



Financial Mis-selling Disputes in the DIFC

EXECUTIVE SUMMARY

In this summary article we consider financial mis-selling disputes in the Dubai International Financial Centre (“**DIFC**”), with a focus on the Dubai Financial Services Authority (“**DFSA**”) and DIFC Courts approach in dealing with and handling such claims, to provide guidance to our readers.

In particular, we focus on: (i) what is financial mis-selling; (ii) when can a claim for financial mis-selling be made; (iii) what remedies are available for a financial mis-selling claim; and (iv) how to make a financial mis-selling complaint in the DIFC.

WHAT IS FINANCIAL MIS-SELLING?

Mis-selling is a prevalent issue within the financial services industry and often involves the misrepresentation of a product or service by a financial institution/adviser to an investor/customer as to the product or services suitability. It often arises in situations where a financial institution/adviser makes a deliberate omission of key information to secure a sale and/or where a product is purchased and/or entered into that was not what was described (or sold).

WHEN CAN A CLAIM FOR MIS-SELLING BE MADE?

A claim can be brought for financial mis-selling in circumstances where it can be established that there has been a failure to comply with the DFSA’s regulatory rules which are in force in the DIFC.

The DFSA as an organisation, is an independent regulator of financial services, and its function is to build a clear and flexible regulatory framework based on the best practices and laws of the world’s leading financial jurisdiction. Regulatory Law 2004 provides the DFSA Board of Directors the power to make rules relating to all matters that are related to its objectives, functions and powers.

The rules and laws governing the DFSA can be found on its website and via its rulebook, General Module - GEN Rules. The specific provisions within the Conduct of Business Rules (“**COB Rules**”) and the Financial Service Prohibition imposed by Article 41(1) of the Regulatory Law (DIFC Law No. 1 of 2004) (“**Regulatory Law**”) are key provisions.

Article 94 of the Regulatory Law states:

“(1) Where a person:

intentionally, recklessly or negligently commits a breach of duty, requirement, prohibition, obligation or responsibility imposed under the Law or Rules or other legislation administered by the DFSA; or



commits fraud or other dishonest conduct in connection with a matter arising under such Law, Rules or Legislation;

the person is liable to compensate any other person for any loss or damage caused to that person as a result of such conduct, and otherwise is liable to restore such other person to the position they were prior to such conduct.”

COB Rule 3.2.1 provides that “*when communicating information to a Person in relation to a financial product or financial service, an Authorised Firm must take reasonable steps to ensure that the communication is clear, fair and not misleading*”. COB Rule 6.2.1(2) deals with the suitability of investments and COB Rule 2.11.1(3)C deals with whether the advice tendered was generic advice or not.

A leading example of the application of the DFSA regulatory rules is in the landmark decision of *Al Khorafi v Bank Sarasin-Alpen and Bank Sarasin (CFI 026/2009)* on financial mis-selling in the DIFC Courts, where financial service providers in the DIFC and in Switzerland were held liable to investors for breaches of DFSA laws.

In the 2015 *Al Khorafi* judgment, at the time, Deputy Chief Justice Sir John Chadwick stated that “*I am satisfied that the present case is a clear case of mis-selling unsuitable investments to an unsophisticated investor, and to his equally unsophisticated wife and mother*”¹ and in the later judgment given in 2016 held that “*given the findings as to the manner of selling these products it is not possible to conclude that the advice was only generic and the advice advanced by Sarasin-Alpen went beyond being likely to influence a buyer and constituted advice on the merits.*”²

Therefore, in the *Al Khorafi* judgment it was held that the bank(s) had committed breaches of the regulatory law which allowed the claimants to seek legal recourse within the DIFC Courts.

WHAT REMEDIES ARE AVAILABLE FOR MIS-SELLING?

The potential relief that is available to a claimant(s) in a financial mis-selling claim is significant.³

For example, if a financial institution is found to be in breach of the Financial Services Prohibition in treating (and dealing with) a claimant as a “Client” rather than as a “Retail Customer”, the DIFC Courts can and have made an award for multiple damages.

Article 40(2) of the Law of Damages and Remedies (DIFC Law No. 7 of 2005) states:

“40 (2) The Court may in its discretion on application of a claimant, and where warranted in the circumstances, award damages to an aggrieved party in an amount no greater than three (3) times the

¹ DIFC Court website CFI 026/2009 (“<https://www.difccourts.ae/rules-decisions/judgments-orders/court-first-instance/1-abdel-mohsen-bader-al-khorafi-2-amrah-ali-abdel-latif-al-hamad-3-alia-mohamed-sulaiman-al-rifai-v-1-bank-sarasin-alpen-me-limi>”)

² DIFC Court website CA 003/2015 (“<https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/1-rafed-abdel-mohsen-bader-al-khorafi-2-amrah-ali-abdel-latif-al-hamad-3-alia-mohamed-sulaiman-al-rifai-v-1-bank-sarasin-alpen-m>”)

³ Please note that for the purposes of this article, we do not rehearse all the remedies that are available.



*actual damages where it appears to the Court that the defendant's conduct producing actual damages was deliberate and particularly egregious or offensive*⁴

In the case of Al Khorafis, Deputy Chief Justice Sir John Chadwick had to decide “*whether an award of compensation in the form of multiple damages against Sarasin-Alpen would be warranted in the circumstances... [and] whether Sarasin-Alpen's conduct “producing actual damages was deliberate and particularly egregious or offensive.”*⁶

In the judgment, it was held that this was a case where the conduct of Sarasin-Alpen called for an award of multiple damages under Article 40(2) of the Law of Damages and Remedies, and Sarasin-Alpen was ordered to pay compensation to the claimants of an amount equal to twice the losses that they had sustained under the relevant heads of loss. Therefore, in the judgment itself, Sarasin-Alpen was ordered to pay the claimants, in addition to the monies already paid, the sum of USD 59,611,899 and Bank Sarasin was ordered to pay the claimants, in addition to the monies already paid, the sum of USD 24,583,425, a significant ruling in the DIFC Courts. We should point out that in addition to multiple damages and other reliefs available, a claimant can also seek interest on losses under Article 35(1)(g) and/or Article 35(3) of the Law of Damages and Remedies (DIFC Law No. 7 of 2005) and Article 94(2) of the Regulatory Law also empowers the Court to award interest on specific heads of loss.

HOW TO MAKE A FINANCIAL MIS-SELLING COMPLAINT?

In circumstances where an individual(s) has cause to make a financial mis-selling claim in the DIFC, usually, the first port of call will be for them to notify the DFSA (either by themselves or with the assistance of a legal adviser), by submitting a complaint form to the DFSA via its website. Once the claim has been submitted, the Complaints Team will handle the dispute and take the necessary action, which may involve referring the matter to the Enforcement Division (“**Enforcement**”) within the DFSA. The DFSA Rulebook Enforcement Module (ENF) provides guidance on Enforcement's approach, including how Enforcement assess the allegations that have been made, their commencement of investigations, their information and investigation powers and the procedure for making decisions.

A key consideration when making a complaint is to consider what license the financial institution holds and whether it is authorised by the DFSA to conduct such activity, as if not, they are likely to be a breach of the rules. When making a complaint, this will be a key factor, and our readers should seek guidance (where required) on the DFSA Rules and Regulations and the process that is involved.

⁴ DIFC Court website CFI 026/2009 (“<https://www.difccourts.ae/rules-decisions/judgments-orders/court-first-instance/1-abdel-mohsen-bader-al-khorafi-2-amrah-ali-abdel-latif-al-hamad-3-alia-mohamed-sulaiman-al-rifai-v-1-bank-sarasin-alpen-me-limi>”)

⁵ (1) *Abdel Mohsen Bader Al Khorafi* (2) *Amrah Ali Abdel Latif Al Hamad* (3) *Alia Mohamed Sulaiman Al Rifai v* (1) *Bank Sarasin-Alpen (ME) Limited* (2) *Bank Sarasin & Co Ltd* [2009] DIFC CFI 026 – October 07, 2015 Court of First Instance Judgment

⁶ DIFC Court website CFI 026/2009 (“<https://www.difccourts.ae/rules-decisions/judgments-orders/court-first-instance/1-abdel-mohsen-bader-al-khorafi-2-amrah-ali-abdel-latif-al-hamad-3-alia-mohamed-sulaiman-al-rifai-v-1-bank-sarasin-alpen-me-limi>”)



HOW CAN WE HELP?

Robert is a Senior Associate at Hamdan Al Shamsi Lawyers & Legal Consultants and leading international commercial litigator who manages a complex and high value caseload. He is a UK qualified Solicitor and has a broad international commercial and financial dispute practice, with specialist focus in agreements arising out of property, finance, banking and shareholder disputes.

Hamdan Al Shamsi Lawyers and Legal Consultants are perfectly positioned to assist our clients in respect of all claims in the DIFC and ADGM Courts. We also have three divisions including (1) the DIFC Team (2) the UAE Litigation team and (3) the Corporate team, and currently deals with a network of other law firms around the world including the USA, UK, France, Italy, Germany, Saudi Arabi, Oman, Kuwait, Bahrain, Jordan, Lebanon, China, Israel and Australia.

Please note that as with all our articles the above note is for guidance purposes only and does not constitute legal advice. Separate legal advice should be requested from legal counsel.

Robert Whitehead | Senior Associate
Hamdan Al Shamsi Lawyers & Legal Consultants

For any enquiry please click [here](#)

