



Dubai
International
Financial
Centre

CONSULTATION PAPER NO. 4

October 2017

PROPOSED TRUST LAW DIFC LAW NO. 6 OF 2017

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PROPOSALS RELATING TO A NEW TRUST LAW

Why are we issuing this paper?

1. The Dubai Financial Services Authority (“DFSA”) has been the administrator of the Trust Law, DIFC Law No. 11 of 2005 (the “Current Law”) since its enactment in 2005. As the DFSA is a financial services regulator, the DFSA and the Dubai International Financial Centre Authority (“DIFCA”) consider that it would be more appropriate going forward for DIFCA to take over this function.
2. In addition to the above, DIFCA proposes to enhance the Current Law to bring the trust regime of Dubai International Financial Centre (“DIFC”) in line with international best practice. In doing so, the DIFCA has taken into account specific factors relating to the DIFC and the need to provide an appropriate environment for the operation of trusts having regard to the requirements of local families, particularly in the context of succession planning. This Consultation Paper No. 4 of 2017 (“Consultation Paper”) seeks public comments on the proposed new Trust Law, DIFC Law No.6 of 2017 (the “Proposed Law”).

Who should read this paper?

3. This Consultation Paper would be of interest to persons holding assets or proposing to hold assets in the DIFC or interested in the conducting or proposing to conduct business in the DIFC utilising trust structures. In particular:
 - (a) Family offices
 - (b) Asset managers;
 - (c) Trust and corporate service providers;
 - (d) Family businesses
 - (e) officers and employees of Companies and Recognised Companies, such as directors, company secretaries, compliance officers, partners, senior executive officers of companies and partnerships;
 - (f) legal advisors; and
 - (g) persons conducting commercial or wealth management activities in or from the DIFC.

How to provide comments

4. DIFCA and the DFSA invite interested parties to provide their views and comments on the issues outlined in the Consultation Paper, using the table of comments provided in Annex E.
5. All comments should be provided to the person specified below:

Jacques Visser
Chief Legal Officer
DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae
6. You may choose to identify the organisation you represent in your comments.
7. DIFCA and the DFSA reserve the right to publish, on their website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

What happens next?

8. The deadline for providing comments on the proposals in this Consultation Paper is 8 November 2017.
9. Once we receive your comments, we will consider if any further refinements are required to the Proposed Law annexed to this Consultation Paper at Annex A. Once the task is complete, the Proposed Law will be enacted as a new DIFC law to come in to force on a date specified and published, which will also (by it simultaneously revoking the Current Law) receive the consent of His Highness the Ruler of the replacement of the DFSA with DIFCA as the administrator of the DIFC Trust Law.
10. The Proposed Law is in draft form only and is, therefore, subject to change following consultation as mentioned above. Consequently, you should not act on it until the Proposed Law is formally enacted. We will issue a notice on our website when this happens.

Defined terms

11. Defined terms are identified throughout this paper by the capitalisation of the initial letter of a word or of each word in a phrase and are defined in the Proposed Law. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

Background

12. The proposal to replace the Current Law with the Proposed Law stems from a comprehensive review of the Current Law as part of the wider review of the DIFC's wealth management offer, inclusive of considering the recommendations of the Wealth Management Working Group of the Governor's Strategy and Policy Committee approved by the DIFC Higher Board in December 2016. In undertaking that review, we considered international best practice and comparable models in other jurisdictions, focusing specifically on recent developments in the United Kingdom ("UK"), United States and other international financial centres.
13. As appears from Annexes C and D, a significant part of the Proposed Law is a re-enactment, or re-enactment with minor changes, of the Current Law. The DIFC's Wealth Management Review conducted extensive consultations which sought to identify any perceived difficulties associated with the Current Law. For that reason where no issues were raised with the existing provisions and in consequence they are re-enacted in the Proposed Law, we have not dealt with the continuing provisions in detail in this Consultation Paper. However the final section of the Consultation Paper invites comments and suggestions in respect of the continuing provisions.

Key changes proposed

14. The Proposed Law contains significant enhancements and refinements to the current regime to promote better trust administration, whilst also providing greater certainty and flexibility for settlors, trustees and beneficiaries, as well as technical amendments to better give effect to the policy underlying the existing provisions. The key aspects of the proposed changes include:
 - (a) enhanced provision as to the application of foreign law in determining the validity of trusts, and for other purposes, and adoption of the Hague Convention – see paragraphs 15 – 20;
 - (b) specific provisions allowing the Court to allow for the protection of the interests of incapacitated and unborn beneficiaries – see paragraphs 22 –23;

- (c) conferral of powers on the Court to ameliorate or negate the effect of mistakes – see paragraphs 24 – 31;
- (d) provision for the resolution of trust disputes by arbitration – see paragraphs 32 – 36;
- (e) enhanced provision for the enforcement of charitable and purpose trusts – see paragraphs 37 – 40;
- (f) conferral of power on the Court to authorise dealings with trust property – see paragraphs 41 – 43;
- (g) provision for consequences where a beneficiary challenges the status of a trust or refuses to assist in the arbitration of a trust dispute – see paragraphs 44 – 47;
- (h) provision for the appointment of advisory and custodian trustees – see paragraphs 48 – 51;
- (i) more specific delineation of powers which might be reserved by a settlor or granted to a third party (“Protector”) – see paragraphs 52 – 57; and
- (j) miscellaneous enhancements – see paragraph 58.

Private international law issues

15. The Current Law, unlike corresponding legislation in jurisdictions with a background of English trust law, seeks to deal comprehensively with trust law concepts rather than modify the existing law in relation to trusts. Although elements of the Current Law draw on legislative developments in other international finance centres, its core provisions closely follow the United States Uniform Trust Code (UTC) which was prepared by the National Conference of Commissioners on Uniform State Laws. The Proposed Law proceeds on the same basis.
16. A number of provisions of the Current Law¹ address the interaction of DIFC law and the law of other jurisdictions in relation to the establishment and validity of trusts. The policy of the Current Law is that these issues should be governed exclusively by DIFC law except in limited circumstances such as where the original settled property is outside the DIFC and the settlor does not, according to the law of the situs of the property, have power to dispose of it.

¹ See Articles 14 to 17 of the Current Law.

17. In the period since the enactment of the Current Law, a number of jurisdictions with comparable legislative provisions have amended their legislation so as to strengthen the policy. The Proposed Law adopts these changes² as part of DIFC law.
18. The Hague Convention on the Law applicable to Trusts and on their Recognition (“the Hague Convention”) establishes the essential private international law rules relating to the recognition of trusts outside their home jurisdictions. In many ways it reflects the provisions of Part 11 of both the Current Law and the Proposed Law, and the latter will complete the alignment³.
19. It may be that the residual application of English law provided for in Article 8(2)(e) of the Law on the Application of Civil and Commercial Laws in the DIFC 2004 has the result that the Hague Convention currently applies within the DIFC, although subject to the paramount operation of the DIFC Trust Law by reason of Article 8(2)(a). The contrary view is that by virtue of Article 8(2)(a) of the Law on the Application of Civil and Commercial Laws in the DIFC and Article 11 of the DIFC Trust Law it is only “(t)he common law of trusts and principles of equity” which apply in the DIFC in addition to the DIFC Trust Law itself, and not English statutory modifications thereto. Care needs to be taken in assuming that every statutory lacuna in the DIFC is capable of resolution by reference to English law, as the DIFC Court has noted⁴.
20. Given that the primary source of the Current Law and the Proposed Law is the UTC, the application of English statutory provisions to fill any perceived gaps is considered inappropriate and the Proposed Law expressly adopts the second of these views.⁵ As noted above, the application of the Hague Convention in the DIFC is separately confirmed by the Proposed Law.

- Q1. Do you have any concerns about the proposed enhancement of the existing exclusions of foreign law? If so, what are they, and how should they be addressed?**
- Q2. In particular, do the contemplated provisions in the Proposed Law sufficiently address this issue?**
- Q3. Do you have any concerns about the proposed application of the Hague Convention in the DIFC? If so, what are they, and how should they be addressed?**

² See Articles 13 to 16 of the Proposed Law.

³ See Schedule 1 of the Proposed Law (definition of “foreign trust”).

⁴ See *Re Forsyth Partners Global Distributors Limited and ors* (2008) CFI 5-7/2007 at [35] to [46]

⁵ See Article 10(2) of the Proposed Law.

Representation of the interests of incapacitated and unborn beneficiaries

21. Many of the powers of the Court (and, under the Proposed Law, an arbitrator) have the capacity to affect the interests of incapacitated (or minor) beneficiaries or, given the lack of a rule against perpetuities, unborn beneficiaries. The power to vary the terms of a trust, or bring it to an end, are paradigm cases.
22. The DIFC Courts Rules make no specific provision for the conduct of litigation by or on behalf of incapacitated persons. This is perhaps unsurprising given that the primary focus of the Court's work is commercial. In Courts where such litigation is more common, general provision is made in the Court Rules, as in, for example, Part 21 of the English High Court Rules. But in cases involving trusts there needs to be appropriate provision.
23. The Proposed Law makes provision for the appointment and removal of guardians ad litem by the Court or under the trust instrument in such circumstances, corresponding with the litigation friend who can be appointed under Part 21 of the English High Court Rules.⁶ Similar provisions are made in the context of arbitrations.⁷

Q4. Are there any concerns in relation to the proposed provisions in relation to guardians ad litem? If so, what are they, and how should they be addressed?

Q5. Are there any other aspects relating to the representation of the interests of incapacitated persons in the context of trust administration and trust disputes which should also be included in the Proposed Law? What are they, and why should they be included?

Relief from the consequences of mistakes

24. This is an area in which the law in England has become extremely complex and controversial. At the heart of the problem is the application of the so-called rule in Hastings-Bass⁸.
25. Clarification is needed as to the parameters of the discretionary equitable remedy of rectification, especially when the United Kingdom Supreme Court relatively recently clarified the scope of the equitable discretionary remedy of rescinding a disposition for mistake - and

⁶ See Articles 20(3) to 20(7) of the Proposed Law.

⁷ See Articles 32(3) to 32(7) of the Proposed Law.

⁸ [2013] UKSC 26, [2013] 2 AC 108.

rectification is a response to a mistake. Thus Lewison LJ in *Day v Day*⁹ opined that in the case of voluntary dispositions rectification and rescission for mistake should be governed by the same principles.

26. This, however, was before Lord Walker gave the judgment of the Supreme Court in *Pitt v Holt*¹⁰.
27. The rule, which emerged from case law, has traditionally allowed trustees who have made a costly mistake to apply to a court to have their action voided. This allowed the adverse consequences, usually tax-related, to be nullified without the need for the trust beneficiaries to sue the trustees for negligence or breach of trust.
28. But the value of *Hastings-Bass* was seriously undermined by the UK Supreme Court in the recent *Pitt* and *Futter* decisions. These rulings declared that previous court decisions had been wrong in law and that the rule has a much narrower field of application than previously thought.
29. The jurisprudence in Canada and the United States has been less restrictive than recent English jurisprudence, and readily permits rectification to achieve a settlor's intent. In the context of a settlor who manifests an intent to have a Shari'a compliant trust, this could be a particularly useful power.
30. Jurisdictions with well-developed trust industries that have relied upon the rule have been considering how to react. Jersey, whose trust industry has GBP400 billion of assets under administration, was the first to enact a statutory amendment¹¹ restoring *Hastings-Bass*'s potency. This confirmed the Jersey Royal Court's ability to provide discretionary relief where beneficiaries find themselves materially prejudiced by a trustee's decision. It is not necessary for the fiduciary to be shown to have been at fault. Moreover, the amendment has retrospective effect.
31. The mistake provisions of the Proposed Law¹² mirror the corresponding provisions in the Jersey Law, and are considered particularly appropriate for the DIFC given the stage of development of the DIFC trust jurisdiction and the different (and at times uncertain) regional needs associated with Shari'a compliance where that is intended.

⁹ [2013] EWCA 280, [2014] Ch 114.

¹⁰ [2013] UKSC 26, [2013] 2 AC 108.

¹¹ Trusts (Amendment No.6) (Jersey) Law 2013

¹² See Articles 22 to 29 of the Proposed Law.

Q6. Are there any concerns relating to the proposed provisions relating to the consequences of mistakes? If so, what are they, and how should they be addressed?

Trust arbitrations

32. Arbitration of trust disputes and differences provides a very successful process for commercial disputes between persons of full capacity who can waive their rights to a public hearing under international human rights conventions. Arbitration is also readily available for disputes between trustees and third parties. The problem, however, with family trusts is that internal disputes will normally involve minors and unborn or unascertained persons, who cannot waive their human rights and who have special protection in court disputes entitling them to proper representation and to have compromises approved if they are to be valid.
33. The English Trust Law Committee has observed, in the context of the United Kingdom Human Rights Act, that arbitration in these circumstances can be problematic: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and the public may be excluded from all or any part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” Article 14(1) of the International Covenant on Civil and Political Rights, to which the UAE is a party but which is not part of the domestic law of the UAE, is worded in very similar terms.
34. In the United Kingdom, it has been said that much will depend upon how far the court is prepared to allow liberal “wriggle-room” in the exceptions from the need for a public hearing. If little wriggle-room is allowed then, for arbitration to become possible, court proceedings will need to be instituted so that persons may represent minor, unborn and as yet unascertained beneficiaries, and these representatives can then waive their beneficiaries’ rights. The court can then stay proceedings to enable arbitrators to resolve the trust dispute and make an award which the court can then approve. In the regional context, privacy and security considerations may be expected to have a more significant weight in this balancing exercise.

35. As noted by Mr Justice Hayton, a preferable alternative is for legislation to confer on arbitrators of trust disputes all the powers of a judge if hearing such disputes - as in The Bahamas¹³.
36. The Proposed Law avoids these issues by, in addition to adopting Mr Justice Hayton's solution, also creating a statutory right to arbitration of trust disputes where that is consistent with the trust instrument, together with a discretionary power on the part of the Court to refer a matter to arbitration should some or all of the parties to Court proceedings request that.¹⁴

Q7. Are the provisions of the Proposed Law adequate to ensure effective conduct of an arbitration? If not what are the deficiencies, and how should they be addressed?

Q8. Given the central role of the Court in the administration of trusts, is the proposed structure of a right to arbitration where the trust instrument so provides, coupled with a discretionary power on the part of the Court to refer other matters appropriate? If not, how should the balance be struck?

Q9. Do you have any other concerns relating to the arbitration provisions? If so what are they, and how should they be addressed?

Enforcement of charitable and purpose trusts

37. Article 28(5) of the Current Law confers enforcement rights on the settlor of a charitable trust during his lifetime, and the Court. This is not really a practical arrangement, as the Court, unless its attention is brought to some form of misconduct by a person with standing to do so, is unlikely to take any action on its own account.
38. The corresponding role in the context of a charitable trust in common law jurisdictions is filled by the Attorney-General.
39. Under the Proposed Law, the heirs of the settlor may enforce the trust, and also DIFCA, if necessary acting through a designated person.¹⁵

¹³ Trustee Act 1998 s 91B, inserted by Trustee (Amendment) Act 2013.

¹⁴ See Articles 30 to 32 of the Proposed Law.

¹⁵ See Article 38(5) of the Proposed Law.

40. Article 29 of the Current Law provides that a purpose trust must have an enforcer. But makes no provision for what is to occur if there is no enforcer. Under the Proposed Law the trustee must apply to the Court for the appointment of an enforcer in such circumstances.¹⁶

Q10. Do you have any concerns relating to the proposed additional powers of enforcement of charitable and purpose trusts? If so, what are those concerns, and how should they be addressed?

Q11. Do you have any concerns relating to any other aspect of the operation of charitable and purpose trusts? What are they and how should they be addressed?

Authorisation of dealings with trust property

41. Article 30(6) of the Current Law contains a wide power of variation of the terms of a trust which comprehends all of the circumstances covered by its English equivalent, the Variation of Trusts Act 1958.
42. There is, however, no specific power to approve transactions which might otherwise be in breach of trust. Such provisions exist in most jurisdictions, of which perhaps the best known exemplar is section 57 of the United Kingdom Trustee Act 1925. Other examples include section 47 of the Bermuda Trusts Act 1975.
43. The utility of a power to authorize a particular transaction without changing the terms of the trust itself has commended itself to most other trust jurisdictions and the Proposed Law includes such a power¹⁷, which may be exercised in respect of past transactions.

Q12. Do you have any concerns relating to the proposed additional powers of the Court to authorise particular dealings with trust property? If so, what are those concerns, and how should they be addressed?

Exclusion of beneficiary for challenging validity of trust or refusing to agree to arbitrate

44. Trust instruments may provide that a beneficiary who challenges the creation of a trust will lose some or all rights under it. More frequently they provide that a beneficiary may be excluded in such cases by a trustee.

¹⁶ See Articles 39(10) to (12) of the Proposed Law.

¹⁷ See Article 41 of the Proposed Law.

45. The taking of such a step by a trustee could be challenged on the ground that the trustee had acted from improper motives in such circumstances.
46. The Proposed Law puts beyond doubt the capacity of a trustee to take this action. It confers similar powers where the beneficiary refuses to co-operate with a trust arbitration.¹⁸
47. These may be thought extraordinary powers, but they address a situation where a beneficiary by his own conduct acts detrimentally to the interest of the trust. They do not in any way limit the beneficiary's capacity to hold the trustee to account for misconduct in the administration of the affairs of the trust by way of Court proceedings or arbitration.

Q13. Do you have any concerns relating to the proposed provision for exclusion of beneficiaries? If so, what are those concerns, and how should they be addressed?

Advisory and Custodian Trustees

48. These two common arrangements in relation to the holding of trust property can be created by specific provision in the trust instrument, but many jurisdictions provide for these in their legislation. The Current Law makes no such provision. The Proposed Law provides for appointment of both advisory trustees¹⁹ and custodian trustees.²⁰
49. Advisory trustees are appointed who can act with either the Public Trustee (where there is one), or any trustee. The basic role of an advisory trustee is to provide advice to trustees because the role does not have any property vested in it, nor do advisory trustees have any power of management or administration of property.
50. Custodian trustees are appointed to hold any trust property to be managed by the managing trustees.
51. The role of advisory trustees is potentially of value in the context of trusts which are intended to be Shari'a compliant. The trustee may have no relevant expertise in the area, as may the Court should a matter come before it. In this sense the position would be

¹⁸ See Article 48 of the Proposed Law.

¹⁹ See Article 57 of the Proposed Law.

²⁰ See Article 58 of the Proposed Law.

analogous to the position taken by the DFSA in relation to Islamic financial products: it is a Shari'a Systems Regulator, not a Shari'a Regulator. In the same way the trustee, and the Court if necessary, can be satisfied that the trustee has faithfully attempted to comply with any Shari'a related requirements.

Q14. Do you have any concerns relating to the proposed provisions for advisory trustees? If so, what are those concerns, and how should they be addressed?

Q15. Do you have any concerns relating to the proposed provisions for custodian trustees? If so, what are those concerns, and how should they be addressed?

Reserved Powers and Protectors

52. Article 68 of the Current Law makes provision for reservation of powers by the settlor, or appointment of a protector who may exercise those powers.
53. Its counterpart in the Proposed Law²¹ deals more comprehensively with these concepts, and expands the list of powers which may be reserved or restricted. It also exonerates the trustee from adverse consequences where the trustee has acted in accordance with the restrictions so imposed.
54. Of particular interest are provisions which allow a settlor to establish a trust upon terms that the trustee is not obliged to interfere in the management of a company in which the trustee in that capacity has an interest – even a controlling interest - and delimit the extent to which the trustee may do so.²²
55. This last mentioned power would enable a DIFC trust to be established with most of the features of the special trust regime of the British Virgin Islands.
56. Given the significance of these positions, the Proposed Law provides for the consequences of either the settlor or a protector becoming incapacitated.²³
57. Consistently with the enhanced operation of the provision, the Part has been renamed in the Proposed Law.

²¹ See Article 83 of the Proposed Law.

²² See Article 83(2)(f) of the Proposed Law.

²³ See Article 84 of the Proposed Law.

Q16. Do you have any concerns relating to the proposed alteration to the provisions for restricted and reserved powers? If so, what are those concerns, and how should they be addressed?

Q17. Do you have any concerns relating to the approach adopted in relation to the provisions intended to enable trusts to be established on the model referred to in CP paragraph 55? What are they and how should they be addressed?

Miscellaneous enhancements

58. We have also made a significant number of other changes to the Current Law to ensure the Proposed Law better expresses the underlying intent of the Current Law and improves its administration and application. These include:
- (a) transitional provisions in relation to acts and omissions occurring prior to the commencement of the Current Law;²⁴
 - (b) the transfer of administration from the DFSA to DIFCA, in line with practice in other financial centres;²⁵
 - (c) facilitating transfers of trusts to places outside the DIFC²⁶, and to the DIFC;²⁷
 - (d) confirming the power of the Court to rectify trusts;²⁸
 - (e) the changing of terminology in relation to declarations of trust to make clear that prior to any such declaration there exists no separate legal and beneficial ownership;²⁹
 - (f) clarification of the implications of the abolition of the rule against perpetuities;³⁰
 - (g) provision that a trust may have both charitable and non-charitable purposes;³¹
 - (h) addition of a default rule that trusts are irrevocable in the absence of explicit provision to the contrary and allowing for the trust instrument to specify certain consequences of revocability;³²

²⁴ See Articles 1(2) of the Proposed Law.

²⁵ See Article 8 of the Proposed Law.

²⁶ See Article 12(1)(b) of the Proposed Law.

²⁷ See Article 12(4) of the Proposed Law.

²⁸ See Article 20(2)(d) of the Proposed Law.

²⁹ See Article 33(1)(c) of the Proposed Law.

³⁰ See Articles 36 (2) and (3) of the Proposed Law.

³¹ See Article 37(4) of the Proposed Law.

³² See Articles 40(2) and 40(6) of the Proposed Law.

- (i) empowering the Court to make orders for variation of a trust instrument with retrospective effect;³³
- (j) empowering the Court to vary the terms of a trust to give effect to a settlor's tax objectives;³⁴
- (k) confirmation that the power of the Court to remove a trustee is in addition to any power contained in the trust instrument;³⁵ and
- (l) providing for the making of decisions by corporate trustees.³⁶

Q18. Do you have any other concerns relating to any one or more proposed changes referred to in CP paragraph 56? If so, what are they and how should they be addressed?

Continuing Provisions

59. As noted in paragraph 13, a significant part of the Proposed Law is a re-enactment, or re-enactment with minor changes, of the Current Law. Where no issues were raised with the existing provisions in the consultation process associated with the Wealth Management Review, and none were identified by the Review's Working Group in the course of its Review, those provisions are re-enacted in the Proposed Law. In this, the final section of the Consultation Paper, we invite comments and suggestions in respect of the continuing provisions.

Q19. Do you have any concerns relating to the operation of the provisions in the Current Law which have been replicated in the Proposed Law? If so, what are those concerns, and how should they be addressed?

Q20. Are there any other concerns that are not addressed relating to the Proposed Law? If so, what are they, and how should they be addressed?

Legislative Proposal

60. This legislative proposal contains the following:

³³ See Article 40(8) of the Proposed Law.

³⁴ See Article 40(9) of the Proposed Law.

³⁵ See Article 54(4) of the Proposed Law.

³⁶ See Article 71 of the Proposed Law.

- a. the Proposed Law (at Annex A);
- b. the Current Law (at Annex B);
- c. a comparison of the Current Law and the Proposed Law (at Annex C);
- d. a roadmap of the proposed changes (at Annex D); and
- e. a table of comments to provide your views and comments on the Consultation Paper (at Annex E).