GATEWAY TO THE MIDDLE EAST

YANN MRAZEK OUTLINES THE PRACTICAL IMPACT OF ADGM AND DIFC FOUNDATIONS ON REGIONAL ASSETS, FOR BOTH INVESTORS AND FIDUCIARIES

KEY POINTS

WHAT IS THE ISSUE?
Settling regional assets into foreign trusts and foundations was often not possible prior to the enactment of the Dubai International Financial Centre and Abu Dhabi Global Market foundation regimes, due to the foreign ownership restriction and/or red tape imposed by some local authorities.

WHAT DOES IT MEAN FOR ME?
Investors can now structure their regional assets through UAE-based tools, which allow for legacy planning without the circumvention of Shari'a principles, protection against third parties and greater privacy.

WHAT CAN I TAKE AWAY?
Foundations are currently the most sophisticated tool for structuring assets, specifically real estate, in the UAE.

MOST MIDDLE EASTERN entrepreneurial families are familiar with foreign offshore trusts and foundations, and have been using these tools to ensure wealth preservation and intergenerational continuity for several generations. These strategies are primarily used in conjunction with assets located abroad. Most of these assets are both non-strategic and non-operational, such as real estate, financial investments or cash.

At the same time, many of these families have historically shied away from settling regionally located assets into the same foreign offshore trusts or foundations, particularly strategic assets such as shares in the family's corporate vehicle or vehicles through which the family's core business is run, or real estate.

OFFSHORE ISSUES

Several factors may explain this trend. Locally based families may wish to avoid the potentially negative perception accompanying their transferring the control over shares in their core business, with which they are closely associated as individuals, to a foreign country with which they have no connection. Appearances very much matter in the Middle East, and this is particularly true for citizens of Gulf Cooperation Council (GCC) countries,[1] who traditionally have strong cultural and religious roots in the region.

Non-GCC national entrepreneurs and investors, on the other hand, have often adopted a different approach, and tended whenever possible to consolidate their Middle Eastern assets into foreign offshore vehicles, the shares of which may eventually be settled into a foreign trust or foundation. But this approach triggers a number of unwelcome consequences.

In some instances, settling assets into a foreign trust or foundation is simply not possible, due to foreign ownership restrictions applicable in various GCC jurisdictions. In the UAE, for example, non-GCC nationals are restricted to owning no more than 49 per cent in local limited liability companies, and prohibited from owning real estate in the UAE mainland outside some specially designated freehold areas. In addition, as per the current practice of the UAE land departments, regional real estate cannot be settled into a foreign foundation or trust.

Using a foreign, often multilayered, corporate structure (such as companies) also triggers substantial red tape, additional costs and delays related to the double-legalisation process. The recent implementation of economic substance rules in a number of popular offshore financial centres[2] is likely to further contribute to this trend.

As a result, at the time of writing, relatively few foreign fiduciaries are actively involved in the management of regionally located strategic assets. However, this is about to change radically following the introduction of foundation regimes in the UAE.

ADGM AND DIFC FOUNDATIONS

In 2017, both the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre (DIFC) extended their respective structuring and legacy-planning offerings with the adaption of the civil-law-based foundation tool.[3] While each regime has a number of unique features, both are modern and forward-thinking pieces of legislation, the result of a comprehensive review of the best practices, models and principles of existing foundation regimes from both common- and civil-law backgrounds.

ADGM and DIFC foundations are different from the original Western trust and foundation concepts, as they allow the founder to have substantial influence over the assets devoted to the entity. This is in line with the trend among Middle Eastern high-net-worth individuals, who typically wish to keep control over their wealth.

Another notable feature of the vehicles, as noted by Urs Stirnimann TEP in his column in a recent edition of the *STEP Journal*,[4] that makes the UAE an attractive prospect in particular is that the foundation law 'allows the migration of foundations from other jurisdictions to this country where no tax is imposed, where anybody is welcome to take up residency (90 per cent of the population is foreign) and which has a well-developed infrastructure to accommodate underlying companies'.

The ADGM foundation, in particular, also offers more privacy compared to Western foundation regimes. Information that is made available in the public domain for an ADGM foundation is limited to generic information and only extends to:

- the name and address of the foundation;
- the foundation charter; and
- the registered agent.

The details of the foundation's council members, beneficiaries, founder (if a corporate or acting through the registered agent) and data contained in the by-laws are not publicly available.

'The new foundation regimes are filling a necessary gap for regionally based strategic assets'

REAL ESTATE

The Dubai Land Department entered into a memorandum of understanding with both the DIFC and the ADGM on 4 May 2017 and 7 November 2018 respectively, allowing certain DIFC and ADGM entities to own real estate within the Emirate of Dubai. In practice, this means that investors can now use the DIFC's and ADGM's common-law regulatory framework and sophisticated structures (including the new foundations) to directly, or indirectly, own properties in Dubai. Crucially, this is possible without the need to make use of foreign, often multilayered, corporate structures to securely hold property.

SHARI'A COMPLIANCE

The ADGM and DIFC foundations also enable the founder to structure assets for succession-planning purposes in a Shari'a-compliant manner, by requiring potential distributions to be made in accordance with the principles of Shari'a law. Lifetime gifts, for example, can be structured through a foundation and are not subject to Shari'a inheritance rules; therefore, these can be freely made without circumventing Shari'a principles.

Asset distribution that does not follow the Quranic rules[5] of inheritance may also be considered Shari'a compliant, to the extent that the distribution mechanisms are properly documented by the founder by means of a letter of wishes based on the concepts of fairness and justice that are at the root of Islam.

WEALTH OF OPPORTUNITY

An estimated USD1 trillion is to pass from second-generation GCC business families to millennials within ten years. At the same time, fewer than one in six regional families have a legacy plan in place. So, with the ADGM and DIFC foundations now available, how can smart foreign fiduciaries capitalise on this opportunity?

The ADGM and DIFC foundations' similarity to a corporate vehicle and relative simplicity make them an easy tool for Middle Eastern entrepreneurial families to understand. However, some of the duties of councillors and/or guardian(s) are likely to be alien to people with no previous fiduciary experience. Trustees from established offshore jurisdictions with a long-established tradition of fiduciary services can position themselves as advisors to families in the ongoing administration and management of such structures, be it by the family members themselves or domestically based third parties. Those with relevant experience advising families setting up and operating foundations will stand out.

Foreign fiduciaries can take over active functions too, for example acting as (co-) council members or guardians, enabling them to have oversight and control over assets often off limits until today: no land authorities allow UAE-*situs* properties to be directly or ultimately owned by foreign foundations and trusts. This can be achieved without having to consolidate the assets under a foreign structure or establish a domestic presence, as a number of support functions may be outsourced.

The new foundation regimes do not constitute a threat to existing foreign offshore centres. On the contrary, they are filling a necessary gap for regionally based strategic assets. An entire generation of Middle Eastern families are considering succession strategies, and are realising the potential of domestic foundations. For foreign fiduciaries seeking to increase their footprint in the region and assets under management, the ADGM and DIFC foundations present the perfect gateway to the Middle East.

1 The GCC consists of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE. **2** See pp.37 and 43 **3** For a comparative overview of the ADGM and DIFC foundation regimes, see Y. Mrazek and A. von Düring, 'Common-law Oasis', *STEP Journal* (Vol26 Iss3), pp.38–39 **4** Urs Stirnimann, 'Foundations in the Middle East', *STEP Journal* (Vol26 Iss10), p.19 **5** Rules pursuant to Shari'a principles

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