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Cross-border disputes

International service
International asset recovery/ enforcement
State immunity

English Court of Appeal rules that service on a State of an order permitting enforcement of an arbitration award can be dispensed with in "exceptional circumstances" such as civil unrest

A. Summary

1. States are afforded particular protections in English litigation. They not only have the benefit of various immunities (albeit subject to exceptions), but also other procedural privileges – including as regards the service of documents upon them.

2. Pursuant to Section 12(1) of the State Immunity Act 1978 ("**SIA**"), unless the State has agreed otherwise under Section 12(6), *"Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State…"*.

3. In *General Dynamics United Kingdom Ltd v Libya* [2019] EWCA Civ 1110 however, the English Court of Appeal (overturning the decision at first instance) decided that service on a State of an order, obtained "without notice" and giving permission to enforce an arbitration award, could be dispensed with in "exceptional circumstances". The discretion to do so was exercised in this case in view of the civil unrest in Libya.

4. The Court of Appeal reached that conclusion on the following basis:

    - Section 12 of the SIA did not contemplate that there will always be some document which is required to be served for the purpose of instituting proceedings and that such document (absent the State's agreement to the contrary) must be served through the Foreign and Commonwealth Office ("**FCO**").
    - Indeed, if a foreign State had fully participated in (or deliberately declined to participate in) proceedings in litigation or arbitration, it did not obviously need the protection afforded by Section 12.

- An order giving permission to enforce an arbitration award did not therefore constitute a "*writ or other document required to be served for instituting proceedings against a State*" for the purposes of Section 12(1). It was therefore not mandatory to effect service of that document through the FCO on the relevant Ministry of Affairs as a consequence of Section 12(1).
- Pursuant to Rule 62.18(2) of the English Civil Procedure Rules ("**CPR**") the arbitration claim form did not have to be served unless the Court so ordered, which it had not in this case, and consequently neither Section 12(1) nor CPR 6.44 had any application to that document.
- Pursuant to CPR 62.18(8)(b) and 6.44, the order *prima facie* had to be served and any service of the order did have to be via the FCO. However, in the absence of a statutory obligation – in this case by reason of Section 12(1) of the SIA – to effect service of a document (and do so via the FCO), the Court had a discretion in an appropriate case to dispense with service in accordance with CPR 6.16 or 6.28.
- Since the order permitting the enforcement of an arbitration award was not a "claim form" for the purposes of CPR 6.16, it could be said that the Judge had a general discretion to dispense with service of that document under CPR 6.28 which was not subject to the "exceptional circumstances" pre-requisite that applied in respect of CPR 6.16.
- However, as the order permitting enforcement was to be the first time the foreign State received notice of the claimant's attempt to enforce an award, it was nevertheless "*only right and proper*" to apply the test of "exceptional circumstances".
- The impossibility of service was not a condition of "exceptional circumstances", and in the case at hand the Judge had found that test was met since service was not straightforward, was too dangerous and, if possible at all, would take a significant period of time, and he had therefore not accorded much weight to the fact that there had been no attempt to serve through the FCO. In all those circumstances, it was not appropriate for the Court of Appeal to differ from the Judge on what was effectively an exercise of discretion.

5. The Court of Appeal also said that:

   - where service of such documents on a State was dispensed with, it would always be appropriate to make arrangements (as the Judge had done in this case) to notify the State in question in such a way as will come to the attention of the organs of state which will be responsible for honouring the award;
   - such notification, however, would not constitute "alternative service" and must not be used as a proxy for such service which cannot be used where the respondent is a State.

6. Whilst this Judgment could be of assistance to an entity seeking to enforce an arbitration award (or register a foreign Court judgment) against a State in circumstances in which service is difficult (for example where the State is suffering internal conflict), States will argue that it undermines the SIA protections they are afforded. It is not yet clear whether there will be an appeal to the Supreme Court.

7. However, it is important to bear in mind that the decision does not serve to relax the mandatory effect of Section 12 of the SIA in respect of the service on a State of proceedings:

   - to determine an underlying dispute; or
   - to enforce a foreign Court judgment by means of a claim made on the judgment debt (rather than via a registration process).

Rather, it significantly undermines certain other first instance Judgments to the effect that service in those cases can be dispensed with.

B. The arbitral proceedings and award

8. An English company ("**General Dynamics**"), which was part of a global military defence conglomerate, had obtained an award (the "**Award**") against Libya from an ICC tribunal in Geneva for over £16 million plus interest and costs. Libya had taken part in that arbitration and had been legally represented.

C. The English enforcement proceedings

9. The Award was a New York Convention award enforceable, by leave of the Court, pursuant to Section 101 of the Arbitration Act 1996.

10. Pursuant to CPR 62.18, General Dynamics had applied "without notice" for an order permitting it to enforce the Award. The order had been granted and judgment had been entered in terms of the Award. Teare J had dispensed with service of the order, the Arbitration Claim Form and associated documents, but made provision for General Dynamics to courier them to certain Libyan organs of state and their lawyers.

11. The State applied to set aside parts of Teare J's order. That application came before Males J (as he then was). Males LJ (as he later became) decided that, pursuant to Section 12(1) of the SIA, the order had to be served through the FCO and that such service could not be dispensed with (although he also said that, if such a discretion was available to him, he would have upheld the order dispensing with service in the circumstances).

D. Service under the SIA and the CPR

12. Pursuant to Section 12 of the SIA:

"***Service of process and judgments in default of appearance.***

(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction."

13. Pursuant to CPR 62.18:

"(1) An application for permission under … section 101 of the [Arbitration Act 1966] … to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form.

(2) The court may specify parties to the arbitration on whom the arbitration claim form must be served.

…

(7) An order giving permission must:-

...

(b) be served on the defendant …

(8) An order giving permission may be served out of the jurisdiction:-

(a) without permission; and

(b) in accordance with rules 6.40 to 6.46 as if the order were an arbitration claim form.

(9) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set:-

(a) the defendant may apply to set aside the order; and

(b) the award must not be enforced until after:-

(i) the end of that period; or

(ii) any application made by the defendant within that period has been finally disposed of. …"

14. CPR 6.44 makes provision for service of a claim form or other document on a State. It provides inter alia that:

"(3) [The party who wishes to serve the claim form or other document] must file in the Central Office of the Royal Courts of Justice-

(a) a request for service to be arranged by the Foreign and Commonwealth Office;

(b) a copy of the claim form or other document; and

(c) any translation required under rule 6.45.

(4) The Senior Master will send the documents filed under this rule to the Foreign and Commonwealth Office with a request that it arranges for them to be served.

…

(7) Where-

(a) section 12(6) of the State Immunity Act 1978 applies; and

(b) the State has agreed to a method of service other than through the Foreign and Commonwealth Office,

the claim form or other document may be served either by the method agreed or in accordance with this rule.

(Section 12(6) of the State Immunity Act 1978 provides that section 12(1) enables the service of a claim form or other document in a manner to which the State has agreed.)"

15. CPR 6.16 provides:

"*(1) The court may dispense with service of a claim form in exceptional circumstances.*"

16. CPR 6.28 provides:

"*(1) The court may dispense with service of any document which is to be served in the proceedings.*"

17. However, pursuant to CPR 6.1, neither CPR 6.16 nor 6.28 applies:

"*where … any … enactment … makes different provision*".

E. The issues for the Court of Appeal to determine

18. The issues for the Court of Appeal to decide were, in essence, these:

- What was the meaning of Section 12(1) of the SIA? In particular:
  - » Was it mandatory for either the claim form or the order permitting the enforcement of the Award to be served through the FCO, on the basis that:
    - the SIA contemplated that there will always be some document which is required to be served for the purpose of instituting proceedings and that such document (absent the State's agreement to the contrary) must be served through the FCO; and
    - thus, an order giving permission to enforce an arbitration award constituted a "*writ or other document required to be served for instituting proceedings against a State*"?

    Alternatively, could service be dispensed with and in what circumstances?
- If the order permitting enforcement of the Award must be treated as a document required to be served for instituting proceedings against a State, can an order be made dispensing with service such that the order is no longer a document "*required to be served*" for the purposes of Section 12(1)?
- If service could be dispensed with, should that discretion be exercised in this case?

F. The decision of the Court of Appeal

The meaning of Section 12(1) of the SIA

19. The Court of Appeal considered that, contrary to the view of Males LJ, Section 12 of the SIA did not contemplate that there will always be some document which is required to be served for the purpose of instituting proceedings and that such document (absent the State's agreement to the contrary) must be served through the FCO.

20. When considering the position in respect of proceedings to register arbitration awards (and foreign Court judgments), its reasoning included the following:

    - At the time of enactment of the SIA there existed procedures for instituting registration of both foreign judgments and foreign awards that did not require service of the initiating document.[1]
    - If a foreign State had fully participated in (or deliberately declined to participate in) proceedings in litigation or arbitration, it did not obviously need the protection afforded by Section 12.[2]
    - It could not be argued that if Section 12 did not apply, the State would lose the protection afforded by Section 12(2) (giving a State an additional two months to enter an appearance). That was because there was no requirement (or indeed provision) for the entry of an appearance or an acknowledgement of service of a registrable foreign Court judgment or arbitration award unless the Court specified that the document instituting proceedings needed to be served. Rather, the relevant procedure was that the State would have time to apply to set aside the order.[3]
    - There were competing policy considerations:
        - » on the one hand that arbitration awards should be honoured, particularly if the State has participated fully in the arbitration, and obstacles to enforcement should be few and far between;
        - » on the other, that there were still sensitivities about impleading a foreign State.

      In this respect, the Court of Appeal said that whilst one would like to think that there would normally be no difficulty in serving a foreign State through the FCO and the Foreign Ministry of that State, on occasion there will still be serious difficulties. It said that they were perhaps more likely to arise after adjudication because it is at that stage that liability is quantified and the State, if it is the case of a commercial transaction or an arbitration, will be expected to pay.

      In such circumstances, the Court of Appeal considered that the correct course was to go by the deliberately chosen wording of the statute rather than adopt a meaning different from the natural meaning of the words.[4]

1 Para [41] of the Court of Appeal Judgment.
2 Para [42] of the Court of Appeal Judgment.
3 Para [49] of the Court of Appeal Judgment.

Pursuant to CPR 62.18(9), the order would have to set the period within which such an application had to be made and provide for it not to be enforced meanwhile. The Court of Appeal said that, in the case of a State, the normal period should be two months by analogy with Section 12(2) but there was no statutory requirement that such period must always be given – see para [51], and also para [43], of the Court of Appeal Judgment.

4 Paras [57]-[59] of the Court of Appeal Judgment.

21. Consequently, the Court of Appeal overturned the decision of Males LJ, ruling that:

- an order giving permission to enforce an arbitration award did not constitute a "*writ or other document required to be served for instituting proceedings against a State*" for the purposes of Section 12(1); and
- it was therefore not mandatory to effect service of that order through the FCO on the relevant Ministry of Affairs as a consequence of Section 12(1)[5].

22. The Court of Appeal further found as follows:

- Pursuant to CPR 62.18(2) the arbitration claim form did not have to be served unless the Court so ordered, which it had not in this case, and consequently neither Section 12(1) nor CPR 6.44 had any application to that document[6].
- Pursuant to CPR 62.18(8)(b) and CPR 6.44, the order *prima facie* had to be served and any service of the order did have to be via the FCO[7].
- However, in the absence of a statutory obligation – in this case by reason of Section 12(1) of the SIA – to effect service of a document (and do so via the FCO)[8], the Court had a discretion in an appropriate case to dispense with service in accordance with CPR 6.16 or 6.28[9].
- Since the order permitting the enforcement of an arbitration award was not a "claim form" for the purposes of CPR 6.16, strictly speaking it could be said that the Judge had a general discretion to dispense with service of that document under CPR 6.28 which was not subject to the "exceptional circumstances" pre-requisite that applied in respect of CPR 6.16[10].

5 Paras [52] and [60] of the Court of Appeal Judgment.

6 Paras [18], [51] and [60] of the Court of Appeal Judgment.

7 Paras [18]-[19], [51]-[52] and [60] of the Court of Appeal Judgment.

8 A document which did constitute a "*writ or other document required to be served for instituting proceedings against a State*" would (in the absence of contrary agreement by the State) have to be served via the FCO pursuant to Section 12(1), since the CPR could not prevail over a statutory requirement – see paras [23], [52] and also [63] of the Court of Appeal Judgment.

There is a tension between the Court of Appeal's approach in this respect and the recent Judgment of Master Kaye in *Qatar National Bank (Q.P.S.C) (formerly Qatar National Bank (S.A.Q)) v (1) Government of Eritrea (2) State of Eritrea* [2019] EWHC 1601 (Ch). In the latter case (which, unlike *General Dynamics*, concerned service of a claim form initiating proceedings), the Master decided that the mandatory wording of Section 12 simply meant that where a document had to be served under Section 12(1), service by an alternative method was not available. He therefore considered that the wording permitted a Court to dispense with service such that there was then no document "*required to be served*", and decided that such discretion should be exercised, applying the "exceptional circumstances" test, where that State had sought to avoid its legal obligations by obstructing service via the diplomatic route (which he considered to be a different situation to that in *General Dynamics*). The decision in *Qatar National Bank*, which also ran contrary to the logic of the first instance decision in *General Dynamics*, was handed down before the Court of Appeal Judgment in *General Dynamics* was available. It is unclear whether the Court of Appeal would have reached the same conclusion as the Master in *Qatar National Bank*, but to do so, it would have had to have followed a different logic to the Master in view of its decision on the second issue – see paragraph 25 below and paras [62]-[63] of the Court of Appeal's Judgment.

If documents are handed over on Ministry of Foreign Affairs premises, that will be sufficient for them to have been "transmitted" through the FCO and "*received at the Ministry*" within Section 12(1) of the FCO (*Estate of Michael Heiser & 121 Ors v (1) Islamic Republic of Iran (2) Iranian Ministry of Information & Security* [2019] EWHC 2074 (QB) at paras [206] and [218]). However, there are conflicting authorities as to whether, in order to satisfy the word "*receive*", it is necessary for the recipient to accept the documents upon delivery, and thus whether a State can therefore in effect evade service for the purposes of Section 12 by refusing to take documents (*Estate of Michael Heiser* at paras [233]-[236] as compared to the decision of the Judge (albeit on a "without notice" application) in *Certain Underwriters at Lloyd's of London and Ors v Syrian Arab Republic and Ors* [2018] EWHC 385 (Comm) at paras [19]-[23]).

9 Paras [20]-[23], [52] and [60] of the Court of Appeal Judgment.

10 Paras [20]-[22] and [61] of the Court of Appeal Judgment.

- However, as the order permitting enforcement was to be the first time the foreign State received notice of the claimant's attempt to enforce an award, it was nevertheless "*only right and proper*" to apply the test of "exceptional circumstances", taking account of the competing policy considerations[11].

23. The Court of Appeal also said that:

- where service of such documents on a State was dispensed with, it would always be appropriate to make arrangements (as Teare J had done in this case) to notify the State in question in such a way as will come to the attention of the organs of state which will be responsible for honouring the award[12];
- such notification, however, would not constitute "alternative service" and must not be used as a proxy for such service which cannot be used where the respondent is a State[13].

Dispensing with service such that the order is no longer a document "*required to be served*"

24. This issue did not arise in view of its conclusion on the meaning of Section 12(1) of the SIA.

25. However, the Court of Appeal said that if Section 12 in every case did require service through the FCO of an order permitting enforcement of an award, it would not accept that, even so, service could be dispensed with on the basis that no document would then be required to be served. It found that to be an impossible construction of Section 12, since that would give a Judge a discretion to dispense with a statutory requirement.[14]

The exercise of any discretion in this case

26. The Court of Appeal noted that:

- whilst the Judge accepted that there had been no attempt to serve through the FCO, he decided not to accord it much weight in the circumstances[15];
- the stated view of the FCO was that service in Libya was "*not at all straightforward, too dangerous and (assuming it was possible at all) likely to take over a year*"[16];
- the evidence established, for example, that:
  - "*… much of Libya was in a state of civil unrest and was violent and unstable, with armed militia groups active in the capital endangering civilian lives and safety, an atmosphere of persistent lawlessness and a real risk of a full-scale civil war.*";
  - "*The British Embassy had closed, with diplomats moving to neighbouring Tunisia, although visits to Libya were sometimes possible and some diplomatic staff remained in the country.*"

11 Para [61] of the Court of Appeal Judgment.
12 Para [60] of the Court of Appeal Judgment.
13 Para [61] of the Court of Appeal Judgment.
14 Paras [62]-[63] of the Court of Appeal Judgment. Thus, the Court of Appeal considered that the *obiter* decision in the *Certain Underwriters at Lloyd's of London v Syrian Arab Republic* case at para [25] of that Judgment cannot be considered good law (and, by implication, the same would be true of *Havlish v Iran* [2018] EWHC 1478 (Comm) on which the Master in the *Qatar National Bank* case also relied).
15 Para [65] of the Court of Appeal Judgment.
16 Para [65] of the Court of Appeal Judgment.

- » "*There was at least uncertainty as to the time which would be required to effect service through the Foreign & Commonwealth Office, assuming this was possible at all.*"
- » "*There were some periods when it would have been dangerous to attempt to deliver documents to the Ministry of Foreign affairs as a result, not only of the situation in Tripoli generally, but also the presence of armed militia around the Ministry itself. …*"[17]

- further, events since the order made on the "without notice" application had demonstrated that the concerns were well-founded, since:
  - » "*There were outbreaks of serious violence in Tripoli in which, by September 2018, 115 people had died and 383 had been injured*";
  - » "*Reports by the United Nations Support Mission in Libya* [had] *described Tripoli as being 'on the brink of all-out war'*";
  - » "*It* [remained] *unstable with the potential for further large-scale conflict*";
  - » as the Judge was writing his Judgment there were "*reports of an armed attack by militants on the Ministry involving loss of life, with newspaper photographs of black smoke rising from the building. …*"[18].

27. The Court of Appeal decided that:

- contrary to the State's submissions, the impossibility of service was not a condition of "exceptional circumstances"[19];
- in the circumstances at hand, it was not appropriate to differ from the Judge on what was effectively an exercise of discretion[20].

G. The effect of the decision and its practical and commercial implications

28. On the one hand, this Judgment could be of assistance to an entity seeking to enforce an arbitration award (or register a foreign Court judgment) against a State in circumstances in which service is difficult. However, States may be concerned that it undermines the SIA protections which they are afforded.

17 Para [66] of the Court of Appeal Judgment.
18 Para [66] of the Court of Appeal Judgment.
19 Para [67] of the Court of Appeal Judgment.
20 Para [70] of the Court of Appeal Judgment.

In *Qatar National Bank*, service was dispensed with (albeit there was arguably no power to do so at all in the circumstances of that case since what was being served there was a claim form initiating proceedings within Section 12(1) of the SIA – see footnotes 8 and 14 above) on the basis that "exceptional circumstances" existed where a State had sought to avoid its legal obligations by obstructing service via the diplomatic route. In essence, the Court there found that Eritrea had sought to do so since its Embassy had refused to re-legalise the documents to be served and/or delayed that process. Re-legalisation was a requirement since Eritrea was not part of the Hague Apostille Convention – i.e. the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

29. Two important points must be borne in mind in relation to this Judgment, however:

- First, there could yet be an appeal to the Supreme Court.
- Secondly, the Judgment does not serve to relax the mandatory effect of Section 12 of the SIA in respect of the service on a State of proceedings:
  - » to determine an underlying dispute[21]; or
  - » to enforce a foreign Court judgment by means of a claim made on the judgment debt (rather than via a registration process)[22].

  Rather, it significantly undermines certain other first instance Judgments to the effect that service in those cases can be dispensed with.

May 2020

21 See paras [52] and [63] of the Court of Appeal Judgment.

22 See para [48] of the Court of Appeal Judgment.

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