

The QFC Trust Law



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Overview

The Trust Law of the Qatar Financial Centre (QFC) is contained in QFC Regulation No. 12/2007 (the "**QFC Trust Regulations**") which in its original form was modelled on the DIFC Trust Law DIFC Law No. 11/2005, which in turn was substantially modelled on the Uniform Trust Code (US) (http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf) with additions and some amendments.

The QFC Trust Regulations were significantly amended in 2017 with some provisions being updated in line with the then proposed revision of DIFC Law No. 11/2005, others drawing on the Bahrain Decree-Law No. 23/2016 on Trusts and (particularly in relation to Court procedures) the QFC Foundations Regulations 2016.

The definition of "trust" in Article 78 of the QFC Trust Regulations provides that a trust is a right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title. Articles 16(1) and (2), based on Bahrain Decree-Law No. 23/2016, expand on this statement. In the context of a foreign trust the term includes a trust within the meaning of Article 2 of the Hague Trusts Convention

The QFC Trust Regulations should be regarded as of general application in Qatar, rather than as the law of a Common Law jurisdiction within Qatar (as with the Abu Dhabi Global Market and DIFC). Rather than being geographical, the jurisdictional limitations are the requirement for registration and the requirement that at least one party to the trust instrument be a registered entity in the QFC (Article 18(3) of Qatar Law No. 5/2007, as amended by Qatar Law No. 2/2009).

The Common Law of trusts and principles of equity applicable in England and Wales supplement the QFC Trust Regulations, except to the extent modified by the Regulations or any other QFC Regulations. In the context of the corresponding DIFC provision, the DIFC Court of Appeal has clarified that this does not supplant the law as determined by the Court but provides a source of law to which the Court can have resort along with the law as applied in other Common Law jurisdictions: *Re DIFCA's Application* [2021] DIFC CA 02/20.

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Definitions

- **Foreign Trust:** A trust whose governing law is the law of a jurisdiction other than QFC.
- **QFC:** Qatar Financial Centre.
- **QFC Trust:** A trust whose governing law is QFC law.
- **QFC Trust Regulations:** QFC Regulation No. 12/2007 as amended.

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Practical Guidance

A. THE CONCEPT OF THE TRUST

A trust is a relationship, not an entity.

The DIFC Court of Appeal in *Re DIFCA's Application* [2021] DIFC CA 02/20 confirmed that the location of the trust assets is irrelevant, a decision which is consistent with the law of England: *Akers v Samba Financial Group* [2017] UKSC 6.

The principal risk in a non-trust jurisdiction is that trust assets could be applied to satisfy trustee's private debts. This is avoidable by use of standalone trustee.

B. ANALOGUES OF TRUSTS – FOUNDATIONS

Foundations share attributes with both trusts and companies.

QFC foundations have a comparable outcome in private international law terms. The rights of parties inter se are determined in accordance with governing law in courts of domicile of the foundation.

It is more difficult, but possible, to re-domicile a foundation to and from the QFC.

Some uncertainty exists as to tax treatment of foundations in Common Law countries, but such little authority as exists supports corporate treatment: *The Queen v Sommerer* [2012] FCA 207.

C. ANALOGUES OF TRUSTS – AWQAF (ENDOWMENTS)

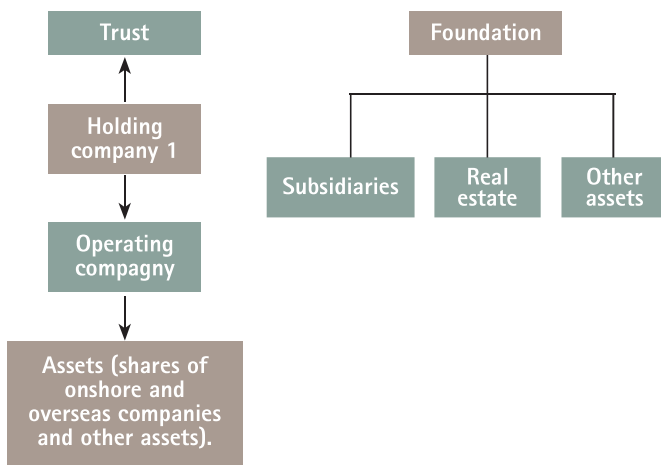
In parallel to the development of the trust in Common Law countries, a remarkably similar structure developed in the Islamic world known

as the *waqf* (the plural of which is *awqaf*) thrived, and then declined. However, more recently, as great wealth has been created in many Islamic countries, and as a result of the Islamic tradition of philanthropy, there has been a revival in interest in the *waqf* structure, and increased resources are now being held on terms which seek to comply with the requirements of Islamic law.

Awqaf share many features in common with both trusts and foundations. A useful summary can be found in *Re DIFCA's Application* [2021] DIFC CA 02/20 at [108] to [119].

More recently, statutory provisions are being enacted relating to the establishment and governance of *awqaf*, the English translation using the term "endowment", to describe the concept. Qatar has had such a law since 1996 (Law No.8/1996) and according to media reports, an updated Endowments Law is shortly to be enacted.

D. USE OF TRUSTS AND FOUNDATIONS



E. WHY A TRUST OR FOUNDATION?

Corporate structures are inherently inflexible.

Family member share ownership means that although the worst consequences on death of a founder of fractional interests in business assets are avoided, the potential for disruptive disputes remains.

It is very difficult to engraft family governance structures onto companies as shareholder agreements usually only bind signatories.

F. SHAM

The notion of "sham" is applicable to companies, trusts and foundations but in different ways.

For companies and foundations, the question is whether they acted beneficially or as agent/nominee.

For trusts, the question is whether or not they exist at all, and the consequence of their non-existence.

Sham will usually involve tax evasion (as could non-compliance with attribution regimes where there is no sham).

Revenue authorities are likely to look for indications of sham. Sharia courts may also look for this.

G. IS A TRUST OR FOUNDATION APPROPRIATE TO FAMILY NEEDS? – QUESTIONS TO CONSIDER

- Does the family understand the legal consequences of the structure?
- Is the family prepared to accept these consequences and live with them?
- Do those involved in its establishment under the legal consequences of structure?
- Are they prepared to comply with and implement them, even if individuals prefer otherwise?
- Is everyone prepared to give evidence about it?
- Will there be scrupulous onshore compliance?

H. THE SETTLOR AUTONOMY PRINCIPLE

Article 7(2) of the QFC Trust Regulations affords settlors a wide range of autonomy.

Limitations reflect the need for there to be an irreducible core of trust obligations (*cf. Armitage v Nurse* [1997] EWCA Civ. 1279).

I. PRIVATE INTERNATIONAL LAW ISSUES

Articles 11, 12, 13 and 14 of the QFC Trust Regulations provide guidance regarding the interactions between QFC Trusts and the laws of other jurisdictions.

Article 12 of the QFC Trust Regulations does not apply to protect a trust where the settled property was not owned by the settlor, as opposed to cases where claims based on community of property forced heirship may arise. This was highlighted in *Slutzker v. Haron Investments Ltd.* [2013] EWCA Civ 430.

Articles 11 to 14 of the QFC Trust Regulations may not protect invalid lifetime gifts if attacked on grounds other than those of personal relationship or heirship.

Dispositions of immovable property outside the QFC or Qatar are seemingly not protected (Articles 11(2) (B) and 13 of the QFC Trust Regulations), but note the generality of Article 12 of the QFC Trust Regulations which may support contrary view.

A foreign judgment will not be recognised or enforced or give rise to any estoppels insofar as it is inconsistent with Articles 13 and 14 of the QFC Trust Regulations.

These articles do not attempt to override public policy requirements.

J. PUBLIC POLICY

Article 7(2) of the QFC Trust Regulations states that the terms of a trust prevail over any provision of the Trust Regulations except (*inter alia*) the requirement that:

- the trust and its terms be for the benefit of the beneficiaries; and
- the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

Article 20(2) of the QFC Trust Regulations states that a trust shall be invalid to the extent that:

- it is created for the predominant purpose of avoiding obligations under any other law or regulations, or
- the trust is immoral or contrary to public policy.

Article 62(2) of the QFC Trust Regulations contains a corresponding provision in relation to the enforceability of foreign trusts.

In each case the relevant public policy is not limited to QFC public policy and probably reflects a wider Qatari public policy, including national ownership rules and Shari'a inheritance rules.

However, public policy cannot be contrary to the terms of the QFC Trust Regulations (including the private international law provisions) as legislation is the primary source of public policy.

Public policy requirements would operate, if at all, to invalidate the terms of the trust at the outset, not by reason of a subsequent act on the part of the trustee.

It will be necessary to ensure compliance with national ownership laws and (for Muslims) sharia compliance in the context of testamentary trusts.

Given the increasing use of the trust concept in GCC countries (there are now trust laws of general application in each of Bahrain, Qatar and the UAE) as well as foundations laws in the financial centres and endowments laws in Qatar and the UAE, which are remarkably similar in making provision for the devolution and management of family wealth, the notion that trusts *per se* are somehow contrary to public policy is increasingly unsustainable.

K. NATIONAL OWNERSHIP ISSUES

National ownership requirements are relevant where trust property includes property which may only be owned by Qatari (or other GCC) nationals.

Whether or not national ownership requirements are met is determined not by QFC law but the law of the jurisdiction in question.

In principle a trust with national trustees satisfies requirements. Foundations may raise some problems.

L. JURISDICTION OF THE QFC CIVIL AND COMMERCIAL COURT

Article 8(3)(c) of Qatar Law No. 7/2005 Promulgating the Qatar Financial Centre (QFC) Law states that the First Instance Circuit of the Court shall have jurisdiction to hear civil and commercial disputes arising from transactions, contracts, arrangements or incidences taking place in or from the QFC between the entities established therein.

The power of the Civil and Commercial Court of the QFC to make many orders in respect of trusts is contained in Part 14 of the QFC Trust Regulations (which replaced the former Part 4). Modelled as it largely is on the provisions of the QFC Foundations Regulations, the Part can be complex to apply. It creates a very wide range of persons who can make applications in relation to the affairs of QFC trusts (including the QFC Regulatory Authorities).

M. ROLE OF THE COURT IN THE ADMINISTRATION OF TRUSTS (PART 14)

The use of a precedent from a statutory jurisdiction relating to foundations has the potential to be problematic. The control of trusts has been traditionally regarded as within the inherent jurisdiction of Courts of Equity, with statutory powers providing enhancements.

Moreover, there is no statement equivalent to the former Article 16(2) of the QFC Trust Regulations to the effect that a trust is not

subject to continuing judicial supervision. This coupled with the extensive powers of intervention by the QFC regulatory authorities is a marked departure from conventional trust jurisprudence.

Other problems may emerge over time. For example, Articles 68(2) and 70(1) of the QFC Trust Regulations refer to the trust as if it were a person (entirely appropriate in the context of a foundation from which the provision was drawn). But as the legislation explicitly recognises, a trust has no legal personality

N. APPLICATION TO AND CERTAIN POWERS OF THE COURT

A trustee may make an application to the Court for direction, opinion or advice concerning the manner in which they may or should act in connection with any matter concerning the trust and the Court may make such order, if any, as it thinks fit (Article 46(3) of the QFC Trust Regulations).

The Court may if it thinks fit make an order concerning:

- compliance with the terms of a trust (Article 68 of the QFC Trust Regulations);
- amendment of the terms of a trust (Article 69 of the QFC Trust Regulations);
- directions in relation to the affairs of a trust (Article 70 of the QFC Trust Regulations);
- representation of unborn and minor beneficiaries (Article 71 of the QFC Trust Regulations);
- removal of a trustee (Article 72 of the QFC Trust Regulations); appointment of the QFC Authority to take action on behalf of others (Article 73 of the QFC Trust Regulations);
- removal of any person holding office in connection with a trust (Article 74 of the QFC Trust Regulations);
- setting aside dispositions to a trust on the ground of mistake (Article 75 of the QFC Trust Regulations); or
- authorising dealings with trust property (Article 76 of the QFC Trust Regulations).

O. CREDITORS' CLAIMS IN RELATION TO A DISCRETIONARY TRUST (ARTICLE 31 OF THE QFC TRUST REGULATIONS)

In the case of a discretionary trust, whether or not such trust contains a protective provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if the:

- discretion is expressed in the form of a standard of distribution; or
- the trustee has abused the discretion.

To the extent a trustee has not complied with a standard of distribution or has abused their discretion:

- a distribution may be ordered by the Court to satisfy a judgment or Court order against the beneficiary for support or maintenance of the beneficiary's child, spouse or former spouse; and
- the Court may direct the trustee to pay to the child, spouse or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

P. VACANCY IN TRUSTEESHIP, APPOINTMENT OF A NEW TRUSTEE (ARTICLE 33 OF THE QFC TRUST REGULATIONS)

Where the terms of a trust contain no provision for the appointment of a new trustee, the trustee for the time being may appoint a new trustee or failing that the Court may appoint a new trustee.

A new trustee having the power to appoint a new trustee who fails to exercise such power may be removed from office by the Court and the Court may appoint a new trustee.

A QFC trust will not fail for want of a trustee (Article 33(7)).

Q. REMOVAL OF TRUSTEE BY COURT OR UNDER THE TERMS OF A TRUST (ARTICLE 35 OF THE QFC TRUST REGULATIONS)

The settlor, an enforcer, a co-trustee, or a beneficiary may request the Court to remove a trustee, or a trustee may be removed by the Court on its own initiative.

The Court may remove a trustee if:

- the trustee has committed a breach of trust; lack of cooperation among co-trustees substantially impairs and administration of the trust;
- because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust, the Court determines that removal of the trustee best serves the interests of the beneficiaries; or
- there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, the Court finds that removal of the trustee best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

R. DUTY TO INFORM AND REPORT (ARTICLE 45 OF THE QFC TRUST REGULATIONS)

Notwithstanding the terms of the trust:

- the Court may on application made to it declare that in the particular circumstances of the trust its terms do not render the trustees sufficiently or appropriately accountable to the beneficiaries or any of them; and
- the Court may, pursuant to such declaration, extend or restrict the rights of all or any beneficiaries to information regarding the trust or may make such other order as it thinks fit.

S. REMEDIES FOR BREACH OF TRUST (ARTICLE 52 OF THE QFC TRUST REGULATIONS)

To remedy a breach of trust that has occurred or may occur, the Court may:

- compel the trustee to perform the trustee's duties; restrain the trustee from committing a breach of trust;
- compel the trustee to redress a breach e.g., by paying money; order a trustee to account;
- appoint a special fiduciary to take possession of the trust property and administer the trust;
- suspend the trustee;

- remove the trustee as provided in Article 35;
- reduce or deny compensation to the trustee;
- subject to Article 60, invalidate an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- order any other appropriate relief.

T. COSTS (ARTICLE 54 OF THE QFC TRUST REGULATIONS)

The costs and expenses of and incidental to an application to the Court under the Regulations shall be paid out of the trust property or be borne and paid in such other manner or person as the Court may order.

In a judicial proceeding involving the administration of a trust, the Court, as justice and equity may require, may award costs and expenses, including reasonable lawyers' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

U. CORRECTION OF MISTAKES IN ESTABLISHING, OR ADMINISTERING, TRUSTS

Article 75 of the QFC Trust Regulations gives the Court a power to set aside certain dispositions to a trustee. Presumably what was in mind were provisions to give effect to the principles in *Re Hastings-Bass; Hastings v. IRC* [1974] 2 All ER 193 (<http://swarb.co.uk/re-hastings-bass-hastings-v-inland-revenue-ca-14-mar-1974/>), thereby in the QFC overriding their curtailment by the UK Supreme Court in *Pitt v. Holt and Futter v. HM Revenue and Customs* [2013] UKSC 26 (<https://www.supremecourt.uk/cases/docs/uksc-2011-0091-judgment.pdf>).

This requires in either case an operative mistake of fact or law which leads to a mistaken action or a wrongful exercise of a fiduciary power.

There is, however, no power to set aside dispositions by a trustee based on a mistake, which was the basis of the Hastings-Bass jurisprudence. In this respect the provision is narrower than comparable provisions in the DIFC, Jersey and Guernsey.

V. POWER TO AUTHORISE DEALINGS

Article 76 of the QFC Trust Regulations contains provisions empowering the Court to authorise dealings. This differs from normal power of the Court to vary because the Court is not supplying the consent of minor and unborn beneficiaries.

Such procedures require the consent of adult beneficiaries, with adverse tax consequences in some jurisdictions.

The Court confers power on the trustee to take the necessary action, including a variation of trust.

W. TERMINATION OF A TRUST (ARTICLE 25 OF THE QFC TRUST REGULATIONS)

The Court may terminate a trust:

- because of circumstances not anticipated by the settlor, if termination will further the purposes of the trust; or
- if the value of the trust property is insufficient to justify the cost of administration;

An application to the Court under this article may be made by a settlor, a trustee a beneficiary or an "Interested Person" (including the QFC regulatory authorities).

Distribution of Property (Article 26 of the QFC Trust Regulation)

The Court may, on the termination of a trust or at any time thereafter, upon an application made by a trustee or any beneficiary as the case may be:

- require the trustee to distribute the trust property;
- direct the trustee not to distribute the trust property; or
- make such other order as it thinks fit.

Creation Variation and Termination of QFC Trusts

Article 16 of the QFC Trust Regulations provides guidance on creation of a QFC trust.

A trust may be created by:

- a transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- the transfer of property from one trust to another;
- declaration by the beneficial owner of property that the legal owner holds identifiable property as trustee; or
- exercise of a power of appointment in favour of a trustee.

A trust must come into existence by an instrument in writing including a will or codicil.

Of particular significance is the requirement for registration as a condition of validity (Article 16A of the QFC Trust Regulations). Once again, the provisions have been drafted with the circumstances of a foundation in mind, and do not deal with such issues as the variation of trusts.

Charitable trusts (formerly permitted) are no longer allowed but purpose trusts are (Article 22 of the QFC Trust Regulations).

X. VARIATION OF THE TERMS OF A TRUST BY THE COURT (ARTICLE 23 OF THE QFC TRUST REGULATIONS)

Variation by the Court

The Court may vary the terms of a trust:

- even if unambiguous, to conform the terms to the settlor's intention if it is provided by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement;
- if, because of circumstances not anticipated by the settlor, modification will further the purpose of the trust;
- if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration, with effect from either the date the order for variation of the trusts was made or such earlier date as to the Court seems fit; or
- an application under Article 23 of the QFC Trust Regulations may be made by the settlor, the trustee, a beneficiary or an interested person (which includes the QFC regulatory authorities).

Variation Pursuant to the Terms of a Trust Instrument

Article 23(1) of the QFC Trust Regulations recognises the validity of a power to vary or revoke the trust contained in the trust instrument.

Article 61A of the QFC Trust Regulations emphasises the width of this power.

It is important to query the desirability of relying on such provisions in a Shari'a context without careful consideration as the result may be that the Shari'a estate of a deceased settlor includes the power to revoke.

Y. FOREIGN TRUSTS

Article 62 of the QFC Trust Regulations provides that Foreign Trusts will be enforceable in accordance with their own governing law. Part 14 (which deals with the powers of the Court) does not distinguish between QFC Trusts and Foreign Trusts which is potentially problematic. In principle the powers would be limited only to matters connected with Qatar.

Z. SHARIA IMPLICATIONS FOR TRUSTS

As with any vehicle (e.g., a company), the issue is not the vehicle as such, but the use to which it is put.

Trust instruments can contain conditions binding trustees as to both permissible investments and beneficiary entitlements.

The procedures for establishing sharia requirements before the Court will be similar to proof of foreign law by expert evidence (cf. DIFC Registrar's Direction No. 3/2017 in relation to provision of Expert Evidence of Sharia Law in the DIFC Courts).

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Comparison with Civil Law

COMMON LAW	IN CIVIL LAW COUNTRIES
<ul style="list-style-type: none"> • Express Trusts • Resulting Trusts • Constructive Trusts 	<ul style="list-style-type: none"> • <i>Fiducie and Fidecommissi</i> • Statutory Trusts (China, Taiwan, Switzerland, Liechtenstein and Monaco) • The Hague Convention and the Trust <i>Interno</i>

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Related Content

Legislation

DIFC

- DIFC Law No. 4/2018 (Trust Law) repealing and replacing DIFC Law No. 11/2005

- DIFC Registrar's Direction No. 3/2017 referring to DIFC Registrar's Direction Expert Evidence of Sharia Law in the DIFC Courts

Bahrain

- Bahrain Decree-Law No. 23/2016 on Trusts.

Qatar

- Qatar Law No. 7/2005 Promulgating the Qatar Financial Centre (QFC) Law

QFC

- QFC Regulation No. 12/2007 on QFC Trusts

International Conventions

- Hague Trusts Convention

Cases

- *Armitage v. Nurse* [1997] EWCA Civ. 1279
- *Slutzker v. Haron Investments Ltd.* [2013] EWCA Civ 430
- *Hastings-Bass v. IRC* [1974] 2 All ER 193
- *Pitt v. Holt* [2013] UKSC 26
- *Futter v. HM Revenue and Customs* [2013] UKSC 26
- *The Queen v. Sommerer* [2012] FCA 207
- *Re DIFCA's Application* [2021] DIFC CA 02/20
- *Akers v. Samba Financial Group* [2017] UKSC 6.

BIOGRAPHY

DAVID RUSSELL AM RFD QC is an Australian barrister specialising in international trust and tax law. He is admitted to practise in England and Wales, Australia, New York (as a legal consultant) Papua New Guinea, New Zealand and the Courts of the Dubai International Financial Centre. He was first appointed Queen's Counsel in 1986.

Mr. Russell was President of the Taxation Institute of Australia from 1993 to 1995, and of the Asia Oceania Tax Consultants' Association (AOTCA) from 1996 to 2000. He has been appointed an AOTCA Honorary Adviser for life, an Honorary Member of the Taxation Institute of Hong Kong and an Advisor of the Global Tax Advisors Platform.

Mr. Russell was Deputy Chairman of STEP WorldWide during 2018 and 2019 and was Chair of its Governance Committee, a co-chair of the UAE Chapter of the International Section of the New York State Bar Association, an Academician of The International Academy of Estate and Trust Law (and is currently a Council member) and since 2016 has been a member of Legal Week's Private Client Global Elite.

Mr. Russell holds an LL.M from the University of Queensland.

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