

Appeals to the AIFC Court from regulatory decisions

Justice Sir Stephen Richards

AIFC Court

28 May 2020

1. Relevant jurisdiction of the AIFC Court

- AIFC Court Regulations, Article 26(5):

“The Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body ... as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules where the appeal relates to: (a) a question of law; (b) an allegation of a miscarriage of justice; (c) an issue of procedural fairness; or (d) a matter provided for in or under AIFC law.”

- AIFC Financial Services Framework Regulations, section 11:

“A Person aggrieved by a decision of the AFSA may appeal to the AIFC Court against the decision. The grounds of an appeal ... are that (a) the decision was ultra vires or there was some other error of law; (b) the decision was unreasonable; (c) the decision was made in bad faith; (d) there was a lack of proportionality; or (e) there was a material error as to the procedure.”

2. The powers of the AFSA

- AIFC Financial Services Framework Regulations: wide-ranging powers in relation to the regulation, control and supervision of financial activities in the AIFC, including:
 - Rules, directions, licensing, etc
 - power to impose or vary Licence conditions etc, or to withdraw or suspend a Licence (section 98)
 - power to impose a prohibition (section 99) or a requirement (section 100)
 - power to impose sanctions for contraventions (section 118)
- Contraventions include (section 119): failure to comply with any prohibition or requirement, doing anything prohibited under legislation administered by the ASFA, not doing something that the Person is required to do under such legislation, or acts of fraud etc.
- Sanctions include (section 118): a fine, censure, and various types of direction (to effect restitution or compensation, to account for profits, to cease and desist, to remedy the contravention, etc)

3. Regulation in the Covid-19 environment

AFSA press release of 20 April 2020:

- Introduction of targeted measures to support AIFC Participants and ensure market integrity and stability
- Extension of deadlines for submission of various types of mandatory reports and market disclosure
- But emphasis that “the regulator is operating in business as usual mode and continues performing supervision over the financial markets”
- Attention drawn to “the importance of complying with requirements for systems and controls ...”
- Expectation that “prudentially regulated firms will actively manage their liquidity”

Increased chance of adverse decisions in the exercise of AFSA’s supervisory and enforcement powers?

4. The grounds of appeal against AFSA decisions

The grounds of appeal under section 11(2) of the AIFC Financial Services Framework Regulations:

- (a) the decision was ultra vires or there was some other error of law
- (b) the decision was unreasonable
- (c) the decision was made in bad faith
- (d) there was a lack of proportionality
- (e) there was a material error as to the procedure

What those grounds indicate is that this is not a full appeal on the merits but is directed at determining whether the decision was vitiated by legal or procedural error

5. Ground (a): ultra vires or other error of law

Very broad in scope, covering for example:

- acting outside the powers conferred by the governing legislation
- misinterpreting or misapplying a relevant legislative provision
- fettering the exercise of a discretion by applying an inflexible policy
- failing to take relevant considerations into account, or taking irrelevant considerations into account

6. Ground (b): unreasonableness

- Was the decision one that a reasonable decision-maker could take? In an area of discretionary judgement, there is often scope for reasonable people to reach different conclusions
- The role of the court is to see whether the decision fell within reasonable limits, not to substitute its own judgment for that of the decision-maker
- The court will not normally interfere with the decision-maker's findings of fact
- The weight to be given to relevant considerations, and the balance to be struck between them, are matters for the judgment of the decision-maker, subject to the reasonableness of the overall conclusion
- The court will take into account the expertise of the decision-maker and, for example, whether the decision required the evaluation of complex economic evidence

7. Ground (c): bad faith

- Bad faith may include, for example:
 - the imposition of a sanction because of personal animosity on the part of the decision-maker
 - making a decision for some other dishonest motive
- A serious allegation and likely to be difficult to prove
- But where a decision is shown to have been made in bad faith, the immunity otherwise enjoyed by the AFSA under section 11(4) of the AIFC Financial Services Framework Regulations is disapplied

8. Ground (d): lack of proportionality

Proportionality overlaps with reasonableness and can often produce the same result but focuses on a more structured analysis of the appropriateness of, and necessity for, the measure decided on

Particularly important in relation to interferences with fundamental rights, where a four-stage test has been adopted:

- Is the objective sufficiently important to justify the limitation of a fundamental right?
- Is the measure rationally connected to the objective?
- Could a less intrusive measure have been adopted?
- Having regard to these matters and to the severity of the consequences, has a fair balance been struck between the rights of the individual and the interests of the community?

Consider for example in relation to a sanction: is it excessive in relation to the contravention, having regard to hardship to the individual and the wider public interest?

9.1 Ground (e): material error as to procedure

Section 10 and schedule 1 of the AIFC Financial Services Framework Regulations lay down the procedures to be followed by the AFSA, with limited exceptions, in making a decision:

- Preliminary notice containing specified information (the proposed decision, reasons, materials considered, etc)
- Opportunity to make representations in person and in writing
- Consideration of any representations received
- Decision notice containing specified information; alternatively notification that the AFSA has decided not to make the decision

- Where the AFSA concludes that delay would be prejudicial to the interests of users of financial services or of the AIFC, the pre-decision requirements do not apply but an opportunity must be given to make representations after the decision; any representations received must be considered; and the decision may be confirmed, withdrawn or varied

9.2: Ground (e): material error as to procedure, cont.

Examples of issues that might arise as to compliance with the procedures laid down by section 10 and schedule 1:

- Adequacy of reasons
- Adequacy of time allowed for representations
- Where pre-decision requirements dispensed with on the ground that delay would be prejudicial, whether that was a lawful judgement by the AFSA

A further potential question: if there was a failure to comply with the procedures, was that a “material” error?

9.3 Ground (e): material error as to procedure, cont.

Another area of potential procedural error is bias or the appearance of bias (apparent bias):

- Actual bias is rare and difficult to prove
- Test for apparent bias: whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility of bias on the part of the decision-maker
- Apparent bias includes the possibility of predetermination of the case by the decision-maker, or approaching the issues with a prematurely closed mind

Note the importance attached generally to procedural fairness in protecting the rights of the defence and promoting the quality of decision-making

10.1 Appeal procedures – the Regulations

Schedule 2 of the AIFC Financial Services Framework Regulations sets out some key elements of the procedure for an appeal under section 11:

- An appeal may be instituted within 28 days of the decision notice, by serving a claim form in accordance with the AIFC Court Rules
- An appeal does not operate as an automatic stay of the decision (but note the power of the AIFC Court under paragraph 3(c) of schedule 2 to suspend or modify the operation of a decision pending the determination of the appeal)
- The AIFC Court may confirm the decision in whole or in part, or may set the decision aside and, if appropriate, remit the matter to the AFSA with directions

The appeal lies to the Court of First Instance, whose decisions are final (article 26(5) of the AIFC Court Regulations). It will generally be heard by a single judge (article 28(2))

10.2 Appeal procedures – the Court Rules

Appeals in general are governed by Part 29 of the AIFC Court Rules. Part 29 applies to appeals to the Court of First Instance from decisions of the AFSA (see rule 29.1(2)) but “is subject to any ... enactment ... which sets out further procedures with regard to any particular category of appeal” (rule 29.3) and may therefore have to be applied with modifications to give effect to the AIFC Financial Services Framework Regulations. Consider for example:

- the time limit for instituting an appeal (21 days under rule 29.10 but 28 days under schedule 2)
- the manner of instituting an appeal (an “appellant’s notice” under rules 29.23-29.27 but a “claim form” under schedule 2)
- the requirement of permission to appeal (the norm under rules 29.5-29.6 but not mentioned in schedule 2)
- the conditions for allowing an appeal (compare rule 29.7 with section 11 of the AIFC Financial Services Framework Regulations)

Note also the provisions relating to hearings in public/private (rules 22.2-22.7 of the Court Rules; compare schedule 2, paragraph 4, of the AIFC Financial Services Framework Regulations)

11. Other forms of recourse to the AIFC Court in regulatory matters

The scope for involvement by the AIFC Court in regulatory or related matters goes much wider than appeals against AFSA decisions. See, for example, these provisions of the AIFC Financial Services Framework Regulations:

- Section 28: application to recover money paid under an agreement made in breach of a regulatory prohibition
- Section 54: application for directions about compliance with the Business Rules of an Authorised Market Institution
- Section 112: application for an order sanctioning a Relevant Transfer
- Sections 124-126: applications for injunctions
- Sections 127-128: applications for restitution orders
- Section 129: application for recovery of damages caused by an intentional, reckless or negligent breach of duty, requirement, prohibition etc imposed by or under the Regulations

12. Conclusion

The AIFC Court, specifically the Court of First Instance, has a clear and important appellate function in relation to regulatory decisions by the AFSA.

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