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DIFC COURT OF APPEAL RULES THAT RIYADH CONVENTION IS NOT A PART OF DIFC LAW AND CLARIFIES THE IMPLEMENTATION OF INTERNATIONAL AGREEMENTS

To Our Clients and Friends:

Pearl of Wisdom

The DIFC Court of Appeal in Lahelalahela V Lameezlameez [2020] DIFC CA 007 found that the Riyadh Convention[1] is not a part of DIFC Law, and in any event provides a non-exclusive service regime. To the extent Pearl Petroleum[2] found to the contrary, it was wrongly decided. The DIFC Court can therefore order alternative service or dispense with service in respect of a receiving party domiciled in a Riyadh Convention state. This will come as a great relief to DIFC Court practitioners who have been grappling with Pearl Petroleum and the significant hurdles it created for service of DIFC Court documents in the GCC Region. The Court of Appeal also provided welcome clarity on the implementation of international agreements to which the UAE is a party into DIFC Law, finding that obligations in such agreements are not automatically a part of DIFC Law where they relate to civil and commercial matters. This is an important development with wide-ranging implications for the source and content of DIFC Law, as well as for the enforcement of DIFC-seated arbitrations. Gibson, Dunn & Crutcher, with lead Counsel Tom Montagu-Smith-QC, acted for the successful Claimant at first instance and Respondent on appeal.

Background

The Claimant obtained a monetary award in DIFC-seated arbitration proceedings against the Defendant, and later successfully obtained (*ex parte*) a DIFC Court order recognising and enforcing the award (the “**Enforcement Order**”). Pursuant to RDC 43.70 and the terms of the Enforcement Order, the Enforcement Order could not be enforced until after it had been served on the Defendant.

The Defendant company is registered in Erbil, in the Republic of Iraq, which, along with the UAE, is a signatory to the Riyadh Convention. Article 6 of the Riyadh Convention sets out a method of service (“**Convention Service**”), which applies where the sender and recipient are both resident in a signatory state to the Riyadh Convention (a “**Convention State**”).[3] Unlike diplomatic service, Convention Service operates directly between a sending court (in this case the DIFC Court) and a receiving court (in this case the local Erbil Court).

The Claimant attempted Convention Service. The local court in Erbil refused to serve the Enforcement Order and stated (wrongly) that the Riyadh Convention did not apply. The Claimant then obtained (*ex parte*) an order for alternative service from the DIFC Court (the “**Service Order**”). Upon being served with the Service Order, the Defendant applied for it to be set aside. The principal argument by the Defendant was that *Pearl Petroleum* correctly found that the Riyadh Convention, where applicable, is

part of DIFC law and provides an exclusive and mandatory service regime, and the DIFC Court does not have the power to order alternative service or dispense with service.

The Claimant argued that *Pearl Petroleum* was distinguishable, and in any event wrongly decided because the Riyadh Convention is not binding on the DIFC Court. At first instance, H.E. Justice Shamlan Al Sawalehi (“**Justice Al Sawalehi**”) found for the Claimant on both these grounds. As the first instance decision conflicted with *Pearl Petroleum*, permission to appeal was granted, and a hearing occurred before the Court of Appeal in February 2021, with the Court of Appeal issuing its decision on 9 May 2021.

Pearl Petroleum

In *Pearl Petroleum*, the DIFC Court set aside an order for alternative service of a recognition and enforcement order. The alternative service order had been initially granted *ex parte* on the basis that service under the Riyadh Convention would very likely be stymied by the award-debtor, the Kurdistan Regional Government. The DIFC Court held that, by virtue of Article 5 of UAE Federal Law No. 8 of 2004 (“**Article 5**”)[4], treaties which form part of the law of the UAE are binding in the DIFC. Importantly, the Court found that, not only was the Riyadh Convention applicable in the DIFC, but the service regime in Article 6 of the Riyadh Convention was **mandatory and exclusive**. That is, there was no scope to circumvent the terms of the Riyadh Convention by an order for alternative service or to dispense with service altogether so that the Riyadh Convention was not engaged.

The effect of *Pearl Petroleum* was that, if the Court of a Convention State refuses or fails to serve a DIFC Court recognition and enforcement order pursuant to the Convention Service regime, the recognition and enforcement order will **never** become enforceable; similarly draconian implications applied to the service of other court documents. The obvious problem that this gave DIFC Court users was exacerbated by the fact that the Riyadh Convention is of broad application throughout the GCC region.

Justice Al Sawalehi’s Decision

At first instance, Justice Al Sawalehi held that *Pearl Petroleum* was distinguishable, as, unlike in *Pearl Petroleum*, service had been attempted but failed in the present case. In the alternative, His Honour found that *Pearl Petroleum* was wrongly decided and the DIFC Court was not bound to follow the Riyadh Convention at all.

The present case distinguished from *Pearl Petroleum*

In *Pearl Petroleum*, the claimant had not actually attempted service in accordance with the Riyadh Convention – instead, alternative service had been sought on the basis that interference with service by the Defendant was *highly likely*. Justice Al Sawalehi considered this to be a critical distinction and confined the ration in *Pearl Petroleum* accordingly. That is, *Pearl Petroleum*, properly interpreted, held that where a document in DIFC Court proceedings is required to be served on a defendant in a Convention State, it must first be attempted to be served by Convention Service, but after this attempt, the Court is empowered to order alternative service or dispense with it altogether.

Pearl Petroleum wrongly decided

Justice Al Sawalehi also found that, even if *Pearl Petroleum* was not distinguishable, it was in any event wrong on a more fundamental basis – i.e. the Riyadh Convention was not binding in the DIFC at all. There are two ‘avenues’ by which the Riyadh Convention could ‘automatically’^[5] apply in the DIFC: (1) Article 5; and (2) Article 3(2) of the UAE Federal Law No. 8 of 2004, which provides that financial Free Zones “shall...be subject to all Federal laws, with the exception of Federal civil and commercial laws” (“**Article 3(2)**”).

Regarding Article 5, His Honour found that it placed an obligation on “*financial free zones*”, which meant the DIFC executive (i.e. the Ruler, the President of the DIFC and the DIFC Authority), but not the DIFC Courts. To the contrary, Article 30 of the DIFC Court Law^[6] provides a mandatory, exhaustive list of the law that can be applied by the DIFC Court. UAE Federal law is not mentioned. Therefore, the DIFC Court shall not apply UAE Federal law unless either: (1) it is agreed by the parties, or (2) it is incorporated into DIFC domestic law by express enactment. There was no such party agreement, and His Honour found that the Riyadh Convention had not been incorporated into DIFC Law, notwithstanding Article 42(1) of the DIFC Arbitration Law^[7] and Article 24(2) of the DIFC Court Law^[8]. As such, Article 5 was not binding on the DIFC Court.

His Honour also grappled with the slightly different question of whether the Riyadh Convention applied to the DIFC Court, not by virtue of Article 5, but by virtue of Article 3(2). The Riyadh Convention is not only an international treaty to which the UAE is party (thus potentially triggering Article 5, were it to apply), but it is also incorporated directly into UAE Federal law by way of Federal Decree No. 53 of 1999 (the “**Decree**”). If the Riyadh Convention (as converted to Federal Law by the Decree) was not a civil or commercial law, it would therefore apply to the DIFC by virtue of Article 3(2). The Defendant argued that the Riyadh Convention was procedural law, not civil or commercial law, and thus applied in the DIFC. Justice Al Sawalehi rejected this, finding that Article 6 fell under the rubric of civil and commercial law in Article 3(2), and was thus precluded from application in the DIFC.

The Appeal

The Defendant appealed, and the hearing occurred in February 2021 before Chief Justice Zaki Azmi, Justice Wayne Martin, and Justice Sir Richard Field. The two^[9] key issues on appeal were:

1. Do the terms of the Riyadh Convention form part of DIFC Law such that they must be applied by the DIFC Court?
2. If the answer to (1) is yes, is the service regime in the Riyadh Convention exclusive, such that the DIFC Court cannot either order alternative service or dispense with service?

(1) Is the Riyadh Convention part of DIFC Law?

The Court of Appeal answered this question in the negative, which was sufficient to dismiss the Appeal. Like the Court of First Instance, the focus of the Court of Appeal was on whether the Riyadh

Convention was ‘automatically’ a part of DIFC Law (and therefore binding on the DIFC Court), by virtue of Article 5 and/or Article 3(2).

Article 5

Regarding Article 5, the Court of Appeal found:

(a) Article 5 imposes obligations upon the “*Financial Free Zones*”. On the proper construction of Article 5, “*Financial Free Zones*” does not include the DIFC Courts. This was for the following reasons:

- i. A “*Financial Free Zone*” is defined by Article 1 to be the corporate body created when a Federal Decree is issued in accordance with Article 2[10] of UAE Federal Law No. 8 of 2004. The DIFC Court is not such a corporate entity[11]. Rather, 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. It is this entity that is the subject of Article 5.
- ii. There is an 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. The Defendant/Appellant’s reliance on Article 5 elided this distinction.
- iii. Article 5 is intended to ensure that the relevant corporate body which is delegated executive power by the State exercises such power in a manner which does not put the State in breach of its international agreements. In other words, Article 5 functions as a constraint on the exercise of executive power; it cannot be taken to import all obligations imposed under all treaties to which the UAE is a party into the domestic law of each Financial Free Zone.
- iv. Indeed, Articles 3 and 7(3)[12] of UAE Federal Law No. 8 of 2004 are the provisions concerned with the laws applicable in Financial Free Zones, not Article 5.
- v. 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). It is impossible to construe the reference in Article 5 to the “*Financial Free Zones*” to include whatever myriad arrangements might be made with respect to the exercise of judicial authority within the various Emirates within which such Zones might be created.

The crux of the above is that Article 5 does not provide that international agreements to which the UAE is party apply automatically within the DIFC. Subject to Article 3(2) (see below), unless and until a relevant Emirate exercises the powers reserved to it by Article 7(3) to issue legislation implementing international agreements into 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.

However, the Court of Appeal was careful to say that, although the Riyadh Convention was not binding law in the DIFC, the DIFC Court was a UAE Court and thus could invoke the provisions of the Riyadh Convention to facilitate service where it was applicable. In such cases, whether service is validly effected as a matter of DIFC Law will turn upon the question of whether service has taken place in accordance with the rules of the Court.

Article 3(2)

As set out above, Article 3 provides that all Financial Free Zones are subject to all Federal Laws “*with the exception of Federal civil and commercial laws*”. On the assumption that the Riyadh Convention formed part of the UAE Federal Law, the critical question for the Court of Appeal was whether the Riyadh Convention generally, or Article 6 of the Riyadh Convention specifically, were “*civil and commercial laws*” and therefore excepted from the operation of Article 3(2). The Court of Appeal found as follows:

- a. Article 3(2) is properly construed as applying to the specific rule or 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. So the question was not whether the Riyadh Convention is a civil and commercial law, but whether the relevant provisions are (e.g. Article 6).
- b. The relevant provisions in the Riyadh Convention relate to service of DIFC Court documents. This is a matter of civil procedure. Pursuant to the case of *IGPL v Standard Chartered Bank*[13], matters of civil procedure are matters of civil and commercial law, and thus excepted from the operation of Article 3. This is further supported by the application of Article 6, which is expressly said to relate to “*civil, commercial and administrative cases and cases of personal status*”.

For these reasons Article 3(2) expressly excludes Article 6 of the Riyadh Convention from application within the DIFC. The Judge in *Pearl Petroleum* was wrong to conclude otherwise.

(2) Is the service regime in the Riyadh Convention exclusive?

While strictly unnecessary given the finding that the Riyadh Convention did not apply in the DIFC under either Article 5 or Article 3(2), the Court of Appeal also considered whether the Riyadh Convention specified an exclusive service regime. The Court of Appeal answered this in the negative, finding that:

- a. The Riyadh Convention does not state that Convention Service is the exclusive means by which service can be validly effected.
- b. Any construction of the Riyadh Convention to that effect would be antithetical to its objects and purpose.
- c. The proposition that service by alternative methods may only be permitted after service under the Riyadh Convention had been attempted but failed therefore falls away.

(3) Can the DIFC Court in any event dispense with service so that the Riyadh Convention is not engaged?

The Riyadh Convention also did not prevent the DIFC Court from dispensing with service. Article 6 applies to documents which are “*required to be served or notified*”. Determining which documents fall within that category is a matter for the Court in which the proceedings are being conducted. If that Court concludes, in accordance with its own rules, that a document is not required to be served, Article 6 has no application.

Take-away points

To recap, the key points from the Judgment are as follows:

1. Article 5 of Federal Law No. 8 of 2004 does not provide that international agreements to which the UAE is party apply automatically within the DIFC. Subject to Article 3(2), unless and until a relevant Emirate expressly implements the international agreement into the domestic law of the relevant Financial Free Zone, such obligations will not form part of that domestic law. The Riyadh Convention is not therefore part of DIFC Law.
2. In any event, the Riyadh Convention does not provide an exclusive service regime.
3. The DIFC Court can, in an appropriate case, order alternative service or dispense with service in respect of a receiving party domiciled in a Convention State.
4. That said, where a receiving party is domiciled in a Convention State, the Riyadh Convention should be considered a ‘tool in the arsenal’ – it can still be used to effect valid service, provided the DIFC Court Rules are satisfied.

Conclusion

The Court of Appeal’s decision will be welcomed by DIFC Court practitioners and users. It provides welcome clarity to an issue that has dogged practitioners since *Pearl Petroleum*, and confirms flexibility regarding service-out of DIFC Court documents on parties resident in Convention states. No longer are parties bound to attempt Convention Service, and blocked when Convention Service fails. This reaffirms the DIFC Court’s status as a regional dispute resolution hub that is pro-arbitration and committed to enforcement. Further, and perhaps most importantly, the decision has answered the fundamental question of when and how international agreements to which the UAE is a party become part of DIFC law. This will no doubt be relied on in many cases to come.

For further information or advice regarding the Court of Appeal decision, or service and enforcement more generally, please contact the highly experienced team at Gibson Dunn.

[1] The 1983 Riyadh Arab Agreement for Judicial Cooperation (the “**Riyadh Convention**”). The Riyadh Convention has state signatories from across the Arab world (including the UAE, Jordan, Bahrain, Tunisia, Egypt, Algeria, Djibouti, Saudi Arabia, Sudan, Syria, Somalia, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, Libya, Morocco, Mauritania and Yemen).

[2] *Pearl Petroleum Company Limited & Others v The Kurdistan Regional Government of Iraq* [2017] DIFC ARB 003 (“**Pearl Petroleum**”).

[3] A translation of Article 6 of the Riyadh Convention provides (with alternative wording in square brackets): “*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 or the competent legal office [from the judicial body or officer 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].*”

[4] 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*”.

[5] That is to say, apply without express implementation by Dubai or DIFC Law, or the agreement of the parties.

[6] Law No. 10 of 2004. Article 30 provides: “**Governing Law** (1) *In exercising its power and functions, the DIFC Court shall apply: (a) the Judicial Authority Law; (b) DIFC Law or any legislation made under it; (c) the Rules of Court; or (d) such law as is agreed by the parties. (2) The DIFC Court may, in determining a matter or proceeding, consider decisions made in other jurisdictions for the purpose of making its decision*”.

[7] Article 42(1) provides: “*For the avoidance of doubt, where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards the DIFC Court shall comply with the terms of such treaty*”.

[8] Article 24(2) provides: “*Where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the Court of First Instance shall comply with the terms of such treaty*”. In his additional reasons for granting permission to appeal, Justice Al Sawalehi found that, Article 24(2) was an express exception to the general rule that UAE treaties do not apply directly within the DIFC. The need for this express exception carried with it a negative implication – i.e. that UAE treaties do not have direct effect within the DIFC absent DIFC legislation enacting the treaty as law. This was consistent with the relationship between UAE treaties and the rest of the UAE. This does not mean that DIFC Courts cannot comply with UAE treaties which have not been expressly incorporated into DIFC Law; it simply means that the effectiveness of proceedings will not come down to compliance or non-compliance with them. This is similar to the approach of the English Courts with respect to UK treaties.

[9] The Court also briefly discussed other issues that had been raised by the Parties, including: (1) whether the DIFC Court was precluded from applying Federal Laws generally, absent agreement of the Parties and (2) whether the New York Convention overrode any inconsistent provisions of the Riyadh Convention. Ultimately the Court found it was unnecessary to decide these issues given its primary finding that the Riyadh Convention was not a part of DIFC law.

[10] 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*”.

[11] The DIFC Courts are a separate (in effect, subsidiary) corporate body established under the Dubai Law No. 9 of 2004, which was made pursuant to the legislative powers specifically reserved to the Emirate of Dubai by Article 7(3) of Federal Law No. 8 of 2004.

[12] 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*”.

[13] [2015] DIFC CA 004.



Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in the firm's Dubai office:

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