ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2015

IN THE MATTER OF NMC HEALTHCARE LTD (in administration) (subject to a deed of company arrangement) **AND THE COMPANIES LISTED IN SCHEDULE 1 TO THE ADMINISTRATION APPLICATION**

AND

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2015

IN THE MATTER OF NMC HEALTH PLC (in administration)

BENJAMIN THOM CAIRNS AND RICHARD DIXON FLEMING (in their capacities as the joint administrators of **NMC HEALTHCARE LTD** (in administration) (subject to a deed of company arrangement), **NMC HOLDING LTD** (in administration) and **NMC HEALTH PLC** (in administration))

Applicants

(1) NEOPHARMA LLC

(2) NEXGEN PHARMA FZ LLC

(3) ERNST & YOUNG – MIDDLE EAST, trading as Ernst & Young Middle East (Abu Dhabi Branch)

Respondents

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2024] ADGMCFI 0008
Before:	Justice Sir Andrew Smith
Decision Date:	9 July 2024
Decision:	1. The r.117 Application is granted. 2. The Expert Evidence Application is refused.
Hearing Date:	Determined on the papers.
Date of Orders:	To be drafted by the representatives of the Applicants, in consultation with the Third Respondent's representatives, to give effect to this Judgment.
Catchwords:	Whether production of documents might contravene foreign law. Scope for expert evidence on foreign law under CPR r. 142. Whether expert evidence is reasonably required. Submissions on foreign law under CPR r.117. Translation of documents.
Cases Cited	NMC Healthcare Ltd v Dubai Islamic Bank PJSC, [2023] ADGMCFI 0017 Iraqi Civilians v Ministry of Defence, [2016] UKSC 23 Byers v Saudi National Bank, [2022] EWCA Civ 43, Bank Mellat v HM Treasury [2019] EWCA Civ 449 Harley v Smith [2010] EWCA Civ 78 Brownlie v FS Cairo [2021] UKSC 45
Case Numbers:	ADGMCFI-2020-020; and ADGMCFI-2022-063
Parties and representation:	***Applicants*** DLA Piper UK LLP ***Third Respondent*** Clyde & Co LLP

JUDGMENT

Introduction

1. This ruling is about matters that arise from paragraph 18 of my Order in these proceedings of 5 February 2024 (the "**February Order")**, which followed my judgment of 5 December 2023 ([2023] ADGMCFI 0022), in particular the question considered under the heading "*Prohibitions under UAE Law*" at paras 126 to 135. Paragraph 18 provided that, if the Third Respondent, Ernst & Young Middle East (Abu Dhabi Branch) ("**EYME**"), believed that the production of documents pursuant to the February Order would give rise to a real risk that it would be in contravention of the law of another jurisdiction, then, if EYME gave notice objecting to production, the question whether EYME should produce the documents might be subject to further consideration by the Court. This provision was included in the February Order because EYME had expressed concerns that production might contravene criminal and other laws of the United Arab Emirates ("**UAE**"). EYME having served notices dated 9 April 2024 and 10 May 2024 (the "**Notices**"), the Applicants, the Joint Administrators of three companies in the NMC Group, NMC Health PLC, NMC Healthcare Ltd,

and NMC Holding Ltd (the "**JAs**"), applied by notice dated 12 June 2024 for an order that nevertheless the documents should be produced by EYME (the **"Foreign Law Application"**).

Procedural History

2. By an order of 20 June 2024 (the "**June Order**"), I gave directions for management of the Foreign Law Application, including that any party who sought either (i) permission under rule 142(2) of the ADGM Court Procedure Rules 2016 ("**CPR**") to call an expert or put in evidence an expert's report under CPR r.14, or (ii) directions under CPR r. 117(2) that questions of foreign law be dealt with by legal submissions, should apply for permission or directions; and that an application for permission under CPR r.142 should be accompanied by a draft order specifying the particular issues that the evidence should address.

3. By an application of 28 June 2024 (the "**r. 117 Application**"), the JAs applied for directions that questions of foreign law arising in the Foreign Law Application are to be dealt with by legal submissions. The r.117 Application is supported by a witness statement of Mr Christopher Parker, a Partner in DLA Piper UK LLP, the JAs' solicitors.

4. By another application of 28 June 2024 (the "**Expert Evidence Application**"), EYME applied for an order permitting it to file and serve an expert report dealing with seven matters, and to apply for permission to call expert evidence. The Expert Evidence Application is supported by evidence of Mr Mark Beswetherick, a Partner in Clyde & Co LLP, EYME's solicitors. The seven matters are these:

> *a) What UAE laws might be contravened by [EYME] by production of the documentation as required by the February Order?*
>
> *b) Whether production of the material which [EYME] is required to produce by the February Order would breach any of the UAE laws identified in response to (a) above.*
>
> *c) Whether the reference to "the laws and regulations in force" at Article 12(1) of the 2014 Auditors Law is to onshore UAE laws and regulations only.*
>
> *d) Whether the reference to "permitted by Law" at Article 432 of the Penal Code is to onshore UAE laws and regulations only.*
>
> *e) Whether the 2014 Auditors Law extends to include advisory (non-audit) work which may be performed by accountancy and auditing professionals, as well as audit engagements.*
>
> *f) Whether disclosure may be permitted under the UAE laws identified in response to (a) above if client consent is provided.*
>
> *g) Whether the February Order means that [EYME] now permitted, as a matter of UAE law, to produce the documents without breaching the provisions of UAE law identified in response to (a) above.*

5. I have received further evidence and submissions about whether expert evidence and legal submissions about UAE law should be permitted on the Foreign Law Application. EYME requested an oral hearing of its application, but I consider that unnecessary. In my judgment, the r.117 Application and the Expert Evidence Application can both be determined satisfactorily and fairly without an oral hearing, and I decide them on the basis of the written evidence and submissions. Although the parties cited English and Abu Dhabi Global Market ("**ADGM**") authorities about how issues of foreign law are to be determined, the question that I have to decide is essentially one of case management under the ADGM regime, and so I must consider what directions will further the overriding objective, "*that the system of civil justice in the ADGM is accessible, fair and efficient*": CPR r.2(2). It is a fact-sensitive question, and decisions on different facts, *a fortiori* on different fact made under different procedural rules, are of limited, if any, assistance.

Scope for expert evidence of foreign law under CPR r.142

6. CPR r. 142(1) provides that "*Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings*". In the case of expert evidence of foreign law, therefore, the Court must consider whether the expert evidence is reasonably required, given that there is available to the Court the alternative course of dealing with questions of foreign law by legal submissions: CPR r. 117. Before I engage with the question whether in this case expert evidence is reasonably required, I make four observations.

7. First, EYME contends, through Mr Beswetherick's evidence, that in so far as it is necessary to determine UAE law, this "*does not simply involve this Court interpreting UAE statutes …; rather, it necessitates a focus on how those statutes would be interpreted and applied by relevant authorities in onshore UAE".* I agree: see *NMC Healthcare Ltd v Dubai Islamic Bank PJSC,* [2023] ADGMCFI 0017 at para 24*, citing Iraqi Civilians v Ministry of Defence,* [2016] UKSC at para 14 per Lord Sumption, and *Byers v Saudi National Bank*, [2022] EWCA Civ 43, in which Newey LJ said this (at paragraph 104): "*Where the foreign law is in the form of a provision of a code, statute or other written source, the task of the Court remains one of determining how the foreign Courts would itself interpret and apply it, based on the evidence of the expert witnesses. Generally speaking the Court's task is not to address how it would interpret and apply the provision; the wording of the provision is to be considered only as part of the evidence and as a help to deciding between conflicting expert testimony*".

8. Secondly, EYME criticised the proposal of the JAs that questions of foreign law be dealt with by submissions in these terms: that it "*envisages that lawyers without any experience or competence in respect of onshore UAE law will make submissions to a Court that is itself not an authority on onshore UAE law authority [sic] with no other material to guide either the parties or the Court*" and "*[i]f the Court has questions as to the way in which the UAE courts and other authorities would approach the interpretation and application of relevant UAE laws …, none of the legal representatives on either side will be competent to respond".* This assumption is quite unjustified: the Court does not only receive submissions from English advocates or lawyers from a common law background. If the Court directs that foreign law questions be deal with by legal submissions, the Court does not prevent or discourage the parties from presenting that part of their argument through a suitably qualified UAE lawyer. The parties might well consider that to be the sensible course. If a party decides to present its arguments through unsuitable or incompetent counsel, it must take the consequences.

9. Thirdly, Mr Beswetherick stated in his witness statement of 28 June 2024 that the "*sole issue in the [Foreign Law] Application is whether or not the production of certain documentation will give rise to a real risk that [EYME] would be in contravention of UAE law".* However, he also said in a witness statement of 5 July 2024 that the "*core issue for the Foreign Law Application is whether [EYME] is exposed to a risk (and if so what risk) of sanction by onshore UAE Courts and authorities".* Although I do not express a concluded view before hearing argument on the Foreign Law Application itself, his second statement seems to me the more accurate. As presently advised, I consider it likely that the approach of this Court should be that of English law, and specifically English law as explained by the English Court of Appeal in *Bank Mellat v HM Treasury* [2019] EWCA Civ 449. In that case, Gross LJ, with whom the other members of the Court agreed, endorsed (at para 62) the position stated in *Matthews and Malek, Disclosure* (5th ed.), at para. 8.26, as follows: "*The court may take into account, in deciding whether to order disclosure, the fact that compliance with the order would or might entail a breach of foreign law……. It will…need to be shown that the foreign law contains no exception for legal proceedings, and that it is not just a text, or an empty vessel, but is regularly enforced, so that the threat to the party is real. Even so, the court has a discretion and, on the basis that English litigation is to be played according to English and not foreign rules, it will rarely be persuaded not to make a disclosure order on this ground. More often than not where foreign law is raised as an objection, any threat of a sanction abroad against the disclosing party is found to be more illusory than real."* Gross LJ therefore concluded, "*When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other*

hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful" (at para 63).

10. Finally, I observe that CPR r.143 requires that an order permitting expert evidence specifies the "*particular issues which the expert evidence should address*" and the June Order reflects this. The first two matters listed by EYME in the Expert Evidence Application are not particular issues, but closer to general topics. The last matter is not within the proper ambit of expert evidence of foreign law, being not about the principles of foreign law but their application of foreign law to this specific case. It is not clear whether there is any, and if so what, difference, or "*issue*" between the parties about at least some of the other matters. Mr Beswetherick apparently recognised this: he said that "*If the Court is minded to grant permission to rely on expert evidence, it will be necessary to define the scope of the question(s) to be addressed by any expert(s). It is anticipated that this can readily be agreed between the parties* ….". It has not been explained why EYME has not sought to engage with the question earlier, despite the terms of the June Order. Even without this further delay, EYME already proposed directions that would mean that the Foreign Law Application would not be ready for hearing before late September 2024, and the need for the parties to seek to agree suitable issues and return to the Court to endorse their agreement or otherwise determine the issues would lead to further delay. If delay were necessary to do justice, the Court would accept it, but it is a relevant consideration.

Is expert evidence reasonably required in this case?

11. The basis of EYME's application is that "*complex issues of foreign law should be the preserve of exert evidence",* and Mr Beswetherick warned of the dangers of English lawyers interpreting foreign law without expert guidance. He cited in support of this a judgment of Sir John Chadwick in the English Court of Appeal in *Harley v Smith* [2010] EWCA Civ 78, who criticised the Judge for "*purport[ing] to construe foreign legislation by applying principles of interpretation which had not been established by evidence*". In that case, the Judge had heard expert evidence of foreign law and made a finding which was inconsistent with the only evidence on the point: that is far removed from the question that I am dealing with. In any case, the judgment must now be read subject to Lord Leggatt's observation in *Brownlie v FS Cairo* [2021] UKSC 45 that "*[t]he old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated"* (at para148), and further the ADGM procedure (unlike the English procedural rules) expressly recognises that foreign law may be presented by way of submissions.

12. It is asserted on behalf of EYME that the questions of foreign law are complex, but the assertion is neither persuasively developed nor exemplified. In a witness statement of 12 June 2024, Mr Parker identified the directly relevant laws, and it appears to me that he has done so accurately and comprehensively. Having considered what issues about them that might arise, I do not regard them as too complex to be dealt with by legal submissions. EYME has not identified any judicial authorities upon which it relies or what, if any, further material might be introduced upon these questions: Mr Beswetherick simply asserts that EYME does "*not accept … that there are no further laws or principles relevant to the foreign Law Application: such matters, as to the principles that would be applied in interpreting and applying the UAE statutes that have been identified, would be a key part of the proper subject-matter of expert evidence".* General statements of this kind are too vague to justify the Expert Evidence Application.

13. I observe that, in the Notices, EYME referred to UAE public policy and said "*EYME is … concerned that production of these documents may place it at real risk of contravening UAE public policy. This is particularly the case where: (a) … at least some of those documents will be used in relation to foreign proceedings and therefore removed from the jurisdiction of the UAE; and (b) some of the documents contain Sensitive Personal Information relating to individuals' health and family, and especially where it is foreseeable that some of the data may relate to Emirati nationals".* This point was not reflected in the list of seven matters that were identified in the Expert Evidence Application, and it was not developed by EYME

in its submissions on the r.117 Application and the Expert Evidence Application. I am not persuaded that expert evidence is required to deal with any point of this kind that EYME might wish to advance.

14. EYME has observed that some of the issues involve questions of criminal law and that this Court has no criminal jurisdiction. This does not seem to me a weighty consideration: it is not unusual for the Court, when exercising its civil jurisdiction, to engage with issues involving the criminal law of other jurisdictions.

15. Mr Beswetherick emphasised that the sources of UAE law will be in Arabic, and said that, without expert evidence, the Court would be reliant on translations with no way of establishing which translations are more accurate or properly reflect the nuance of the original Arabic. In his witness statement of 12 June 2024, Mr Parker compared translations of the relevant statutory provisions from two sources: the UAE Government legislation portal and LexisNexis. The JAs contend that the Court, with the assistance of submissions, is likely to be able to discern the meaning of the statutory provisions, and I consider that likely to be the case.

16. In response to Mr Parker's evidence about this, Mr Beswetherick observed that no translation is *"definitive"*, and that they "*do not necessarily capture the nuances of the original Arabic or the ways in which the provisions are actually intended to be read*". He illustrates the point by reference to the question whether references in the statutory provisions to the "*State*" and to "*laws and regulations*" include the Financial Free Zones (such as the ADGM) and their laws and regulations. He does not explain why evidence, rather than submissions, would assist the Court to resolve any issues of this kind, and I do not accept that they would do so. The Court's experience is that expert evidence is not always necessary to resolve differences about translations: for example, the Court might invite the parties to agree upon, and if necessary itself appoint, a neutral translator to provide a translation of any disputed texts (with notes if necessary). This procedure has worked satisfactorily in other cases in this Court, and I see no reason that it should not do so here, if there are significant differences of this kind between the parties. That said, on the material before me, I see no reason to think that there will be.

Conclusion

17. EYME has not shown that expert evidence is reasonably required to decide the Foreign Law Application. I do not consider that it is, and I conclude that it would be more efficient, and better promote the overriding objective more generally, to deal with any questions of UAE law by way of submissions

18. I therefore grant the r.117 Application, and I refuse the Expert Evidence Application. I should be grateful if the JAs' representatives, in consultation with EYME's representatives, would draft an order giving effect to my ruling; and if the parties would seek to agree directions for the future management of the Foreign Law Application in light of my decision and include such directions in the draft order.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
9 July 2024