



**DISPUTE RESOLUTION
IN THE MIDDLE EAST**
A YEAR IN PERSPECTIVE

INTRODUCTION

2014 proved to be yet another transformative one for dispute resolution in the Middle East, as key business centres across the region made further, convincing strides towards cementing their reputation as robust jurisdictions in which parties can effectively resolve their commercial disagreements.

Among the many positive examples of progress, Saudi Arabia passed legislation establishing the Kingdom's first arbitration centre, Qatar's Court of Cassation unequivocally confirmed the applicability of the New York Convention to the enforcement of arbitral awards, and the DIFC Courts agreed a protocol with the English Commercial Courts for the mutual enforcement of judgments.

DLA Piper's Middle East Litigation, Arbitration and Investigations team followed these developments closely throughout the year, regularly producing bulletins and articles to ensure that you were kept fully abreast of the key issues which could affect business interests. For your ease of reference, we are today publishing these bulletins in a single volume. We hope you find them useful and of interest, whether you are reading them for the first time, or whether you are using them to refresh your memory.

Jurisdiction and Enforcement training for in-house counsel and business heads

Now more than ever in the Gulf and the wider Middle East, parties entering into commercial transactions have an overwhelming amount of choice as to where to resolve their disputes in the unfortunate event that a business relationship turns sour.

"Should I use DIFC Court jurisdiction clauses in my contracts rather than UAE Court clauses?"

"Can I enforce a court judgment or arbitral award in Saudi Arabia?"

"If I want to submit any disputes under this contract to arbitration, should I push for arbitration in Dubai, or in the DIFC under the rules of the DIFC-LCIA Arbitration Centre?"

"Will the UAE courts enforce an English court judgment?"

"Do mediation and expert determination work in the Middle East?"

These are just a few of the many questions around the topics of jurisdiction clauses and enforcement that we were required to answer in 2014, as our clients wrestled with what has become an increasingly complex consideration when transacting business in this region.

To assist you with such important decisions, and to answer some of the increasingly difficult practical questions that can arise, the Litigation, Arbitration and Investigations team will this year be offering our clients complimentary training sessions at which our experienced dispute resolution lawyers will provide a comprehensive insight into the different dispute resolution mechanisms available, explain the pros and cons of those options, and answer any questions you might have which are specific to your particular business or sector.

If you or others within your company would be interested in this training, please do not hesitate to contact me and we will provide you with further details. We would be delighted to assist.



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LITIGATION, ARBITRATION AND INVESTIGATIONS IN THE MIDDLE EAST



DLA Piper's Litigation, Arbitration and Investigations team is one of the largest dispute resolution practices in the Middle East. We specialise in conducting complex, high value, multi-jurisdictional litigation and arbitration proceedings, as well as significant regulatory, compliance-related reviews and investigations. We are also one of the only firms in the United Arab Emirates which has a specialist in-house local litigation practice, run by experienced Arabic-speaking lawyers with an in-depth knowledge of UAE law and procedure. We also have a substantial disputes practice (and a team of disputes specialist) in the Kingdom of Saudi Arabia

Our expertise covers the full spectrum of contentious matters, with a particular focus on:

- International arbitration;
- Construction and infrastructure disputes;
- Regulatory and compliance-related matters, including corporate crime and investigations; and
- Litigation, both offshore and before the local courts

We also have significant experience of enforcing judgments and arbitral awards across the region.



OUR TEAM



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I. DIFC COURTS/ENGLISH COMMERCIAL COURT AGREE PROTOCOL OF COOPERATION



Over the past decade, Dubai has taken great steps to foster an environment in which international business can flourish. The latest step in this direction – the introduction of a new protocol between the DIFC Courts and the Commercial Court of England and Wales – should provide confidence to UK-based parties who have counterparties with significant assets located in Dubai. Parties now have a mechanism by which to enforce their Commercial Court judgments in Dubai and, potentially, the wider GCC region.

THE DIFC

In 2006, Dubai provided its offshore jurisdiction, the Dubai International Financial Centre (“**DIFC**”), with its own independent judicial forum in the form of the DIFC Courts. Although, initially at least, disputes being litigated in the DIFC Courts were restricted to those which had a sufficient connection to the DIFC (for example, relating to a contract performed in the DIFC; where one of the parties is registered in the DIFC; or a dispute over real property that is located in the DIFC), pursuant to Law No. 16 of 2011 (“**Law 16**”), the DIFC became an “opt in” jurisdiction like most national courts, enabling all contracting parties to include DIFC Courts jurisdiction clauses in their agreements, irrespective of whether they have any connection with the DIFC Courts.





For entities operating in the Middle East, and in particular those used to common law courts, the DIFC Courts provide a more attractive forum to which to refer their disputes than the regional onshore courts. The advantages of choosing the DIFC Courts over the regional courts include:

- *experienced judiciary* – the DIFC Courts are presided over by very experienced judges from around the world. These include Chief Justice Michael Hwang, SC (former Singapore Court of Appeal judge); Deputy Chief Justice Sir John Chadwick (former English Court of Appeal judge); and Justice Sir David Steel (former English Commercial Court judge). Many of the judges also have significant experience as arbitrators;
- *efficient court procedures* – the DIFC Courts' procedures closely follow the Civil Procedure Rules used by the English Courts, thereby offering a forum which has long-established procedures (including default and summary judgment) supported by legal precedents. They also publish their judgments online;
- *enforcement onshore* – pursuant to Law 16 and the 2009 Protocol of Enforcement between the Dubai Courts and the DIFC Courts, provided certain administrative steps are followed, arbitral awards/judgments ratified by the DIFC Courts can be enforced onshore in the Dubai Courts (and vice versa) without any further review by the Dubai Courts (a procedure that has thus far been successfully implemented in over 60 cases);
- *language* – unlike most courts in the region, cases are heard in English, and are therefore more accessible to international parties. Further, documentation does not need to be translated into Arabic, removing the risk of material facts being lost in translation;
- *representation* – parties can select their counsel from the wide range of international law firms operating in the region;
- *costs* – the winning party will be able to claim their legal fees from the losing party; and
- *limited rights of appeal* – the DIFC Courts only have one level of appeal (in comparison with the onshore courts which have two) and leave to appeal must be obtained.



New Development – Protocol of Enforcement between the DIFC Courts and the Commercial Court of England and Wales

On 23 January 2013, Mr Justice Cooke, the judge in charge of the Commercial Court (Queen's Bench Division, England and Wales) and Mr Michael Hwang, the DIFC Courts' chief justice, entered into a memorandum of guidance as to the enforcement of court judgments between the two courts ("**Memorandum**"). The Memorandum aims to clarify existing arrangements in place between the two courts in relation to the mutual enforcement of civil judgments. Pursuant to the provisions of the Memorandum, once a Commercial Court judgment is granted in favour of a party, that party may apply to the DIFC Courts to, effectively, obtain a DIFC Courts judgment to the same effect as the original judgment. Once obtained, the judgment creditor will be entitled to use the procedures of the DIFC Courts to enforce the judgment (such procedures will be similar to those available to the Commercial Court of England and Wales), which include:

- third party debt orders;
- charging orders;
- orders for possession of land;
- orders requiring judgment debtors to provide information about their assets;
- orders appointing enforcement officers to seize and sell the judgment debtor's goods;
- orders appointing receivers;
- orders for committal for contempt of court; and/or
- orders relating to insolvency procedures.

Once a DIFC Courts judgment is obtained, a judgment creditor may also use Law 16 to apply to the UAE Courts to have the judgment recognized as a UAE Court judgment. Once this process is complete, the judgment creditor can thereafter make use of the various conventions and treaties to which the UAE is signatory in order to seek to enforce this judgment in the wider GCC region through, for example, the GCC Protocol or the Riyadh Convention, and vice versa.




Comment

This move will no doubt help to strengthen legal and commercial relations between Dubai and the UK, as it facilitates a party's ability to enforce judgments, rendered in one of those jurisdictions, against judgment debtors who are based, or who have assets located, in the other jurisdiction.

This development will be of particular relevance to international companies (particular those based in the UK) which:

- are entering into, or presently have, contractual relationships with entities registered, or with significant assets located, in the UAE or wider GCC region; and
- tend to favour the English courts as a dispute resolution forum.

The Memorandum provides a further example of Dubai's attempt to enhance its reputation in the international business community by providing clarity and confidence to the relationship between the courts of the DIFC and England and Wales. Parties based in the UK should find comfort in the knowledge that there is now a formal mechanism by which English Commercial Court judgments rendered against their counterparties based, or with significant assets located, in the UAE or wider Middle East region can now be enforced in the jurisdiction where those assets are located.



2. DIFC AMENDS ARBITRATION LAW TO ENSURE COMPLIANCE WITH THE NEW YORK CONVENTION

WHAT HAS HAPPENED?

The reputation of the Dubai International Financial Centre (DIFC) as a burgeoning hub for international arbitration was significantly boosted late last month, when the DIFC Authority amended the DIFC Arbitration Law (the "**Law**") to ensure that it now fully complies with the UAE's treaty obligations under the New York Convention.

Two decisions of the DIFC Court in 2012 highlighted that the Law as previously drafted did not comply with the Convention, in that it did not contain an express requirement that the DIFC Courts stay their own proceedings in favour of a foreign-seated arbitration – even in the face of a valid arbitration clause.

The Convention requires member state courts to dismiss or stay an action, on the request of a party, in respect of matters that fall within the scope of a valid arbitration agreement. Before the amendment, Article 13(1) of the Law only required the DIFC Courts to stay proceedings on the request of a party where an arbitration was seated in the DIFC itself.

However, Article 13(1) now also applies where the seat of arbitration is one other than the DIFC, and indeed where no seat has been determined.



WHY IS THE AMENDMENT POTENTIALLY IMPORTANT FOR YOUR BUSINESS?

This amendment is significant for parties involved in international arbitration proceedings anywhere in the world, where parallel court proceedings have been erroneously commenced in the DIFC Courts (for tactical, or other reasons). These parties may now rest assured that the DIFC Courts are under an express obligation to recognise foreign-seated arbitration agreements and give them precedence over pending litigation that has been brought in violation of an existing foreign arbitration clause.



3. SAUDI ARABIA APPROVES PLANS FOR FIRST ARBITRATION CENTRE



WHAT HAS HAPPENED?

The Kingdom of Saudi Arabia will soon establish its very first arbitration centre – a potentially significant development for commercial parties doing business in one of the region's most important markets.

The Saudi Council of Ministers recently approved plans for the formation of the “Saudi Center for Commercial Arbitration” (“**SCCA**”). The SCCA is to be based in the capital, Riyadh, and will be responsible for the supervision of domestic and international commercial arbitrations under the auspices of the Council of Saudi Chambers (“**CSC**”).

At present, the following is known about the composition and proposed operations of the SCCA:

- there will be a board of directors who will serve three-year terms, subject to renewal;
- the board will be formed by agreement between the CSC, the Ministry of Justice and the Ministry of Commerce and Industry in coordination with the Governor of the Saudi Arabian General Investment Authority;
- the board is to have minimum requirements for private sector experience; ten years for the Chairman and five years for the remaining board members;
- the board will be responsible for approving the rules of the SCCA and for establishing a list of arbitrators; and
- there are plans for the SCCA to establish branches in jurisdictions outside of Saudi Arabia.



WHAT ARE THE POTENTIAL IMPLICATIONS FOR YOUR BUSINESS?

The proposed formation of the SCCA, in addition to the Kingdom's recent adoption of the new Arbitration Law and Enforcement Law, marks another step forward in establishing arbitration as a viable form of alternative dispute resolution in the Kingdom. This is already the case elsewhere in the region, for example in the United Arab Emirates.

Arbitration is an internationally recognised and well-established form of dispute resolution which has important differences to traditional court litigation. These differences include:

- a more comprehensive system for international enforcement of awards;
- the ability to choose a neutral "seat" (or legal place) of the arbitration;
- flexibility of procedure;
- confidentiality of proceedings and/or award;
- choice of arbitrator (including experts from disciplines other than law);
- speed of resolution; and
- finality of award (as they are not typically subject to review or appeal).

Depending on the nature of your business or any dispute, it may be that arbitration offers certain advantages over local court litigation (and vice versa). For example, arbitration may be preferable where a dispute has significant international elements, where it is preferable to control who will resolve the dispute or where it is important that a claimant obtains a final award as quickly as possible.

In addition to strengthening the Kingdom's increasingly pro-arbitration stance, the establishment of the SCCA has the potential to make it more convenient and practical for parties who would prefer to arbitrate disputes in Saudi Arabia. There is also the opportunity for the SCCA to adopt bespoke procedural rules that are complementary to the current legal framework in the Kingdom.



4. DIFC COURT OF APPEAL CONFIRMS THE DIFC COURTS HAVE JURISDICTION TO RECOGNISE DOMESTIC UAE ARBITRAL AWARDS

In Claim No: ARB-003-2013, the DIFC Court of Appeal considered an appeal against the DIFC Court of First Instance decision in *Banyan Tree Corporate PTE Ltd v Meydan Group*.

WHAT HAS HAPPENED?

The DIFC Court of Appeal has dismissed an appeal brought by Meydan Group (“**Meydan**”) and it has ruled that DIFC Courts do have jurisdiction to recognise and enforce domestic onshore (non-DIFC) arbitration awards.

In 2007, Banyan Tree Corporate PTE Ltd (“**Banyan**”) entered into a hotel management agreement with Meydan. A dispute arose and arbitration was conducted under the rules of the Dubai International Arbitration Centre (“**DIAC**”). In 2013, a sole arbitrator ruled in favour of Banyan entitling the company to compensation and damages. Meydan failed to satisfy the award voluntarily and Banyan therefore sought recognition and enforcement of the award before the DIFC Court. In May 2014, the DIFC Court of First Instance rejected Meydan’s application to dismiss the enforcement action in relation to the DIAC award.

The DIFC Court of First Instance ruled that it had jurisdiction to hear claims to recognise and enforce arbitral awards rendered in “onshore” UAE, even where the award had no connection with the “offshore” DIFC and had not been ratified by the local UAE courts.

THE COURT OF APPEAL’S JUDGMENT

The DIFC Court of Appeal dismissed the appeal by Meydan and confirmed that DIFC courts do have jurisdiction to recognise and enforce domestic onshore (non-DIFC) arbitration awards.



MEYDAN'S MAIN GROUNDS OF APPEAL

1. First, Meydan argued that Articles 42 and 43 of the DIFC arbitration law did not confer jurisdiction to entertain a claim for the recognition and enforcement of an award rendered in onshore Dubai (outside the DIFC).
2. Second, Meydan referred to the common law doctrine of forum non conveniens and argued that the proceedings should be stayed on those grounds, with the onshore Dubai courts being the more appropriate forum.
3. In its final ground of appeal, Meydan argued that the only purpose of seeking recognition of an arbitral award in the DIFC in circumstances where neither party had any assets in the DIFC was to use the *“machinery for automatic recognition and enforcement of DIFC money judgments in the Dubai courts”* which leads to automatic enforcement in the Dubai courts.

JURISDICTION TO RECOGNISE ARBITRAL AWARDS

- The DIFC Court of Appeal found that *“on its face this Article 42 imposes an obligation on the DIFC Court to recognise and to enforce an award irrespective of the state or jurisdiction in which it is made.”*
- Further, the court relied on DIFC Court Law No. 10 of 2004 to establish jurisdiction. The DIFC Court of Appeal observed that the only grounds for refusing recognition are those contained in Article 44 of the DIFC Arbitration Law. None of these grounds appeared to be the subject of this appeal. Justice Sir David Steel went on to find that jurisdiction is not circumscribed by any requirements for in personam or subject matter in connection with the DIFC.



FORUM NON CONVENIENS

- Justice Sir David Steel confirmed that “... *there is no alternative forum (let alone more appropriate) forum for the determination of the question whether the award should be recognised and enforced in the DIFC. The DIFC Courts have exclusive jurisdiction.*”

ABUSE OF PROCESS

- The Court of Appeal dismissed the abuse of process arguments. While there was no evidence that Meydan currently had assets in the DIFC, the court decided that it may have such assets in the future, and these could be enforced against. The court also found that “*whether the bar on considering the merits of the DIFC order before the execution judge would also inhibit the Dubai Courts from ruling on a challenge to the validity of the underlying award is a matter for the Dubai Courts.*”

WHY IS THIS POTENTIALLY IMPORTANT TO MY BUSINESS?

The judgment potentially widens the avenues of recognition and enforcement of awards for businesses in the UAE. The DIFC courts can hear actions for the recognition and enforcement of awards which are seated outside of the DIFC (on-shore Dubai). The judgment makes clear that DIFC courts will not entertain arguments to the effect that another court is a more appropriate forum, or that bringing such a claim before the DIFC courts is an abuse of power.

OUR COMMENT

The question remains unanswered as to whether the Dubai courts would enforce an order from the DIFC courts without examining the merits of the claim underlying such an order. If the Dubai courts do execute a DIFC court order in these novel circumstances, this may result in a floodgate of enforcement actions of onshore seated awards.

5. NEW ARBITRATION INSTITUTE ESTABLISHED IN THE DIFC



WHAT HAS HAPPENED?

Dubai has established a new “umbrella” authority named the Dispute Resolution Authority (“**Authority**”).

Authority

The Authority will oversee both the DIFC Courts and a new Arbitration Institute. The Chief Justice of the DIFC Courts, Michael Hwang SC, will be Head of the Authority within the DIFC. The Authority has its own legal personality and is to carry out its duties without interference from other DIFC bodies (namely, the DIFC Authority and Dubai Financial Services Authority).

Arbitration Institute

The Arbitration Institute will have a Board of Trustees, which is to be appointed by the Head of the Authority. They will run the Arbitration Institute independently from the DIFC Courts. It is understood that the LCIA and the DIFC, which together formed the DIFC-LCIA Arbitration Centre in 2008, are in discussions aimed at establishing the DIFC-LCIA as the Arbitration Institute.

WHAT WILL THE ARBITRATION INSTITUTE DO?

1. promote itself as a hub for the settlement of disputes, whether through arbitration, mediation or other forms of ADR;
2. prepare and issue rules and procedures for regulating the administration of arbitration, mediation and other forms of ADR;
3. host conferences, seminars and lectures relating to arbitration, mediation and other forms of ADR;
4. publish books, journals, articles and papers on arbitration, mediation and other forms of ADR;
5. provide courses and accreditation for arbitrators and mediators; and
6. enter into co-operation and joint venture agreements with other organisations involved in arbitration and ADR.



HOW WILL THIS AFFECT MY BUSINESS?

While the detail around these new institutions is presently unknown, the establishment of the Authority is a clear signal of Dubai's continuing desire to position itself not only as an attractive market for investors but also to position the DIFC as a regional and international dispute resolution centre of choice for international business.

The provision for an Arbitration Institute within the DIFC appears to be part of a co-ordinated attempt to reinforce confidence in the DIFC as a dispute resolution forum, and in particular to promote the DIFC as an arbitration-friendly jurisdiction.

The DIFC judicial system will undoubtedly benefit from closer co-ordination between the DIFC Courts and the Arbitration Institute within the new framework of the overarching Authority. This in turn will better enable Dubai's offshore jurisdiction to fulfil its purpose, to become one of the world's central hubs for dispute resolution (and international business).

This development comes hot on the heels of the recent decision in *Banyan Tree v Meydan*, in which the DIFC Court of First Instance accepted jurisdiction to hear a claim to recognise and enforce an award rendered in onshore Dubai – even though the award had no connection with the DIFC and had not been ratified by the Dubai courts.

6. ENFORCEMENT OF ARBITRAL AWARDS IN THE UAE



WHAT HAS HAPPENED?

Following significant client demand we have now produced an updated practice note on “Enforcing Arbitration Awards In The UAE”.

The Practice Note includes discussion of the following key topics, as well as an updated summary of significant recent decisions in both the DIFC and Dubai courts:

- Preliminary enforcement questions: “on-shore” and “off-shore” enforcement
- The procedure for the enforcement of domestic arbitral awards and the grounds upon which enforcement can be refused by the UAE courts
- The procedure for the enforcement of foreign arbitral awards
- Public Policy considerations

We also briefly summarise the DIFC Court’s potentially ground-breaking new Practice Direction, anticipated to come into force in early 2015, which will introduce a mechanism for the referral of any dispute concerning the enforcement of DIFC Court judgments to DIFC-LCIA arbitration, which could potentially be enforced overseas under the New York Convention.



WHY IS THIS PRACTICE NOTE IMPORTANT?

The increasing popularity of arbitration as a mechanism for dispute resolution in the region means that it has become increasingly important for business leaders and in house legal counsels to develop an understanding of the arbitration process and, in particular, how exactly arbitral awards are enforced in this jurisdiction.

Arbitration in the UAE has experienced tremendous growth in recent years, with both domestic and international users increasingly drawn to many of its advantages over conventional court litigation.

A crucial factor in any jurisdiction's development as a credible centre for arbitration is the existence of a functioning and efficient enforcement regime for both domestic and foreign arbitral awards. One important reason for the growing popularity of arbitration in the UAE is that the historical and well-publicised problems with enforcement have, in light of some recent developments, progressively begun to recede. To request a copy of the Practice Note please contact Susie Beales at susie.beales@dlapiper.com.





7. ENFORCING FOREIGN ARBITRAL AWARDS IN QATAR: A STEP IN THE RIGHT DIRECTION

WHAT HAS HAPPENED?

The Qatar Court of Cassation has overturned a decision by the lower courts to annul a foreign arbitral award on the grounds that it had not been issued in the name of the Emir of Qatar.

(Case 2216/2013)

Last year the Qatari Court of First Instance annulled a foreign ICC award on the above grounds, incorrectly relying on Article 69 of the Qatari Civil and Commercial Procedural Code ("**Code**") which requires all "judgments" to be issued in the name of the Emir. This was despite the fact that the arbitration was seated in Paris, and its enforcement in Qatar was therefore subject to the New York Convention (to which Qatar is a signatory) and not the Code.

The first instance decision had been upheld by the Court of Appeal previously which, in light of (a) Article 69 of the Code and (b) the fact that the section of the Code governing arbitration proceedings uses the same word for judgment (*hukum*) to describe arbitral awards, concluded that the law had been correctly applied by the Court of First Instance.

However, the Court of Cassation has now remitted the case back to the lower court, stating unequivocally that foreign awards are subject to the New York Convention and therefore the Qatar courts should not impose the requirements of the Code upon them.

Interestingly, the Court of Cassation decided that arbitral awards rendered in Qatar *must* be issued in the name of the Emir, seemingly overturning a previous decision on that issue (Case 826/2013).



WHY IS THIS POTENTIALLY IMPORTANT TO MY BUSINESS?

This judgment represents a significant step towards greater certainty for foreign award creditors seeking to enforce against assets located in Qatar. The New York Convention has been a central factor in the trend towards international arbitration becoming the dispute resolution mechanism of choice for many commercial parties. However, enforceability still remains a key concern for many, as the ability to enforce foreign arbitral awards remains inconsistent across contracting states, particularly in emerging legal jurisdictions such as Qatar and the UAE.

In this judgment, the highest appellate court in Qatar:

- acknowledged a party's right to seek enforcement of a foreign arbitral award by relying on the New York Convention;
- recognised the important distinction between the procedural law that applies to the arbitration and the substantive law of the contract in dispute; and
- clarified the applicability of Qatari law to arbitrations seated outside of Qatar.

OUR COMMENT

Under the civil law system in Qatar, until the Court of Cassation makes a ruling on substantially similar facts or grounds in three different instances, the decision is merely persuasive. So while there will almost certainly be some more bumps in the road, the Court of Cassation has at least sent a clear message about the correct application of Qatari law to awards rendered outside the jurisdiction.



8. SALE OF FINANCIAL SERVICES AND PRODUCTS IN THE DIFC – IMPORTANT JUDGMENT IN THE DIFC COURTS

Case: CFI 026/2009 Rafed Al Khorafi v Bank Sarasin-Alpen (ME) Ltd

WHAT HAS HAPPENED

1. The DIFC Courts have found that Switzerland-based Bank Sarasin & Co. Ltd (“**Sarasin**”) was providing financial services in or from the DIFC, despite using a popular business model whereby investments are arranged by the bank’s DFSA-authorized subsidiary (Bank Sarasin-Alpen ME Limited – “**Sarasin-Alpen**”) in the DIFC, but are actually sold from/booked overseas.
2. As a result, the Court held that, in contravention of the Financial Services Prohibition, Sarasin had dealt with the Claimants in the case without DFSA authorisation – a mandatory requirement for financial service providers doing business in or from the DIFC. The contracts between Sarasin and the Claimants were therefore unenforceable.
3. In addition to the findings against Sarasin, the Court held that Sarasin-Alpen had failed to carry out the requisite investigations to determine whether the Claimants had a sufficient level of financial experience to enter into the contracts. Whilst the contracts were found unlawful on this ground, the judge suggested that even if the subsidiary had been permitted to deal with the Claimants, they would have breached the DFSA’s Code of Business Rules, as they had not given due consideration to the suitability of the Claimants in light of the Claimants’ objectives and attitude to risk. Sarasin-Alpen was found to have breached the DFSA Rules, having not acted with reasonable skill and care when recommending investments and considering suitability and the Claimants were therefore entitled to compensation under the DIFC Regulatory Law.
4. On 30 October 2014, the Court of First Instance awarded the Claimants US\$10.45 million in compensation.



Brief facts

1. The Claimants are members of a prominent Kuwaiti business family, and are resident in Kuwait. In the course of 2007 and early 2008, on the introduction of Sarasin-Alpen, the Claimants purchased structured financial products from Sarasin. The purchases (in the sum of US\$200 million) were funded by loans made to the Claimants, in part by Al Ahli Bank Kuwait and in part by Sarasin.
2. In November 2008, as the global financial crisis gathered pace, Sarasin made margin calls, requesting additional capital, which the Claimants did not meet. Sarasin closed out the notes; with the consequence that the Claimants suffered substantial losses. The proceedings were brought with the object of recovering those losses, the Claimants arguing that, but for Sarasin's and Sarasin-Alpen's regulatory breaches, breach of contract and breaches of duty of care, the Claimants could not and would not have purchased the products sold to them, and would not therefore have suffered the losses which they to recover.

WHY IS THIS IMPORTANT TO MY BUSINESS

1. Whilst this first instance judgment is likely to go to appeal, it is potentially very significant for those businesses operating on a similar basis, whereby the parent company/head office has no registered presence in the DIFC and is not authorised to conduct financial service activities in the DIFC, but where a DIFC-registered entity advises on and arranges the investments and financial products.
2. On the facts, the Court found that employees of Sarasin-Alpen were providing financial services for Sarasin, and that employees of Sarasin-Alpen had held themselves out to the Claimants as performing a service for Sarasin, which was conduct that Sarasin had endorsed.



3. Consequently, if your business uses a similar business model, it is important that:
 - 3.1 a clear distinction is maintained between the DFSA authorised firm and the overseas entity which sells/books the financial products;
 - 3.2 any activities undertaken in or from the DIFC should be distinct from those activities carried out in other locations; and
 - 3.3 your literature and employees do not mislead clients as to the structural distinction between business entities and the roles that each entity undertakes.
4. In relation to suitability requirements, it is important that your business has effective controls and compliance mechanisms in place to assess customer suitability for financial products. This should include a robust system of supervision. In this case, the court noted a number of documentary inconsistencies and irregularities, such as forms being signed by customers prior to being completed – which clearly breach best practice policies.



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