one of these crimes, they can be deported after serving their sentence.

In addition, under Article 13 of Federal Decree Law No. 2/2015 those, who establish, set up, organise or manage an association, centre, entity, organisation, league or group or a branch of any such entity or who use any other means aimed at offending religions, or provoking discrimination or hate speech or any act involving encouraging or promoting these offences can be sentenced to at least 10 years in prison.

### **WHISTLEBLOWERS**

The law also includes special exemptions for whistleblowers. Those who are perpetrators of any of these crimes but report the matter to the judicial or administrative authorities before the crime is discovered are exempt from the penalties.

The courts also have the discretion to exempt perpetrators from the penalties, if they report the matter to the relevant authorities after the crime is discovered.

### **POTENTIAL IMPACT ON COMPANIES**

It is important for companies to be aware of the provisions in this law.

Those who produce, manufacture, promote, sell or circulate any products, goods, publications, recordings, films, tapes, discs, software, apps or other electronic material which could incite others to discriminate, blaspheme or provoke hate speech can be imprisoned for up to seven years and fined between 500,000 – 2,000,000 AED.

In addition, those who acquire or possess documents, publications, recordings, movies, tapes, discs, software, smart applications or electronic information, industrial materials or other things involving a means of expression which are intended for distribution or to be available to the public and are aimed at offending religions, provoking discrimination or hate speech, will be sentenced to no less than a year in prison, and fined between 50,000 AED and 250,000 AED.

The same penalties also apply to those who acquire or possess any means of printing, recording, storage, sound or visual recording devices or other means of publication, broadcasting or promotion which with their knowledge are used in the commission of any of these crimes. ■



## THE ORIGIN OF AWQAF?

While trusts were developing in common law countries, a similar structure known as a waqf (the plural of which is awqaf) developed in the Islamic world. However, the concept of the waqf had existed for over 500 years before the first identified English trust. In fact some commentators have speculated that personal trust law which developed in England around the time of the crusades in the 12th and 13th centuries as the Court of Chancery was asked to enforce the rights of absentee crusaders who had made temporary assignments of their land to caretakers, may have been influenced by this Middle East tradition.

In Egypt an early example of a waqf dates back to 919 and involved a pond and surrounding orchards, the revenue from which was used to help feed the poor and operate a hydraulic complex. In India references to what are known there as Wakf date back to the 14th century and an Act on the subject was issued in 1954.

From the 11th century awqaf can be seen in the Islamic world being used to fund hospitals, medical schools and chemists.

However, in the Ottoman Empire and during British Mandate of Palestine awqaf were defined as usufruct state land or property where the state revenue was assured for pious foundations.

The term means 'confinement and prohibition' or causing something to stop or stand still. Basically, keeping land, property or another asset in the ownership of 'waqf' and devoting its profits or products to charity for the poor and other good purposes. Property used to found a waqf cannot be something which is forbidden by Islam, public property or property the founder has already given to someone else.

The concept of wealth re-distribution is strongly emphasised in the Quran. However, a hadith which states, 'When a man dies, all his acts come to an end, but three: recurring charity, or knowledge (by which people benefit), or a pious offspring, who prays for him' may account for the creation this institution, as it provided a means for muslims to perform all three of these good deeds. A waqf assures ongoing, recurring charity

for many years, even centuries after the founder's death, can also finance scholars whose lasting works will benefit mankind for a long time and the good deeds, which accrue to them can be shared by the waqf's founder who provided for them in the first place.

The management of a waqf can also be entrusted to the founder's offspring who should be diligent managers and may also pray for the deceased as thanks to the waqf they will have an income.

Although awqaf are similar in some respects to trusts there is one important difference, while trusts can be set up for family or charitable purposes a waqf needs a religious, pious or charitable purpose. Trusts can be set up for any lawful purpose but a waqf can only be created for a purpose which is ultimately religious, pious or charitable, even if its object is to settle family assets while the family and their descendants continue to exist.

The founder of a waqf known as the waqif will usually appoint himself or someone else to be the first administrator of the waqf (or mutawalli).

A waqf is a contract so the waqif must have the necessary capacity to enter into a contract including being an adult of sound mind who is capable of handling financial affairs and is not bankrupt. The mutawalli, who is the manager of the waqf deals with the administration of waqf property. They may be a family member or descendant of the founder.

While they are still alive the waqif can appoint, remove or control the mutawalli and set their remuneration, as normally the mutawalli does receive a salary. It is also possible for more than one mutawalli to be appointed and if that is the case they work jointly. If no mutawalli has been appointed and the waqif is dead a qadi or judge can rule on the appointment and their remuneration.

The waqif can have fairly wide discretion on who will be the beneficiaries, although in some jurisdictions such as Algeria there are restrictions for example, the waqif may be prevented from excluding their son or daughter from their estate. ■



## Remarkable

In 2011, it was reported that Trouble who must have been the richest lapdog in the world, had died at her home in Florida. She was aged 12 and had spent her last days having her every need cared for. In fact, the dog had been driven round in a stretch limo and had even had a pet shop bought for her.

In 2007, Trouble's owner New York resident, real estate and hotel mogul Leona Helmsley (who had an estimated fortune of \$4 billion) had died and had left Trouble, \$12 million in her will (which was filed in the Surrogate's Court).

However, she was less generous to other members of her family and purposefully left two of her grandchildren out of the will entirely for what was described simply in the document as 'reasons which are known to them'. Two other grandchildren, however, were lucky enough to be named beneficiaries of Mrs Helmsley's will but only on the condition that they visit the grave of their late father (Mrs Helmsley's son who had died before her) at least once a year.

The will stated too if they failed to do so their interests in the trusts which had been established for their benefit would terminate at the end of that calendar year and all money accrued or undistributed



net income from those trusts would be disposed of as if they had actually died.

A register was also to be kept at the family mausoleum and signed by visitors so that the trustees would be able to police this strange condition.

Trouble herself was left to Mrs Helmsley's brother Alvin Rosenthal who was also left a substantial inheritance in the will in his own right. However, when after his sister's death he refused to care for the dog, Trouble was flown instead in a private jet to Florida. There followed between 20 and 30 death and kidnapping threats against the white Maltese which led to a full-time security guard being added to a list of the dog's necessary expenses (along with a groomer), which a judge was then required to review, before ruling, the amount given to the dog should be reduced and \$2 million would be a

reasonable amount for her requirements. Trouble lived the equivalent of 84 human years and was tended to around the clock at the Helmsley Sandcastle hotel in Sarasota. Her caretaker, Carl Lekic spent \$100,000 a year on her care which included \$8,000 for grooming and \$1,200 for dog food.

There were also strict instructions that the dog was to be buried beside Mrs Helmsley. Other unusual terms in this will included a bequest of \$3 million to a trust for the continued upkeep and cleaning of the final resting places of various family members, with instructions that the mausoleums would be acid-washed or steam cleaned at least once a year. In the end, when Trouble died, the funds which were held in her trust reverted instead to the Helmsley family trust, which supports a range of charities. ■

## By Definition

### Ultra vires (Latin)

Beyond the powers

Ultra vires (or beyond the powers) is the opposite of the latin term intra vires (or within the powers) which means that an act which requires it has been done within that authority. If the act has not been done within that authority it will instead be ultra vires and invalid. For example, in a corporate context acts beyond the company's object clause or articles of association or other founding documents would be ultra

vires. In the past this could mean that a company which had stated in its founding document its purpose was to make shoes could not decide to make another product. This led to founding documents being drafted with very wide objects or if this was not the case purpose clauses had to be amended to add the new purpose. As a result, in some jurisdictions such as the UK, legislators have scaled back the use of this concept in a corporate law context.

In addition, under constitutional law, constitutions give federal and state governments specific powers and going outside these may be ultra vires.

In recent years in the public sector, e.g. with municipalities and local authorities this concept has generated most debate, among legal commentators particularly as these bodies try to experiment with new ways of working and raising finance. In these cases it has been said the ultra vires position can be highly nuanced not simply a matter of whether the action is within or outside its powers (as would be the case with corporates) but also whether innocent parties acted on assumption that the act was a valid one.



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