

**OCTOBER 12, 2020**

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## NMC Health PLC's Subsidiaries Enter Groundbreaking Administration Under the Jurisdiction of the ADGM Courts

### BACKGROUND

NMC Health plc (**NMC Health**) made news around the globe in December 2019 when it was the subject of a Muddy Waters report which alleged various bad acts had been carried out by the company. NMC Health was subsequently placed into administration by the High Court of England and Wales (the **High Court**), following an internal investigation which decided it was possible that the NMC Health group of companies may have been involved in "*suspected fraudulent behaviour*". The shares of NMC Health were delisted from the London Stock Exchange shortly after, on 27 April 2020.

### RECENT DEVELOPMENTS

The English High Court appointed Ben Cairns and Richard Fleming of Alvarez & Marsal as joint administrators of NMC Health on 9 April 2020, but NMC Health's operating subsidiaries in the Middle East, including its 36 UAE-incorporated subsidiaries (the **NMC Companies**), are not within the jurisdiction of the English courts and are not part of the English administration process.

On 27 September 2020, however, the Courts of Abu Dhabi Global Market (the **ADGM Courts**) placed the NMC Companies into administration and appointed Ben Cairns and Richard Fleming as administrators.

How can the ADGM Courts place onshore UAE-incorporated companies into an ADGM administration process?

### THE REGIME OF "CONTINUANCE"

The simple answer is that the ADGM Courts cannot – and did not – place non-ADGM companies into an ADGM administration process. The ADGM Insolvency Regulations 2015 (as amended) (the **Insolvency Regulations**) do not contain any provisions that could enable the ADGM Courts to issue administration orders in respect of non-ADGM companies.



However, the ADGM Companies Regulations 2020 (the **Companies Regulations**) contain a mechanism that enables companies not incorporated in the ADGM to be “*continued*” as ADGM companies (the **Continuance Regime** or **Regime**). This mechanism also existed under the ADGM Companies Regulations 2015 (as amended), which were repealed and replaced by the current Companies Regulations earlier this year. The Continuance Regime is governed by Chapter 2 of Part 7 of the Companies Regulations.

The Regime enables companies incorporated outside the ADGM to apply to the ADGM Company Registrar (the **Registrar**) for the issuance of a Certificate of Continuance (the **Certificate**). For all intents and purposes, the Certificate transforms a non-ADGM company (in the case of each NMC Company, a company incorporated in the UAE) 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 jurisdiction of incorporation. The Continuance Regime is not available to all companies. For example, a company cannot apply under the Continuance Regime if: (i) it is being wound up or is in liquidation; (ii) it is insolvent; (iii) a receiver, a manager or an administrator has been appointed, whether by a court or by any other means; (iv) it has entered into a compromise or an arrangement with a creditor, that is still in force; or (v) an application is pending before a court with respect to any of (i)-(iv). The jurisdiction where any such liquidation, receivership, or administration proceedings may be ongoing is immaterial to the continuance application.

Section 102, Part 7 of the Companies Regulations lists the documents and the information that must be provided to the Registrar alongside the application for continuance. One of the key documents is a statement of solvency. The statement of solvency must be signed by every director of the company applying under the Regime. It must state that, having made full inquiry into the affairs of the applicant company, the director reasonably believes that the company will be able to discharge its liabilities as they fall due upon the issue of the Certificate to it. The statement of solvency must also attest to the fact that the “*continued*” ADGM company will be able to carry on business and discharge its liabilities as they fall due until the expiry of a 12-month period after the date of the statement. The application for continuance must also be accompanied by “satisfactory” evidence that the company will “*cease to be incorporated under the other jurisdiction*” and, if a Certificate is issued by the Registrar, the interests of the members and creditors of the company will not be unfairly prejudiced. If the Company Registrar is satisfied that the company is eligible under the Continuance Regime and has complied with the requirements prescribed by Part 7, it will grant the application for continuance and issue a Certificate. The Certificate is conclusive proof of the fact that (i) the company is formed or registered under the Companies Regulations; and (ii) the requirements of the Companies Regulations have been met. When a company “*continues*” as an ADGM company, (i) it remains subject to all criminal and civil liabilities, contracts, debts, and other obligations to which it was subject immediately before the Certificate was issued, and (ii) all actions and legal proceedings, which were pending immediately before the Certificate was issued, may be continued by or against the company.

### THE ADMINISTRATION PROCEEDINGS OF THE NMC COMPANIES IN THE ADGM COURTS

Before the hearing on 27 September 2020 in the ADGM Courts, the NMC Companies had applied to the Company Registrar to be continued in the ADGM. All 36 applications were approved on 15-17 September 2020 and the Registrar issued Certificates in respect of all NMC Companies. Shortly thereafter, the NMC Companies applied to the ADGM Courts for an administration order. A priority funding application immediately followed the administration order application. Justice Andrew Smith (the **Judge**) heard and granted the applications on 27 September 2020 and handed down his reasoned judgment on 30 September 2020, noting the fact that the NMC Companies had applied for the continuance “*relatively recently*”.

The Companies Regulations do not contain any provisions that would allow a third party to challenge a continuance of a particular company. Therefore, once a Certificate of Continuance is issued by the Registrar, it cannot be challenged under the Companies Regulations.



## THE ADGM ADMINISTRATION ORDER

The Judge noted that the NMC group of companies owes approximately USD 6.8 billion to its creditors. After NMC Health was placed into administration by the High Court, some creditors formed a coordinating committee. Collectively, the coordinating committee is owed approximately USD 2.8 billion. At least 13 creditors who are not part of this coordinating committee have brought proceedings in onshore UAE courts in Dubai and Abu Dhabi as well as in the DIFC courts claiming they are owed monies by the NMC group of companies and seeking to recover those monies. Those proceedings were one of the reasons the NMC Companies applied for an ADGM administration order, one of the effects of such order is a creditor moratorium.

The Judge noted the legal advice given to the administrators of the NMC Companies which provided that ADGM administration orders are “*likely to be accorded effective recognition throughout the UAE and thus provide an effective platform for the stabilisation and restructuring of NMC*”. However, he ultimately determined that it is for the other UAE courts to decide whether proceedings against companies in administration under the order of the ADGM Courts will affect the proceedings before them, and, if so, how.

In any event, other UAE courts are unlikely to be grappling with this question in the immediate future. On 31 May 2020, the Federal Cabinet of the UAE issued a Resolution No. 21M/8F of 2020 (the **Federal Cabinet Resolution**), which directed local judicial councils of the UAE to be “*considerate*” of healthcare providers during the COVID-19 pandemic. The Federal Cabinet Resolution instructed the councils to consider imposing a six-month stay on claims, applications, appeals, seizures, and attachments against healthcare companies and their property.

The Head of the Supreme Judicial Council of Abu Dhabi issued Circular No. 5 of 29 June 2020, which implemented the Federal Cabinet Resolution for six-months. The Judicial Council of Dubai followed suit, by passing Resolution No. 17, which also implemented a six-month stay (effective until 1 March 2021) on onshore Dubai proceedings against over 60 healthcare providers. The DIFC Courts have not yet implemented the Federal Cabinet Resolution.

## WHAT DOES THIS MEAN FOR THE CREDITORS OF THE NMC COMPANIES?

Dubai and Abu-Dhabi onshore courts are subject to the six-month moratorium, leaving only the DIFC Courts able to consider the impact of the ADGM administration order on creditors’ claims against the NMC Companies. Specifically, will the DIFC Courts recognise the ADGM administration order and its effect (the most import being a creditor moratorium) and suspend all current claims which have been bought against the NMC Companies in the DIFC Courts?

If the Dubai, Abu Dhabi and DIFC courts do recognise the ADGM administration order, the creditors of the NMC Companies will be subject to a creditor moratorium and they will have to accept the outcome of the ADGM administration. For example, the NMC Companies may exit the ADGM administration process through a trade sale, splitting the NMC Companies into a good and a bad business with the good business being sold to new owners and the bad business being liquidated.

In all likelihood, the creditors of the NMC group of companies are not going to be in any worse position following the NMC Companies being placed into the ADGM administration process. The ADGM Courts granted the priority funding application sought by the joint administrators, allowing them to obtain credit or incur debt on the terms of the administration financing facility with Abu Dhabi Commercial Bank PJSC as the facility agent. Therefore, the administration procedure should enable the administrators a period of time to steady the ship and develop a long term plan for the survival of at least the good part of the business.



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