Claim No. CA 007/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the Name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL
BEFORE CHIEF JUSTICE ZAKI AZMI, JUSTICE SIR RICHARD FIELD AND JUSTICE WAYNE MARTIN

BETWEEN

LAHELA

Appellant

and

LAMEEZ

Respondent

ORDERS OF THE COURT OF APPEAL WITH REASONS

Hearing :	**9 February 2021**
Counsel :	William Hooker instructed by Boies Schiller Flexner (UK) LLP for the Appellant Tom Montagu-Smith QC instructed by Gibson, Dunn & Crutcher LLP for the Respondent
Judgment :	**9 May 2021**

ORDER

UPON the Order with Reasons of H.E Justice Shamlan Al Sawalehi dated 26 August 2020 granting permission to appeal against the Order dated 2 July 2020

AND UPON hearing Counsel for the Appellant and Counsel for the Respondent at an appeal hearing on 9 February 2021

AND UPON reading the submissions and evidence filed and recorded in the Court file

IT IS HEREBY ORDRED THAT:

1. The appeal is be dismissed.

2. The Appellant is ordered to pay the Respondent's costs of the appeal to be assessed by a Registrar of the Court unless agreed within twenty-eight (28) days of the date of this decision.

Issued by:
Nour Hineidi
Registrar
Date of issue: 9 May 2021
At: 1.30pm

Summary

1. This appeal is concerned with the service of documents relating to proceedings brought in this Court by Lameez (**"Lameez"**) against Lahela (**"Lahela"**) relating to the enforcement of an arbitral award (the **"Award"**) made in favour of Lameez and against Lahela in an arbitration conducted in the DIFC. Lahela contends that even though it received copies of the relevant court documents, and is well aware of the proceedings in this Court, because the documents were not served upon it in accordance with the procedures specified in the Riyadh Convention (the **"Convention"**) the proceedings for the enforcement of the Award must be stayed unless and until service is effected in accordance with the Convention, which seems most unlikely to ever occur.

2. In *Abela v Baadarani*[1] the English Supreme Court approved observations of Lewison J. in the following terms:

> The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games.

3. For the reasons which follow it is the view of this Court that neither the Convention nor the law which must be applied by this Court have the unjust consequence for which Lahela contends.

4. This appeal provides this Court with the opportunity to address the inconsistencies between the decision under appeal and the earlier decision of a Judge of the Court of First Instance in *Pearl Petroleum and Ors v The Kurdistan Regional Government of Iraq*[2] (**"Pearl"**). For the reasons which follow, the decision in Pearl with respect to service in accordance with the Convention should not be followed.

The facts

5. The facts are not contentious. They are conveniently set out in the reasons given by the Judge in the Court of First Instance[3] (the **"Judge"**). The following summary of material facts is taken largely from that helpful exposition.

6. Lahela is a company registered in the Republic of Iraq. Iraq is a party to the Convention, as is the UAE.[4] In July 2011, Lahela and Lameez entered into an agreement for the supply of certain services by Lameez. That agreement contained a provision for the arbitration of disputes in accordance with the Arbitration Rules of the International Chamber of Commerce. The arbitration agreement provided that the seat of the arbitration was to be the DIFC.

7. A dispute arose between the parties which was referred to arbitration before a single arbitrator. Both parties participated in the arbitration, which was conducted in the DIFC. On 20 March 2019, the Arbitrator issued an Award directing Lahela to pay Lameez USD $4,622,589.47, plus interest and costs.

8. Lahela made no payment to Lameez under the Award. On 18 June 2019, Lameez applied to this Court for recognition and enforcement of the Award pursuant to Article 42 and 43 of DIFC Law no. 1 of 2008 (the **"Arbitration Law"**).

9. The application for recognition and enforcement was made without notice to Lahela. An Order for recognition and enforcement was made on 10 July 2019. However, because the Order was made without notice to Lahela, the Order expressly provided Lahela with permission to apply to set it aside within 14 days of service and also provided that the Order was not to be enforced until after that time had expired or any application made within that time had been determined.

10. On 9 December 2019, Lameez sought the assistance of this Court with respect to service of the Order in accordance with the terms of the Convention.

11. On 26 December 2019, this Court wrote to the Court at Erbil in Iraq, which is the Court having jurisdiction over the region in Iraq within which Lahela's headquarters are located. The letter enclosed the Order and other relevant documents and requested that they be served upon Lahela.

12. The letter and documents were delivered to the Erbil Court on 9 January 2020. On 15 January 2020, this Court was advised that the documents would be served on Lahela that day or the following day.

13. On 16 January 2020, the President of the Erbil Court of Appeal issued an order instructing the service department of the Court to serve the documents. However, the service of documents department refused to act in accordance with that order, on the grounds that service had to be effected by the Police Station, which required a further order from the Erbil Court.

14. On 19 January 2020, the President of the Erbil Court of Appeal changed his position, and determined that, as a result of internal regulations issued by the Judicial Council, the documents had to be served through diplomatic channels rather than through the Court.

15. On 26 January 2020, the President of the Judicial Council stated that the Convention did not apply to the documents and asserted that service had to be undertaken through diplomatic channels. Lameez's attempt to obtain a written decision from the Judicial Council was unsuccessful. However, the President of the Erbil Court of Appeal then issued an internal written decision to the Court's Department of Relations, directing that the documents be returned to this Court.

16. That direction was followed, and on 9 February 2020 this Court informed Lameez's legal representatives that the documents had been returned unserved, on the ground that the documents had not been sent to the Erbil Court by the Iraqi Ministry of Foreign Affairs as required by Article 23 of the Iraqi Civil Procedures Law.

17. Lameez requested this Court to take steps to challenge the decision of the Erbil Court. The Chief Justice of this Court declined that request.

18. On 23 February 2020, Lameez sent copies of the Order to the email addresses of Lahela's statutory manager, Mr Luint, three lawyers at Boies Shiller Flexner (UK) LLP, the law firm which acted for Lahela in the arbitration and which continued to act for it in other arbitrations, and to an individual who Lameez believed to be Lahela's company secretary, Mr Lustin. "Read receipts" were issued by the recipients of all emails.

19. On 26 February 2020, one of Lahela's lawyers, Listin replied to the email advising that neither Boies Shiller Flexner, nor Lutfi were authorized to accept service and that Lahela did not accept that the email to Linis constituted valid service.

20. On 11 March 2020, Lameez applied to the Court for permission to use alternative means of service in order to serve the Order on Lahela or, in the alternative, for the requirement of service to be dispensed with. On 17 March 2020, the Court granted the application for permission to use alternative means of service and retrospectively ratified Lameez's attempted service of the documents by email on 23 February 2020, providing that the date of effective service was deemed to be the date upon which the order permitting alternative service was issued.

21. On 24 March 2020, Lahela applied for orders setting aside the order for alternative service and for an order declaring that the Order had not been served on Lahela.

22. On 2 July 2020, Lahela's application was dismissed by the Judge at first instance. We will consider the reasons given by the Judge below. Lahela appeals from that decision.

23. Before considering the reasons given by the Judge at first instance, it is desirable to set out the relevant provisions of the Convention, and to consider the decision in *Pearl*.

The Convention

24. Federal Decree no. (53) of 1999 concerns the Convention and provides:

> **Article 1**
>
> Riyadh Arab Convention for Judicial Co-operation Agreement is hereby approved, the provisions of which are attached hereto.
>
> **Article 2**
>
> The Minister of Justice, Islamic Affairs and Awqaf shall implement this Decree which shall be published in the Official Gazette.

25. As indicated, the terms of the Convention are attached to the Decree. Those terms identify more than 20 parties to the Convention, being States which would generally be regarded as Arab States.

26. The preamble to the Convention is in the following terms:

> Being confident that the unity of legislation between the Arab Countries is a national target which implementation must be pursued to advance forward the comprehensive Arab Unity being convinced that the judicial co-operation between the Arab Countries must be a co-operation inclusive of all judicial fields in a manner which can positively and actively sustain the efforts existing in this field, and being prudent to consolidate co-operation bonds existing between the Arab Countries in judicial fields and to purport to strengthen, develop and extend the scope of such bonds, and in implementation of the declaration issued by the First Arab Conference of the Ministers of Justice . [the parties] have agreed as follows:

27. Part 1 of the Convention is headed "General Provisions" and contains Articles dealing with the exchange of information, the encouragement of visits, symposiums and co-operative research. It also includes a warranty of the right of the nationals of the contracting parties to litigate before the judicial authorities of other contracting parties. Other provisions relate to the right to obtain legal assistance and the exchange of statements of penal proceedings completed and issued against the nationals of party States.

28. Part 2 of the Convention is concerned with the service of notice and notification of "legal and non-legal documents and papers".

29. Article 6 lies at the heart of this appeal. In Pearl, Justice Sir Jeremy Cooke noted that there were conflicting contentions with respect to the proper translation of that Article from the original in Arabic. He prepared a compendious version which included the competing translations in the following terms:

> Legal and non-legal [Judicial and non-judicial] documents and papers relating [pertaining] to civil, commercial and administrative cases and cases of personal status required to be served or notified to [which are to be published or which are to be transmitted to] persons residing in one of the contracting States shall be sent [dispatched] directly by the authority of the competent legal office [from the judicial body or office concerned] to the court which the person who is required to be served or notified resides in its jurisdiction area [to the court of the district in which the person to be notified resides]...

30. Article 7 of the Convention provides that if the court to which documents are sent for service has no jurisdiction it shall, of its own accord, send the case to the competent authority in its country and if that is not possible, it shall refer the documents to the Ministry of Justice and notify the applicant accordingly.

31. Article 8 contains provisions relating to the form of the documents to be served, and the attachments to be served with them.

32. Article 10 provides:

> It is not permissible to reject to execute the application for service of notice or notification in accordance with the provisions of this Agreement, unless if the contracting Party which is required to execute it thinks that its execution prejudices its sovereignty or public order therein. .

33. Articles 11 and 12 are concerned with methods of service and proof of service, and Article 13 is concerned with charges and expenses.

34. Other provisions of the Convention are concerned with delegation of judicial authority from one contracting Party to another, the attendance of witnesses and experts in penal cases, the recognition and execution of judgments issued in civil, commercial and administrative cases and cases of personal status, the extradition of persons accused of crime and judgment debtors and the imposition of penalties on judgment debtors.

Pearl

35. Pearl and Ors were claimants in a continuing arbitration against the Kurdistan Regional Government of Iraq (the **"KRG"**). Three awards had been issued in favour of the claimants against KRG in amounts exceeding USD$2 billion.

36. Orders for recognition and enforcement of the awards were made in this Court without notice to the KRG, permitting alternative service of the orders made on the London solicitors who acted for the KRG in the arbitration. The KRG applied to set aside those orders on two grounds - namely, its claim to sovereign or State immunity and the claim that service of the proceedings could only be validly effected under the terms of the Convention. Obviously the first ground is of no relevance to these proceedings.

37. On the subject of service, the KRG contended that there was only one permissible way in which it could be served with the Enforcement Order - namely, in accordance with the Convention.

38. The Judge referred to the various provisions of the Convention including Article 10, and accepted Pearl's contention that the KRG would very likely exercise its powers to cause the courts in Erbil, to which any request for service under the Convention would be sent, to refuse to implement the request. The Judge was reinforced in that conclusion by the failure of the KRG to proffer an undertaking not to cause this to occur, despite his

request for such an undertaking.

39. The Judge then referred to the various rules of this Court relating to the service of documents, including the rules which require the service of an ex parte order for recognition or enforcement of an arbitration award.

40. The Judge then referred to English cases dealing with orders for alternative service in cases where international treaties were applicable. He summarised those cases with the observation that:

> Whereas only good reason is needed for an alternative service where the treaty in question is permissive as to the means of service, where the treaty is exclusive in setting out the means of service, the Court must find exceptional circumstances before it can make such an order.[5]

The Judge accepted that if those principles were applicable, exceptional circumstances would have to exist in the case before him before service other than in accordance with the Convention could be ordered.

41. The Judge noted Pearl's contentions that service under the Convention was permissive rather than mandatory, that the Convention did not specify the documents which had to be served or notified in accordance with its terms, which was a matter for the DIFC Courts, and thirdly, that the Convention could not be construed in such a way as would enable the KRG to effectively "stymie" service of the enforcement proceedings.

42. In the context of these competing contentions the Judge observed:

> There is one difference between the position in England and the DIFC, which is to my mind critical in the present case. In England, treaties do not form part of English domestic law but constitute factors to be taken into account. . The position is different in the DIFC. International conventions achieve the force of law in the UAE by ratification and are deemed to be part of the applicable domestic laws of this State, so that UAE judges must give effect to them. Moreover, under Article 238 of the UAE Law of Civil Procedures, the terms of treaties between UAE and foreign countries and international conventions ratified by the UAE, are applicable in law in connection with the enforcement and recognition of foreign arbitration awards. By virtue of the terms of Article 5 of Federal Law no. 8 of 2004, although the civil and commercial laws of the UAE are not applicable in the DIFC, it remains bound by terms of the Treaties which form part of the law of the UAE.
>
> .
>
> If the DIFC is bound by the terms of treaties which form part of the law of the UAE, it is bound to adhere to the terms of the Riyadh Convention if it is mandatory in its terms in requiring service under Article 6. If that is the position there is no room for circumvention of its terms by alternative service under RDC 9.31 nor 43.11, nor for dispensing with service under RDC 9.34, whether there are exceptional circumstances or not. The court cannot exercise any general power under RDC 9.1 nor any curative powers under RDC 4.51 in such circumstances.
>
> If the effect is that service can be stymied lawfully under the terms of the Convention by the engagement of Article 10 by the KRG, as opposed to the Federal Republic of Iraq . that is the result of the treaty obligation by which DIFC is bound and which it is bound to observe. The fact that the exercise of Article 10 powers or their purported exercise may give rise to a conflict with the rights of the citizen under Article 3 or a conflict between the UAE's obligations under the New York Convention to enforce an Award cannot affect the question whether or not the Court can order a means of service which is not in accordance with the sole means of service prescribed by Article 6.
>
> The terms of Article 6 are self evidently mandatory in respect of the documents to which it refers. "Legal and non legal/judicial and non-judicial documents . required to be served or notified/which are to be published or which are to be transmitted . shall be sent/dispatched" by the prescribed means. There is no avoiding the mandatory requirement for such documents to be so served or notified if service/notification is required on/to the KRG. As Counsel for the KRG pointed out, whatever the translation difficulties with Article 6, the ex parte Order was a document which, one way or another, had to be served on the KRG in order to [be] effective. The same must apply to the inter partes application for disclosure of assets. Whatever else may be included in the expression "non-legal" or "non-judicial" documents and papers "pertaining" or "relating" to commercial cases, and whatever notional or practical difficulties might arise in relation to the need for service or delivery of all such documents relating to the proceedings on the KRG [correspondence etc], the Order and the inter partes application, as a matter of DIFC procedural law, had to be served on it, and the Article provided that they "shall be sent/dispatched" by the "authority or the competent legal officer/judicial body or officer concerned" to the court of the district where the defendant resided. As such, the Riyadh Convention requires such documents to be delivered, notified or served on the KRG by a prescribed method and there is no escaping that by the Court decreeing that service can be made by a different method in accordance with its own procedures. It is bound to adhere to the terms of the treaty for service, regardless of its own Rules for service.
>
> In these circumstances, the Order for alternative service must be set aside as incompatible with the treaty obligations of the UAE, which form part of the law of the DIFC and service of the Order . must be set aside.

RDC Part 9

43. RDC Part 9 specifies this Court's rules relating to service. RDC 9.2 provides that a document may be served by any of four methods, including by means of electronic communication. Further, RDC 9.31 provides that:

> Where it appears to the Court that there is a good reason to authorize service by a method not permitted by these Rules, the Court may make an order permitting service by an alternative method.

44. Further, RDC 9.34 provides that the Court may dispense with service of a document.

45. RDC 9.53 provides:

> Given the international nature of the DIFC, permission to serve process outside the DIFC is not required, but it is the responsibility of the

party serving process to ensure he complies with the rules regarding service of the place where he is seeking to effect service.

The reasons of the Judge at first instance

46. After setting out the facts in terms which we have largely recounted above, the Judge at first instance set out the relevant terms of the Convention and the competing arguments advanced by the parties with respect to the decision in Pearl.

47. In that context the Judge rejected a submission by Lameez to the effect that Pearl could be distinguished on the basis that the present case concerns an application for the recognition and enforcement of a DIFC seated arbitral award. As that submission is not pressed in this appeal, it is unnecessary to consider it.

48. However, the Judge accepted the submission that Pearl should be distinguished on the basis that service under the Convention had not been attempted in that case, whereas in the present case, Convention service had been attempted and failed. The Judge maintained that view even on the assumptions that the Erbil Court has not finally determined that the Convention does not apply to the Order in this case, and that Lahela had not taken any steps to frustrate service under the Convention, and that the DIFC Courts had standing to challenge the decision of the Erbil Court.[6]

49. The Judge also accepted the submission that the Convention should not be construed in such a way as to confer a power to permanently block the commencement of proceedings, or the enforcement of arbitral awards, upon the Court with jurisdiction over the area in which the defendant resides. The Judge then addressed the question of whether that conclusion was inconsistent with the reasons given in Pearl. With respect to that issue, the Judge considered that the word "stymied" in Pearl should be construed as "hindered" rather than "prevented"[7], with the result that the conclusion in Pearl to the effect that this Court was bound to restrict the manner of service to service in accordance with the Convention should be construed as not applying to a circumstance in which such a restriction would have the effect of preventing the proceedings indefinitely.[8]

50. The Judge also expressed the view that the reasons given in Pearl should be construed as not applying to a case in which service under the Convention had been attempted and had failed.[9]

51. The essence of the Judge's conclusions with respect to the effect of the decision in *Pearl* appears in the following passage:

> For me, the thrust of Cooke J's findings in Pearl is that, whatever the nature of the service obligations under the Riyadh Convention, those obligations cannot be circumvented by the Court by granting alternative service or dispensing with service. . What the learned judge did not find, in my view, is that . service obligations persist indefinitely. . I cannot find anything in Pearl that would prevent me from distinguishing the case from another on the basis that, unlike in Pearl, Convention Service had been attempted and failed. For me, Pearl is authority for the proposition that Convention Service must be attempted or, put differently, that that the service obligations under the Riyadh Convention must be discharged before any orders permitting service by a method inconsistent with Convention Service or dispensing with service can be considered.[10]

52. The Judge also concluded that:

> While there are several clearly defined obligations relating to service in the relevant Articles of the Riyadh Convention, none of them, in my judgment, have the effect of creating an exclusive method of service with no exceptions.[11]

53. The Judge also noted that under Article 10 of the Convention, if the Court to which documents were sent for service (described by the Judge as "the receiving court") refused to serve them, that Court was obliged to give notice to that effect to the sending Court - an obligation which the Judge described as the "rejection obligation". In that context the Judge observed:

> In circumstances where a receiving court refuses to execute service, after this Rejection Obligation has been discharged by the receiving court, there is nothing in the Riyadh Convention which the receiving court or the applicant court is thereafter required to do. In my view, in circumstances where execution is refused and the Rejection Obligation is discharged, the Riyadh Convention will cease to have relevance in proceedings.[12]

54. The Judge summarized his conclusions in these terms:

> Where, after an application under Article 6 has been made, service under the Riyadh Convention fails, and upon the applicant court receiving notification of the rejection from the receiving court or, in the absence of a notification, upon the expiration of a reasonable amount of time, in my view, all of the service obligations of the Riyadh Convention have been discharged and the treaty no longer remain relevant in the proceedings in question.[13]

55. The Judge drew support for this conclusion from his acceptance of a submission to the effect that the objective of the Convention, properly considered in the construction of the Convention pursuant to the Vienna Convention, was to facilitate rather than restrict the service of proceedings amongst parties to the Convention.[14]

56. After acknowledging that the parties had not been given full opportunity to present submissions on the issue, the Judge went on to express the view that the decision in Pearl was wrong, and should not be followed, because Article 5 of Federal Law no. 8 of 2004 did not impose an obligation upon the DIFC Courts to comply with the Convention. In his view the DIFC Courts could not be considered to be a Financial Free Zone for the purposes of that Article.[15]

57. The Judge also expressed the view that Article 31 of DIFC Law No. 10 of 2004 (being the DIFC Court Law) specified the laws which this Court was obliged to apply in the exercise of its functions, and the laws listed in that Article did not include the Federal Laws of the UAE. In the Judge's view, those laws could only be applied by this Court with the agreement of the parties.[16]

58. Consistently with this approach, the Judge took the view that, in the absence of the agreement of the parties, the Convention should not be

applied by this Court unless and until it had been incorporated into DIFC domestic law by a law made by the Ruler of Dubai.[17] The Judge did not consider that Article 42 of the DIFC Arbitration Law had the effect of incorporating the service provisions of the Convention into the domestic law of the DIFC,[18] although the Convention could become relevant at the enforcement stage.[19]

59. The Judge accepted that the Convention had been made part of UAE Federal Law by Federal Decree no. 53 of 1999, but in his view the provisions of the Convention relating to service of documents in civil and commercial proceedings are excluded from operation in Financial Free Zones under Article 3(2) of Federal Law no. 8 of 2004, which expressly excepts the operation of "Federal civil and commercial laws" within the Financial Free Zones.[20]

60. The Judge also noted that, so far as he was aware, the Dubai Courts do not require service under the Convention and routinely grant permission to serve by alternative methods. He considered that it would be strange indeed if this Court, which is common law based and has an international focus, were to be restricted in its operations by the requirement that service take place only pursuant to the Convention, when the onshore Courts were not apparently subject to such a restriction.[21]

61. For those various reasons, the Judge dismissed Lahela's application to set aside the earlier orders ratifying service upon it.[22]

The Grounds of Appeal

62. The Grounds of Appeal challenged the Judge's conclusions that:

(a) *Pearl* was wrongly decided;

(b) the Convention is not binding on the DIFC Courts unless agreed by the parties;

(c) the DIFC Courts is entitled to order alternative service or dispense with service after service under the Convention has been attempted and failed; and

(d) *Pearl* could be distinguished on the basis that service under the Convention had been attempted and failed.

So, the Grounds of Appeal are only concerned with the Judge's conclusions of law. There is no ground of appeal to the effect that if the Court does have power to order service by alternative means, the power was not properly exercised in the circumstances of this case. Rather, Lahela's contention is to the effect that there is no such power.

Lameez's Notice of Contention

63. In response to the appeal, Lameez has filed a Notice asserting that the decision of the Judge should be upheld on grounds other than those upon which he relied, namely:

(a) Article 6 of the Convention does not prohibit service of the documents to which it refers by a method other than the one set out in Article 6, whether service under Article 6 has been attempted or not;

(b) if the Court was not able to permit alternative service, it was open to the Court to dispense with service and appropriate for it to do so; and

(c) if, contrary to Lameez's submissions, the Convention did preclude service except in accordance with its terms, as a matter of DIFC Law, that part of the Convention was repealed or disapplied on the implementation in the DIFC of the New York Convention relating to the recognition and enforcement of international arbitral awards pursuant to the DIFC Arbitration Law.

The issues

64. It is convenient to adopt the categorization of the issues raised by the Grounds of Appeal and Notice of Contention proposed by Lameez in the following terms:

(a) Do the terms of the Convention form part of DIFC Law such that they must be applied by this Court?

(b) Do the terms of the Convention preclude service by any other means:

(i) in any circumstances; or

(ii) in circumstances in which service under the Convention has been attempted but has failed;

(c) Do the terms of the Convention preclude the Court from dispensing with service of any document and if not, should service be dispensed with in this case?

and

(d) Do the terms of the Convention conflict with the provisions of the New York Convention and if so, which should prevail in DIFC Law. [23]

65. Some of these issues depend upon the conclusions reached with respect to other issues. It follows that the conclusions reached with respect to some of these issues may render it unnecessary or undesirable to address and resolve other issues.

Is the Convention part of DIFC Law which must be applied by this Court?

66. The Judge gave three reasons for concluding that Pearl was wrongly decided, and that the Convention was not a part of DIFC Law which had to be applied by this Court, namely:

> (a) this Court is not a Financial Free Zone which is precluded from doing anything which may lead to contravention of any international agreements to which the UAE is a party by Article 5 of Federal Law no. 8 of 2004;
>
> (b) to the extent that the Convention has been implemented into UAE Federal Law, its provisions relating to the service of documents in connection with civil and commercial proceedings do not apply in the Financial Free Zones, including the DIFC, by reason of Article 3(2) of Federal Law no. 8 of 2004; and
>
> (c) alternatively, pursuant to the provisions of the DIFC Court Law, this Court can only apply the laws specified in that Law, which do not include Federal Laws generally, unless the parties agree that those Laws are to be applied or the relevant Federal Law has been applied in the DIFC by a Law made by the Ruler of Dubai.

It will be convenient to address each of these issues in turn.

Is the Court bound to apply the Convention by Article 5 of Federal Law no. 8 of 2004?

67. Federal Law no. 8 of 2004 is a Federal Law "Regarding The Financial Free Zones". Article 1 defines "the State" to mean the UAE, and "the Financial Free Zone" to mean:

> The Financial Free Zone established in any of the Emirates of the State in which financial activities are carried on.

68. Article 2 provides:

> A Financial Free zone shall be established by a Federal Decree. It shall have a body corporate and shall be represented by the President of its Board. It and no one else shall be responsible for the obligations arising out of the conduct of its activities. The Cabinet will describe its area and location. [24]

69. Article 3(2) provides:

> These Zones and Financial activities shall . be subject to all Federal laws with the exception of Federal civil and commercial laws.

70. Article 5 provides:

> The Financial Free Zones shall not do anything which may lead to contravention of any international agreements to which the State is or shall be a party.

71. Article 7(3) provides:

> Subject to the provisions of Article 3, the concerned Emirate may, within the limits of the goals of establishing the Financial Free Zone, issue legislation necessary for the conduct of its activities.

72. Consistently with Article 2, the DIFC was established as a Financial Free Zone by Federal Decree No. 35 of 2004. It follows that consistently with Article 2 of Federal Law no. 8 of 2004, the relevant Federal Decree created a body corporate comprising the Dubai International Financial Centre which is represented by the President of its Board.

73. Consistently with Article 7(3) of Federal Law no. 8 of 2004, the Ruler of Dubai issued legislation relating to the conduct of the activities of the DIFC by Dubai Law no. 9 of 2004 (the **"DIFC Law"**). Article 3(1) of that Law recognizes the existence of the Financial Free Zone established in the Emirate and named "Dubai International Financial Centre" and provides that it shall have financial and administrative independence and shall be attached to the Government of Dubai.

74. Article 3(2) provides that the Centre (being the corporate entity created by the combined operation of the Federal Decree and Federal Law no. 8 of 2004) shall have a President appointed by a decree issued by the Ruler of Dubai.

75. Article 3(3) of the DIFC Law provides that:

> The following bodies shall be established in the Centre:
>
> (a) Dubai International Financial Centre Authority;
>
> (b) Dubai Financial Services Authority; and
>
> (c) Dispute Resolution Authority.

76. Article 4 of the DIFC Law provides that the objectives of the Centre are to include the promotion of the position of the Emirate of Dubai as a leading international financial centre.

77. Article 6 of the DIFC Law concerns the first body created by Article 3(3) - namely, the Centre Authority. Article 6(1) provides that the Authority shall have separate legal personality and may sue and be sued in that capacity.

78. Article 7 of the DIFC Law concerns the second of the bodies created by Article 3(3) - namely the Financial Services Authority, and also

provides that such Authority shall have separate legal personality and may sue and be sued in such capacity.

79. Article 8 of the DIFC Law is concerned with the third of the bodies created by Article 3(3) - namely the Dispute Resolution Authority. Article 8(1) provides that the Authority shall be comprised of the Centre's Courts and the Arbitration Institute,[25] and any other tribunals and ancillary bodies established in accordance with Article 8.

80. Article 8(2) provides that the Dispute Resolution Authority shall have separate legal personality and may sue and be sued in that capacity.

81. The second part of Article 8 is concerned with the Centre's Courts. That part includes the following provisions:

> 1. The Centre's Courts shall have separate legal personality, and may sue and be sued in this capacity.
>
> 2. The Centre's Courts shall have an independent budget and the Government shall allocate to the Centre's Courts the funds required to enable them to exercise their duties and powers independently from the Centre's Bodies.
>
> .
>
> 4. The functions of the Centre's Courts shall be determined in accordance with the Centre's Laws, and they shall carry out their duties and powers pursuant to the Centre's Laws and the Centre's Regulations.
>
> .
>
> 6. The Courts of the Emirate shall have jurisdiction on crimes committed within the Centre.

82. In summary, the combined effect of Federal Law no. 8 of 2004 and Federal Decree No. 35 of 2004 was to create a corporate entity known as the Dubai International Financial Centre. Under the legislative powers specifically reserved to the Emirate of Dubai, by Article 7(3) of Federal Law no. 8 of 2004, the Ruler of Dubai issued the DIFC Law, which created the following corporate entities, each with separate legal personality:

> The DIFC Authority
>
> The Financial Services Authority
>
> The Dispute Resolution Authority
>
> The DIFC Courts[26]

83. It is necessary to address the proper construction and effect of Article 5 of Federal Law no. 8 of 2004 in this context. It is also contextually relevant to note that the international agreements (or treaties) to which Article 5 refers, are agreements between States. Such agreements (or treaties) create obligations as between the contracting States. Those obligations might include an obligation to implement the provisions of the agreement into the domestic law of the contracting parties. However, unless and until the contracting parties take steps to implement the provisions of the relevant international agreement or treaty into domestic law, they do not form part of the domestic law of the States which are parties to a treaty.

84. Article 5 imposes obligations upon the "Financial Free Zones". That expression is defined by Article 1 to be the corporate bodies created when a Federal Decree is issued in accordance with Article 2. As a matter of construction of Federal Law no. 8 of 2004, there is simply no basis upon which the obligations imposed by Article 5 can be construed as being imposed upon any entities other than the corporate bodies created when a Federal Decree is issued in accordance with Article 2.

85. No courts are created by Federal Law no. 8 of 2004. The exercise of judicial authority within a Financial Free Zone is left to be dealt with by laws issued by the relevant Emirate pursuant to Article 7(3). Of course an Emirate might choose to make no separate or distinct provision for the exercise of judicial authority within a Financial Free Zone, with the result that such authority would be exercised by the existing courts of the Emirate. Indeed, that was the choice made by the Emirate of Dubai in relation to the exercise of jurisdiction with respect to criminal matters occurring within the DIFC.

86. It follows that there are at least two reasons why Article 5 does not impose any obligations upon this Court. First, obligations imposed by Article 5 are imposed only upon corporate entities created by the combined operation of Article 2 and a relevant Federal Decree. This Court is not such a corporate entity. Second, as the exercise of judicial authority within any Financial Free Zone was left to be determined by each relevant Emirate, it is impossible to construe the reference in Article 5 to the "Financial Free Zones" to include whatever arrangements might be made from time to time with respect to the exercise of judicial authority within the various Emirates within which such Zones might be created.

87. This approach to the construction of Federal Law no. 8 of 2004 accords with its structure. Article 2 creates a body corporate with executive authority within the region of each Financial Free Zone. Articles 3 and 7 are concerned with the laws applicable in each such Zone. In this context, the reference in Article 5 to the corporate body created by the operation of Article 2 is clearly intended to impose obligations upon that body in relation to the exercise of its executive powers and functions.

88. This approach is also consistent with the nature and operation of international agreements to which we have referred above. As we have noted, parties exercising the executive authority of a State which is a party to such an agreement might, by their actions, put the State in breach. The evident purpose of Article 5 is to ensure that, to the extent that the corporate bodies created by Article 2 exercise the delegated executive authority of the State, they do so in a manner which does not put the State in breach of its international agreements.

89. It might be argued that Article 5 imposes obligations upon a corporate body created under Article 2 to propose that the relevant Emirate exercise the legislative powers reserved to it by Article 7(3) so as to ensure that the domestic law applicable within the region of the relevant Zone

is consistent with the obligations of the UAE under international agreements to which it is a party. However, leaving to one side the question of whether the Convention forms part of Federal law applied in the DIFC under Article 3 of Federal Law no 8 of 2004[27], unless and until a relevant Emirate exercises the legislative powers reserved to it by Article 7(3) to issue legislation implementing obligations arising under international agreements to which the UAE is a party as part of the domestic law of the relevant Financial Free Zone, such obligations will not form part of that domestic law - in the same way as treaty obligations do not form part of the domestic law of any State unless and until implemented by the State.

90. For the sake of completeness, we turn now to the contentions advanced on behalf of Lahela in opposition to these conclusions.

91. First, Lahela contends that the definition of "Financial Free Zones" in Federal Law no. 8 of 2004 is a "broad definition which is clearly capable of encompassing the legal systems and Courts established as part of the constitution of that Financial Free Zone".[28] However, this submission ignores Article 2 of the Law, which provides that the Zone is the body corporate created when a relevant Federal Decree is issued. The submission also ignores the fact that the exercise of judicial authority within a Financial Free Zone is not a matter addressed by the Federal Law at all - it is a matter reserved entirely to the laws of each Emirate. For the reasons we have given above, this submission is contrary to the express terms of the relevant Federal Law and must be rejected.

92. Second, Lahela submits that:

> If . the DIFC Authority must, as a matter of law, adhere to the UAE's obligations under the Riyadh Convention, then its Courts (which must apply DIFC Law) cannot operate a general case management discretion to act in a manner inconsistent with the Law.

93. This submission elides the distinction between obligations arising under international agreements as between the parties to those agreements, and the question of whether such obligations have been implemented into the domestic law of a contracting State. As we have noted, this important distinction is fundamental to the operation and effect of international agreements and treaties. Article 5 requires Financial Free Zones to exercise their delegated executive authority in such a way as to not place the UAE in breach of its obligations under international agreements. That obligation is fundamentally different in character to the proposition that this Court is obliged to act in accordance with obligations imposed by such international agreements as if they are part of the domestic law of the DIFC. Article 5 does not purport to import all obligations imposed under all treaties to which the UAE is a party into the domestic law of each Financial Free Zone. Rather, as we have noted, the Laws applicable in each Zone are addressed in Articles 3 and 7 of Federal Law no. 8 of 2004.[29]

94. Third, Lahela submits that this reasoning leaves a large and improbable loophole in Federal Law no. 8 of 2004, through which the courts of any Financial Free Zone are free to take steps which may lead to the contravention of any international agreement to which the UAE is, or shall be, a party.[30] However, this submission suffers the same flaw as the previous submission - namely, it elides the important distinction between the obligation of courts to apply the domestic law of the jurisdiction, and the obligation of States to comply with their international agreements. In the many cases in which State parties to international agreements do not implement those agreements as part of the domestic law of the State, actions taken by the courts in accordance with the domestic law of the State may well be inconsistent with the obligations undertaken by the State by its agreement. However, that is simply the consequence of the State's decision to not implement the international agreement as part of its domestic law.

95. Fourth, Lahela submits that it follows from the Judge's conclusions that the DIFC Authority and President have put in place rules of court which are inconsistent with their obligations under Article 5 and the Convention. Leaving to one side the circularity of argument evident in this reasoning, it wrongly presumes that each of the Authority and the President have the obligation and the authority to import the Convention into the domestic law of the DIFC. That assumption is simply wrong. Consistently with Article 7(3) of Federal Law no. 8 of 2004, the domestic law of any Financial Free Zone is to be determined by the Emirate in which it is located - in this case, by the Ruler of Dubai.

96. Fifth, Lahela submits that it is not necessary for the Convention to be implemented and that under Article 5 the Financial Free Zones are obliged to not do anything which would result in a breach of the UAE's treaty obligations.[31] This submission assumes that the Financial Free Zones are to be equated with the courts exercising judicial authority in those Zones and ignores the obligation of those courts to apply the domestic law applicable in the relevant Zone. This submission is flawed and must be rejected.

97. Sixth, it is submitted that because this Court is clearly a court within the UAE, it is obliged to comply with the provisions of the Convention to which the UAE is a party. This submission suffers the same flaw as many of Lahela's other submissions on this topic - namely, that of eliding the important distinction between the obligations of State parties as between themselves, as a result of entry into international agreements, and the obligations of the courts of a State to apply the domestic law of the State.

98. Seventh, it is submitted that because there are few examples of implementation of treaties within the domestic law of the DIFC, it should be inferred that implementation is unnecessary because of Article 5. This proposition is simply wrong. Lameez has provided a number of examples of DIFC Laws which implement obligations arising under treaties to which the UAE is a party, including the DIFC Arbitration Law. In any event, as we have already noted, there is nothing in the language of Article 5 which suggests that its intent is to implement all obligations under all treaties to which the UAE is a party as part of the domestic law of each Financial Free Zone.

99. Eighth, it is submitted that "Financial Free Zone is broadly defined . and includes the DIFC Courts".[32] This is simply wrong. There is no definition of Financial Free Zone which includes any courts, let alone the DIFC Courts.

100. Ninth, Lahela submits that "it is not controversial that a judicial authority forms part of the Financial Free Zone for the purposes of Federal Law in a way that a company incorporated in the DIFC or an individual domiciled in the DIFC does not".[33] This also is wrong. As we have already noted a number of times, a Financial Free Zone is a corporate body created when a Federal Decree is issued under Article 2 of Federal Law no. 8 of 2004. The identification of the entity or entities responsible for the exercise of judicial authority within the geographical area of such a Zone is a matter left entirely to the laws of each relevant Emirate.

101. Tenth, Lahela submits that a construction of Article 5 which would require the corporate entity which comprises the Zone to comply with the

Convention is meaningless, because Convention obligations are imposed upon courts. This submission overlooks the generality of Article 5 which is not concerned with any specific Convention, but rather with all international agreements to which the UAE is a party. If some of those agreements do not impose obligations upon executive bodies, the obligations imposed by Article 5 will have no practical content in relation to those agreements.

102. For these reasons none of Lahela's contentions in opposition to the conclusions which follow from the natural and ordinary meaning of the words used in Federal Law no. 8 of 2004, viewed in the context of general principles of law relating to the consequences of international agreements and the particular context of the Dubai Laws relating to the DIFC, result in any different conclusion to that which we would draw from the words used. It follows that Article 5 does not have the consequence that the Convention forms part of the domestic law of the DIFC which must be applied by this Court. It also follows that the decision in Pearl, which assumed that Article 5 has this effect was wrong. That error is significant because, as we have noted, the Judge in Pearl distinguished the English cases relating to the grant of permission to serve by means other than those specified in an international agreement as being distinguishable on the basis that the relevant international agreements were not part of the domestic law of England. On the conclusion which we have reached, that basis of distinction is not open.

Does Article 3 of Federal Law no. 8 of 2004 require this Court to apply the Convention?

103. As we have noted, Article 3 provides that all Financial Free Zones are subject to all Federal Laws "with the exception of Federal, civil and commercial laws". The question which we now address is whether this Article obliges this Court to apply the provisions of the Convention as part of the domestic law of the DIFC.

104. For the purposes of this issue it can be assumed that the Convention forms part of UAE Federal Law, as a result of Federal Decree no. 53 of 1999, under which the Convention was "approved". For the purposes of this issue, we will assume that "approval" is the equivalent of implementation as part of the Federal Laws of the UAE.

105. On that assumption the critical question becomes whether either the Convention generally, or Article 6 of the Convention in particular, are excepted from the operation of Article 3 of Federal Law no. 8 of 2004 because they are "civil and commercial laws".

106. The submissions of the parties on this issue proceed on the assumption that the decision of this Court in *IGPL v Standard Chartered Bank*[34] to the effect that the UAE Civil Procedure Code is a "Federal civil and commercial law" which does not therefore apply in the DIFC is correct. It follows that if and to the extent that either the Convention generally, or Article 6 of the Convention is properly characterized as a law relating to civil procedure, it also is excluded from operation within the DIFC.

107. Lahela contends that for the purposes of Article 3 of Federal Law no. 8 of 2004, the relevant law is the Convention viewed as a whole. It submits that when the Convention is viewed as a whole, it is properly characterized as a law relating to judicial co-operation between the parties to the Convention, and not as a "civil and commercial law". Lahela points out that there are various provisions in the Convention, which we have noted, dealing with criminal proceedings.

108. On the other hand, Lameez submits that the proper approach to Article 3 is to identify the legal rule which it is said should be applied and then address the question of whether that rule is properly characterized as a "civil and commercial law". Lameez supports this submission with the proposition that it is very common for legislative instruments to include, within the one instrument, provisions or legal rules which are properly characterized as civil and commercial laws, and other provisions which are not properly so characterized. It is submitted that if the applicability of a particular law or rule within the DIFC depended upon the characterization of the entire instrument in which that law or rule is to be found, there would be great uncertainty with respect to the rules and laws applicable in the DIFC. That uncertainty would arise from the difficulty of predicting with confidence the characterization of legislative instruments containing a combination of provisions, some of which are properly characterized as civil and commercial, and some of which are not.

109. We accept Lameez's submissions on this issue. The evident purpose of Article 3 is to ensure that the Emirate within which any Financial Free Zone is located retains the exclusive power to issue legislation with respect to the civil and commercial laws applicable in that Zone. That evident purpose is best achieved by construing the Article in such a way that any Federal rule, principle of law, or legal obligation imposed by Federal Law which is properly characterized as "civil and commercial" is excluded from operation within a Financial Free Zone. The evident purpose of Article 3 would be significantly diminished if Federal rules, laws or legal obligations properly characterized as civil and commercial laws nevertheless continued to operate within a Financial Free Zone because they form part of a larger legal instrument in which there are other provisions not properly so characterised. The latter approach would also create significant uncertainty in relation to the applicable content of the civil and commercial laws of any Financial Free Zone, which might turn upon decisions made with respect to the scope and ambit of instruments promulgated at Federal level.

110. In our view the expression "Federal civil and commercial laws" in Article 3 is properly construed as applying to the relevant rule, principle of law or legal obligation which it is contended should be applied within the relevant Zone, rather than as a reference to the instrument in which that rule, law or obligation is located.

111. So, the question is not whether the Convention is a "civil and commercial law". Rather, the question is whether the provisions of the Convention which are said to be applicable in this case are "civil and commercial laws".

112. The provisions relevant to this case are the provisions relating to the service of documents pertaining to proceedings in this Court. This Court only has jurisdiction in relation to civil and commercial matters. It follows that any rule of law applicable to service of documents pertaining to proceedings in this Court is properly characterized as a "civil and commercial law", being a law relating to the procedure applicable to civil and commercial proceedings.[35]

113. Further, the provision of the Convention upon which Lahela relies is Article 6 which is only concerned with the service of documents relating to "civil, commercial and administrative cases and cases of personal status". That grouping of cases is properly characterized as cases falling within the civil jurisdiction of any court. It follows that the Article is properly characterized as a provision relating to civil procedure, and is therefore

properly characterized as a "civil and commercial law"[36].

114. For these reasons Article 3(2) of Federal Law no. 8 of 2004 expressly excludes the provisions of the Convention upon which Lahela's case depends from application within the DIFC.

115. This is another reason why the Judge in this case was correct to conclude that this Court is not obliged to apply the provisions of the Convention, and the Judge in Pearl was wrong to conclude otherwise.

Is this Court precluded from applying Federal Laws generally?

116. The third reason given by the Judge for not applying the Convention is his conclusion that the DIFC Court Law precludes this Court from applying Federal laws generally in the absence of the agreement of the parties to the effect that such laws should be applied. Lameez maintains that contention, albeit for slightly different reasons to those enunciated by the Judge.

117. Our conclusion is that the Judge was correct to conclude that Article 5 did not oblige this Court to apply the provisions of the Convention, and was also correct to conclude that Article 3(2) excluded the relevant provisions of the Convention from applying to this case are sufficient to dispose of this aspect of the appeal.

118. It is therefore unnecessary to determine the much broader proposition to the effect that Federal Law generally should not be applied by this Court in the absence of the agreement of the parties - a proposition which raises issues which potentially go well beyond the scope of this case. We note also that if the proposition is said to extend beyond "Federal civil and commercial laws" it would appear to raise issues of conflict between the provisions of Article 3 of Federal Law no. 8 of 2004 and the provisions of the laws of Dubai, including the DIFC Court Law which are said to have the effect of excluding Federal law generally from the scope of the laws to be applied by this Court. That conflict could potentially raise an issue apt for reference to the Union Supreme Court, although such a reference would not be necessary or appropriate in this case, because the resolution of the issue would have no impact upon the outcome of the appeal.

119. For these reasons we consider that this broader proposition should be left for consideration in another case in which its resolution would be determinative.

120. Before leaving this issue, we should observe that the issue we have been addressing is the issue of whether this Court is obliged to apply the provisions of the Convention. That question is quite different to the question of whether the Court might, in the exercise of its discretion, invoke the provisions of the Convention to facilitate service in particular cases. As Lahela has submitted, there is no doubt that this Court is a Court of the UAE, and the UAE is a party to the Convention. It follows that the facilities provided by the Convention are available to the Court should it choose to utilise them.

121. Because we have concluded that the Convention does not form part of the domestic law of the DIFC, the question of whether service has been effected will turn upon the question of whether service has taken place in accordance with the rules of the Court and not upon the question of whether service has been effected by means of the Convention. However, it seems very likely that service utilizing the facilities provided under the Convention would result in service in accordance with one or other of the means deemed effective under RDC Part 9, which include personal service, service by courier or by leaving the document at a place specified in RDC 9.15-9.21.[37]

122. Put even more simply, the effect of this decision is not to preclude parties to proceedings in this Court from requesting the Court to utilize the facilities for service which are available under the Convention. Rather, the effect of this decision is that parties are not limited to that means of service in the case of service upon parties resident in a State which is a party to the Convention.

Does the Convention preclude service by any other method in any circumstances, or in circumstances in which service under the Convention has been attempted and has failed?

123. Although the conclusion we have reached in relation to the issue above is sufficient to dispose of Lahela's appeal, as this issue was addressed in Pearl and out of deference to the arguments presented, it is appropriate to address the issue raised, albeit briefly.

124. In the passage in Pearl which we have set out above, the Judge placed emphasis upon the mandatory character of the language used in Article 6 - particularly "shall be sent", to support the conclusion that compliance with that Article was "mandatory". However, with the greatest respect to the Judge in that case, there is a significant difference between the question of whether Courts in States which have implemented the Convention as part of the domestic law of that State are obliged to comply with its provisions and the question of whether service in accordance with the Convention is the exclusive means by which service can be validly effected in States which are parties to the Convention. The observations made by the Judge in Pearl are entirely appropriate in relation to the former issue, but by no means determinative of the latter issue, which is the issue with which we are now concerned.

125. That issue turns upon the proper construction of the Convention, which in turn invokes the application of the Vienna Convention on the Law of Treaties of 1969 (the **"Vienna Convention"**).

126. Article 31 of the Vienna Convention provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Other parts of Article 31 and Article 32 make provisions for recourse to other aids to interpretation, although it is unnecessary to refer to any of those specific matters for the purposes of this issue.

127. Unlike the Hague Convention relating to service, there is no provision in the Convention dealing with the question of whether service under its provisions is to be the exclusive means by which service can be validly effected in States which are parties to the Convention. The question

therefore is whether, notwithstanding the absence of any term to that effect, the Convention should nevertheless be construed in that way.

128. In accordance with Article 31 of the Vienna Convention, the primary source of meaning to be given to an international convention is its terms. As we have noted, there is no term in the Convention to the effect that service in accordance with its provisions is to be the exclusive means of service upon parties resident in States which are parties to the Convention. As we have already observed, the use of mandatory language in the provisions relating to service bears upon the nature of the obligations imposed upon States which are parties to the Convention but has little or no bearing upon the different question of whether service can only be validly effected in accordance with the Convention. The absence of any words which would have that effect tell strongly against the construction of the Convention for which Lahela contends.

129. Article 31 of the Vienna Convention requires the words of the Convention to be construed in the light of its object and purpose. The object and purpose of the Convention is to be derived from its preamble, which refers to the desirability of unity and co-operation between Arab countries and from the provisions of the Convention, which create specific opportunities and obligations in relation to such co-operation. The preamble, and the provisions of the Convention support the conclusion that its object and purpose is to enhance the administration of justice in the various Arab States which are parties to the Convention by facilitating and indeed obliging States to ensure co-operation between their respective judicial authorities.

130. In other words, the evident object and purpose of the Convention is to facilitate the attainment of justice by co-operation between the judicial authorities of State parties, rather than to constrain the achievement of justice. It follows that a construction of the Convention under which provisions relating to service of documents pertaining to legal proceedings provide an additional means by which such documents may be served, rather than the exclusive means by which such documents may be served, is more consistent with the evident object and purpose of the Convention than a construction to the effect that service under the Convention is the only means by which service may be validly effected. The latter construction would deprive the courts of each State of the capacity to determine the means of service which are to be effective for the purposes of that Court and would also make proceedings in any court in any State dependent upon the actions, or inactions, of a Court in another State. In our view such a construction would be antithetical to the evident object and purpose of the Convention.

131. There are other matters which point in favour of this conclusion. Prior to the Convention the customary means of effecting service in foreign States was through diplomatic channels. It is a matter of common knowledge that service through those channels was often ineffective and slow. In that context it can be inferred that the provisions of the Convention relating to service by means of co-operation between courts were thought likely to enhance efficacy and expedite service. However, it does not follow that it should be inferred that it was the intention of the State parties to the Convention that this additional facility, of service through judicial co-operation, was to be the exclusive means by which service could be validly effected.

132. The breadth of the documents to which reference is made in Article 6 of the Convention is also relevant to this issue. The Article is not confined to initiating process but extends to "legal and non legal documents and papers relating to" proceedings. A construction of the Article to the effect that it is available to facilitate service of such documents should a court choose to invoke its provisions is much more consistent with the broad range of documents to which the Article applies than a construction to the effect that all of such a broad range of documents can only be validly served in accordance with the provisions of the Convention.

133. Lahela relies upon decisions under the *State Immunity Act* of the United Kingdom to the effect that the means of service stipulated in that Act, which is through diplomatic channels, is the only means by which foreign States can be validly served. However, those decisions are of no assistance in relation to the proper construction of the Convention for a number of reasons. The first is because the considerations which apply to the service of proceedings commenced in an English Court against a foreign State are fundamentally different to the considerations which apply to proceedings between the residents of different States to which the Convention applies. In the former category of case, considerations pertaining to the comity of States and the possibility of claims for State immunity support a construction of the Act which is prescriptive in relation to the means of service to be adopted and which requires the utilization of diplomatic channels. However, those considerations have no application to service under the Convention. Second, the *State Immunity Act* is a domestic law, rather than an international treaty, and it is inherently more likely that a domestic law is properly construed as prescriptive and exclusive as compared to an international treaty. Third, the *State Immunity Act* only applies to the service of initiating process, and not to the much broader range of documents to which Article 6 of the Convention applies.

134. In summary, there are no terms of the Convention to the effect that service under its provisions is to be the exclusive means by which service can be validly effected. Further, any construction of the Convention to that effect would be antithetical to its evident objects and purpose. We therefore conclude that on its proper construction the Convention does not provide the only means by which service may validly be effected. The proposition that alternative means of service may be utilised after service under the Convention has been attempted but has failed, therefore falls away.

Is it open to the Court to dispense with service?

135. In *Pearl* it was held that if the Convention applied it was not open to the Court to "turn the flank" on the Convention by dispensing with service. Of course that proposition falls away in the light of our conclusion that the Convention does not exclude alternative means of service. Further, because Lahela's appeal must be dismissed because of the conclusions we have already enunciated, no question of dispensing with service arises.

136. However, out of deference to the arguments presented, and to the decision in Pearl, we will briefly state our conclusion to the effect that the Convention would not preclude an order dispensing with service in appropriate circumstances. Article 6 of the Convention only applies to documents "required to be served or notified". The Convention makes no attempt to identify the documents or categories of documents that fall within that description. It follows that the identification of documents which fall within that category must be undertaken by reference to the requirements of the Court in which the proceedings are being conducted. If that Court concludes, in accordance with its own rules, that a document does not require to be served, Article 6 has no application. This process of reasoning is consistent with the decisions in *Knauf UK GmbH v British Gypsum Ltd*[38] and *Rockefeller Technology Investments (Asia) VII v Changzhou Sinotype Technology Co Ltd*[39] .

137. Of course this is not to exclude the proposition that if a treaty was to be construed as providing the exclusive means of service, and if such a

treaty had been implemented as part of the domestic law of the relevant jurisdiction, a decision of a court to dispense with service for the dominant purpose of avoiding the application of the treaty might be inconsistent with the law of the jurisdiction. However, none of those circumstances apply in this case, and of course no order dispensing with service has been made.

Inconsistency with the New York Convention

138. The question of any inconsistency between the Convention and the New York Convention implemented by the DIFC Arbitration Law was not addressed in either Pearl or the decision at first instance in this case. Further, the resolution of that question requires assumptions to be made with respect to the application and effect of the Convention which are contrary to the conclusions which we have set out above. In these circumstances no purpose would be served by addressing a hypothetical question which could have no impact upon the outcome of this appeal.

Conclusion

139. For these reasons:

(a) the Judge was correct to conclude that Lahela's application to set aside the orders previously made relating to service upon it should be dismissed;

(b) the appeal must be dismissed; and

(c) Lahela will be ordered to pay Lameez's costs of the appeal to be assessed by a Registrar of the Court unless agreed within twenty-eight (28) days of the date of this decision.