ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Khalifa 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 COMPANIES LISTED IN SCHEDULE 1 TO THE APPLICATION NOTICE IN CASE NUMBER ADGMCFI-2020-020

AND IN THE MATTER OF THE INSOLVENCY REGULATIONS 2015

BETWEEN

(1) RICHARD FLEMING
(2) BENJAMIN CAIRNS
(in their capacities as joint administrators of the Companies listed in Schedule 1)

Applicants

and

(1) DUBAI ISLAMIC BANK PJSC
(2) – (13) THE INSURANCE COMPANIES AND THIRD PARTY ADMINISTRATORS LISTED IN SCHEDULE 2

Respondents

AND IN THE MATTER OF CASE NUMBER ADGMCFI-2021-042

BETWEEN

(1) NMC HEALTHCARE LTD (IN ADMINISTRATION)
(2) – (32) THE COMPANIES LISTED IN SCHEDULE 1 TO THE CLAIM FORM
(33) RICHARD FLEMING
(34) BENJAMIN CAIRNS
(in their capacities as joint administrators of the Claimants (1) – (32))

Claimants

and

(1) DUBAI ISLAMIC BANK PJSC
(2) – (13) THE INSURANCE COMPANIES AND THIRD-PARTY ADMINISTRATORS LISTED IN SCHEDULE 2 TO THE CLAIM FORM

Defendants

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2021] ADGMCFI 0006
Before:	Justice Sir Andrew Smith
Decision Date:	24 May 2021
Decision:	1. Directions Application refused. 2. Claim Form Proceedings stayed in so far as they concern the determination as between Dubai Islamic Bank PJSC and the Original Guarantors in the Master Murabaha Agreement dated 26 April 2018 of matters within the scope of the Arbitration Agreement, or as between Dubai Islamic Bank PJSC and NMC Healthcare Ltd of matters within the scope of the jurisdiction agreement in the Assignment of Receivables Agreement dated 26 April 2018. 3. Amendment Application refused. 4. Costs reserved.
Hearing Date(s):	3, 5 and 6 May 2021
Date of Orders:	Submissions on the terms of order invited
Catchwords:	Notice of grounds of service out of the jurisdiction; Power to give an administrator directions under Insolvency Regulations 2015; Application for relief affecting rights of third parties; Stay of proceedings under Arbitration Regulations 2015; Legal proceedings in respect of a "matter"; Meaning of "agree to refer … to arbitration" in Article (13)9 of the Founding Law; Arbitrability; Stay of proceedings to enforce exclusive jurisdiction clause; Stay in favour of another UAE court.
Legislation Cited:	Insolvency Regulations 2015 ADGM Court Procedure Rules 2016 UK Insolvency Act 1986 ADGM Court, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 Convention on the Recognition of and Enforcement of Foreign Arbitral Awards (1958) English Arbitration Act 1996 Arbitration Regulations 2015 Application of English Law Regulations 2015
Cases cited:	Cherry v Boultbee (1838) 2 Keen 319 National Bonds Corp PJSC v Taaleem PJSC [2011] DIFC CA 001 Re G B Nathan and Co Pty Ltd. (1991) 24 NSWLR 674 Re J W Murphy & P C Allen (1996) ACSR 569 Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd. (1994) 121 ALR 626

	Editions Tom Thompson Pty Ltd v Pilley [1997] 77 FCR 141 Australian Securities & Investment Commission v Edwards [2009] QSC 360 Meadow Springs Fairway Resort Ltd v Balanced Securities Ltd [2007] FCA 1443 Korda v Silkchime Pty Ltd [2010] WASC 155, 78 ACSR 675 In re Dawson International plc [2019] SCLR 65 Allanfield Property Insurance Services Ltd v Aviva Insurance Ltd [2015] EWHC 3721 (Ch) Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25 Re Worldspread Ltd [2015] EWHC 1719 (Ch) Lombard North Central plc v GATX Corpn. [2012] EWHC 1067 (Comm) Autridad del Canal de Panama v Sacyr SA [2017] EWHC 2228 (Comm) Sodzawiczny v Ruhan [2018] EWHC 1908 (Comm) Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57 Bridgehouse (Bradford No. 2) Ltd v BAE Systems Ltd [2020] EWCA Civ 759 Fiona Trust & Holding Corp v Privalov [2007] UKHL 40 Trust Risk Group SpA v Am Trust [2015] EWCA 437 Larsen Oil and Gas Pte Ltd v Petropod Ltd [2011] SGCA 21 McGuiness v Norwich and Peterborough Building Society [2011] EWCA Civ 1286 Moschi v Lep Air Services Ltd, [1973] AC 331 Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2014] EWCA Civ 1575 Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855 Rinehart v Welker (2012) 95 NSWLR 221 ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896 New Cap Reinsurance Corp Ltd v Grant (2009) 72 ACSR 638 Riverrock Securities v International Joint Bank of St Petersburg (Joint Stock Company) [2020] EWHC 2483 Investment Group Private Ltd v Standard Chartered Bank [2015] DIFC CA 004 Allianz v Al Ain Ahlia CF2012/2012 Donohue v Armco Inc and Others, [2001] UKHL 64 Fitzpatrick v Emerald Green Pty Ltd [2017] WASC 206
Case Numbers:	ADGMCFI-2020-020 ADGMCFI-2021-042

Parties and representation:	**ADGMCFI-2020-020** **Richard Fleming and Benjamin Cairns** (in their capacities as joint administrators of the companies listed in Schedule 1) ***Applicants*** Ms Felicity Toube QC, Mr Adam Al-Attar and Mr Matthew Abraham Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP on behalf of Alvarez & Marsal Europe LLP **Dubai Islamic Bank PJSC and the Insurance Companies and Third Party Administrators listed in Schedule 2** ***Respondents*** Mr Ewan McQuater QC, Mr David Quest QC and Mr Nathaniel Bird Instructed by Eversheds-Sutherland International LLP on behalf of Dubai Islamic Bank PJSC **ADGMCFI-2021-042** **NMC Healthcare LTD (in administration) and the companies listed in Schedule 1 to the Claim Form, Richard Fleming and Benjamin Cairns** ***Claimants*** Ms Felicity Toube QC, Mr Adam Al-Attar and Mr Matthew Abraham Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP on behalf of Alvarez & Marsal Europe LLP **Dubai Islamic Bank PJSC and the insurance companies and third-party administrators listed in Schedule 2 to the Claim Form** ***Defendants*** Mr Ewan McQuater QC, Mr David Quest QC and Mr Nathaniel Bird Instructed by Eversheds Sutherland International LLP on behalf of Dubai Islamic Bank PJSC

JUDGMENT

The Applications

1. The main application before me (to which I shall refer as the "**Jurisdiction Application**") is brought by Dubai Islamic Bank PJSC ("**DIB**"), and it seeks to set aside an application made by companies' administrators on 28 March 2021 (the "**Directions Application**"), and to stay proceedings brought by a claim form dated 15 April 2021 (the "**Claim Form Proceedings**").

The respondents to the Directions Application and the defendants to the Claim Form Proceedings are DIB and twelve insurance companies (the "**Insurers**"). DIB contends that the Court has no jurisdiction to grant the relief sought in the Directions Application. With regard to the Claim Form Proceedings, DIB relies on: (i) arbitration agreements in two Master Murabaha Agreements dated 26 April 2018 and 30 April 2018 that it made with NMC Healthcare LTD ("**NMCH**") and associated companies; and (ii) jurisdiction clauses in two Assignment of Receivables Agreements and two Account Pledge and Assignment Agreements dated 26 April and 30 April 2018. In its notice of the Jurisdiction Application, DIB also contended that the Directions Application and the Claim Form Proceedings should be stayed on case management grounds, but that contention was not pursued.

2. There is also before me an application (the "**Amendment Application**") made by the Claimants in the Claim Form Proceedings to amend the Claim Form and Particulars of Claim, although this, they said, would be unnecessary if their primary submissions on the Jurisdiction Application are successful.

Introduction

3. The NMC Group, comprising NMCH and its subsidiaries, is the largest provider of private healthcare in the United Arab Emirates ("**UAE**"), operating more than 200 hospitals and other medical facilities. NMCH does not itself provide healthcare directly: this is done through subsidiaries which, unlike NMCH, are licensed for this purpose with one or more of the UAE Health Regulatory Authorities. Many of the NMC Group's patients have private health care insurance policies, and a large part of the NMC Group's income is from payments made by the patients' insurers under contracts between insurers and a NMC Group company, which set out the terms on which the NMC Group companies are to be paid by the insurers in return for providing healthcare services to an insured person.

4. By 2020, the NMC Group had incurred enormous debts, calculated at between some US$4.3 billion and US$5.3 billon, which had not been disclosed in its financial statements and appeared to result from fraud on a grand scale. NMCH's parent company is NMC Health PLC, an English company which was listed on the London Stock Exchange: it was put into administration on 9 April 2020 by an order of the English High Court. On 27 September 2020, I made an administration order in this Court (the "**Administration Order**") in respect of NMCH and 35 associated companies on the grounds that they were insolvent. The 36 companies, originally incorporated variously in the Emirates of Abu Dhabi, Dubai and Sharjah, had been registered in the Abu Dhabi Global Market ("**ADGM**") under certificates of continuance issued by the ADGM Registration Authority dated 14 September 2020. I appointed as their Joint Administrators, Mr Richard Dixon Fleming and Mr Benjamin Thom Cairns, both of Alvarez & Marsal Europe LLP (the "**Joint Administrators**").

Procedural History

5. On 28 March 2021, the Joint Administrators, as administrators of 32 of the companies, NMCH and 31 others, the operating companies in the NMC Group (the "**Operating Companies**"), made the Directions Application under section 95(7) of the *ADGM Insolvency Regulations 2015* ("**IR 2015**"), under which an administrator may apply to the Court "for directions in connection with his functions". It was supported by a witness statement of Mr Cairns. The Respondents are DIB and the Insurers. In essence, the Directions Application is about "insurance receivables" paid by insurers, whether DIB has any security interest over them, and if so, its nature.

6. DIB is a Dubai company, and the Directions Application was served on it there. The Joint Administrators also served on DIB a Notice in ADGM Form CFI 32 ("Notice to Defendant (outside ADGM)"), without prejudice to its position that no such notice was required under rule 25 of the ADGM Court Procedure Rules ("**CPR**") for service of an application. It stated that the Court had jurisdiction because, under CPR rule 24(1), a claimant may serve a claim form on a person out of the jurisdiction where every claim against that person is one "which the Court has power to determine under - (a) the Regulations [sc. *the ADGM Court, Civil Evidence,*

Judgments, Enforcement and Judicial Appointments Regulations 2015 (the "**2015 Regulations**")]; (b) any ADGM enactment other than the Regulations; or (c) the "ADGM Founding Law", that is to say Law No (4) of 2013 concerning the ADGM, as amended by Law No (12) of 2020; that this Court has jurisdiction because the Directions Application is made under IR 2015, an "ADGM enactment"; and that under Article (13)7(a) of the Founding Law, the Court has jurisdiction to consider and decide on specified matters, including "[c]ivil or commercial claims and disputes involving … any of the Global Market Establishments", which include companies registered in the ADGM.

7. At a case management conference ("**CMC**") on 14 April 2021, DIB said that it disputed the jurisdiction of the Court under IR 2015, section 95(7) to give the directions sought by the Joint Administrators, and that it intended to challenge the Court's jurisdiction on these grounds:

   a. That the Directions Application had not validly been served on it;

   b. That there are no grounds for serving DIB out of the jurisdiction; and

   c. That the Court lacks jurisdiction to make orders sought in the Directions Application because the relief could not properly be characterised as directions to the Joint Administrators, being designed to obtain declarations as to substantive rights and obligations of DIB and the Insurers.

   The first two of these grounds have not been pursued. At the CMC, DIB did not indicate that it would invoke any arbitration agreement.

8. In view of DIB's third complaint, I invited the Joint Administrators to consider whether they would proceed only by way of the Directions Application, or they would issue a claim form for essentially the same relief. Ms Felicity Toube QC, who represents the Joint Administrators, while maintaining that the relief was properly sought under IR 2015, section 95(7), said that they would do so. Mr David Quest QC, who represented DIB at the CMC, told me that DIB was content that the notice in respect of the Directions Application should stand as notice for a claim form, and I directed that it should do so.

9. On 15 April 2021, a claim form was issued by the Joint Administrators, avowedly on a protective basis, NMCH and the Operating Companies, claiming relief similar to that sought by the Directions Application. On 22 April 2021, they served Particulars of Claim.

10. DIB issued the Jurisdiction Application on 22 April 2021. It is supported by a witness statement of Mr Omar Hayat Rahman, DIB's Chief Legal Officer. As I have indicated, it included a challenge to the proceedings inter alia on the basis that the relief sought against it was "in respect of matters which are the subject of arbitration agreements …".

11. In response to this contention, on 1 May 2021, Quinn Emanuel Urquhart & Sullivan, LLP, who act for the Joint Administrators, NMCH and the Operating Companies, wrote to Eversheds Sutherland (International) LLP, who act for DIB, that "if and in so far as the Court requires the Joint Administrators to proceed by way of Claim Form rather than by the Directions Application, we intend to seek permission … to amend the Protective Claim so that the Joint Administrators and NMCH are the only claimants. All other NMC Companies will be converted to Defendants for the purpose of the Protective Claim". A proposed amended Claim Form and amended Particulars of Claim were served on 2 May 2021.

12. I heard the Jurisdiction Application on 3, 5 and 6 May 2021. DIB was represented by Mr Ewan McQuater QC, Mr Quest and Mr Nathaniel Bird. The Joint Administrators and the companies in administration were represented by Ms Toube, leading Mr Adam Al Attar and Mr Matthew Abraham.

13. None of the Insurers has challenged the Court's jurisdiction or made submissions about DIB's challenge. Dubai Insurance Company psc ("**DIC**") has, through its legal representatives, written to the Court confirming that it will comply with any order made by the Court (for which it has

been given valid notice) regarding the payment of existing and future receivables due from DIC to the NMC Group. Similarly, Axa Insurance (Gulf) BSC's legal representatives have written to the Court that it does not challenge the Court's jurisdiction and will comply with any order that is made.

DIB's Contracts with NMCH and the Operating Companies

14. I need examine in detail fewer of the NMC Group's contracts with DIB than it appeared when DIB first made the Jurisdiction Application. First, the issues originally concerned both the Master Murabaha Agreements and also another facility (the "**Finance Facility**") provided by DIB under a letter dated 30 July 2017 and other letters. The differences between the Joint Administrators and DIB about the Finance Facility were resolved during the hearing, the Joint Administrators and DIB agreeing on the terms of a declaration that I should make.

15. Secondly, the first Master Murabaha Agreement, dated 26 April 2018, was made by DIB with NMC Specialty Hospital LTD ("**Specialty**") as "the Purchaser or the Obligor", NMCH as "Co-Obligor" and thirteen other Operating Companies as "Original Guarantors", and under it DIB agreed to make available to Specialty a facility of up to US$230 million to be applied to six hospital projects in the Emirates of Abu Dhabi and Dubai. The other Master Murabaha Agreement, dated 30 April 2018, was made by DIB with NMC Saudi Arabia Healthcare LLC ("**NMC SAH**") as "the Purchaser or the Obligor", NMCH as the "Co-Obligor" and the thirteen Operating Companies as "Original Guarantors", and under it DIB agreed to make available to NMC SAH a facility of up to US$120 million to be applied to acquire five hospitals or clinics in the Kingdom of Saudi Arabia. The two Master Murabaha Agreements are in materially identical terms, and the same, and only the same, issues arise in relation to each. Accordingly, I need consider the issues only in relation to the agreement of 26 April 2018, to which I shall refer as the "**MMA**".

16. Thirdly, NMCH and DIB entered into other agreements dated 26 April 2018 relating to the MMA, including an "Assignment of Receivables Agreement" (or "**ARA**") and an "Account Pledge and Assignment Agreement" (or "**APAA**") (and similar agreements in relation to the Master Murabaha Agreement of 30 April 2018). Ms Toube and Mr McQuater agreed that, as far as concerns the Jurisdiction Application, the same, and only the same, arguments need to be considered in relation to the ARA and the APAA. Accordingly, I need only refer to the ARA in this judgment.

17. Against this background, I come to the MMA. Under clauses 6.1 and 6.2 of the MMA, Specialty agreed to make monthly payments to reduce the sums outstanding under the facility. By clause 15.16, DIB might cancel the facility and accelerate the payment of the outstanding amount in the event of default by way, inter alia, of Specialty failing to make a payment on the due date.

18. By clause 13.7 of the MMA, NMCH and Specialty were obliged to ensure that "insurance receivables" from twelve specified insurers were received into a collection account, or "Amanat account", that NMCH had with DIB, and that those insurance receivables would be at least sufficient to provide cover of 1.4 times the monthly payment contemplated under the MMA. To this end, the MMA provided, by clause 13.8 and Schedule 11 paragraph 5, that Specialty and NMCH irrevocably covenanted to provide (inter alia) "Instruction from NMCH/ [Specialty] to [the specified insurers] to transfer all due receivables to their Amanat Account with [DIB], until such time till [DIB] confirms full payment of its facilities". Monies received into the Amanat account were to be retained until they were equal to the amount of the next monthly repayment, and this amount was then to be blocked by DIB and used to pay the monthly repayment on the due date. Any excess "may be released" to NMCH's current account with DIB.

19. By clause 6.4 of the MMA, in order to secure the payment obligations, Specialty and NMCH agreed to provide security documents as specified in Schedule 10. They included:

    a. A "Perfected Assignment Agreement with NMC Healthcare [LTD] and/or its subsidiaries (as applicable) related to the Assignment of Insurance Receivables" from the specified insurers.

b. A "Pledge over the Amanat Account, to be the Collection Account for the insurance receivables, with the Monthly payment of the facility to be debited from [the Amanat] Account".

Schedule 10 also provided that, "In each monthly period, [NMCH/Specialty] will ensure that the monthly insurance Receivables flows (from the [specified insurers]) in the Amanat Account will provide a coverage ratio of minimum of 1.4X the monthly payment under the Facility".

20. By clause 10.1, the "Original Guarantors" jointly and severally guaranteed "punctual performance by [Specialty] of all [its] obligations under" (inter alia) the MMA.

21. The MMA expressly states, at clause 22, that it and "any non-contractual obligations arising out of, or in connection with it" are governed by and construed in accordance with English law. It also contained, at clause 23, an arbitration agreement (the "**Arbitration Agreement**") in these terms: " … any dispute, claim, difference or controversy arising out of, relating to, or having any connection with any Murabaha Document, including any question regarding its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute in relation to any non-contractual obligations arising out of, or in connection with, it … shall be referred to, and finally resolved by arbitration under, the LCIA Arbitration Rules". The Arbitration Agreement was subject to an option enjoyed by DIB (and certain others, but not NMCH or its subsidiaries) to take "proceedings in any other court (including, but not limited to, the courts of the Dubai International Financial Centre (the "**DIFC**"))" and each Obligor submits to the jurisdiction of the DIFC courts". The expression "Murabaha Document" was defined to include, inter alia, the MMA itself. The expression "Obligor" was defined to include Specialty, NMCH and the Original Guarantors.

22. The MMA referred to monies received from twelve specified insurers ("the **Original Insurers**"). They include ten of the Insurers who are respondents to the Directions Application and defendants to the Claim Form Proceedings. Proceedings have not been brought against Pentacare Medical Services LLC ("**Pentacare**") because the Joint Administrators understand it to be in liquidation. According to the evidence of Mr Cairns, the twelfth, Al Dhafra Insurance Co PSC ("**Al Dhafra**"), was later removed from the list of specified insurers, and replaced by the other two Insurers, Aetna Global Benefits (Middle East) LLC ("**Aetna**") and Dubai Insurance Company psc ("**Dubai Care**"). Mr Rahman stated that he does not believe that the substitution took place, and that DIB has not released Al Dhafra from its obligations. This difference is not relevant to what I have to decide in this judgment.

23. As I have said, NMCH, as Assignor, and DIB, as Assignee, also entered into an ARA and an APAA, both dated 26 April 2018, in respect of the MMA. By clause 3.1 of the ARA, NMCH undertook to "assign to [DIB], the Assigned Receivables, including any amounts agreed to be paid by an Insurance Provider to commute further liability under such Assigned Receivables …"; to "give notice to the Insurance Provider to this Assignment" in a form attached to the ARA; and to "procure an acknowledgement from such Insurance Provider" in a form attached to the ARA or "in form and substance acceptable to [DIB]". The expression "Insurance Provider" was defined as the twelve insurers specified in the MMA. "Assigned Receivables" was defined as "all the Assignor's right and interest (but none of its obligations) which [NMCH] may have in respect of the insurance receivable from the Insurance Providers". By clause 5.2, NMCH was to "hold the [Assigned Receivables] on behalf of, and to the order of, [DIB]".

24. Clause 7.1 of the ARA provided that "the security created by this Agreement shall not be enforced prior to the occurrence of an Event of Default. Following the occurrence of an Event of Default, [DIB] shall be entitled, without giving prior notice to [NMCH] or obtaining consent from [NMCH] (but at the cost of [NMCH]) in the name of [NMCH] or on behalf of [NMCH] to exercise, subject to applicable law, all the Rights of [NMCH] in relation to the Secured Assets". The expression "Secured Assets" was defined to mean the Assigned Receivables: clause 1.1.

25. By clause 10 of the ARA, NMCH authorised DIB at any time to set-off the monies standing to the credit of the Amanat account towards payment and discharge of the amounts owed by NMCH to DIB under the MMA.

26. Clause 14 of the ARA, headed "Governing Law and Jurisdiction", provided that the ARA was to be "governed by and … construed in accordance with the laws of the Emirate of Dubai and the applicable federal laws of the United Arab Emirates and the principles of Sharia ….", which was to prevail in the event of any conflict with the laws of Dubai or the federal laws. It also provided that:

    a. "(T)he courts of the Emirate of Dubai" should have exclusive jurisdiction "to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement)"; and

    b. The parties agreed that the courts of the Emirate of Dubai were the most appropriate and convenient courts to settle such disputes and accordingly no party would argue to the contrary; but

    c. These provisions were for the benefit of DIB only, and as a result DIB should not be prevented from taking proceedings relating to a dispute in any other courts that had jurisdiction.

27. Schedule 1 to the ARA specified the form of the notices to be given to insurers. The heading to the notice was to identify a contract between the NMC Group company and the insurer (which was referred to as the "Contract"), and the notice stated that NMCH thereby gave notice to the addressee that "we have assigned by way of security pursuant to an Assignment of Receivables … all our right, title and interest (but not the obligations) in and to the Contract to [DIB]". It went on to state that NMCH thereby irrevocably authorised the addressee "to make all payments as from the date of this notice in respect of the Contract to" a specified account at DIB. It also stated that "This notice and acknowledgment shall be governed by and construed in accordance with the laws of the Emirate of Dubai and applicable federal laws of the" UAE.

28. The form of the acknowledgments that NMCH was to procure from insurers was also in Schedule 1 to the ARA. It was to be addressed to DIB, and provided that the insurer acknowledged receipt of the notice, and continued, "We hereby …. agree that we shall make all payments related to the Contract to the account specified in the ... notice and in particular shall comply with any of your instructions as provided for in such notice. We acknowledge receipt of that notice and confirm we will comply with its provisions".

29. As I have said, the only parties to the ARA were NMCH and DIB. It contemplated that there might be additional parties by way of assignors who might be identified in its Annexure A, but no further parties were added, Annexure A being left blank.

The Joint Administrators' Powers and the Conduct of the Administrations

30. By the Administration Order, the Joint Administrators were appointed under IR 2015 to manage the affairs, business and property of the NMC Group companies (section 1(1)), and they must perform their functions with the objective of rescuing the companies as going concerns and/or achieving a better result for their creditors as a whole than would result from liquidation, acting in the interests of the creditors as a whole: IR 2015, section 2. They are to manage the companies' affairs, business and property in accordance with (inter alia) any deed of company arrangement ("**DOCA**") approved under IR 2015, Chapter 8 or other approved proposals (section 97).

31. One effect of the Administration Order is to impose a moratorium on all legal process against the companies, except with the consent of the Joint Administrators or with the permission of the Court: IR 2015, section 45. This is a vital part of the regime to achieve orderly management of the insolvency and to maximise the prospects of rescuing the businesses.

32. The Joint Administrators are empowered to get in the property of the companies under section 254 of IR 2015. To this end, they are entitled to apply to the Court for:

a. An order that any person indebted to a company pay the Joint Administrators what is due: section 254(3).

b. An order that any person who has in his possession or control property of a company, including any money and "obligations and every description of interest, whether present or future or vested or contingent arising out of, or incidental to, property …" shall deliver it to the Joint Administrators: section 254(2) and 215(2).

They are also empowered to make distributions to the creditors of companies in accordance with the provisions of IR 2015 and, except in the case of secured and preferential creditors, provided the Court permits it: section 96. In making any distribution or other payment, they are entitled (in accordance with the principle of hotchpot and under the equitable rule in *Cherry v Boultbee, (1838) 2 Keen 319)* to withhold it from any creditor who has appropriated assets that would have otherwise been brought into the administration and realised for the purpose of the distribution or other payment.

33. The Joint Administrators are entitled, and required, to pay all claims in accordance with the scheme of priorities in IR 2015, under which administration expenses and remuneration are charged on and may be paid from assets of the companies that are in their control or custody, other than assets that are subject to a fixed charge and notwithstanding they are subject to a charge that was floating when it was created: sections 143(3) and 298 of IR 2015.

34. The Joint Administrators have sought to achieve the objectives of the administration by continuing to trade the NMC Group companies and seeking to restructure their debts to enable them to trade on a stable financial basis. This, of course, is a large and complex exercise, given the scale of the losses said to have resulted from fraudulent activities. One aspect of the complexity is that, before the discovery of the alleged fraudulent activities, receivables, including those from the Insurers, were paid into a central Group account maintained by NMCH, and since their appointment, the Joint Administrators have continued to operate centralised accounts, which has made it impossible readily to isolate the financial position of individual companies.

35. In view of the financial difficulties that the NMC Group was facing at the time of the Administration Order, the Joint Administrators immediately sought and obtained permission from the Court under Chapter 9A of IR 2015 to enter into "priority funding" arrangements by way of an additional finance facility ("**AFF**") with certain creditors of the companies, whereby claims of the creditors in respect of the AFF were elevated above those of preferential and other creditors, other than fixed charge creditors, and over some claims in respect of expenses in the insolvency proceedings. The AFF was required to provide a necessary financial safety net should income from the continuing operations not cover the expenses of the administrations, but finance of this kind is, of course, expensive and the Joint Administrators have drawn down as little as possible under the AFF, and operated as far as possible on revenue from the continuing trading.

36. On 25 March 2021, the Joint Administrators informed creditors of the NMC Group companies of a "bar date" of 30 April 2021 for submitting proofs of debt under IR 2015, Schedule 5 part 3, and that failure to do so might result in a creditor not being entitled to receive a distribution, vote on a Deed of Company Arrangement or receive consideration in the event of a companies' reorganisation.

37. Having achieved strong trading results in 2020, continuing into 2021, on 8 April 2021 the Joint Administrators outlined their proposals to enter into re-structuring arrangements by way of Deeds of Company Arrangements ("**DOCAs**") in respect of 35 of the 36 companies in administration under the Administration Order. It is expected, according to Mr Cairns' evidence, that meetings for formal voting on the proposal will be held in June 2021. If they are approved, a distribution will be payable to creditors in accordance with their terms.

38. Mr Cairns' evidence explains the importance of the proposed arrangements for the conduct of the administrations and the urgency, in particular with regard to cash flow, of the Directions

Application to progress them. Mr McQuater sought to question this, but Mr Cairns is well placed to assess matters of this kind, and I see no reason to doubt his assessment.

39. The Joint Administrators have presented calculations to demonstrate the significance for creditors of the matters about which they seek directions from the Court. They are illustrative only, and are necessarily based upon various assumptions and subject to various qualifications, including, for example, that no other creditors have (fixed or floating) security over the assets that are the subject of DIB's claim. However, the calculations are still helpful illustrations: it is calculated that the distribution that would be paid to DIB would be some US$19 million if it has no security and some US$86 million if it has security. This difference, of course, has a considerable impact on what would be available to pay other creditors. The calculations also illustrate the potential importance of determining whether, if DIB has security, it is fixed (so that, in particular, DIB's claims have priority over administration expenses) or floating (so that administration expenses have priority).

DIB's claims and its proceedings in Dubai

40. DIB claims that NMCH and other companies in the NMC Group have defaulted in respect of very substantial sums under the MMA. When it brought its Jurisdiction Application, it had not submitted a proof of debt in the administration of any of the companies. Shortly before the "bar date" of 30 April 2021 that the Joint Administrators had laid down (or purported to lay down), DIB submitted a proof of debt in the administration of NMCH and 13 other NMC Group companies. In doing so, it purported to reserve its position by stating that the proof was submitted "as a purely protective measure" and without prejudice to any argument that it might have with regard to jurisdiction of the ADGM Courts (or whether any jurisdiction should be exercised). Ms Toube made clear that the Joint Administrators did not accept that DIB could so qualify a proof of debt: their primary position is that the qualifications are of no effect; their alternative position is that, by reason of the qualifications, the proof of debt is invalid. Mr McQuater refuted that. I do not need to resolve this question, and I say nothing more about it.

41. Each of the Insurers, or at least each of the Original Insurers, entered into an agreement to make payments (by way of "insurance receivables") in return for the provision of healthcare services to insured persons. The agreements provide (by article 11):

    a. That they are to be "governed by and construed in accordance with the laws of Abu Dhabi and the applicable law of the United Arab Emirates";

    b. That all disputes arising from interpretation, implementation or termination of the agreements might be "submitted to the Grievance & Appeals Unit of the [Abu Dhabi Health Authority]" for an amicable settlement; and

    c. That, if the "dispute or conflict" was not so resolved, "all disputes shall be referred to and determined by the Abu Dhabi Courts, which shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement". It was not disputed before me that the expression "Abu Dhabi Courts" includes the Courts of ADGM: see the decision of the Court of Appeal of the Dubai International Financial Centre ("DIFC") in *National Bonds Corp PJSC v Taaleem PJSC, [2011] DIFC CA 001*, in which the expression "courts of Dubai" was interpreted (in its context) to refer to the Courts of the DIFC.

42. DIB claims that it has an interest in these insurance receivables. It accepts, for the purposes of the Jurisdiction Application only, that the ARAs (and the APAAs) were entered into only by NMCH and not by Specialty or any other of the NMC Group companies, but contends that, through the MMA and related agreements, the receivables were assigned to it. In its proof of debt, DIB stated that its valuation of security was "based on DIB's opinion that it holds a valid fixed charge security … in its favour". Mr McQuater told me, however, that DIB's primary case is that the effect of the contractual arrangements is that it took an absolute assignment of the insurance receivables, and its interest in them is not by way of charge at all.

43. Mr Rahman's evidence is that each of the Original Insurers was given a notice in the prescribed form, and provided an acknowledgment in the prescribed form, including the undertaking in it, (the "**Acknowledgments**"). He does not know whether notices were given to Aetna and Dubai Care, and does not believe that either provided an acknowledgment. These details are not important for present purposes.

44. Although the Joint Administrators express concern about whether this will continue in view of the position adopted by DIB, to date most of the Insurers have been making payments under the insurance contracts to the NMC Group companies. The exceptions are:

    a. NAS Administration Services LLC (**"NAS**"), which has been paying monies into an account of NMCH with DIB, which has apparently been blocked by DIB. The Joint Administrators estimate that, since their appointment, these payments amount to some US$20 million: DIB does not accept the estimate, but has not said how much they have received.

    b. Al Buhaira National Insurance Company ("**Al Buhaira**") has been withholding payments, which are said to amount to some US$8 million.

45. According to Mr Rahman's witness statement, in March 2020 some insurers stopped paying insurance receivables to DIB. Others reduced their payments, before stopping altogether in October or November 2020. Having sent letters of demand, DIB has brought separate proceedings in the Courts of Dubai against each of the Original Insurers other than NAS. The claims in those proceedings are brought, as Mr Rahman puts it, "on the basis that [the insurer defendants] have breached their contractual obligations to pay receivables to DIB into the Collection Account, as agreed in their signed Acknowledgments and in breach of their Undertakings". Mr Rahman goes on to say that "DIB also places reliance on the relevant provisions of the UAE Federal Law (5) of 1985 Civil Transactions Law as amended (the 'Civil Transactions Code') including Article 254 which expressly permits a party to assign rights to another party and which recognizes the third party assignee's rights to enforce those rights". I find this evidence puzzling because, on the face of it, Article 254 is not concerned with assignment, but with privity of contract and the right of third parties in some circumstances to bring claims in respect of contracts. However that might be, as I was told by Mr McQuater and as appears from the translations of those Statements of Case in the Dubai proceedings which are in evidence, the claims in those proceedings are based on the undertakings in the Acknowledgments rather than the (purportedly assigned) choses in action arising from insurance contracts.

46. All the Original Insurers, as I understand it, defend the proceedings but, according to Mr Rahman (and as far as he is aware), only Al Buhaira has challenged the jurisdiction of the Dubai Courts to hear the claims, Al Buhaira contending that the Courts of Sharjah have jurisdiction since their main headquarters are there. The challenge is pending. Al Buhaira has also submitted a memorandum seeking (inter alia) to join NMCH in the proceedings, to which NMCH has responded challenging the jurisdiction of the Dubai Court to hear the matter on the grounds that this Court is properly vested with jurisdiction, having made the Administration Order. As far as I have been made aware, that challenge is pending before the Dubai Court. I add for completeness that National General Insurance Co psc has similarly sought to join NMCH in proceedings brought against it in Dubai, and as in the Al Buhaira proceedings, NMCH has disputed the Court's jurisdiction. Globemed Healthcare Solutions LLC has sought to join three NMC Group companies in the Dubai proceedings against it, namely NMCH, Specialty and NMC Royal Hospital LTD, another Operating Company (the company listed at 9 in Schedule 1 to this judgment).

47. The Joint Administrators have taken steps to have the Administration Order, including the moratorium, recognised and enforced in Dubai and elsewhere in the UAE. The information before me about the progress of their efforts in Dubai is controversial, but I need not engage with that controversy.

The Application under section 95(7) of IR 2015

48. As I have said, the Directions Application is made pursuant to section 95(7) of IR 2015, which provides that, "The administrator of a company … may apply to the Court for directions in connection with his functions". This section, like most of the provisions of IR 2015, echoes the United Kingdom Insolvency Act 1986 (the "**1986 Act**"), section 95(7) corresponding to Schedule B1, paragraph 63 to the 1986 Act.

49. By Article (13)7(d) of the Founding Law, this Court has exclusive jurisdiction to consider and decide on "Any request, claim or dispute which the Global Market's Courts [have] jurisdiction to consider under the Global Market Regulations", which include IR 2015.

50. Mr McQuater pointed out that the Joint Administrators' notice under CPR rule 25 does not refer to Article (13)7(d): indeed, it does not do so expressly, Article (13)7(a) being the only provision in the Founding Law specifically mentioned. I see nothing in this point. First, it might well not be strictly necessary to serve a notice under CPR rule 25 in respect of an application notice: the rule refers only to claim forms. More importantly, the Joint Administrators' notice does state, "The ADGM Court has the jurisdiction and power to determine the [Directions] Application under Section 95(7) of [IR 2015]…[IR 2015] are an 'ADGM enactment'". I consider that this clearly gives notice of the basis on which it is said that the Court has jurisdiction: an express reference to Article (13)7(d) was not obligatory. I find it entirely understandable that the Joint Administrators gave the notice in the terms that they did: the requirement in CPR rule 25 is directed to rule 24, which permits a claim form to be served out of the jurisdiction where each claim made against the person to be served and included on the claim form is a claim which the Court has power to do so under (inter alia) "any ADGM enactment other than" the 2015 Regulations. Mr McQuater acknowledged that, if the Joint Administrators sought to amend their rule 25 notice, it was likely that they would be permitted to do so. In my judgment, amendment is unnecessary. If a notice was required at all, the unamended notice is quite adequate**.**

51. The orders that the Joint Administrators seek under section 95(7) are these:

    a. An order that DIB holds no effective security, or alternatively that any security held is a floating charge in DIB's favour in relation to insurance receivables due from Insurers, together with receivables due from Pentacare, "in respect of the [MMA]" and the other MMA of 30 April 2018.

    b. An order that the Insurers pay the Joint Administrators the proceeds of the insurance receivables; and that the proceeds shall be treated by the Joint Administrators (and the Joint Administrators shall be entitled to treat the proceeds) as property of the NMC Group companies, or alternatively as the realisation of assets subject to a floating charge.

    c. An order that DIB account to the Joint Administrators for the value of any proceeds of the insurance receivables that DIB has received from the Insurers since the date of the Administration Order; and that it pay the value of any such proceeds to the Joint Administrators.

    d. An order that, pending such an account and payment, the Joint Administrators shall be entitled to withhold any distribution or payment otherwise due from the estates of the NMC Group companies, or other property in the hands of the Joint Administrators (subject to a limit as to the amount withheld).

52. The argument of the Joint Administrators that DIB has no security in respect of the Insurance Receivables despite entering into the ARA with NMCH is, in outline, that under the contracts with the Insurers (and Pentacare) payments were to be made to the Operating Company that provided the service to the insured person, and not to NMCH: that is to say, any chose in action in respect of insurance receivables was owned by one of the Operating Companies and not by NMCH. However, none of the Operating Companies was party to the ARA (or the APAA). The only assignor was NMCH, which had no choses in action to assign.

53. It is clear to my mind that the orders that the Joint Administrators seek are "in connection with [their] functions": in particular, their functions with regard to getting in the property of the companies, making payments in accordance with the statutory scheme of priorities and withholding distributions. DIB contends, however, that the Court does not have jurisdiction under section 95(7) of IR 2015 to make any of the orders sought by the Joint Administrators because they are not by way of "directions" within the meaning of the section. Mr McQuater submitted that this is evident on a plain reading of the section, which makes no reference to the Court making declarations as to rights and liabilities or giving directions to anyone other than the administrator.

54. Mr McQuater cited Australian authorities in support of this submission. In *Re G B Nathan and Co Pty Ltd., (1991) 24 NSWLR 674*, a case in the Supreme Court of New South Wales, McLellan J considered an application by a liquidator under a statutory provision (in section 479(3) of the Corporations Law) that: "The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up". Having considered the historical origins of the provision, McLellan J continued (at p. 479):

> *"The historical antecedents of s.479(3), the terms of that subsection and the provisions of s.479 as a whole combine to lead to the conclusion that the only proper subject of a liquidator's application for directions is the manner in which the liquidator should act in carrying out his functions as such, and that the only binding effect of, or arising from, a direction given in pursuance of such an application (other than rendering the liquidator liable in appropriate sanction if a direction in mandatory or prohibitory form is disobeyed) is that the liquidator, if he has made full and fair disclosure to the Court of the material facts, will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributor or to the company in respect of anything done by him in accordance with the direction.*
>
> *"Modern Australian authority confirms the view that s.479(3) 'does not enable the court to make binding orders in the nature of judgments' and that the function of a liquidator's application for directions is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company's transactions before liquidation". Having cited authority in support of this, he went on to acknowledge (at p.680) that on occasion, in proceedings commenced by way of an application for direction, the courts made orders declaratory of substantive rights which were intended to bind third parties, and had where necessary made representative orders so that all proper parties were bound. The courts adopted flexible procedures to allow proceedings so commenced "to be changed into proceedings for the determination of substantive rights to avoid the need to commence further proceedings involving additional cost and delay … However it is important that the distinction between the two kinds of proceedings be not lost sight of or blurred, and such a fundamental change should not be permitted unless the court is satisfied that those affected either consent to that course … or will not suffer injustice in consequence of the alteration to the status of the proceedings".*

The Judge repeated his views in *Re J W Murphy & P C Allen, (1996) ACSR 569, 570* (as McLelland CJ).

55. Ms Toube responded to this submission with three points: first, she argued that the Australian authorities do not unanimously support McLelland J's opinion. That is so: in particular, in *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd., (1994) 121 ALR 626*, in which a liquidator applied for directions as to the rights of the respondents, who represented different classes of investors and creditors. Northrop J rejected a challenge to the jurisdiction of the Court to make substantive declarations and orders under section 479(3). Having cited the judgment of McLelland J in *Re G B Nathan and Co Pty Ltd*, Northrop J continued (at p.643): "*It has been accepted that courts have power to make final orders in preference claims on an application by a liquidator under sections similar to s 479(3) of the*

Corporations Law. There is no logical reason why final orders binding on other persons cannot be made on applications under s.479(3) with respect to other subject matters. …. In proceedings brought by a liquidator under s 479(3), I can see no reason why binding orders cannot be made where the parties affected have been given the opportunity to be heard".

56. However, as it appears from the authorities to which I have been referred and which I have found, this is a minority view. Thus, in *Editions Tom Thompson Pty Ltd v Pilley, [1997] 77 FCR 141*, Lindgren J considered an application by an administrator for directions under section 447D of the Corporations Act, which provided that, "*The administrator of a company under administration …. may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers*". He said (at p. 147) that, "*The preponderance of authority is to the effect that on a liquidator's application for directions under [section 479(3)] or its predecessors, the Court has no power to make orders binding upon, or affecting the rights of, third parties, and the view is also commonly taken that directions should not be given where the proposed acts of the liquidator which would be sanctioned by the directions would affect such rights*". This statement was cited and endorsed in *Australian Securities & Investment Commission v Edwards, [2009] QSC 360*.

57. In my judgment, it does not detract from the weight of the authorities that, as Ms Toube pointed out, the statutory provisions with which they were concerned have been replaced from 1 March 2017 by The Insolvency Practice Schedule (Corporations) in Schedule 2 of the Corporations Act 2001. Nor do I consider that DIB's submission is answered by two other Australian authorities that Ms Toube cited: *Meadow Springs Fairway Resort Ltd v Balanced Securities Ltd, [2007] FCA 1443* and *Korda v Silkchime Pty Ltd, [2010] WASC 155, 78 ACSR 675*. They decided that an application for directions could be "*converted into proceedings for the determination of substantive rights*" (*Meadow Springs* at para 49) and that the originating process might be "*amended to seek declarations under … the Supreme Court Act or the inherent jurisdiction of the court*" (*Korda* at para 37). They implicitly acknowledge that such relief could not otherwise be granted on an application for directions by a liquidator or administrator.

58. Secondly, Ms Toube relied on the Scottish case of *In re Dawson International plc, [2019] SCLR 65*, in which the administrator of a company made an application under the 1986 Act, Schedule 1B para 63 for directions as to whether either the administrator or the company was a person who might have liabilities in respect of statutory environmental liabilities under the Water Recourses Act1991. The Environment Agency contended that this relief could not be granted by way of "directions" under paragraph 63, arguing, inter alia, that "the provision cannot have been intended to provide the court dealing with the insolvency the jurisdiction to deal with disputes which would not otherwise have come within its jurisdiction" (loc cit at para 51). Lord Clark, sitting in the Outer House, rejected the challenge to his jurisdiction: he said this (loc cit at paras 82 and 85):

> *"It was submitted … that it is only proceedings which derive directly from and are closely connected with the insolvency proceedings which fall outwith the scope of the ordinary rules as to jurisdiction. The [Environment Agency] argued that, where a dispute between an administrator and a third party does not relate to the proper interpretation of the insolvency law governing the administration, para. 63 does not provide the court with jurisdiction to determine the issue".*
>
> *"The issue raised by the [Environment Agency] is really about the scope and effect of the jurisdiction conferred by para. 63. I do not consider the [Environment Agency's] submission on this upon to be well-founded. It seeks to put a gloss on the language of the statutory provision: para 63 is not restricted to matters concerning 'the proper interpretation of the insolvency law governing the administration', as was submitted. … Reading para. 63 in the context of the decisions referred to, the question is whether the directions complained of derive directly from administration and are closely connected with it. In my opinion this does not differ in any material way from the meaning of the expression 'in connection with his functions' actually used in para. 63".*

Lord Clark went on to say (loc cit at para 88*): "In order to apply the test in para.63, it is necessary first to identify which functions of the administrator each direction is said to be in connection with and secondly to consider whether there is indeed the required connection".*

59. This, therefore, is an authority that goes against DIB's contention. Mr McQuater criticised it, on the basis that Lord Clark did not distinguish the scope of matters about which directions may be given under paragraph 63 and the scope of the directions that may be given. He cited the judgment of HH Judge Keyser QC in *Allanfield Property Insurance Services Ltd v Aviva Insurance Ltd, [2015] EWHC 3721 (Ch)*, in which it was said (at para 51): "… *although paragraph 63 defines the matters in respect of which the court may be asked to give directions, it does not specify the directions that may properly be given. That is a distinct question* …". I agree with the thrust of this submission, although I would express it slightly differently: Lord Clark does not distinctly consider whether the relief sought was by way of "directions" within the meaning of paragraph 63. It is perhaps understandable that he did not do so: as I read the judgment, that was not a basis on which the Environment Agency distinctly challenged the Court's jurisdiction.

60. The starting point of Ms Toube's third argument is that IR 2015 generally, and section 95(7) in particular, are modelled on the United Kingdom 1986 Act (rather than, in particular, the Australian regime); and that this Court should therefore follow decisions of the United Kingdom courts (rather than the Australian courts) with regard to the interpretation of section 95(7) and the practice with regard to its application. Thus far, I agree with Ms Toube's submission, although it does not follow that the Australian authorities should be disregarded, not least because in the *Re G B Nathan and Co Pty Ltd* case, McLelland J's reasoning was based on a careful analysis of UK legislation and English caselaw.

61. Ms Toube went on to submit that in England (as well as in Lord Clark's Scottish judgment) the power to give directions, now enacted in Schedule B1 paragraph 63 of the 1986 Act, has been interpreted generously and pragmatically, and has been used flexibly to give directions based on an adjudication of pre-insolvency rights and obligations. In *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd, [2020] UKSC 25*, Lord Briggs said this (at para 33):

> *"Where there are real disputes between the company and third parties (who may be creditors or debtors) the insolvency code is inherently flexible as to the best means for their resolution. A disputed pending claim (in court proceedings or in arbitration) against the company (as at the cut-off date) may be allowed to continue by the liquidator or by the court supervising the insolvency process, as the best means of resolving the dispute: …. New proceedings may be authorised for the same purpose. The liquidator may take the initiative by seeking the directions of the court in relation to particular disputes or to legal issues common to a number of disputed claims, and for that purpose join interested parties or representatives of interested classes. Within those proceedings the court has almost unlimited procedural flexibility, as the numerous matters referred to court by the administrators of the top Lehman company in London (Lehman Brothers International (Europe)) demonstrated. Furthermore, there is no rule that, merely because there exists set-off between cross-claims, and the need to take an account, disputes about all the claims and cross-claims need to be adjudicated upon in a single proceeding. Again, the Lehman litigation contains numerous examples of the separate resolution, in successive proceedings, of different issues between the same parties within the Lehman group, concerning their mutual dealings".*

62. I need no persuading that in many cases the English courts have exercised their power to give directions on the application of an administrator or liquidator to make determinations about and affecting the pre-insolvency rights and obligations of third parties. Further, where necessary, the Courts have appointed representative respondents to ensure that directions are effective and binding on all interested parties. Ms Toube was able to refer to many cases that illustrate this, including cases concerning the administration of Lehman Brothers International (Europe) to which Lord Briggs referred (and of which he had conduct in the early years of the administration). However, nothing suggests that in these cases there was a challenge to the

power of the court to make the directions sought, and the parties to them appear to have consented to have their disputes determined in such proceedings, or at least acquiesced in the courts so determining them: they are cases of the kind to which McLelland J referred in the passage of his judgment in *Re G B Nathan and Co Pty Ltd* that I have cited.

63. I should refer specifically to two cases on which Ms Toube relied, in which there was a challenge to the Court's jurisdiction: *Re Worldspread Ltd, [2015] EWHC 1719 (Ch)* and *Re Allanfield Property Insurance Services Ltd.*, (cit sup). In *Re Worldspread Ltd*, the company was in special administration, and directions were sought to enable the administrators to distribute client money, which was held on a statutory trust, and to close the administration. The administrators argued that the Court had jurisdiction to give directions and to sanction their proposals on two bases: under paragraph 63 of Schedule 1B to the 1986 Act, and under its inherent powers in relation to trusts. With regard to the former basis, Birss J said this (at para. 21): "*Whether the paragraph 63 jurisdiction would be sufficiently wide on its own to justify the final order sought is at least open to question. After all client money is not part of the insolvent estate*". He observed that that debate did not matter if the Court's inherent jurisdiction applied, and he decided that it did.

64. The *Allanfield* case is similar, in that, when they went into administration, the companies, which had operated as insurance intermediaries, held client monies by way of insurance premiums that had been received from customers but not yet been passed on to insurers (or other insurance intermediaries). The administrators considered, and the Court agreed, that they were subject to the applicable statutory trust regime, and they sought directions for their distribution. HHJ Keyser QC referred to the judgment of Birss J in the *Worldspread Ltd* case, and said (at para 49), "*In my judgment … the court has power under paragraph 63 of Schedule B1 to give directions to the administrators in respect of moneys held by a company in administration on statutory trusts, although these moneys do not form parts of the assets of the company*". However, at paragraph 51, in the passage that I have already cited, he observed that paragraph 63 does not specify the scope of the directions that the Court may properly give, and said that "*That question is conveniently considered in light of the alternative basis on which the application is brought, namely the invocation of the court's inherent equitable jurisdiction*". He made his order under that jurisdiction.

65. In light of these two contemporaneous judgments (and given that *In re Dawson International plc* had not then been decided), I cannot accept the submission that the intention of IR 2015 was to adopt a settled position established under the laws of the United Kingdom that the Courts have the power under the insolvency regime in the 1986 Act to make directions such as those sought in the Directions Application.

66. In my judgment, none of Ms Toube's arguments answer DIB's jurisdiction challenge to the Directions Application, and I uphold it. I find the reasoning of McLellan J in *Re G B Nathan and Co Pty Ltd* (cit sup) persuasive. I acknowledge that McLelland J based his interpretation on (i) the historical antecedents to section 497(3), (ii) the terms of the subsection, and (iii) the provisions of section 497 as a whole. I take it that he refers to this third consideration because the section also requires a liquidator to have regard to "any directions given by resolution of creditors or contributories at any general meeting or by the committee of inspection", and here, clearly, the word "directions" cannot include determination of the rights of third parties; and McLelland J considered that "directions" should be given a similar meaning in section 497(3). No such consideration arises here from any use of the term "directions" elsewhere in IR 2015. However, the other two reasons that McLelland gave for his interpretation are applicable here, and, as I see it, the fundamental question is about the ordinary and natural meaning to be given to "directions" in section 95(7). I consider that it stretches the natural meaning of the word too far to interpret it as conferring jurisdiction to make the determinations sought by the Joint Administrators.

67. I add for completeness that, in the absence of any complaint by the Insurers, the Joint Administrators might be able to proceed under section 95(7) of IR 2015 for directions that the Insurers pay them insurance receivables, or indeed to apply for such an order under section

254(3). However, there is, in my judgment, no proper basis on which they can make DIB a party to such an application.

The Claim Form Proceedings

68. I therefore come to the Claim Form Proceedings, and consider first the challenge to the unamended proceedings. The claimants are NMCH, the Operating Companies, and the Joint Administrators. The defendants are DIB and the Insurers. The orders sought are similar to those sought by the Joint Administrators in the Directions Application.

69. The Court has jurisdiction over claims brought in the Claim Form Proceedings under Article (13)7(a) of the Founding Law, because they involve NMCH and the Operating Companies, which, being registered in ADGM, are Global Market Establishments within the definition of Article (1) of the Founding Law.

70. DIB submits that the proceedings are not properly brought because:

a. The claims brought by the Original Guarantors under the MMA should be stayed under the *Arbitration Regulations 2015*.

b. The claims by NMCH should be stayed because of the jurisdiction clauses in the ARAs and APAAs.

c. The other Operating Companies have no contractual relationship of any kind with DIB, and their claims serve no purpose.

d. The Joint Administrators do not have claims that they can pursue on their own behalf, as opposed to acting in the name of and acting for the companies.

The Application for a Stay of the Claim under the Arbitration Regulations 2015

71. Section 16(1) of the *Arbitration Regulations 2015* (the "**Arbitration Regulations**") provides that, "A party to an arbitration agreement against whom legal proceedings in the Court are brought (whether by way of claim or counterclaim) in respect of a matter which is the subject of the arbitration agreement may … apply to the Court to stay the proceedings in so far as they concern that matter". The term "legal proceedings" means "civil proceedings in the ADGM Courts": see Schedule 1 paragraph 3(k). Section 16(2) provides that, "On an application made under subsection (1), the Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed". Section 16(3)(b) provides that an application for a stay may "not be made by a person … after he has taken any step in those proceedings to answer the substantive claim". These provisions in section 16 are modelled on article II of the Convention on the Recognition of and Enforcement of Foreign Arbitral Awards (1958) (the "**New York Convention**"), and based on the Model Law (on International Commercial Arbitration drafted by UNCITRAL and adopted by the United Nations in June 1985). They are in materially similar terms to sections 9(1), 9(3) and 9(4) of the English Arbitration Act 1996 (the "**1996 Act**").

72. If and in so far as an application satisfies the conditions of section 16(1), the only grounds on which the Court may refuse a stay are those in section 16(2); otherwise, the Court has no discretion. DIB claims that it is entitled under section 16(1) to a stay of proceedings brought by the Operating Companies because they are in respect of a matter (or matters) which is (or are) the subject of the Arbitration Agreement.

73. The proper approach to the question what constitutes a "matter" "in respect of which proceedings have been brought" has been considered in three cases in the English Commercial Court: *Lombard North Central plc v GATX Corpn., [2012] EWHC 1067 (Comm), Autridad del Canal de Panama v Sacyr SA, [2017] EWHC 2228 (Comm),* and *Sodzawiczny v Ruhan, [2018] EWHC 1908 (Comm)*. It was not controversial before me that I should adopt the approach

explained in those cases, and I can summarise the essential principles by drawing upon the formulation of them by Popplewell J in the *Sodzawiczny* case at paragraph 43:

a. A "matter" is an issue constituting a dispute or difference that is within the scope of the arbitration agreement.

b. Where the issues between the parties have been identified when the court considers an application for a stay, the matters are likely to be readily discerned, but (since a defendant must apply for a stay before serving a defence) the issues might not be fully identified or developed with particularity by that time. In those circumstances (and this is such a case) the court should seek to identify issues that it is reasonably foreseeable might arise.

c. The court must stay the proceedings if and to the extent that they are in respect of an issue that is covered by the arbitration agreement, whether or not it is the main issue or one of the most substantial issues. It will order a stay in respect of "any reasonably substantial issue that is not merely peripheral or tangentially connected with the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner": *Tomolugen Holdings Ltd v Silica Investors Ltd, [2015] SGCA 57* at paragraph 113.

d. In considering whether the proceedings are in respect of a matter covered by the arbitration agreement, the court is concerned with the nature and substance of the claim, and not its pleaded form.

74. It is recognised that this approach might lead to proceedings being fragmented, and the convenience and efficiency of unified proceedings to resolve a dispute might be sacrificed in order to uphold the parties' choice to arbitrate: see the *Lombard North Central case* (loc cit) at para 16 and the *Sodzawiczny case* at para 44. As Newey LJ put it in *Bridgehouse (Bradford No. 2) Ltd v BAE Systems Ltd, [2020] EWCA Civ 759* at para 63, "*I do not consider that procedural complexity will of itself generally be capable of giving rise to non-arbitrability*".

75. Mr McQuater identified four points ("**DIB's Propositions**") as matters that, he submitted, are covered by the Arbitration Agreement, and that, he submitted, it was reasonably foreseeable would be in dispute in the Claim Form Proceedings if they are not stayed:

a. A contention by DIB that it holds security by way of an equitable assignment under the terms of the MMA in view, in particular, of (i) the undertaking in Schedule 10 to provide the specified security documents, including an assignment agreement in respect of insurance receivables, and (ii) the guarantees given by the Original Guarantors in clause 10. This entails a question whether, if DIB has a security interest by way of charge, it is, as DIB contends, a fixed charge. I shall refer to this contention as the "**Equitable Assignment Proposition**".

b. A contention by DIB that the intention of the parties to the MMA was that the ARA should effect an assignment of the insurance receivables, and that it should be entered into by the parties who could assign them validly and effectively: and that, if necessary parties were omitted when the ARA was executed, that come about by a mistake, which should be rectified. I shall refer to this as the "**Rectification Proposition**".

c. A contention that, by Schedule 10 of the MMA, NMCH was given authority by other parties to the MMA to assign insurance receivables on their behalf, and, when entering into the ARA, it did so. I shall refer to this as the "**Agency Proposition**".

d. A contention that the undertakings by the Insurers to pay insurance receivables into the Amanat account gave DIB a security interest in them. I shall refer to this as the "**Undertakings Proposition**".

76. I must consider three questions:

a. Are DIB's Propositions covered by the Arbitration Agreement?

b. Is it reasonably foreseeable that DIB's Propositions will become issues in the Claim Form Proceedings unless a stay is ordered?

c. Are DIB's Propositions arbitrable?

Article (13)9 of the Founding Law

77. Before I come to these questions, I shall consider a submission of Ms Toube about Article (13)9 of the Founding Law, which provides that, notwithstanding Article (13)7, "the parties may agree to refer their claims or disputes to arbitration or, in relation to the issues specified in subparagraphs 7(a) and (b), may agree in their commercial contracts and transactions to submit to the jurisdiction of any other court other than the Global Market's Court of First Instance". (I need not consider Article (13)7(b).)

78. Ms Toube advanced a preliminary argument against DIB's challenge under the Arbitration Regulations that Article (13)9 does not permit parties to restrict the jurisdiction of the Court under Article (13)7 by entering into an arbitration agreement such as that in the MMA. She submitted that, whereas Article (13)9 permitted parties to make jurisdiction agreements "in their commercial contracts and transactions", it did not permit them so to make arbitration agreements. When Article (13)9 is interpreted as a whole, she argued, the term "claims or disputes" must be taken to refer to claims already made or disputes that had already arisen when the arbitration agreement was made, and not to claims under earlier "commercial contracts and transactions" that contain an arbitration clause: in other words, it is restricted to ad hoc arbitrations. I cannot accept this submission: I see nothing in Article (13)9 that requires such a strange restriction on parties' freedom to choose to arbitrate their disputes.

Are DIB's Propositions within the Scope of the Arbitration Agreement

79. Since the decision of the House of Lords in *Fiona Trust & Holding Corp v Privalov, [2007] UKHL 40*, the starting point for interpreting an arbitration agreement and determining its scope is not to focus on "fussy distinctions" about the exact terms used, but to construe it liberally, recognising that generally rational businessmen entering into an arbitration agreement will intend that any dispute arising out of their relationship should be resolved by the same tribunal: see esp. at para 13 per Lord Hoffmann and at paras 26 and 27 per Lord Hope.

80. On occasions, however, parties enter into arrangements that contemplate engaging different tribunals to resolve disputes. Such a case was considered by the English Court of Appeal in *Trust Risk Group SpA v Am Trust, [2015] EWCA 437*. Beatson LJ cited (at para 48) the observation in *Dicey, Morris & Collins, The Conflict of Laws (2012, 15th Ed)* para 12-110 that, "*Where a complex financial or other transaction is put in place by means of a number of interlinked contracts, and each has its own provision for the resolution of disputes, the point of departure will be that it is improbable that a jurisdiction clause in one contract, even in ample terms, was intended to capture disputes more naturally seen as arising under a related contract*", and that, even if the consequence is a risk that the overall process of resolving disputes will be fragmented, this will not be sufficient to displace the policy of construing and giving effect to the parties' agreements. As Beatson LJ explained, in these circumstances a court should construe the agreements as a whole, which might require consideration of which contract gave rise to the dispute and so which jurisdiction clause is "closer to the claim". DIB accepts that, as far as concerns the relationship between NMCH and DIB, the claims in the Claim Form Proceedings, and the matters in dispute in respect of them, are closer to the jurisdiction clauses in the ARA and APAA than the Arbitration Agreement, and so they concede that the Claim Form Proceedings are not in respect of any matter in dispute between NMCH and DIB that is within the Arbitration Agreement. For convenience, I shall refer to this as the "**NMCH Concession**".

81. DIB argues that the position with regard to the claims brought by the Original Guarantors is different. The Claimants' case is that that the Original Guarantors were not party to any agreement other than the MMAs. There is therefore no reason to restrict the meaning of the Arbitration Agreement on a liberal construction in accordance with the proper approach explained in *Fiona Trust v Privalov* (cit sup). Accordingly, DIB submits that, given the wide wording of the Arbitration Agreement, all four of its Propositions fall within its scope.

82. It should be said first that, as it is put in *Merkel, Arbitration Law, para 3-17 fn 20*, "*The English courts have taken the view that insolvency does not affect the construction of an arbitration clause, so that if it extends to the dispute then insolvency will not prevent the matter from being arbitrated even though the arbitral tribunal may not be [able to] make all the necessary orders … The Singaporean approach in [Larsen Oil and Gas Pte Ltd v Petropod Ltd, [2011] SGCA 21], by contrast, is to construe the arbitration clause as excluding such disputes entirely*". The ADGM Courts will follow the approach of English law in accordance with the *Application of English Law Regulations 2015*.

83. I do not consider that the Undertakings Proposition is within the scope of the Arbitration Agreement. Mr McQuater stated it in these terms: "…the [Original] Insurers each gave separate undertakings … to DIB to pay the proceeds into the Amanat account as security for this facility; and DIB is arguing in Dubai and would argue [in the Claim Form Proceedings] that it is entitled to enforce those undertakings irrespective of the validity of the assignment". As Mr McQuater expressly acknowledged, therefore, the claims under the undertakings that DIB asserts are discrete from any question about whether the insurance receivables have been assigned, whether under the MMA or otherwise. I do not consider that the parties to the MMA are to be taken to have intended that the Arbitration Agreement should extend to a claim against third parties, the Insurers, under the undertakings irrespective of whether there was an assignment of the insurance receivables or the terms or effect of any assignment. To my mind, however liberally the Arbitration Agreement be interpreted, it does not come within its natural meaning.

84. I take the Rectification Proposition and the Agency Proposition together. The thrust of DIB's argument on both is that the Original Guarantors are properly to be regarded as parties to the ARA, so that the choses in action against the Insurers in respect of insurance receivables were assigned under it. However, if the Original Guarantors are parties to the ARA, they are parties to the jurisdiction clause in it. It therefore follows from the NMCH Concession that the Rectification Proposition and the Agency Proposition are closer to the jurisdiction clause than to the Arbitration Agreement, and there is no arbitration agreement (in the MMA or at all) applicable to them. In these circumstances, the award of an arbitral tribunal would have no validity over these matters (unless, which it is to my mind unrealistic to suppose, the Original Guarantors extended the tribunal's jurisdiction by agreement or waiver): see the *Fiona Trust v Privalov case* (cit sup), in which, at paragraph 34, Lord Hope stated the position where there is no relevant agreement to arbitrate.

85. The position with regard to the Equitable Assignment Proposition is, in my judgment, different. I consider that it clearly falls within the scope of the Arbitration Agreement. This is not because, as Mr McQuater argued, the first head of relief in the Claim is expressed in terms of a declaration "[i]n respect of … the [MMA]". That argument is directed at the form to which the proceedings are couched, rather than their substance, and, as Ms Toube pointed out, the declaration is framed by reference to the MMA simply in order to identify the insurance receivables with which it is concerned. However, Mr McQuater's real argument here is that the whole focus of the Equitable Assignment Proposition would be about the effect of the MMA, and whether the MMA was an agreement by the Original Guarantors to assign that itself constituted an equitable assignment by them.

86. Since I consider that only the Equitable Assignment Proposition is within the scope of the Arbitration Agreement, I shall make particular reference to it in the rest of my consideration of the application for a stay under the Arbitration Regulations, but my conclusions about it apply to DIB's other Propositions.

Is it reasonably foreseeable that DIB's Propositions will become issues in the Claim Form Proceedings?

87. Ms Toube did not dispute the principle that, in deciding whether a potential dispute is a "matter" within the meaning of section 16(1) of the Arbitration Regulations, the proper test is what disputes are reasonably foreseeable. She also accepted that the Court should not engage with the merits of a matter, or consider whether it is properly arguable. She submitted, however, that a matter might be so hopelessly unarguable that it cannot be said to be reasonably foreseeable that it will be raised as a dispute or a difference in the proceedings, and that for this reason it is not reasonably foreseeable that the Equitable Assignment Proposition will be a matter in issue in the Claim Form Proceedings.

88. Ms Toube referred to the distinction between different kinds of guarantee that English law recognises. In *McGuiness v Norwich and Peterborough Building Society, [2011] EWCA Civ 1286*, Patten LJ identified four categories of guarantees of a loan (at para 7):

a. A "see to it" obligation: i.e. an undertaking by the guarantor that the principal obligee will perform his contract;

b. A conditional payment obligation: i.e. a promise to pay if the principal obligee fails to do so;

c. An indemnity; and

d. A concurrent liability with the principal obligee for what is due.

Ms Toube submitted that the nature of the obligation of the Original Guarantors under clause 10 of the MMA is plainly by way of a "see to it" obligation (terminology deriving, I believe, from Lord Diplock's speech in *Moschi v Lep Air Services Ltd, [1973] AC 331*, 348G/H), breach of which would found a claim in damages, and not by way of an undertaking to effect an assignment of the insurance receivables; and that a "see to it" commitment cannot effect an equitable assignment by the Original Guarantors.

89. Under the Arbitration Regulations, the Court has no jurisdiction to give summary judgment on a matter that is covered by an arbitration agreement on the basis that a contention is unarguable or clearly unsustainable as a matter of law. It is concerned only with whether a dispute is a "matter" in respect of which an applicant is entitled to a stay, and not with the merits or arguability of the applicant's contentions: see the *Lombard North Central case* (cit sup) at para 18. As Popplewell J put it in the *Sodzawiczny* case (cit sup. at para 41), "*If a party claims a sum of money, it is enough to constitute a dispute that the other party simply fails to pay. The existence of a dispute does not depend upon the disputing party advancing any reasons for disputing the claim. If it does not advance reasons, a dispute exists regardless irrespective of whether the grounds are bona fide or reach any merits threshold*".

90. It would be inconsistent with the principles governing the Arbitration Regulations for the Court to assess the strength of a parties' case about a matter that the parties agreed should be referred to arbitration, and the Court will be wary of being drawn into making such an assessment in whatever procedural context the disputed question arises. In *Salford Estates (No 2) Ltd v Altomart Ltd (No 2), [2014] EWCA Civ 1575*, a case concerned with staying a winding up petition on the grounds that the alleged debt on which it was based was subject to an arbitration agreement, Sir Terence Etherton C said this (at para 40):

> "… *the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the Companies Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably*

encourage parties to an arbitration agreement – as a standard tactic - to by-pass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act".

91. Even if there might be some very extreme cases in which a court would consider a contention to be so clear that it would be futile to expend time and money pursuing it, it would be very cautious before refusing a stay on the basis that, therefore, it is not reasonably foreseeable that it would be disputed. I do not consider that the Equitable Assignment Proposition to be such an extreme case, or that it is so unarguable that, for that reason, I should reject DIB's contention that it is reasonably foreseeable that it will be in dispute between it and the Original Guarantors. Having so concluded, I do not think it right to discuss further an issue which, in my judgment, is within the territory that the parties have allocated to an arbitral tribunal for determination. I add only, therefore, that I regard the matter as a reasonably substantial issue and not only peripheral or tangential to the parties' rival contentions.

Are DIB's Propositions Arbitrable?

92. The provisions of section 9 of the 1996 Act are subject to section 81(1) which expressly preserves the operation of "any rule of law as to … matters which are not capable of settlement by arbitration". There is no comparable provision in the Arbitration Regulations, but it was not in dispute before me that DIB would not be entitled to a stay if and in so far as DIB's Propositions are not capable of being resolved by arbitration, that is to say are "nonarbitrable". The point about arbitrability might be accommodated within the structure of the Arbitration Regulations in either (or both) of two ways: one is that, if a dispute is not arbitrable, the conditions for applying for a stay under section 16(1) are not satisfied; the other analysis is to regard the arbitration agreement to be, in that regard, incapable of being performed, within the meaning of section 16(2). I do not think that anything turns on which view is preferred. In *Fulham Football Club (1987) Ltd v Richards, [2011] EWCA Civ 855* at para 36, Patten LJ preferred the second approach, and I agree with him: see too *Russell on Arbitration (24th Ed, 2015)*, where (at para 2-080) the concept is presented in terms of whether a matter is "capable of being submitted to arbitration".

93. Russell goes on to explain (at para 2-081) that, while there is no agreed or statutory definition of arbitrability, or of what is capable of settlement by arbitration, in English law (and there is none in ADGM law), "*In particular, a dispute will generally not be arbitrable if it involves an issue of public policy, public rights or the interests of third parties, or where the dispute in question is clearly covered by a statutory provision which provides inalienable access to the courts*". In the context of insolvency, questions of arbitrability engage these various considerations, and the focus of the inquiry is whether respect for the arbitration agreement gives way to a public policy in managing the insolvency in accordance with the statutory scheme in the interests of creditors and others. This is explained by Gary B. Born in *International Commercial Arbitration* at p.1084, para 6.40(F), and I consider his observations about the international position of particular interest because, as I have said, section 16 of the Arbitration Regulations implements an international treaty, the New York Convention, to which the UAE is a party. He writes (at para 6.40 (F)):

> *"Parties to international arbitration agreements sometimes become subject to some form of bankruptcy or insolvency, either in their home jurisdiction or elsewhere. In most jurisdictions, only national courts (often specialised courts) have authority to commence, administer and wind-up bankruptcy proceedings, including proceedings to liquidate a bankrupt company, reschedule its liabilities, operate it under some form of receivership or administration, or distribute pro rata to designated creditors and owners. Disputes concerning these "core" bankruptcy functions are almost universally*

considered nonarbitrable, whether in domestic or international arbitrations, under the laws of developed jurisdictions.

It is much more controversial, however, whether and when disputes merely involving a bankrupt entity as a party or raising questions of bankruptcy law (e.g. the continued effect of a contract), may be resolved in arbitration. Different national legislative regimes and judicial decisions have reached different conclusions about these types of disputes. In many such cases, the desirability of a centralised forum for resolving all disputes involving the bankrupt entity is weighed against that entity's preexisting commitment to resolve disputes with a contractual counterparty by international arbitration, with different legal systems adopting different resolutions of these competing interests. Again, however, the weight of authority, particularly in recent years, supports narrow nonarbitrability rules in this context".

94. Certainly, English law adopts narrow nonarbitrability rules. A month before Born's third edition was published, in *Bridgehouse (Bradford No. 2) Ltd v BAE Systems Ltd, [2020] EWCA Civ 759,* a case concerning a company being struck off the companies register, albeit not for insolvency, Males LJ said (at para 73): *"In considering whether a dispute is arbitrable, the fact that the parties have agreed that it should be arbitrated is an important starting point. What that means is that they have agreed, not only that it should be arbitrated, but also that it should not be decided by a court. The law permits commercial parties to choose arbitration and should respect their choice unless there are compelling reasons not to do so*". He went on to say (at para 79), "*While I would accept that there are some kinds of application which are incapable of being arbitrated, of which an application to wind up a company is an example, this should in my judgment be a conclusion of last resort. Even then it may be appropriate, … for particular issues falling within the scope of an arbitration clause to be referred to arbitration before the court decides whether to make an order which only the court can make*". A similarly narrow view of what is nonarbitrable has been adopted in Australia: for example, in *Rinehart v Welker, (2012) 95 NSWLR 221*, Bathurst CJ said (at para 167), "*it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will be held to be non-arbitrable*".

95. Ms Toube submitted that DIB's Propositions, including the Equitable Assignment Proposition, are not arbitrable. Her first point was that the nature of the security rights asserted by DIB is *in rem*, and are unsuitable, therefore, to be determined in arbitration. She referred to the judgment of Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd, [2002] NSWSC 896,* a case in which the applicant sought, inter alia, orders invalidating a transfer of shares and rectifying the share register accordingly. Having referred to authority refusing an application to stay a winding up petition on the basis that the underlying dispute was governed by an arbitration agreement, Austin J said this (at para 194): "…, *the public policy considerations held … to be applicable to a disputed claim to wind up a company do not seem to me to prevent the parties from referring to arbitration a claim for some merely inter partes relief under the oppression provisions of the Corporations Act, or for access to corporate information under s 247A. However, the 'in rem' nature of an order for rectification of the share register of a company may prevent reference of that power to an arbitrator*". However, it does not follow, and it is not the law, that a matter is nonarbitrable because it involves an adjudication of the claim of one party to *in rem* rights over the property of another.

96. Next, Ms Toube argued that the essential nature of these proceedings is that the Joint Administrators are seeking to establish how they should conduct the administration. The dispute, she said, was really between the DIB and the Joint Administrators, who are not party to the MMA or the Arbitration Agreement in it. She cited another Australian authority, the judgment of Barrett J in *New Cap Reinsurance Corp Ltd v Grant, (2009) 72 ACSR 638*, in which a liquidator sought repayment from the defendants, a Lloyd's syndicate, of sums said to have been paid under a transaction that he claimed was voidable as an unfair preference under the applicable Corporations Act. The defendants did not take part in the proceedings, but their solicitors made clear in correspondence that they considered that they had an answer to the claim and relied on an arbitration agreement in the underlying reinsurance contract. Ms Toube

relied particularly on part of paragraph 87 of the judgment, but I shall set out paragraph 87 and 88 in full:

> *"… even on the most generous interpretation of the words [of the arbitration agreement] "[a]ll matters in difference between the parties arising under, out of or in connection with this Reinsurance", they do not extend to the present proceeding under s 588FF(1) of the Corporations Act in which the liquidator of one party to the reinsurance contract seeks an order for the payment of money to that contracting party by the other contracting party. This proceeding has nothing to do with the reinsurance contract. It is a proceeding upon a statutory cause of action maintainable by the liquidator of one of the former contracting parties. The cause of action is not available to the contracting party itself. Its liquidator, when suing upon the statutory cause of action, does not attempt to enforce some right of the contracting party. Furthermore, the event giving rise to the proceeding is not anything done under, by reference to or in relation to the reinsurance contract. The relevant event is the making of a payment by one of the parties to the reinsurance contract to the other of them pursuant to a new and separate contact by which they agreed to compromise and release rights and obligations created by the reinsurance contract.*
>
> *"In summary, the "matters in difference" in these present proceedings are matters between NCRA's liquidator and the defendants. They are matters arising from events that happened after the agreed termination of the reinsurance contract and, following the commencement of NCRA's winding up, caused a statutory cause of action to become vested in the liquidator. There was no cause of action and no claim upon the defendants until the winding up of NCRA intervened. The arbitration provision in the reinsurance contract - which ceased to be in force between NCRA and the defendants when, in December 1998, they became parties to the commutation agreement - has no bearing on the statutory right that the subsequently appointed liquidator of NCRA subsequently acquired to seek orders against the defendants under s. 558FF(1)".*

97. Ms Toube relied upon the observation that the proceedings of this nature could only be brought by the liquidator (and by the company in liquidation), and that the liquidator was suing on a statutory cause of action. However, in my judgment, the authority does not help Ms Toube. First, the decision of Barrett J turned on the interpretation of the arbitration agreement, and he decided that it did not extend to the liquidator's claim. Secondly, the dispute in this case is about the rights and obligations of DIB and the Original Guarantors under the MMA prior to the administration order, albeit the determination of the dispute will affect how the administration should be conducted (for example, by way of how the Joint Administrators should distribute assets in their control and whether, in a distribution, they should withhold monies from DIB). The fact that a dispute arises in the context of proceedings on a statutory cause of action that can only be brought by a liquidator or administrator does not mean that the dispute is nonarbitrable.

98. Ms Toube's next point was that DIB's Propositions are nonarbitable because they affect the position of third parties, namely (i) the Joint Administrators; (ii) NMCH and the other NMC Group companies in administration; (iii) creditors (whether secured or unsecured) of the Original Guarantors; and (iv) the Insurers.

99. The particular interest of the Joint Administrators is that the determination of the Equitable Assignment Proposition affects whether DIB's security has priority over their remuneration and expenses. The interests of other NMC group companies are engaged because the determination would affect the web of interrelated rights and obligations of the companies in administration. It would also affect the distributions and payments to other creditors, in that it would determine whether the insurance receivables fall into the companies' estates and, if so, DIB's standing as a creditor in terms of priorities.

100. The determination of the Equitable Assignment Proposition by an arbitral award would indeed affect these non-parties to an arbitration in this way, but it does not follow that it is nonarbitrable. As Foxton J said in *Riverrock Securities v International Joint Bank of St Petersburg (Joint Stock*

Company), [2020] EWHC 2483 (at para 87(ii)), a matter might engage the interests of third parties "*to the extent that any creditor of an insolvent company will benefit from its success in arbitration*", but that is not sufficient. That is the real nature of the interests of the Joint Administrators, the other NMC Group companies and the creditors in the question.

101. I have found the position of the Insurers more troubling. In English law, if a chose in action is assigned in equity, the debtor or other obligee will be under no liability to the assignee if before receiving notice of the assignment he pays or settles with the original creditor or obligor, but if he does so having received notice, he remains liable to the assignee: see *Snell's Equity (34th Ed, 2020)* at para 3-020. It is readily understandable that the Insurers might be assisted by a determination about the Equitable Assignment Proposition that is binding upon the Original Guarantors (as putative assignors), DIB (as putative assignees) and themselves. This would not be achieved if the Equitable Assignment Proposition is decided by arbitration (unless by agreement the Insurers were made party to it). Under the English statutory regime, a problem of this kind might be managed by the court ordering interpleader proceedings under section 10 of the 1996 Act, and a stay of the court proceedings pending determination of the issue between rival claimants in accordance with their arbitration agreement. There is no comparable machinery (in the Arbitration Regulations or otherwise) available to this Court.

102. I make these observations:

a. The question about the position of the Insurers is nothing to do with the NMC Group companies being in administration. The question would be the same if they were solvent.

b. DIB's claims in the Courts of Dubai are not brought on the basis that it is entitled against the Original Insurers as assignees of the choses in action against them. They are brought only on the basis of the undertakings that the Original Insurers gave in the Acknowledgments. It is conceptually possible, although commercially unattractive, that the Original Insurers might be liable to pay both DIB under the undertakings and the Original Guarantors under the insurance contracts.

c. The obligations of the Insurers under their contracts with the NMC Group are governed by the laws of Abu Dhabi and the UAE. I have stated the English law position of a debtor who pays the original creditor after having notice of an assignment of the claim against him. I have no information about the position under the laws governing the insurance contracts.

103. I cannot see how the Insurers would be disadvantaged by having the Equitable Assignment Proposition determined as between the Original Guarantors and DIB by arbitration: the award would not be binding on them. None of the Insurers has appeared on this application, or suggested that it would be put into a difficult position if I grant DIB's application for a stay under the Arbitration Regulations. If that is suggested, this Court has adequate powers of case management to avoid injustice or unfairness. There is no reason to think that the Courts of Dubai do not have comparable powers in relation to the claims against the Insurers there.

104. I cannot accept that the position of the Insurers means that the Equitable Assignment Proposition is nonarbitrable. I acknowledge that a stay of the issue between DIB and the Original Guarantors will fragment, or further fragment, the resolution of the questions that arise with regard to the insurance receivables, but it is widely recognised that fragmentation is a price to be paid for the policy of enforcing arbitration agreements.

105. Finally, Ms Toube submitted that, if the Equitable Assignment Proposition is determined by an arbitral tribunal, the determination would not be binding upon third parties, and so would not assist the management of the insolvency. The determination might be challenged by other creditors, and so the same matter might be brought before the Court. I am not persuaded by this argument either. Such a complaint would not mean that Original Guarantors, or the Joint Administrators acting on their behalf, might treat DIB otherwise than as the tribunal's award required: DIB's rights against the Original Guarantors would be those determined in the award.

Any claim by another creditor to priority over or parity to DIB's claims would fall to be assessed accordingly.

106. I therefore conclude that DIB's Propositions are arbitrable, and that, on the unamended claim, DIB is entitled to have the Equitable Assignment Proposition determined in arbitration and to a stay of the Claim Form Proceedings to the extent necessary to give effect to that entitlement.

The Amendment Application

107. The Claimants seek to amend the Claim Form Proceedings so as to avoid them being stayed in so far as relief is sought by the Original Guarantors. To this end, they apply for permission for the Operating Companies, including the Original Guarantors, to be removed from the proceedings as claimants and to be joined as additional defendants. Under rule 56 of the CPR, the Court's permission is required to remove or add a party after a claim form has been served.

108. Ms Toube argued that the Joint Administrators and NMCH, indeed the Joint Administrators alone, have sufficient interest in seeking the relief claimed for the proceedings to be properly constituted without them. I heard no argument to the contrary, and, were such argument advanced, it would go to the merits of the claims and not to jurisdiction. I would give permission for the amendment in so far as it removes companies as claimants: Mr McQuater did not argue against this.

109. DIB's objection to the proposed amendment is that it seeks to add the Operating Companies as defendants. The purpose is not that the remaining claimants intend to pursue any claim against them: the remaining claimants have no dispute with them, and indeed they have common representation. The rationale for the proposed amendment is that the Operating Companies and DIB should all be party to any determination, so that it might be binding as between them, and so to circumvent DIB's entitlement to a stay under the Arbitration Regulations, and to have (inter alia) the Equitable Assignment Proposition determined by this Court and not an arbitral tribunal.

110. As Males LJ said in *Bridgehouse (Bradford No. 2) Ltd v BAE Systems Ltd* (cit sup) at para 73, an agreement to arbitrate means an agreement not only that a dispute should be arbitrated, but also that it should not be decided by a court. The policy of upholding arbitration agreements has regard to both limbs of that proposition, and is concerned with the substance rather than the form of Court proceedings that go against an arbitration agreement. In my judgment, it would not be proper for the Court to permit the proposed amendment which is designed for this purpose. I therefore refuse permission to make the proposed amendment.

The Application for a Stay of the Claim Form Proceedings by NMCH

111. DIB also seeks to stay the claims of NMCH against it in the Claim Form Proceedings on the grounds that it is brought in breach of the jurisdiction clause in the ARA. Ms Toube did not argue that the proceedings fall outside the scope of the jurisdiction clause properly construed. She opposed the stay on the grounds:

    a. That the Court has no power to order a stay in favour of proceedings in another UAE Court; and

    b. That this is not a suitable case for a stay to be granted.

112. The mainstay of the first argument is a decision of the DIFC Court of Appeal in *Investment Group Private Ltd v Standard Chartered Bank, [2015] DIFC CA 004*, the reasoning of which Ms Toube adopts and submits is applicable here. The dispute in that case arose out of two loans advanced by Standard Chartered Bank ("**SCB**") to Investment Group Private Ltd ("**IGP**"). SCB brought proceedings in the DIFC Courts for sums said to be due under them and to enforce a Share Pledge Agreement. IGP applied for a declaration that the courts of DIFC had no jurisdiction to hear the proceedings, and alternatively for a stay on the grounds of *forum non conveniens* in favour of the Sharjah Courts, where IGP had brought overlapping proceedings.

With regard to the application for a stay, the DIFC Court of Appeal considered that the doctrine of *forum non conveniens* has no role in the context of resolving which of two courts of the UAE should determine a dispute. Its essential reason was that under the Constitution of the UAE the power to determine conflicts between the decisions of different courts of the UAE is vested in the Union (or Federal) Supreme Court ("**USC**"). Article 99 of the Constitution provides (according to the translation provided by Mr Nasser Ahmed Nasser Al Osaiba, a partner of Global Advocacy and Legal Counsel, who act for the Joint Administrators): "The Union Supreme Court shall have jurisdiction in the following matters: … Conflict of jurisdiction between the judicial authority in one Emirate and the judicial authority in another Emirate. The rules relating thereto shall be regulated by a Union Law". The DIFC Court reasoned that, "*Although Article 99 does not adopt the language of "exclusive jurisdiction", it cannot be understood as conferring on the USC anything less than exclusive jurisdiction over the matters set out in that provision"* (at para 187), and that *"It is true that a jurisdictional conflict crystallizes, and the USC intervenes, only after the competing UAE courts issue conflicting and final judgments on jurisdiction …. But that fact does not mean that the DIFC can apply the [forum non conveniens] doctrine before the jurisdictional conflict crystalizes …The power to resolve jurisdictional conflicts … is vested in the USC absolutely*" (at para 190). Thus, the Court concluded (at para 191) that "*The point is that the power to determine jurisdictional conflicts is absolutely and exclusively vested in the USC under the UAE's Constitution, and is therefore removed from this Court's power in all circumstances*".

113. Moreover, while the DIFC Court of Appeal observed that Article 99 of the UAE Constitution, though not expressly referring to exclusive jurisdiction, should be interpreted as conferring exclusive jurisdiction on the USC, Mr Al Osaiba points out that this part of the reasoning is reinforced by Article 33 of Federal Law No 10/1973 Concerning the Supreme Federal Court, which provides that, "The Supreme Court has exclusive jurisdiction to look into the following matters: …. 10. Conflict of jurisdiction between a judicial body in an Emirate and another judicial body in another Emirate or between the judicial bodies in any Emirate between them". Article 60 of the Law provides that, "The competent chamber at the Supreme Court shall order the stay of the execution of the contradictory decisions until it determines which of them is to be executed. The President of the Court may order the stay of execution of such decisions until the matter is submitted to the competent chamber in the Court".

114. The decision of the DIFC Court of Appeal is not binding on this Court, but it would be of considerable persuasive authority if its reasoning is applicable. However, in the *Investment Group* case, IGP had conceded that the parties had not agreed to opt out of the jurisdiction of the DIFC Court (and they were not permitted by the Court of Appeal to withdraw that concession), and therefore the Court of Appeal did not consider whether a stay might be granted when, as in this case, the parties have agreed that another court of the UAE should have exclusive jurisdiction to determine the dispute. Indeed, the Court of Appeal cited with apparent approval (at para 196) an observation of HE Justice Ali Al Madhani in *Allianz v Al Ain Ahlia, CF2012/2012* (at para 32): "… any inconvenience that a defendant is put to by the inappropriate exercise of jurisdiction by one UAE Court relative to another UAE Court is, in the words of HE Justice Ali Al Madhani …. a "*risk both parties have brought onto themselves when failing to reach an agreement on a jurisdiction clause in their sophisticated contract, or even to reach an agreement at any stage after the dispute had arisen knowing full well the legal system in place in the UAE*"". Nevertheless, Ms Toube submitted that the basic reasoning of the Court of Appeal applies equally in a case in which, as here, there is an exclusive jurisdiction clause.

115. Mr McQuater did not dispute the reasoning of the judgment of the DIFC Court of Appeal: he disputes its applicability. He referred to Article (13)9 of the Founding Law, which provides that the parties "may agree in their commercial contracts and transactions to submit to the jurisdiction of any other court than" this Court. He submitted that Ms Toube's argument is inconsistent with that provision. I agree with Mr McQuater: there is no scope to contend that the Article is intended to refer only to foreign courts and not to those of the UAE: it expressly refers to any court other than this. Moreover, even if (which I am not in a position to decide) there might be "conflict of jurisdiction", within the meaning of Article 99 of the Constitution, between (i) decisions of the Dubai Courts on the undertakings in the Acknowledgments said to have been given by the Original Insurers and (ii) a decision in this Court about whether the

choses in action against the Insurers have been validly and effectively assigned, I do not accept that the reasoning of the DIFC Court of Appeal can be transposed to a case in which the parties have made an applicable agreement conferring exclusive jurisdiction on another UAE Court: the basis for a stay in such a case is not in order to avoid inconsistent decisions, but that (irrespective of whether there are proceedings in another court) the claimant should be restrained from flouting his agreement not to bring proceedings here.

116. I must therefore consider Ms Toube's other argument, that this is not a suitable case for a stay to be granted. The starting point here is the speech of Lord Bingham in *Donohue v Armco Inc and Others, [2001] UKHL 64*, who said (at para 25): "*Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause*". However, he went on to say (at para 27) that: "*The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions*". When he considered the facts of the case before him, in particular that the applicant, Mr Donohue, sought to rely on an exclusive English jurisdiction clause to restrain multi-party litigation in New York in which the parties included persons not bound by the clause, Lord Bingham said (at para 33), "*Thus, Mr Donohue's strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall within that clause is matched by the clear prima facie right of the Armco companies to pursue in New York [claims against Mr Donohue that were not within the scope of the jurisdiction clause and claims against person not party to it]. The crucial question is whether, on the facts of this case, the Armco companies can sh*ow *strong reasons why the court should displace Mr Donohue's clear prima facie entitlement*". The essential reason that Lord Bingham identified for refusing Mr Donohue an injunction was this (at para 34): "… *in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would … run directly counter to the interests of justice*".

117. Ms Toube was able to present a strong argument against staying the proceedings against NMCH despite the exclusive jurisdiction clause in the ARA if DIB failed in its application against the Original Guarantors for a stay under the Arbitration Regulations. Mr McQuater questioned whether NMCH was entitled to advance some of the points that she made (such as that the language of the contractual documents was English, and that this Court could resolve any questions of English law relatively easily) in view of the parties' agreement in the jurisdiction clause that the Courts of Dubai are the most appropriate and convenient to settle disputes and that they would not argue to the contrary. However that might be as far as NMCH is concerned, it was certainly open to Ms Toube to advance her argument on behalf of her other claimants. More importantly, this does not answer Ms Toube's key point that it is only in this Court that all the issues can be resolved between the relevant parties so as to assist the Joint Administrators to discharge their functions, including carrying through their proposals for DOCAs. If I had refused DIB's application for a stay under the Arbitration Regulations, I should have accepted this submission and refused the application to stay claims by NMCH.

118. However, I have decided that DIB is entitled to a stay under the Arbitration Regulations. Neither Ms Toube nor Mr McQuater suggested that the scope of the jurisdiction clause is materially wider than the Arbitration Agreement, and so a stay to enforce the jurisdiction clause will not stifle the Claim Form Proceedings with regard to questions that would fall outside the stay under the Arbitration Regulations. In these circumstances, the issues covered by the jurisdiction clause cannot in any case be resolved between all the interested parties in the same proceedings in this Court. This being so, I see no sufficient reason not to uphold DIB's prima facie right to enforce the exclusive jurisdiction clause in the ARA.

The Claims of the Operating Companies other than the Original Guarantors

119. I shall deal with the claims brought in the Claim Form Proceedings by the Operating Companies other than the Original Guarantors briefly. Ms Toube explained that they were made party to the Directions Application out of an abundance of caution because the Joint Administrators did not know whether DIB had, or intended to claim, an interest in insurance receivables payable to those companies. I assume that they were included as claimants in the Claim Form Proceedings for the same reason. As far as appears from the evidence before me and from what I was told, DIB asserts no claim in relation to them. My understanding is that there is no point in their claims proceeding, but I shall invite Counsel to address me further about what order, if any, I should make in respect of them.

The Claim in the Claim Form Proceedings by the Joint Administrators

120. I come, therefore, to the claims brought by the Joint Administrators. They say that they are entitled to bring the Claim Form Proceedings on their own behalf, as well as on behalf of other claimants, because they have a charge in respect of their remuneration and expenses on property of which they have custody or control and their remuneration and expenses are payable out of that property: IR 2015, section 143(3). These claims are not subject to the Arbitration Agreement because the Joint Administrators are not party to it, and they are not subject to any jurisdiction agreement. DIB did not argue that they are. In my judgment, the Joint Administrators are entitled to continue the Claim Form Proceedings in so far as they seek relief to enforce their rights and claims in respect of remuneration and expenses.

Should there be a Stay of the Directions Application if they are within IR s.95(7)?

121. I add, for the sake of completeness, that, if I am wrong in my conclusion about jurisdiction under section 95(7) of IR 2015, I should have decided that DIB is entitled to have the Directions Application stayed under the Arbitration Regulation to the extent that the directions would be binding as between it and the Original Guarantors.

122. An application by an administrator or a liquidator constitutes "legal proceedings" as defined for the purposes of section 16(1) of the Arbitration Regulations. Given that the jurisdiction under the section is concerned with the substance and not the form of the proceedings, I cannot accept that they are not to be characterised as proceedings "against" DIB. Nor would it be a reason to refuse a stay under the Arbitration Regulations that the Joint Administrators seek directions to assist them to carry out their functions as Court Officers, and, as such, are subject to the Court's supervision. In the *Rinehart v Welker case* (cit sup) the Court held that a claim to remove a trustee was capable of resolution by arbitration. Bathurst CJ said (at para 175) that, "… *at least in circumstances where the trustee and each beneficiary have expressly agreed to their disputes being referred to arbitration, a court should give effect to that agreement. The supervisory jurisdiction of the court is not ousted. It continues to have the supervisory role conferred on it by the relevant legislation, in this case the Commercial Arbitration Act*". Similarly, in *Fitzpatrick v Emerald Green Pty Ltd [2017] WASC 206* Martin CJ said (at para 91) that issues relating to the proper administration of a trust were arbitrable irrespective of the fact that the Court maintained a supervisory jurisdiction over the administration of trusts and notwithstanding not all the beneficiaries were party to the proceedings.

123. What of the application for a stay on the Directions Applications in so far as the relief would determine questions between NMCH and DIB that are within the scope of the jurisdiction clause in the ARA? The basis of the Court's jurisdiction to hear and determine an administrator's application for directions is Article (13)7(d) of the Founding Law. Article (13)9 provides that parties may agree to submit to the jurisdiction of courts other than this court "in relation to the issues specified in subparagraph 7(a) and (b)". Mr McQuater submitted that, nevertheless, the Court will give effect to a jurisdiction clause when relief might be claimed by way of a claim under Article (13)7(a) or (b), even if the claim is also covered by Article (13)7(d); that (as is shown by the Claim Form Proceedings) the relief sought by the Directions Application might be so claimed; and that therefore Article (13)9 covers the Directions Application.

124. I see considerable force in this reasoning. After all, in so far as it is concerned with agreements to submit to the jurisdiction of another court, Article (13)9 would have very restricted application if it applies to any matter falling within Article (13)7(d) irrespective of whether it also falls within Article (13)7(a) or Article (13)7(b). Article (13)7(d) covers "Any request, claim or dispute which the Global Market's Courts [have] the jurisdiction to consider under the Global Market Regulations", which include the 2015 Regulations, under section 16(2) of which this Court has all such jurisdiction as is conferred on it by (inter alia) Article (13)7 of the Founding Law. However, in view of my conclusion that the Court does not have power to entertain the Directions Application, I do not have to decide the point, and shall not do so. It is better deferred for a case in which a decision is necessary, and the arguments more fully developed.

125. However that might be, if I have interpreted section 95(7) too narrowly, and the Court does have power under it to give directions to an administrator that affect a third party's rights notwithstanding that the third party does not consent to, or acquiesce in, the procedure being so used, nevertheless I could not accept that the Court should exercise the power if to do so would compromise the rights of the third party and fail to safeguard his interests. More specifically, I could not accept that the Court should allow the section 95(7) procedure to be used to override a third party's contractual entitlement under an arbitration agreement or a jurisdiction clause to have his disputes determined in another forum.

Conclusions

126. I accept DIB's submission that the Court has no jurisdiction to entertain the Directions Application. I accept that the Claim Form Proceedings should be stayed in so far as they concern the determination as between DIB and the Original Guarantors of matters within the scope of the Arbitration Agreement, or as between DIB and NMCH of matters within the scope of the jurisdiction agreement in the ARA. I refuse the Amendment Application.

127. Mr McQuater acknowledged that it does not follow from these conclusions that the Claim Form Proceedings should be stayed entirely. It remains to determine the scope and other terms of the stays that I should order. In particular, DIB did not seek to have stayed the Claim Form Proceedings as against the Insurers provided that the Court's determination is not binding upon it with regard to matters within the scope of the Arbitration Agreement in the MMA or the jurisdiction clause in the ARA. Further, I have concluded that the Joint Administrators are entitled to proceed with their own claims in the Claim Form Proceedings against DIB and the other defendants so as to assert their own rights, specifically their rights under IR 2015, section 143 with regards to their remuneration and expenses. I shall invite submissions from Counsel and seek their assistance about a form of order that will give effect to my conclusions. I shall also invite submissions about costs.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
24 May 2021

SCHEDULE 1

No.	Company	Registration No.
1.	**Al Zahra Pvt. Hospital Company LTD** including its branch Al Zahra Pvt. Hospital Company LTD – SHJ.BR, with license no. 16506 (in administration) (formerly known as Al Zahra Pvt. Hospital Company Limited, with license no. 16506)	000004237
2.	**Bait Al Shifaa Pharmacy LTD** including its branches Bait Al Shifaa Pharmacy LLC Dubai Branch- Jafza, with commercial license no. 164999 and Bait Al Shifaa Pharmacy – Dubai Branch, with license no. 224351 (in administration) (formerly known as Bait Al Shifaa Pharmacy (L C), with license no. 224351)	000004236
3.	**Eve Fertility Center LTD** including its branch Eve Fertility Center LTD – SHJ.BR, with license no. 539107 (in administration) (formerly known as Eve Fertility Center L.L.C, with license no. 539107)	000004206
4.	**Fakih IVF Fertility Center LTD** including its branches Fakih IVF Fertility Center LLC – Branch 3, with license no. CN-1360709-3, and Fakih IVF Fertility Center LLC – Branch 4 with license no. CN-1360709-4 (in administration) (formerly known as Fakih IVF Fertility Center L.L.C., with license no. CN-1360709)	000004224
5.	**Fakih IVF LTD** including its Dubai branch with license no. 666849 (in administration) (formerly known as Fakih IVF L.L.C, with license no. 666849)	000004220
6.	**Grand Hamad Pharmacy LTD** including its branch Grand Hamad Pharmacy LTD, with license no. 607766 (in administration) (formerly known as Grand Hamad Pharmacy LLC, with license no. 607766)	000004238
7.	**Hamad Pharmacy LTD** including its branch Hamad Pharmacy LTD, with license no. 118795 (in administration) (formerly known as Hamad Pharmacy L.L.C, with license no.	000004209

No.	Company	Registration No.
	118795)	
8.	**N M C Provita International Medical Center LTD** including its branches N M C Provita International Medical Centre L.L.C. – Branch 1, with license no. CN-1194307-1, Provita International Medical Centre L.L.C. – Branch 2, with license no. CN-1194307-2, and N M C Provita International Medical Centre L.L.C. – Branch 3, with license no. CN-1194307-3 (in administration) (formerly known as N M C Provita International Medical Center L.L.C., with license no. CN-1194307)	000004240
9.	**N M C Royal Hospital LTD** including its branches NMC Clinic (BR of NMC Royal Hospital LLC), with license no. 814785, NMC Polyclinic Branch of NMC Hospital LLC, with license no. 163880, NMC DIC Clinic and Pharmacy (BR of NMC Royal Hospital LLC), with license no. 860025, NMC Hospital (BR of NMC Royal Hospital LLC), with license no. 878386, and its Dubai branch with license no. 710432 (in administration) (formerly known as N M C Royal Hospital L.L.C, with license no. 710432)	000004225
10.	**N M C Royal N M C Royal Hospital LTD** (in administration) (formerly known as N M C Royal Hospital L.L.C., with license no. CN-2015786)	000004245
11.	**N M C Royal Medical Centre LTD** including its branches NMC Royal Medical Centre LLC – Branch (Shahama), with license no. CN-2912685, and NMC Royal Medical Centre LLC –Branch (Karama), with license no. CN-2895125, and NMC Royal Medical Centre LLC – Branch 1 (Abu Dhabi), with license no. CN-2150457-1 (in administration) (formerly known as N M C Royal Medical Centre L.L.C., with license no. CN-2150457)	000004197
12.	**N M C Specialty Hospital LTD** (in administration) (formerly known as NMC Specialty Hospital- LLC, with license no. CN-1026386)	000004217
13.	**NMC Healthcare LTD**, including its Dubai branch with license no. 610400 (in administration) (formerly known as N.M.C Health Care (L.L.C), with license no. 610400)	000004210

No.	Company	Registration No.
14.	**N.M.C Specialty Hospital LTD** including its Dubai branch with license no. 562359 (in administration) (formerly known as N M C Specialty Hospital (LLC), with license no. 562359)	000004241
15.	**New Medical Centre LTD** including its Dubai branch with license no. 127562 (in administration) (formerly known as New Medical Centre L.L.C, with license no. 127562)	000004214
16.	**New Medical Centre LTD** including trading in Ras Al Khaimah as NMC Royal Dental Centre under license no. 38678, NMC Royal Medical Centre, under license no. 21518 and NMC Royal Pharmacy, under license no. 21669 and including its branches New Medical Centre Ajman LLC-BR, with license no. 95454, New Medical Centre L.L.C – Branch of Abu Dhabi 2, with license no. CN-1831682, New Medical Centre L.L.C.-Branch, with license no. 185190 and New Medical Centre LTD – SHJ.BR, with license no. 25954 (in administration) (formerly known as New Medical Centre L L C, with license no. 25954)	000004216
17.	**New Medical Centre Pharmacy LTD** including its branch New Medical Centre Pharmacy – LLC – Al Ain – NMC – Branch 1, with license number CN-1135313-1 (in administration) (formerly known as New Medical Centre Pharmacy - L.L.C – AlAin – NMC, with license no. CN-1135313)	000004253
18.	**New Medical Centre Pharmacy LTD** including its branches New Medical Centre Pharmacy/Branch, with license no. 96634, New Medical Centre Pharmacy LLC NMC Branch 1, with license no. 766270 and New Medical Centre Pharmacy LTD – SHJ.BR, with license no. 608411 (in administration) (formerly known as New Medical Centre Pharmacy LLC– N.M.C, with license no. 608411)	000004255
19.	**New Medical Centre Specialty Hospital LTD** (in administration) (formerly known as New Medical Centre Specialty Hospital LLC, with license no. CN-1135806)	000004228

No.	Company	Registration No.
20.	**New Pharmacy Company LTD** including its branches New Pharmacy Company WLL – Branch 1, with license no. CN-1029364-1, New Pharmacy Company WLL – Branch 2, with license no. CN-1029364-2, New Pharmacy Company WLL – Branch 4, with license no. CN-1029364-4, New Pharmacy Company WLL – Branch 6, with license no. CN-1029364-6, New Pharmacy Company WLL – Branch 7, with license no. CN-2914258, New Pharmacy Company WLL – Branch – (Shahama), with license no. CN-2936047, and New Pharmacy Company WLL – Branch 9, with license no. CN-2832792 (in administration) (formerly known as New Pharmacy Company W L L, with license no. CN-1029364)	000004230
21.	**New Sunny Medical Centre LTD** including its branch New Sunny Medical Centre LTD – SHJ.BR, with license no. 556959 (in administration) (formerly known as New Sunny Medical Centre LLC; N.M.C Medical Center L.L.C Shj. BR 2, with license no. 556959)	000004202
22.	**NMC Royal Family Medical Centre LTD** (in administration) (formerly known as NMC Royal Family Medical Centre L.L.C., with license no. CN-1491505)	000004243
23.	**NMC Royal Women's Hospital LTD** including its branch Cooper Health Clinic 1 – Dubai Branch, with license no. 689748 (in administration) (formerly known as NMC Royal Womens Hospital LL.C., with license no. CN-1532709)	000004235
24.	**Sharjah Pharmacy LTD** including its branch Sharjah Pharmacy LTD – SHJ.BR, with license no. 14966 (in administration) (formerly known as Sharjah Pharmacy L.L.C, with license no. 14966)	000004239
25.	**Sunny Al Buhairah Medical Centre LTD** including its branch Sunny Al Buhairah Medical Centre LTD – SHJ.BR, with license no. 558052 (in administration) (formerly known as N.M.C MEDICAL CENTER L.L.C SHJ.BR and Sunny Al Buhairah Medical Centre LLC, with license no. 558052)	000004199
26.	**Sunny Al Nahda Medical Centre LTD** including its branch Sunny Al Nahda Medical Centre LTD – SHJ.BR, with license no. 572409 (in administration) (formerly known as N.M.C MEDICAL CENTER L.L.C SHJ.BR 4 and	000004232

No.	Company	Registration No.
	Sunny Al Nahda Medical Centre LLC, with license no. 572409)	
27.	**Sunny Dental Centre LTD** including its branch Sunny Dental Centre LTD – SHJ.BR, with license no. 571311 (in administration) (formerly known as N.M.C Dental Centre L.L.C and Sunny Dental Centre LLC, with license no. 571311)	000004198
28.	**Sunny Halwan Speciality Medical Centre LTD** including its branch Sunny Halwan Speciality Medical Centre LTD – SHJ.BR, with license no. 747560 (in administration) (formerly known as Sunny Halwan Speciality Medical Centre LLC, with license no. 747560)	000004204
29.	**Sunny Maysloon Speciality Medical Centre LTD** including its branch Sunny Maysloon Speciality Medical Centre LTD – SHJ.BR, with license no. 751420 (in administration) (formerly known as Sunny Maysloon Speciality Medical Centre L.L.C, with license no. 751420)	000004205
30.	**Sunny Medical Centre LTD** including its branch Sunny Medical Centre LTD – SHJ.BR, with license no. 212280 (in administration) (formerly known as N.M.C MEDICAL CENTER L.L.C SHJ.BR 1 and Sunny Medical Centre LLC, with license no. 212280)	000004231
31.	**Sunny Sharqan Medical Centre LTD** including its branch Sunny Sharqan Medical Centre LTD – SHJ.BR, with license no. 744404 (in administration) (formerly known as Sunny Sharqan Medical Centre L.L.C, with license no. 744404)	000004203
32.	**Sunny Specialty Medical Centre LTD** including its branch Sunny Specialty Medical Centre, with license no. 545893 (in administration) (formerly known as N.M.C MEDICAL CENTER L.L.C SHJ.BR 3 and Sunny Speciality Medical Centre LL.C., with license no. 545893)	000004200

SCHEDULE 2

No.	Insurance Respondents/ Defendants
2.	Aetna Global Benefits (Middle East) LLC
3.	Dubai Insurance Company psc
4.	AXA Insurance (Gulf) B.S.C. (c)
5.	American Life Insurance Company – Alico
6.	Neuron LLC
7.	NAS Administration Services LLC
8.	Saudi Arabian Insurance Company B.S.C (C).
9.	Al Buhaira National Insurance Company
10.	MedNet UAE FZ LLC
11.	National General Insurance Co. (psc) –HealthNet
12.	GlobeMed Gulf Healthcare Solutions LLC
13.	Mobility Saint Honore International For Medical Insurance Claims Management L.L.C. (MSH)