

Recognition of cross-border insolvency proceedings: a UAE perspective

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Enhanced cross-border trade and a march toward globalisation has resulted in companies and individuals having assets and business activities in multiple jurisdictions, thereby necessitating interaction with a diverse range of foreign laws and legal systems. Insolvency in this context often has cross-border consequences with a need to enforce court orders and judgments across multiple jurisdictions.

The United Arab Emirates has three legal regimes that potentially operate in cross-border insolvency situations. These are the UAE civil law system and the common law systems which apply in the Dubai International Financial Centre and Abu Dhabi Global Markets. The UAE civil law regime does not specifically address the recognition of a foreign insolvency order or proceeding, rather any such orders would be treated as foreign judgments and dealt with under the provisions of the Civil Procedures Law which deal with the enforcement of foreign judgments onshore in the UAE. The DIFC and ADGM, by contrast, have embraced the UNCITRAL Model Law on Cross-Border Insolvency, which is incorporated with certain modifications into each of the DIFC's and ADGM's Insolvency Law, no doubt in furtherance of their objectives to establish themselves as key players in the business world and the international insolvency arena. The result is a modern legal framework which provides an orderly and transparent way to deal with multi-jurisdictional restructurings and insolvencies for many international organisations in the DIFC and ADGM. The recent re-domiciliation of the previously UAE based NMC entities into the ADGM for the purpose of accessing its insolvency regime and the appointment of administrators under ADGM law is a case in point.

United Arab Emirates

As a matter of UAE law, the Commercial Code, the Civil Code nor the UAE Bankruptcy Law provide for recognition of foreign bankruptcies. The UAE has not incorporated into national law the UNCITRAL Model Law on Cross-Border Insolvency, and more generally there are no provisions in the UAE civil law for the recognition of foreign insolvency proceedings or which provide for co-operation and co-ordination with the courts of other jurisdictions.

The enforcement of foreign judgments in the UAE (outside of the DIFC and ADGM) is regulated by the Civil Procedures Law (UAE Federal Law No. 11 of 1992) which would also apply to the recognition of a foreign judgment on insolvency. Cabinet Resolution No.57 of 2018 amended the provisions relating to the enforcement of foreign judgments under the UAE Civil Procedure Law and provides a set of rules designed to improve the enforcement regime of foreign judgments and arbitral awards by establishing a process that is more expedient and less costly.

The conditions for enforcement of a foreign judgment have also been amended and the Execution Judge must now be satisfied that there is reciprocity with respect to the enforcement of foreign judgments as

between the foreign state which issued the judgment and the UAE (Article 85(1)) and that the following conditions under Article 85(2) have been fulfilled:

1. "That the Courts of the State do not have exclusive jurisdiction over the dispute on which the judgment or order has been issued, and that the Foreign Courts that issued the same have jurisdiction according to the rules of International Jurisdiction prescribed in its Law.
2. That the judgment or order has been issued by a Court in accordance with the Law of the State in which the judgment or order has been issued and duly certified.
3. That the Parties to the Lawsuit on which the foreign judgment is issued had been required to appear and were properly represented.
4. That the judgment or order has acquired the legal effect of **res judicata** according to the Law of the issuing Court, provided that a certificate shall be furnished indicating that the judgment has acquired the legal effect of **res judicata**, or where the same is already stated in the judgment itself.
5. That the judgment neither conflicts with a judgment or an order previously issued by a Court of the State nor involves anything that violates the public order or morality."

Whilst Cabinet Resolution No.57 has watered down previous strict conditions for the enforcement of foreign judgments and created a more favourable environment to facilitate such enforcement, a foreign administrator or liquidator seeking the recognition of his or her appointment by a UAE onshore court in order to exercise rights and powers in respect of UAE assets or to enforce any other orders will find that this will still be a challenge, if not impossible. Not least because the appointment is unlikely to satisfy the relevant conditions, particularly those at Article 85(2)(A) and (B), since the UAE Courts will almost always seek to assert exclusive jurisdiction in relation to matters involving UAE parties. Further, depending upon the jurisdiction that issued the order, reciprocity poses its own challenges - Article 85(1) requires reciprocity on the basis of the same conditions for enforcement as between the UAE and the relevant state.

DIFC and ADGM

One of the most important aspects of the Insolvency Laws of the DIFC and ADGM is their incorporation of the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law'). The Model Law was originally created to assist states in relation to the regulation of corporate **insolvency** and financial distress involving companies which have assets or creditors in more than one state in order to ensure the efficient, organised and predictable administration of multi-jurisdictional restructurings and insolvencies.

The Model Law has full force in the DIFC and ADGM. This means, in principle, that foreign insolvency proceedings are afforded recognition in the DIFC and ADGM and judicial co-operation is extended to courts in other jurisdictions in the context of cross-border insolvency proceedings, and co-ordinated approach for the many cross-border businesses in the DIFC which may eventually be involved in multi-jurisdictional restructuring proceedings

Schedule 10 to the ADGM Insolvency Regulations and Schedule 4 to the DIFC Insolvency Law are tailored versions of the Model Law which include certain modifications and additions adapting them for application in the DIFC and the ADGM (the 'Regulations'). The Regulations both comprise 32 Articles, which are almost identical in their wording and practical application, by contrast, the Model Law is less comprehensive, comprising 17 Articles.

The Regulations also helpfully distinguish between local, foreign and concurrent insolvency proceedings, with detailed provisions addressing each of these cases. The Regulations apply where:

1. the DIFC and/or ADGM Courts' (together the 'Courts') assistance is sought in respect of foreign proceedings; or

2. foreign assistance is sought in respect of DIFC/ADGM proceedings; or
3. foreign and DIFC/ADGM proceedings are concurrent; or
4. foreign interested parties seek to commence or participate in proceedings commenced under the Regulations.

Under Article 13 of the Regulations, foreign creditors have the same rights as DIFC/ADGM based creditors regarding the commencement of, and participation in, a proceeding under the Regulations. Foreign creditors are also not to be given a lower priority than that of general unsecured creditors solely because they are foreign creditors.

The Regulations stipulate that whenever notification is to be given to DIFC/ADGM creditors in respect of a proceeding, notification must also be given to known creditors outside the DIFC/ADGM.

An application under Article 15(2) of the Regulations for recognition of foreign insolvency proceedings must contain:

1. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
2. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
3. in the absence of 1 and 2, above, any other evidence acceptable to the Courts of the existence of the foreign proceeding and of the appointment of the foreign representative.

After an application is made under Article 15(2), and before a decision is issued in respect of the application, a foreign representative may make an urgent request for relief under Article 19 of the Regulations, including:

1. staying execution against the debtor's assets;
2. entrusting the administration or realisation of all or part of the debtor's assets located in the DIFC/ADGM to the foreign representative or another person designated by the Courts (in order to protect or preserve assets that are perishable or susceptible to devaluation or otherwise in jeopardy);
3. suspending the right to transfer or otherwise dispose of any assets;
4. providing for examination of witnesses concerning the debtor's assets;
5. granting any other relief that may be available under the laws of the DIFC/ADGM.

Upon recognition of a foreign proceeding, foreign representatives may request further relief to the extent not already granted under Article 19 of the Regulations. In making these decisions, the Courts must be satisfied that the interests of all creditors and other interested persons, including the debtor, are adequately protected.

As relates to co-operation and direct communication between the DIFC/ADGM Courts and foreign courts or foreign representatives, the Courts have comprehensive powers (under Article 27 of the Regulations) to:

1. appoint a person or body to act at their direction;
2. communicate with foreign courts or representatives by any means considered appropriate by the Court;
3. co-ordinate the administration and supervision of the debtor's assets and affairs;
4. approve or implement agreements concerning the co-ordination of proceedings;
5. co-ordinate concurrent proceedings regarding the same debtor.

Conclusion

The recognition of foreign orders and judgments in an insolvency context follow those of the law of the jurisdiction where recognition enforcement is sought. This may itself be a relevant consideration when considering a suitable home jurisdiction in the UAE which offers businesses an enviable choice of legal systems and jurisdictions. The widely reported appointment of an administrator in the ADGM in relation to multiple entities within the NMC Group, and subsequent recognition of the ADGM Administration Order by the DIFC Courts, has demonstrated that the insolvency regimes in the ADGM and DIFC are in line with international best practice, and investors can have absolute confidence in looking at the DIFC and ADGM as providing compelling business-friendly jurisdictions for investment or through which they can structure their investments.

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