The Re:NMC Healthcare decision

Transforming companies using the ADGM Companies Regulations 2020: The consequences of redomiciliation for insolvency and litigation in the UAE by Timothy Killen and Robert Whitehead.

BACKGROUND

There are three legal regimes that operate in cross-border insolvency situations in the UAE: (1) the common law system in the Dubai International Financial Centre (the "DIFC"); (2) the common law system in the Abu Dhabi Global Markets (the "ADGM"), and (3) the UAE civil law system.

The "onshore" UAE civil law system utilises the Civil Procedures Law whereas the DIFC and ADGM use a law which closely follows the UNCITRAL Model Law on Cross-Border Insolvency. The DIFC and ADGM (common law) systems have proved popular with international organisations, with the available legal framework being perceived as providing an orderly and transparent way to deal with insolvency events.

The recent case in the ADGM Courts of ***Re: NMC Healthcare Ltd*** [2020] ADGM CFI 0008 relating to (onshore) UAE companies being subject to "redomiciliation" to the ADGM and subsequently placed into administration by order of the ADGM Court, provides an interesting and important example of why the ADGM Courts, at least, may see an increase in the share of international insolvency business carried out in the region.

In this note, we consider the decision

in *Re: NMC Healthcare* Ltd and its wider ramifications, including how the process might be used in future in the UAE's common law Courts, and potential wider issues of intra-UAE conflicts of jurisdiction in litigation involving redomiciled companies.

WHAT HAPPENED?

In 2012, the NMC group became the first UAE-based business to be listed in the premium section of the official list of the London Stock Exchange and until December 2019, NMC appeared to be carrying on business as normal; however, on December 17, 2019, Muddy Waters Capital LLP, published a report which raised questions about the group's consolidated accounts and wrote of "red flags" raising "serious doubt about the company's financial statements" and concerns about "fraudulent asset values and theft of company assets."

Following an investigation, NMC Health PLC ("NMC Health") (the English-incorporated top company for the Group) announced to the market that supply chain financing arrangements had been discovered which had not been disclosed to, or approved by, the board of NMC Health, and it was later discovered that there was an undisclosed debt of approximately USD4.5 billion or more.

The English High Court appointed two insolvency practitioners as joint administrators of NMC Health on April 9, 2020; however, NMC Healthcare Limited ("NMC Ltd") and 35 of its direct and indirect operating subsidiaries (the "NMC Companies") were all limited liability companies incorporated, variously, "onshore" in the Emirates of Abu Dhabi, Dubai and Sharjah and were therefore not within the jurisdiction of the English courts, and accordingly not a part of the English administration process.

In September 2020, the NMC Companies each applied to the ADGM Companies Registrar to be registered in the ADGM and on September 15, 16 and 17, 2020 the Registrar approved each of these applications and issued "certificates of continuance" for each of the NMC Companies.

Very shortly afterwards, on September 27, 2020, Justice Sir Andrew Smith, sitting in the ADGM Court, heard an application pursuant to the (ADGM) Insolvency Regulations 2015 (the "IR 2015") requesting that the Court appoint administrators of the NMC Companies.

Seven lenders representing approximately USD2.1 billion (or approximately 22 per cent) of the group's outstanding financing

debt made submissions at the hearing including the Commercial Bank of Dubai PSC ("CBD") (who appeared through Counsel), Abu Dhabi Commercial Bank, Barclays Bank PLC, HSBC Bank Middle East Limited, Standard Chartered Bank DIFC Branch, Emirates Islamic Bank, and Sculptur Capital Investment Limited (who all submitted letters to the Court).

Sir Andrew granted the application, and joint administrators were duly appointed in respect of the (now) ADGM NMC Companies (the "Joint Administrators") following which an administration order was granted by the ADGM Courts (the "ADGM Administration Order"), and priority funding arrangements were approved.

In the DIFC Court, by Order of Justice Wayne Martin dated November 11, 2020, upon reviewing the ADGM Administration Order, it was ordered that the Joint Administrators be recognised as such within the DIFC and were entitled to the assistance of the DIFC Courts in carrying out their functions and able to apply to the DIFC Courts to stay any proceedings that had been, or may in the future be, commenced against the NMC Companies (the "DIFC Order").

WHY IS IT IMPORTANT?

The redomiciliation of companies is not in-and-of-itself something which is unusual, and it occurs through different mechanisms in many jurisdictions across the world. The precise steps to be taken in any case will depend upon the legal regime of the two states involved (the original place of incorporation and the intended new place of incorporation); common mechanisms include transferring an incorporation of a company to that of another state, incorporating a new holding company in a state and transferring the shares and/or holding structure to the newly incorporated entity or (less commonly) designating an existing company or branch in another state as a head office.

What was notable about the ADGM NMC case was therefore not the redomiciliation itself, but rather that the ADGM Administration Order was made so soon after the redomiciliation of the NMC Companies. It is this fact which raises questions as to the possible future use of redomiciliation in the UAE in relation to insolvency processes and, more widely, potentially in relation to litigation generally.

REDOMICILIATION UNDER THE ADGM COMPANIES REGULATIONS

In the case of the NMC Companies the redomiciliation mechanism used was that set out in Part 7, Chapter 2 of the ADGM Companies Regulations (the "2020 Regulations").

The 2020 Regulations enables a body corporate which is incorporated outside the ADGM to apply to the ADGM Company Registrar for "continuance" within the ADGM by way of the issue of a certificate that it continues as a company registered under the Regulations.

It is a requirement of such an application for the prospective redomiciled company to be authorised to make such an application by the laws of the jurisdiction under which it is incorporated outside the ADGM (2020 Regulations, regulation 100(1)). The certificate of continuation transforms a company incorporated outside the ADGM into an ADGM company; the non-ADGM company will continue its existence as a company registered under the Companies Regulations while it ceases to exist in its (original) jurisdiction of incorporation.

The impact of this process is significant, as in the case of a UAE (onshore) entity using this mechanism to become an ADGM

entity, the transformed entity will from the date of issue of the certificate no longer be subject to the UAE Civil Procedures Law and instead will be subject to different rules and regulations under the ADGM IR 2015 regime.

Regulation 107(3) of the 2020 Regulations provides that a certificate of continuance is conclusive evidence that the company is formed and registered under the Companies Regulations, and the requirements of the Regulations have been complied with in respect of the continuance of the company under them.

Under regulations 101(1) and (3) of the 2020 Regulations, the redomiciliation mechanism cannot, however, be used by a body corporate or company if it is undergoing any insolvency process, or is insolvent. Under regulation 101(4) of the 2020 Regulations, the jurisdiction under which the body corporate is being wound up or is in liquidation is immaterial.

There are various documents and pieces of information that must accompany an application to the Registrar, as set out in regulation 102 of the 2020 Regulations, including a statement of solvency in accordance with regulation 114. Such statement must be signed by each person who is a director of the applicant and must state that, having full inquiry into the affairs of the applicant, the director reasonably believes that the company will be able to discharge its liabilities as they fall due upon the issue of a Certificate of Continuance to it.

LIMITS OF THE ADGM REDOMICILIATION MECHANISM IN INSOLVENCY

Given these limitations and requirements, in particular in relation to statements of solvency, it is perhaps surprising that the NMC Companies were issued a certificate of continuance and then so swiftly placed into administration – a process that is often used when a company is in financial distress.

The administration regime in the ADGM broadly follows that in place in England and Wales. In respect of orders for administration made under the IR 2015, by Part 1, Chapter 2, section 7, a Court may make an order for administration only if satisfied (i) that the Company is or is likely to become unable to pay its debts and (ii) that the administration order is reasonably likely to achieve the purpose of administration (such purposes are set out at IR 2015, Part 1, Chapter 1, section 2).

In assessing whether (i) above is satisfied, the ADGM Court in Re:NMC Healthcare applied the well-known test of insolvency as set out by the English Supreme Court in BNY Corporate v Eurosail [2013] UKSC 28 which provides in essence for either cash flow insolvency or balance sheet insolvency.

Sir Andrew found that both tests were likely satisfied in respect of each of the NMC Companies. This does, then, raise the question of how, as at September 17, 2020 the NMC Companies were able to put forward evidence of insolvency, but (apparently) only 10 days or so prior had been able to make an application to the Registrar which required a statement of solvency to be made.

It is noted that, at [19] of *Re:NMC Healthcare* it was recorded that CBD reserved its rights in relation to the applications to continue in the ADGM made by the NMC Companies, although Sir Andrew remarked that CBD "*did not make any challenge to the process before me, and I do not know what those rights might be*".

It seems, therefore, in this case that as none of the NMC Companies' creditors who appeared or made representations by way of letter objected to the administration order, or the continuation applications, the matter was allowed to proceed.

Whether this process will be open to parties in more contentious insolvency situations remains in doubt, and one matter which remains to be seen (especially in light of Sir Andrew's comments in Re:NMC Healthcare) is the procedure by which the redomiciliation process may be challenged by, e.g. a disgruntled creditor who finds a company now subject to IR 2015, and not the onshore Civil Procedures Law. One possibility may be by way of proceedings for a declaration, an alternative may be to challenge the decision of the Registrar by way of Judicial Review.

Where available, however, the process may prove attractive. As demonstrated in the case of the NMC Companies, the ADGM Administration Order and DIFC Order enabled the Joint Administrators to implement the administration procedure which provided the NMC Companies with the protection of a statutory moratorium. The moratorium did not alter the substantive rights of any creditors against

> "A wider question is also raised by the Re:NMC Healthcare decision, and that is whether domiciliation can be used, not only in respect of a choice of insolvency regimes, but perhaps also in the case of a choice of court jurisdiction for commercial disputes."

any of the NMC Companies; rather, it simply suspended the exercise of those rights during the administration.

As in the above example, the mechanism could be used by any companies that require "breathing space" to allow administrator(s) to be appointed and reorganise the company's affairs and/or conduct an orderly realisation of the company's assets. This will ensure that the goodwill and value of the business is preserved and, as administration often offers better returns to unsecured creditors than an immediate liquidation because of the protection of a statutory moratorium, it may well be the case that contested continuation applications in the context of intended insolvency applications in the ADGM may in fact be few and far between.

WIDER IMPLICATIONS

A wider question is also raised by the *Re:NMC Healthcare* decision, and that is whether domiciliation can be used, not only in respect of a choice of insolvency regimes, but perhaps also in the case of a choice of court jurisdiction for commercial disputes.

Redomiciliation is something that can occur in the DIFC (HSBC Bank Middle East Limited having redomiciled to the DIFC in June 2016 being one high-profile example). The DIFC Court's jurisdiction rules (set out in the Judicial Authority Law, Law No.12 of 2004, or "JAL") provides that the DIFC Court may accept jurisdiction over any dispute to which a DIFC Establishment is party. A DIFC Establishment includes (see JAL Art. 2) any entity "*established…within the DIFC*".

The approach of the JAL focusing on the place of incorporation of a "party" rather than a "defendant" for the purposes of establishing jurisdiction is relatively novel (at least from a common law perspective) as it may give claimants more control over forum than they would otherwise enjoy in other common law jurisdictions.

Further, given, as confirmed by the DIFC Court in *Tavira* Securities Ltd v Re Point Ventures [2017] DIFC CFI 026 (December 17, 2017), Article 5(A)(1)(a) JAL can be engaged even where the relevant events in issue occurred before a claimant is a DIFC Establishment, the door is clearly open for parties to "generate" DIFC Court jurisdiction by the process of redomiciliation. Whilst it is, of course, recognised that the costs of doing so may be disproportionate in many cases, it is not difficult to imagine a piece of litigation of sufficient value and importance to justify such steps to be taken. Parties should be aware, however, that in the DIFC Courts, forum non conveniens arguments may be raised in such circumstances.

The facts and issues in *Tavira* have yet to be replicated in the ADGM although given the ADGM's Founding Law (as recently amended) provides for a similarly-worded jurisdictional "gateway" to that at 5(A)(1)(a) of the DIFC JAL (see Abu Dhabi Law no.4 of 2013, Article 13(6)), it is perhaps inevitable that such an argument will soon be raised and considered.

CONCLUSION

The case of *Re:NMC Healthcare* provides an interesting example of the part that redomiciliation to one of the UAE's free zones might play where there are "friendly" insolvency applications at issue (i.e. those insolvency steps supported by creditors). What remains to be seen is whether, given the requirement of a statement of solvency to be provided at redomiciliation, the process may be challenged where creditors oppose the use of the ADGM or DIFC insolvency rules.

Re:NMC Healthcare also provides interesting food for thought on the implications which the redomiciliation process might have in establishing the jurisdiction of the ADGM and DIFC Courts in litigation in the region more generally.

Text by:
1.TIMOTHY KILLEN, *barrister, 2 Temple Gardens, London*
2. ROBERT WHITEHEAD, *senior associate, Hamdan Al Shamsi Lawyers & Legal Consultants, Dubai*