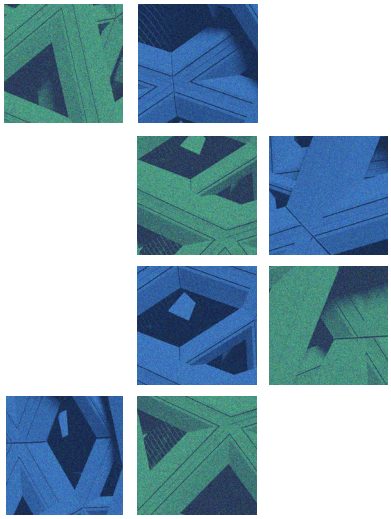

Extra-territoriality in offshore proceedings

Abu Dhabi General Markets court decides that it can compel production from foreign persons

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JANUARY 2024

In a detailed and wide-ranging judgment, the Abu Dhabi Global Markets (ADGM) court has confirmed that its jurisdiction under section 256 of the ADGM Insolvency Regulations 2022 (Inquiry into company's dealings) – the approximate equivalent to s 236 of the UK Insolvency Act 1986 – is not territorially limited and allows the court to make orders for the production of documents and for the examination of persons who are outside the territorial jurisdiction of the ADGM, both in the wider United Arab Emirates and likely beyond.

In so doing, the ADGM court has signalled its intention to be a global centre for cross-border insolvencies, and has adopted an approach which departs from the (currently, unfortunately parochial) approach of the Courts of England and Wales.

Background

The applicants were the joint administrators of three companies within the NMC group, which collapsed into administration after the publication of reports suggesting that the group was the victim of an extensive fraud and substantial financial irregularities.

One of the companies, which was incorporated in England, was placed into administration by the English court, and its administrators obtained recognition of their appointment in the ADGM. The other two companies entered administration pursuant to orders of the ADGM court. The administrators of all three companies applied to the ADGM court for orders under s 256 for the production of documents by three entities: Neopharma LLC, Nexgen Pharma FZ LLC and Ernst & Young Middle East (which had provided component audit services to the NMC group).

In a lengthy judgment, Justice Sir Andrew Smith granted relief against each of the respondents, and in doing so confirmed that ADGM insolvency law has extra-territorial jurisdiction when it comes to compelling production of documents: *Re NMC Healthcare Ltd & ors* [2023] ADGMCFI 0022.[1]

Extra-territoriality

The administrators applied under s 256 ADGM Insolvency Regulations 2022, which is not identical to but apparently derives from s236 English Insolvency Act 1986. Justice Sir Andrew Smith operated on the basis that s 236 did not enable the English court to make an order against persons who were not within that court's territorial jurisdiction. This follows from, among other cases, *Re Akkurate Ltd* [2020] EWHC 1433 (Ch), in which Sir Geoffrey Vos C held that the English courts were bound by the ruling to this effect in *Re Tucker* [1990] Ch 148 (CA).

The respondents all contended that s 256 was similarly territorially limited. Thus, where the respondents and the documents sought were outside the ADGM (they were instead in 'on-shore' Abu Dhabi, in the DIFC or in Bahrain), it was submitted that the ADGM court did not have jurisdiction to make the orders sought by the administrators.

Justice Sir Andrew Smith explained that s 1 Application of English Law Regulations 2015 provides that English common law applies in the ADGM only "so far as is applicable to the circumstances of the [ADGM]". The judge referred to English authorities on statutory interpretation generally, and where it was held that legislative provisions to support insolvency office-holders should be given extra-territorial effect, so as to enable them to fulfil their duties efficiently.

The judge proceeded to refer to the exceptional nature of the s 256 power, distinguishing this from disclosure obligations or powers in other contexts (e.g. the letter of request regime). The judge also distinguished *Re Tucker* on the basis

1 https://www.adgm.com/documents/courts/judgments/2022/2022-nov/adgmcfi-2020-020.pdf

that the key reasoning in that case did not apply in the ADGM. The relevant statutory powers were different as between the two jurisdictions, and (unlike the English courts) the jurisdiction of the ADGM court is not based on presence within the jurisdiction.

For completeness, Justice Sir Andrew Smith also set out the reasons why he would have departed from the rule in *Re Tucker* even if it was otherwise applicable in the ADGM. By reference to *Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Ltd* [2020] ADGMCFI 0002, the judge explained that the statutory power would have limited effect if it was confined to the territorial limits of the ADGM. He also referred to the fact that comity considerations did not apply where the extra-territorial power was being exercised only in respect of persons within the wider UAE.

The judge was dismissive of the suggestion that the court had no power in respect of documents which were outside of the ADGM. As with the location of the respondent, the judge held that this was a matter going only to the court's discretion and not to its jurisdiction.

Finally, the applicants were acting partly in their capacity as office-holder of a company in an English-administered insolvency process. The judge did not consider it to be relevant that the English-appointed administrators, who had been recognised in the ADGM, were seeking relief in the ADGM that (by reason of *Re Tucker*) they would not have been granted under the equivalent provision in their 'home' jurisdiction of England & Wales.

Relief granted

Justice Sir Andrew Smith granted substantially all the relief sought by the administrators, subject to certain revisions and limitations set out in the judgment and thereafter discussed between the parties at a consequentials hearing. The details of the relief sought and granted need not be discussed here, as they are merely illustrative of what the English court has previously granted in applications brought under s 236 Insolvency Act 1986.

International comparators

In a coincidence of timing, the reasoned judgment in *Re Three Arrows Capital Ltd* BVIHC (COM) 2022/0119 was publicly released shortly after the judgment of Justice Sir Andrew Smith was handed down. In *Re Three Arrows Capital*, Small Davis J in the BVI High Court (Commercial Division) granted an ex parte application made by the liquidators of a company for the private examination of and provision of documents by the company's directors. The application was made under ss 284–285 BVI Insolvency Act, which is the equivalent of the provisions under English and ADGM law as discussed above. The directors were outside of the BVI.

Here, the judge decided that the powers under the BVI enactment did have extra-territorial effect. In doing so, she specifically considered *Re Tucker*, but did not consider that it constrained the court's power. The judge explained that *Re Tucker* was considering a provision with an express territorial restriction, whereas the BVI enactment was not so limited. Likewise, Small Davis J explained that it was possible to serve the relevant originating process out of the jurisdiction, which was held not to be possible (save on the debtor) in *Re Tucker*.

By contrast, and in common with the approach of Justice Sir Andrew Smith in *Re NMC Healthcare Ltd*, Small Davis J considered the nature of the BVI as a jurisdiction to be highly relevant, explaining at [48] (see also at [55]) that: "The BVI is an offshore jurisdiction. More often than not, the companies' directors are resident overseas and many never come to the BVI. The companies have no other physical connection with BVI other than their registered agent and office. Usually, there are no assets within BVI. The fair inference is that persons abroad are within the ambit of section 284 and 285."

Small Davis J also referred to *Re AWH Fund Ltd* [2019] UKPC 37, where the Privy Council held that s 160 Bahamas International Business Act 2000 (the statutory provision regarding void preferences under Bahamian insolvency law) tended to have extra-territorial effect.

Small Davis J echoed the oft-repeated refrain that extra-territoriality is no longer to be considered 'exorbitant', in the way that it once was. As modern business has evolved to become ever more international, so too must the court's powers in increasingly international insolvencies.

Takeaways

- Jurisdictions around the world are recognising the importance of insolvency being considered on a supra-national basis. If courts are limited to acting within their own jurisdictions, they are behind the curve in the way that modern business operates.
- The ADGM, as a relatively new insolvency jurisdiction, has made the bold but welcome step of confirming that its powers are not limited to the ADGM or even the UAE. The ADGM court is prepared to grant the fullest assistance to office-holders in order to assist them to perform their duties.

- The ADGM court is willing to do this notwithstanding the limitations on the equivalent English insolvency power, which limitations have been upheld by various English judges only on the strict basis that those judges were bound to do so. If the matter were to be considered at the level of the Supreme Court, one might expect that English law would take the opportunity to move in the same direction as other jurisdictions (and, indeed, the English courts in other insolvency contexts).

Tony and Matthew were instructed by Chris Parker, Peter Manley and Samantha Reeves of DLA Piper UK LLP.

Meet the authors

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Tony has a busy practice specialising in the fields of insolvency, civil fraud, commercial litigation and company law. His work has a strong international element, and he has substantial experience of cross-border issues arising in connection with foreign insolvencies, pre-emptive relief, receiverships and other asset recovery tools.

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Matthew enjoys a broad commercial practice. Clients instruct him to advise or act in national and international litigation and arbitrations across Chambers' practice areas.

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