

Qatar financial centre foundations

Christophe Jolk* and David Russell†

Abstract

Like other Gulf Cooperation Council (GCC) jurisdictions, the Qatar Financial Centre (QFC) Foundation has very favourable private wealth and estate planning aspects, since it picks some of the best features in the common and civil law models and blends them into a single legal framework. One of the advantages of a QFC Foundation over a trust, for instance, is its legal personality and ability to own assets. Similar to other foundation laws within the GCC area, the QFC Foundation does not require a ‘dedicated fund appropriated to a specified purpose’ and also has a specific ‘firewall’ provision securing the asset dedications and benefits granted. Overall, the QFC Foundation is a favourable legal regime for estate planning and pretty standard compared to what other GCC foundations regimes offer. Settling for a specific jurisdiction and legal form should nevertheless be assessed on a case by case basis.

Introduction

Local private wealth and estate planning legal structures in some Gulf Cooperation Council (GCC) Member States are getting more and more traction, as these are generally jurisdictions which tend to offer a good balance between common and civil law traits, while being at the same time Shari’a compliant.

It is that ability to pick the best features in the common and civil law models and blend them into unique local legal structures, which allows some GCC

jurisdictions to have very attractive private wealth and estate planning legal structures, also for non-Muslim subscribers and beneficiaries.

One of the legal structures analysed in this article is the Qatar Financial Centre (QFC) Foundation. The article will briefly touch on the main features of the QFC Foundation, following the order of the Articles in the QFC law and focus mainly on its establishment proceedings, then move on to some aspects of its governance and finish with some of the applicable rights within the QFC Foundation.

Establishment

A QFC Foundation is a legal person with a registered legal name, capable of suing and being sued in its own name, and holds its own assets free of any trust obligations. Except as stipulated otherwise, it has the capacity, rights, and privileges of a natural person and may enter without limitation into contracts, sue and be sued, and own assets of all types (Article 8).

The legal personality and ability to own assets are some of the main advantages of a foundation over for instance a trust, as the latter is a relationship and not an entity.

The legal personality and ability to own assets are some of the main advantages of a foundation over for instance a trust, as the latter is a relationship and not an entity

Once a Foundation is established, the Companies Registration Office (CRO) at the QFC will issue a

* Christophe Jolk, Avocat aux Barreaux de Paris et Luxembourg; Attorney-at-Law, New York; Partner, BMH Avocats, 29 rue du Faubourg Saint-Honoré, 75008 Paris, France. Tel: +33 1 42 66 63 19; Fax: + 33 1 42 66 64 81; Email: cjolk@bmhavocats.com; Website: www.bmhavocats.com

† David Russell, AM QC, Outer Temple Chambers, The Outer Temple, 222 Strand, London WC2R 1BA, UK. Tel: + 44 20 7353 6381; Email: David.RussellQC@outertemple.com

certificate stating that it is established as a Foundation with the name specified in the certificate and with effect from the date of the certificate. The CRO will also allocate to the Foundation a registered number and enter the following pieces of information into the official CRO register:

- the name and registered number of the Foundation;
- the Registered Office of the Foundation;
- the objects of the Foundation;
- the names of the Members of the Council of the Foundation; and
- the name of the Registered Representative.

A certificate of establishment constitutes conclusive evidence that the Foundation is established with the name specified in it and that the requirements of the regulations regarding the establishment and registration of foundations have been fulfilled.

From the date of establishment, the Foundation will be an entity having the name contained in the certificate of establishment and is capable of exercising all the functions of a Foundation (Article 10).

A Foundation must have a Constitution that complies with the respective regulations and any further requirements prescribed by the rules of the QFC Authority. The Constitution must essentially specify the objects for which the Foundation is established, the names and addresses of the Members of the Council of the Foundation, and the name and address of the Registered Representative of the Foundation.

The QFC Authority must not make the Constitution available on the Register or to the public, except in cases where there is either a statutory obligation or an order of the QFC Court to disclose the Constitution, and the QFC Authority may do so on such terms as it considers appropriate (Article 12).

The Constitution requirement is actually a benefit, as it sets the objects of the Foundation, while having the privilege to remain private, which is highly desirable in family matters.

The objects of a Foundation must be certain, reasonable, and possible. They must not be unlawful, contrary to public policy, or immoral.

The objects must not be charitable, but may be for the benefit of a person or a class of persons defined in the Constitution. The objects may be:

- to benefit a person or a class of persons defined in the Constitution;
- to carry out a specified purpose, including, without limitation, the class of assets to be selected by the Foundation, or
- to do both.

The objects of the QFC Foundation may also benefit the Founder. It is sufficient for the Constitution to provide that the person or class of persons is to be determined in accordance with the Constitution.

It is also sufficient for the Constitution to provide that the Foundation is to hold assets selected in accordance with the Constitution (Article 13).

Similar to other foundations legislation within the GCC area, the QFC Foundation does not follow the traditional notion of a foundation as a 'dedicated fund appropriated to a specified purpose' the concept that derives from the Germanic *Zweckvermögen* tradition, as for instance found in Article 552, sections 1 and 2 of the Liechtenstein legislation, especially the notion of a charitable benefit. This is, among other things, one of the reasons why a QFC Foundation can be interesting in private wealth and estate planning matters. The flexibility of allocating the benefits of the QFC Foundation, while having the benefit of a separate legal personality (again, compared to trusts), is also especially sought after.

The QFC Foundation does not follow the traditional notion of a foundation as a 'dedicated fund appropriated to a specified purpose'

A Foundation must also have a Council to administer the assets of the Foundation and to carry out its objects in accordance with the regulations on foundations (Article 14).

In addition, a Foundation must have a Registered Representative appointed in accordance with the

Constitution. The Registered Representative must be a Member of the Council of the Foundation (Article 15).

According to the QFC Foundations Law, such person needs specific permissions to carry out certain activities in accordance to QFC Law, such as but not limited to, auditing, accounting, or legal services, as well as trust administrations.

One particularity of the QFC Foundation is that it must have an Enforcer. The Constitution must provide the following information concerning the Enforcer:

- the name and address of the Enforcer;
- provisions for the appointment of the Enforcer;
- how an Enforcer may retire;
- how a new Enforcer is to be appointed; and
- whether the Enforcer is to be remunerated.

Apart from the Registered Representative, a person may not be both a Member of a Foundation's Council and its Enforcer.

The Enforcer must be appointed in accordance with the Constitution, carry out the functions set out in the Constitution, and take reasonable steps to ensure that the Council of the Foundation carries out its functions and acts in the best interests of the Foundation (Article 18).

The concept of the Enforcer is an intelligent way to have an oversight mechanism and not rely completely on the appointed Foundation's Council to carry out in a fiduciary manner the objects of the Foundations in its best interest.

The concept of the Enforcer is an intelligent way to have an oversight mechanism and not rely completely on the appointed Foundation's Council to carry out in a fiduciary manner the objects of the Foundations in its best interest

A QFC Foundation does need to have an initial dedication of assets (see above comments on the fact that, like many other GCC Foundations, it does not

necessarily require a specific dedicated purpose for its assets). If, however, it does have an initial dedication of assets, the details of the dedicated assets must be specified in the Constitution. Additional assets may be dedicated to the Foundation after its establishment, unless the Constitution provides otherwise. If additional assets are dedicated, the details of the dedication must be specified in the Constitution.

The dedication of assets to a Foundation can be decided by a Dedicator, who is a person, other than the Founder, who can dedicate assets to the Foundation. This, however, does not make the Dedicator a Founder, nor does it vest in the Dedicator any specific right vested in a Founder.

The Foundation must provide additional information pertaining to the dedication as reasonably required by the CRO (Article 19).

Governance

The Council of a Foundation must have at least two Members. The Members must fulfil the eligibility requirements specified by the rules of the QFC Authority.

The Council Members must conduct the Foundation's affairs in accordance with its Constitution, the Regulations on foundations, and any rules enacted by the QFC Authority. They must act honestly and in the best interests of the Foundation and exercise the care, diligence, and skill that reasonably prudent persons would exercise in comparable circumstances. This duty is fiduciary in nature.

An act of a Council Member is valid despite any defect that may afterwards be found in the appointment of the Member or the Member's qualifications (Article 27).

The exercise by the Council of a power under the Regulations or the Constitution must be approved by a resolution at a meeting of the Council or a written resolution.

A resolution of the Members is passed at a meeting of the Council if it is approved by a majority of the Members present and, being entitled to do so, vote on

the matter, or by a majority as defined in the Constitution.

An action that may be taken by the Council at a meeting may also be taken by a resolution of the Council approved in writing or electronic communication by all the Members (or such specified majority as the Constitution provides). Such a resolution may consist of several documents, including electronic communications, in like form each signed or approved by one or more Members (Article 28).

All in all, the general governance rules of the Council are pretty standard. What is beneficial is that the fiduciary nature of the Council Member's activity is explicitly stated in the QFC Foundation's Law.

Rights

The Founder has no rights, benefits, or entitlements in respect of the Foundation and its assets, services provided to the Foundation, or fees or expenses incurred in carrying out functions in respect of the Foundation except as approved by the QFC Authority and provided for in the Constitution (Article 30).

As for a Beneficiary under a Foundation, he/she has in principle no interest in the Foundation's assets. However, if a Beneficiary becomes entitled to a benefit under the Foundation in accordance with the Constitution and the benefit is not provided, the Beneficiary, or a person acting on behalf of the Beneficiary, may seek an order of the QFC Court ordering the Foundation to provide the benefit (Article 31).

Particularly interesting is the fact that any rights a person may have in respect of the Foundation and its assets may be assigned to some other person, if the Constitution so provides. However, if rights are assigned, the Person assigning the rights must provide evidence in writing of their consent to the assignment to the Registered Representative. In case of death of the assignee, the rights generally vest with the Council, unless the Constitution provides otherwise (Article 33).

With respect to the governing law, to the extent permitted by QFC Law, any matter that arises in respect of a Foundation or the dedication of assets to a Foundation must be determined in accordance with the law of the QFC and without reference to any Foreign Law.

With respect to the governing law, to the extent permitted by QFC Law, any matter that arises in respect of a Foundation or the dedication of assets to a Foundation must be determined in accordance with the law of the QFC and without reference to any Foreign Law

However, this shall:

- not validate any disposition of Property where the Property is not owned by the Founder or the Dedicator, or not the subject of a power vested in the Founder or the Dedicator;
- not validate any disposition of immovable Property situated in a jurisdiction other than the QFC in which such disposition is invalid according to the laws of that jurisdiction;
- not validate any disposition, which is invalid according to the laws to which the Property being disposed is subject;
- not affect the recognition of Foreign Law in determining whether a Founder or a Dedicator is or was the owner of Property or the holder of a power to dispose of such Property;
- not affect the recognition of the laws of its place of incorporation in relation to the capacity of a corporation; and
- not affect the recognition of Foreign Law prescribing, without reference to the existence of the Foundation or the Constitution, the formalities for the disposition of Property (Article 22).

This is a pretty sensible solution, as it aims at reducing possible conflicts of laws regarding the most common issues, which might arise when foreign assets are to be dedicated to a QFC Foundation,

and reflects the so-called 'firewall' provisions common in the GCC jurisdictions.

Without limiting the generality of the above governing law provisions (Article 22), under the laws of the QFC, no Foundation or disposition of assets to a Foundation that is valid under the laws of the QFC is void, voidable, liable to be set aside, or defective in any manner by reference to a Foreign Law. In addition, none of the following is subject to an obligation or liability or deprived of a right, claim, or interest arising from or under the Foundation because:

- the Foreign Law prohibits or does not recognize Foundations or prohibits the dedication of assets to Foundations;
- the establishment of a Foundation or the dedication of assets to a Foundation voids or defeats any rights, claims, or interest conferred by Foreign Law upon any Person by reason of a Personal Relationship to the Founder or Dedicator or by way of Inheritance Rights; or
- it contravenes any rule of Foreign Law or any foreign, judicial, or administrative order, arbitration award or action intended to recognize, protect, enforce, or give effect to any such rights, claims, or interest.

other than where the Founder or the Dedicator has acted in bad faith (Article 23).

This limitation of the pretty general rule, where foreign legislations can prohibit dedications of assets to a QFC Foundation, which requests to show, in the above-mentioned cases, that such dedications were made in bad faith. This grants more legal certainty and thus legal viability to the QFC Foundations in an international context.

To the extent permitted by the QFC Law, Inheritance Rights conferred by a Foreign Law, including laws of the State, in relation to the Property of a living person shall not be recognized as affecting the ownership of immovable Property in the State and movable Property, wherever it is situated (Article 24). The judgment of a court in a jurisdiction outside the QFC shall not be recognized or enforced or give rise to any estoppels insofar as it is inconsistent with Article 23 or Article 24 (Article 25).

These limitations of the impacts of foreign laws and court decisions are again aimed at securing the asset dedications and benefits granted through a QFC Foundations. Whether this might actually stop any legal claims/proceedings outside of the QFC is of course debatable. But at the same time, conflict of laws and disputes with respect to title of certain assets are pretty common after the fact in estate settling matters also outside of the QFC. These provisions simply provide an additional hedge for the estate planning, which has been set up.

Christophe Jolk is a French and German citizen, admitted to the Paris, Luxembourg, and New York Bars. He received his legal education from the Universities of Cologne (Germany), Sorbonne, and Dauphine (France), as well as the Pennsylvania State University (USA). His professional experience extends to both Luxembourg and France, where he currently maintains offices in Paris as a partner of the Paris law firm BMH Avocats. He is also a member of Outer Temple Chambers. Email: cjolk@bmhavocats.com

David Russell, AM QC, is one of the editors of *Trusts & Trustees*. He commenced legal practice in 1974. He is admitted to practise in Australia, England and Wales (Lincoln's Inn), the Courts of the Dubai International Financial Centre, New York (as a Legal Consultant), the Singapore International Commercial Court, New Zealand and Papua New Guinea. He was appointed Queen's Counsel in 1986. He currently practises in Dubai, London, New York, Abu Dhabi, Sydney, and Brisbane, and is an associate member of chambers in Auckland and Darwin. He has acted for Commonwealth and State Governments as well as individuals and corporations. He has lectured at the University of Sydney for the Master of Taxation course, the University of Queensland for the Master of Laws course, and served as an Adjunct Professor of the University of Queensland. He is a co-chair of the United Arab Emirates Chapter of the International Section of the New York State Bar Association, a member of the Executive Committee of the Section, an Academician of The International Academy of Estate and Trust Law, a Member of the Middle East and North Africa Branch Committee of the Chartered Institute of Taxation (UK), a member of the Worshipful Company of Tax Advisers, a Freeman of the City of London, and an Honorary Member of the Taxation Institute of Hong Kong. Email: David.RussellQC@outertemple.com