(2011) DFSARAC 4
Capital Investment International [CII-UAE] Ltd

Notice of Decision

1. On 28 November 2011, the Panel heard the appeals of Capital Investment International ("CII" or the "Firm"), Mr Husam Al Ameri ("HAA") ((2011) DFSARAC 5) and Mr Odhaid Saeed Al Mansouri ("OAM") ((2011) DFSARAC 6) against the 26 June 2011 Notice of Decision ("Decision") of the Executive of the DFSA ("DFSA") to withdraw the Authorisation and Licence of CII and the Authorised Individual status of HAA and OAM (collectively the "Applicants"). Nicholas Alves, Matthew Shanahan and Adrian Bock appeared on behalf of the Executive. Lina Saheb ("LS") appeared as authorised representative for CII pursuant to a board resolution dated 3 July 2011. LS was also authorised on 3 July 2011 to represent HAA and OAM in regard to these proceedings. HAA appeared in person and also was authorised by OAM on 27 November 2011 to speak on behalf of OAM at the Hearing.

2. Having heard the representations of the parties and their representatives and having considered the documentation previously filed, the Panel, in the Chairman's Order of 29 November, instructed the parties to negotiate in good faith with a view to attempting to reach a mutually acceptable settlement. In its Order, the Panel gave guidance on certain elements which it considered any such settlement should contain. These included a publishable acknowledgement by the Applicants that they had breached certain requirements and principles of the DFSA, as well as an appropriate Enforceable Undertaking or equivalent document. At the Hearing, the Panel mentioned three possible options in relation to the firm's licence which the settlement discussions might focus on:

   (a) Authorisation to be allowed to remain but the restriction on doing any business would also remain until the firm had reconstituted its management and shareholding structure;

   (b) Authorisation to remain but a re-application would be required when the firm had reconstituted itself;

   (c) Authorisation to be removed and a reconstituted company would be free to apply for a new licence.

3. The Panel allowed the parties until 21 December to conduct negotiations with a view to reaching a settlement. If no agreement was reached by that date, the Panel declared its intention to issue its decision in each of these cases.

4. The Panel has been informed that no agreement was reached by 21 December. Accordingly, the Panel hereby issues its decision in relation to CII.

Decision

5. The Panel has unanimously decided that the Authorisation and Licence of CII should be withdrawn, based on the findings of fact set out below. Because the Applicant did not seek or obtain an order staying the Decision during the pendency of the appeal, the withdrawal shall continue to have effect as from 26 June 2011.

Background

6. CII (or the "Firm") was authorised by the DFSA as a Category 2 firm in February 2009. Key people involved in the governance and management of CII were as follows:

   (a) OAM and HAA, the two shareholders and thus Controllers of CII, holding 51% and 49% respectively, both Licensed Directors of CII;

   (b) The remaining three directors of CII, two of whom were never authorised as Licensed Directors;

   (c) Ms X, Senior Executive Officer of CII during the relevant time for the purposes of this case (February 2009 until June 2011);

   (d) Mr Y, Financial Officer of CII during the relevant time;

   (e) Mr Z, Compliance Officer and Money Laundering Reporting Officer of CII from 28 April 2010 until 6 October 2010;

   (f) LS, Board Secretary of CII during the relevant time and up to the present, who also appeared at the Hearing to represent CII.

7. The DFSA's Notice of Decision found that CII had breached PIB Rules 2.2.1 (which sets the basic capital requirement for an Authorised Firm—in the case of CII $2 million), PIB 4.5.2 (which requires an Authorised Firm to ensure that exposures to connected parties do not exceed 25% of its capital resources), GEN Rule 5.3.1 (1) (which requires an Authorised Person to establish systems and controls, including financial and risk controls, that ensure its affairs are managed effectively and responsibly by its senior management) and GEN Rule 5.3.7 (which requires an Authorised Person to establish and maintain effective compliance arrangements).

8. The DFSA in its Decision also found that CII breached the Principles for Authorised Firms in GEN Rules 4.2.1 (integrity), 4.2.3 (effectiveness of management systems and controls), 4.2.4 (adequacy of resources), 4.2.10 (open and cooperative dealings with regulators) and 4.2.11 (high standards of corporate governance).

Findings of the Panel

9. The Panel considered the DFSA's Notice of Decision, the Record (consisting of the documents which were reviewed by the Decision Maker who made the Decision against which the Applicants are appealing), the Statement of Appeal with its supporting documents, the DFSA's Statement of Response, the Applicants' Reply to the Statement of Response, the Statement of Adrian Bock and the oral evidence presented at the Hearing on 28 November 2011. The findings of fact were determined on a balance of probabilities.

A. General Findings

10. It was evident to the Panel that governance of CII was effectively in the hands of HAA and OAM, whose grant of authority to the senior managers of the Firm was extremely limited, particularly in relation to financial matters. The Board met infrequently and failed to play a significant role in the supervision of the Firm's business, despite its responsibility for governance of the company. Two of the directors were never authorised as Licensed Directors—a matter which should have been addressed by CII and which could have been followed up by the DFSA in the early months of the Firm's operation.

11. The case revolved particularly round two matters:

    (a) The "April Transactions" carried out in April 2010, which were triggered by the need to rectify a breach of PIB 4.5.2 due to CII having deposited more than 25% of its capital resources with another firm owned and controlled by OAM and HAA. The April Transactions involved the movement of substantially the same amount of money (approximately UAED 1,026,000) between a series of accounts in seven transactions over 18 days involving different banks. The DFSA submitted to the Panel that the purpose of these transactions must have been to give the impression to CII management that the breach of PIB 4.5.2 had been rectified, when this was not the case. HAA and LS (on behalf of CII) submitted to the Panel, on the other hand, that these transactions were the result of mistakes by an employee of the other firm controlled by HAA and OAM. The Panel noted that the relevant employee, when he was interviewed by the DFSA, had denied that he made such mistakes. The Panel also noted HAA's acknowledgement at the Hearing that he and OAM had also made mistakes. The Panel found the DFSA explanation of the series of transactions to be preferable. Further, even if it were to be accepted that the transactions were all the result of mistakes (regardless by whom), it was clear to the Panel, and we so find, that the relevant senior managers of the Firm (Ms X and Mr Y) were not kept informed of the transactions at the time and that this was in itself a serious failure in governance.

(b) CII's Term Deposit of approximately US$ 2 million or equivalent in UAE dirhams (representing the bulk of CII's capital resources) with Abu Dhabi Commercial Bank ("ADCB") was pledged as security for an overdraft to OAM in October 2009 which did not come to light until approximately 12 months later. This caused the Firm to be in breach of PIB 2.2.1 (its basic capital requirement) for a lengthy period because the pledge and overdraft rendered the deposit an illiquid asset. The senior management of CII responsible for submitting EPRS (capital adequacy) returns to the DFSA were not informed of the pledge or overdraft. Further, a shareholders' resolution of 15 August 2010 passed by HAA and OAM and sent by them to ADCB denied to the senior managers of CII access for a period of weeks to information from ADCB which would have enabled them to confirm whether a pledge existed.

12. The Panel focused its attention mainly on issue 2 above, because the rule breach was particularly serious and the evidence of intention by HAA and OAM to conceal information from senior managers at CII appeared more clear-cut. The latter aspect is covered in more detail in the Panel's Decisions concerning HAA and OAM as Authorised Individuals.

13. As far as CII as an Authorised Firm is concerned, it was not disputed before the Panel that breaches of PIB 4.5.2 and 2.2.1 had in fact occurred. In relation to both matters, the senior managers of CII responsible for monitoring the Firm's compliance with the DFSA's prudential rules were not in a position to perform their functions because they were not given access to relevant information. The Panel found that this constituted a breach of GEN 5.3.1 (1), GEN 5.3.7 and GEN 4.2.3. The Panel did not consider that a finding against the Firm was justified in relation to GEN 4.2.1 (general principle regarding integrity) because any such finding would relate more to the individuals than the Firm. The Panel did, however, consider that there was ample evidence that GEN 4.2.11 (general principle regarding high standards of corporate governance) had been breached. All of these breaches were due largely or entirely to the role played by HAA and OAM in the governance and management of the Firm.

14. In its Decisions concerning HAA and OAM, the Panel has found that both individuals are unfit to carry on a licensed function in an Authorised Firm. The question of what should become of the Firm's licence remains. Given that the settlement negotiations mandated by the Panel have been unsuccessful, the Panel considers that option (a) described in paragraph 2 above is no longer appropriate. The Panel therefore has considered options (b) and (c). The only benefit that the Panel can see in (b) is that it might preserve any goodwill that might exist in the Firm. However, the Panel has concluded that any such goodwill as may still remain must be minimal in the prevailing circumstances and that option (c) is the cleaner and preferable remedy. Accordingly, the Panel decided that CII's licence as an Authorised Firm should be withdrawn.

B. Findings on the Settlement Proposal

15. The Panel has also had occasion to examine the circumstances surrounding a proposal made by the Firm, when the DFSA was in the process of making its Decision (May-June 2011). The proposal by CII was to reconstitute its shareholding and management structure with a view to being allowed to retain its licence. Under CII's restructuring proposal, the Firm would alter its status to Category 4 (Advising and Arranging, rather than Dealing as Principal, with an accordingly lower capital requirement), the shareholdings of OAM and HAA would be reduced to 26% and 25% respectively and OAM and HAA would undertake to play no part in the affairs of CII; a new CEO (whose name and CV were supplied) would take over management and would hold the remaining 49% of the Firm.

16. CII's settlement proposal was rejected by the DFSA at a meeting of its Enforcement Decisions Committee ("EDC") on 1 June 2011 primarily on the grounds (according to the relevant minute) that the offer did not contain an acknowledgement of wrongdoing (the brief to the EDC mentions that the DFSA required a public enforcement outcome in order to meet its regulatory objectives). It did not appear to the Panel that any of this reasoning was conveyed to the Applicants, nor did the DFSA seek to pursue negotiations with them to see if such an acknowledgement could be obtained. In fact, the letter rejecting the Firm's proposal simply stated that the DFSA had decided not to enter into further settlement negotiations.

17. Other reasons for rejecting the settlement proposal (which are mentioned in the brief to the EDC and in the DFSA Decision) were that it was vague, unclear in places and involved OAM and HAA remaining as Controllers and collectively still holding over 50% of the Firm. It does not appear, however, that these reasons were conveyed to CII either. The DFSA appears to have excluded the possibility of pursuing settlement discussions with a view to seeing whether a new restructuring proposal might be negotiated for the Firm.

18. The Panel concluded that the DFSA were justified in rejecting the settlement proposal in the form in which it was made. However, the Panel considered that the DFSA should have explained to CII its reasons for rejecting the proposal. Although the DFSA is under no obligation to entertain settlement proposals, the Panel considered that, taking account of the context of the DIFC as a regional as well as international financial centre, it should have made an effort to find a basis on which the Firm might have continued to operate without the involvement of HAA and OAM in management and no doubt with a further reduction in their shareholdings, even if that would have meant the Firm's re-applying for authorisation (which it had offered to do). This contributed to the Panel's decision, already mentioned above, to instruct the parties, following the Hearing, to negotiate in good faith with a view to trying to reach a mutually acceptable settlement. The fact that no such settlement was reached may indicate that it was never achievable. However, this does not in the Panel's view justify the DFSA's summary rejection of further settlement negotiations in June without informing the Applicants of the reasons for such rejection.

Costs

19. On 24 August 2011, the Panel ordered that the ultimate decision on payment of filing fees by HAA and OAM and payment, waiver, allocation, and reimbursement of other costs would be reserved until the conclusion of these proceedings.

20. No Order as to costs is made at this stage. However, the Panel's rejection of the Appeal leads the Panel to leave the way open for the DFSA to make an application as to fees and costs. If such an application is made, the Panel will expect to see a quantified statement of out-of-pocket costs incurred, and will expect to be able to deal with the matter by correspondence, giving the Applicants an opportunity to comment on the DFSA's claim before making its Order, which will also deal with the matter of filing fees.

Publicity

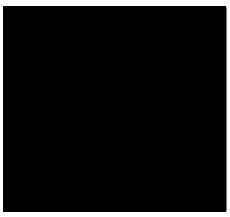
21. The Panel will make a further Order in due course, without a further Hearing, concerning the placing of this Decision on the DFSA's website, as envisaged in Procedural Rule 53 of the Regulatory Appeals Committee. Until such further Order, this Notice of Decision shall not be disclosed publicly.

Supplementary Comments

22. Although not related to its Decision, the Panel considers it appropriate to comment on one other circumstance in this case, which came to its attention as a result of the attempted settlement negotiations mentioned in paragraph 2 above. The Panel became aware that CII sent several letters and meeting requests to the Governor of the DIFC and other senior DIFC officers, both during and after the attempted settlement discussions with the DFSA in May-July 2011 and most recently (and most seriously) in November-December, while the settlement negotiations mandated by the Panel were taking place. The relevant letters included requests to the Governor to intervene personally in the case and to cancel the DFSA's Decision of 26 June 2011.

23. The sending of such letters and seeking of meetings was, in the view of the Panel, a highly improper attempt to bring extraneous pressure to bear on a regulatory decision-making process. The regulatory independence of the DFSA (which is enshrined in Dubai Law) means that conduct of this kind is reprehensible at any time. But it is particularly to be deplored that the most recent approach to the Governor took place at a time when CII was involved in a formal and structured appeal process provided for by law. Surprising as it may seem, it appears that the relevant directors of CII (i.e. those who were involved in the decision to seek intervention by the Governor or other parties) must have been unaware of the regulatory independence of the DFSA. If so, that constitutes further evidence that the relevant directors of CII did not understand the regulatory framework which governs DFSA-authorised firms. The only alternative interpretation would be that they were aware of the relevant law and procedures, and yet took a thoroughly reprehensible (and predictably futile) decision to try to circumvent the due process.

18 January 2012
For the Regulatory Appeals Committee



Robert Owen
Chairman