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Cross-border disputes

International service
International asset recovery/ enforcement
State immunity

English Court declines to recognise/enforce US Court Judgments v. Iran arising from terrorist incidents (and also rules on validity of service)

A. Summary

1. Before the UK Courts will recognise/enforce a foreign Court Judgment against a State, two requirements must generally be met pursuant to Section 31 of the Civil Jurisdiction and Judgments Act 1982 ("**CJJA**"):

    - that the foreign Judgment would be so recognised/enforced if it had not been given against a State (i.e. the ordinary pre-requisites for the recognition/enforceability of a foreign Judgment are satisfied); and
    - (in the absence of submission to enforcement proceedings in the UK by suit on the foreign Court Judgment) that the State would not have been immune from suit had the foreign Court applied rules corresponding to Sections 2-11 of the UK State Immunity Act 1978 (the "**SIA**"), since one of the exceptions to immunity would have applied.

2. In *Estate of Michael Heiser & 121 Ors v (1) Islamic Republic of Iran (2) Iranian Ministry of Information & Security* [2019] EWHC 2074 (QB), the English High Court ruled that these criteria were not satisfied in respect of twelve US Court Judgments arising out of terrorist incidents in a number of countries in the Middle East in which Iran was alleged to have been involved, and so it could not enforce them. That was for the following reasons:

    - In order for a US Court Judgment to be recognised/enforced in England, the common law required that, in the absence of any form of submission to the US Courts, the judgment debtor was present (or resident) in the US at the time the proceedings were instituted. Iran had neither submitted to the US Courts, and nor was it present (or resident) in the US.

- Further and in any event the US Court, applying rules corresponding to Sections 2-11 of the UK SIA (which meant applying those provisions but replacing references to the UK with references to the US), would have determined that Iran was immune from suit save in respect of matters leading to one of the US Court Judgments. That was because none of the exceptions to immunity would have applied in respect of the other eleven, in particular:
  - » the relevant acts/omissions, save in respect of the one US Court Judgment, had not occurred within the US for the purposes of Section 5; and
  - » the state financial sponsorship of terrorism found by the US Courts did not amount to a "commercial transaction", and in any event the US proceedings leading to the Judgments did not "relate to" such a transaction, for the purposes of Section 3(1)(a).

3. The Court also considered the rules which are applicable when serving documents on a State, and addressed the question of whether service of the claim form, and of the Judgment subsequently entered in default, had been validly effected in the circumstances of the case. It decided that:
   - the claim form and accompanying documents had been validly served pursuant to Section 12(1) of the SIA since they were handed over within the Ministry of Foreign Affairs ("**MFA**") compound, and that was sufficient for them to have been "transmitted" through the Foreign and Commonwealth Office ("**FCO**") and "received at the Ministry";
   - the Judgment in default that had subsequently been obtained had, by contrast, not been validly served pursuant to Section 12(5) of the SIA since:
     - » the MFA had refused to accept those papers when attempts were made to deliver them and as such, contrary to *Certain Underwriters at Lloyd's of London v Syrian Arab Republic and Ors* [2018] EWHC 385 (Comm), they could not have been "received", and
     - » notwithstanding a contrary statement in the order obtained "without notice" and also contrary to *The European Union v Syrian Arab Republic* [2018] EWHC 181 (Comm), service could not in fact have been effected by email as the word "received" involved some act of volition and Iran had not expressly agreed to accept email service.

4. The Judgment demonstrates the importance of agreeing in advance appropriate:
   - forum selection agreements;
   - waivers of immunity (in respect of suit, enforcement and/or forms of remedy/relief); and
   - methods by which documents may be served

   if, unlike in this case, it is possible to do so – for example when transacting with a State.

5. Following this Judgment, difficulties may be encountered by a party seeking to serve documents on a State if, in the absence of an agreement on service methods, a State refused to accept those papers (or otherwise sought to avoid its legal obligations by obstructing service via the diplomatic route). Given the existence of conflicting first instance judgments as to the validity of service (and other similar issues) in such circumstances, the issue will probably be considered by the Court of Appeal in another case before too long – not least because it is particularly pertinent if service of the papers in question cannot be dispensed with.

6. In that respect, following the recent Court of Appeal Judgment in *General Dynamics United Kingdom Ltd v Libya* [2019] EWCA Civ 1110 and pending any Supreme Court Judgment on the issue, service of an order obtained "without notice" permitting enforcement of an arbitration award or (*obiter*) registering a foreign Court Judgment can, in theory, be dispensed with, albeit only in exceptional circumstances. However, the Court of Appeal also indicated (*obiter*) that this is not the case for a claim form in 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).

B. The UK requirements for enforcing a foreign Court judgment against a State

7. Section 31(1) of the CJJA provides:

   "A judgment given by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognised and enforced in the United Kingdom if, and only if-

   (a) it would be so recognised and enforced if it had not been given against a state; and

   (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978."

8. This means that there are generally two pre-requisites to the recognition/enforcement in the UK of the judgments of foreign Courts against States:

   - that the standard pre-requisites for the recognition/enforceability of a foreign Court Judgment are satisfied); and
   - (in the absence of submission to enforcement proceedings in the UK by suit on the foreign Court Judgment) that one of the exceptions to immunity would have applied had the foreign Court applied rules corresponding to Sections 2-11 of the UK SIA.[1]

1 In *NML Capital v Republic of Argentina* [2011] UKSC 31, the Supreme Court found that, so far as foreign Court Judgments are concerned, Section 31 of the CJJA both reflected and, in part, replaced the exemptions from immunity contained within the SIA, and that Section 31 was an alternative scheme rather than an additional hurdle. Thus, the provisions of the SIA could in theory provide an exception to immunity for the purposes of the UK proceedings to enforce the US Court Judgment if the proceedings fell within their terms.

The Supreme Court found, by a 3-2 majority, that the US Court Judgment in that case did not itself "relate to a commercial transaction" and so no exception to immunity applied by reason of the direct application of Section 3 of the SIA, despite the fact that the US Court proceedings themselves did "relate to a commercial transaction".

However, the Supreme Court unanimously found that the Judgment of a US Court could be enforced in the UK on either of the following other two bases: (1) the requirements of Section 31 of the CJJA were met in any event (since the State had submitted to the US Courts for the purpose of Section 2 of the SIA if applied replacing references to the UK with references to the US), or (2) the State had submitted to the Courts of any other country in which the Judgment of the US Court might be enforced (as well as waiving its immunity in that regard), and had therefore submitted to the UK Courts for the purposes of enforcement proceedings by suit on the US Court Judgment.

The standard pre-requisites for the recognition/enforceability of a US Court Judgment

9. Since there is currently no treaty or other understanding between the UK and the US in relation to the reciprocal enforcement of judgments, in order to enforce a US Court Judgment in England[2] fresh proceedings must be commenced based on the US Judgment debt, and the question of whether the US Judgment will be recognised or enforced is determined by English common law.

10. Under English common law, in order for a foreign (here US) Judgment to be recognised or enforced, it must be demonstrated, amongst other things, that, in the eyes of the English Court for those purposes, the foreign (here US) Court had jurisdiction to determine the dispute in question. That will be satisfied only if the judgment debtor:

    - either submitted to the jurisdiction of the US Court in one of the following ways:
      - » it was claimant or counterclaimed in the US Court proceedings; or
      - » it voluntarily appeared in the US Court proceedings (other than to contest jurisdiction); or
      - » it had, before the commencement of the US Court proceedings and in respect of the subject matter of the proceedings, agreed to submit to the jurisdiction of that Court or the Courts of the US;
    - or was present or resident in, or in the case of a non-US corporation carried on business in, the US at the time the US proceedings were instituted.

The exceptions to immunity under Sections 2-11 of the SIA

11. Various exceptions to immunity are provided for in Sections 2-11 of the SIA. These include the following, as set out in Sections 3 and 5.

12. Section 3 of the SIA provides:

    "Commercial transactions and contracts to be performed in the United Kingdom.

    (1) A State is not immune as respects proceedings relating to-

    (a) a commercial transaction entered into by the State; or

    (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

    (2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

2 For some time both the UK (in its capacity as an EU Member State) and the US have been signatories to the Hague Convention on Choice of Court Agreements 2005 (the "**2005 Hague Convention**"). That provides for the enforcement by contracting states of Judgments given by the Courts of other contracting states which the parties had agreed were to have "exclusive jurisdiction". However, whilst the EU has been bound by the 2005 Hague Convention since 1 October 2015 (in the case of Denmark, since 1 September 2018) and whilst the UK intends to become a party in its own right at the end of the transition period following its departure from the EU, the US (having signed on 19 January 2009) is still yet to ratify it. Thus, it remains the case at present that there are no treaties or other understandings currently in force between the UK and the US in relation to the reciprocal enforcement of judgments, even in the circumstances envisaged by the 2005 Hague Convention.

(3) In this section "commercial transaction" means-

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual."

13. Section 5 of the SIA provides:

"Personal injuries and damages to property.

A State is not immune as respects proceedings in respect of-

(a) death or personal injury; or

(b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom."

C. Service under the SIA of the claim, and of the subsequent default judgment

14. 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."

15. 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.)"

D. The issues for the Judge

16. In essence, the issues for the Judge to determine were these:

- For the purposes of the recognition/enforceability of a US Court Judgment in the UK, was Iran present in the US at the time the proceedings were instituted, either:
  - because of certain entities located in New York; or
  - because of Iran's presence in the United Nations in New York?

- Would an exception to immunity have applied had the US Court applied rules corresponding to Sections 2-11 of the SIA pursuant to Section 31(1)(b) of the CJJA, and in particular:
  - » did Section 31(1)(b) envisage the application of UK rules on state immunity (as set out in Sections 2-11 of the SIA) but reading references to the UK as references to the US, or did it envisage the application of the US version of such rules (which included an immunity exception in respect of the types of claims at hand where the acts/omissions did not take place in the US)?
  - » if Section 31(1)(b) envisaged adoption of the former approach:
    - – did the relevant acts/omissions occur within the US for the purposes of Section 5?
    - – alternatively, did the state financial support of terrorism found by the US Courts amount to a "commercial transaction" and if so did the proceedings "relate to" such a transaction for the purposes of Section 3(1) of the SIA?
- In relation to the question of service:
  - » were the claim form and accompanying documents validly served for the purposes of Section 12(1) of the SIA?
  - » was the default judgment validly served for the purposes of Section 12(5) of the SIA, either by reason of the attempted delivery and the Iranian MFA's refusal to accept the documents, or alternatively by email?

E. The decision of the Judge

Presence of Iran in the US

17. The Judge determined that, for the purposes of the recognition/enforceability of a US Court Judgment in the UK, Iran was not present in the US.

18. In particular:

- there was no admissible evidence before the Court to displace the strong presumption in this case that the separate corporate status of the entities in New York should be respected, and that as such they were not executive organs of the Iranian Government; and
- the argument in respect of Iran's presence at the United Nations was raised, and certain new evidence was provided, too late and no proper opportunity was given to address it evidentially or legally.

Exceptions to immunity under SIA equivalent

19. The Judge found, applying the unanimous *obiter* views expressed in *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495, that Section 31(1)(b) of the CJJA, and in particular the phrase:

> *"… if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978 …",*

required the application of the UK rules on state immunity (as set out in Sections 2-11 of the SIA) – in effect reading references to the UK as references to the US – and not the application of the US versions of such rules.

20. Applying Section 5 of the SIA (but reading references to the UK as being references to the US), the Judge determined that, save in the case of one of the US Judgments, the relevant acts/omissions did not take place in the US and thus an immunity exception corresponding to Section 5 would not have applied.

21. Applying Section 3(1)(a) of the SIA (but reading references to the US as being references to the US), the Judge determined that the state financial sponsorship of terrorism which had been found by the US Courts did not amount to a "commercial transaction", and in any event the US proceedings leading to the Judgments did not "relate to" such a transaction. As such, an immunity exception corresponding to Section 3(1)(a) would not have applied.

Validity of service

22. As regards the issues concerning validity of service, the Judge decided as follows:

- The claim form and accompanying documents had been validly served pursuant to Section 12(1) of the SIA since a full set of the documents was handed over, and that occurred within MFA compound which was sufficient for them to have been "transmitted" through FCO and "received at the Ministry".
- The Judgment in default that had subsequently been obtained had, by contrast, not been validly served pursuant to Section 12(5) of the SIA. That was for the following reasons:
  - The MFA had refused to accept the papers when attempts were made to deliver them (a senior FCO official had presented them but had not been permitted to leave them at the MFA). As such, contrary to the position taken by Andrew Henshaw QC (upon a "without notice" application) in *Certain Underwriters at Lloyd's of London v Syrian Arab Republic and Ors* [2018] EWHC 385 (Comm), they could not have been "received".
  - Notwithstanding the statement in the order obtained "without notice" in the case at hand that transmission of the documents by email was in "compliance with section 12(5)" of the SIA, and contrary to the position taken by Teare J (again upon a "without notice" application) in *The European Union v Syrian Arab Republic* [2018] EWHC 181 (Comm), service could not in fact have been effected by email. That was because the word "received" involved some act of volition and Iran had not expressly agreed to accept email service.

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

23. The following key points arise from this Judgment:

- In the absence of some form of submission by a judgment debtor to a foreign Court, an English Court will not recognise or enforce a Judgment of that Court under the common law unless it can be established that the judgment debtor was present or resident there at the time the proceedings were instituted. It will not be easy to satisfy that requirement in the case of a State.
- Unless a judgment debtor State has submitted to enforcement proceedings in the UK by suit on the foreign Court Judgment, it will generally be necessary for a judgment creditor that wishes to enforce such a Judgment in the UK to establish that an exception to immunity would have existed had the foreign Court applied rules corresponding to Section 2-11 of the SIA (i.e. those rules but with references to the UK being read as references to the country of the foreign Court).
- Effecting service on a State, in the absence of an agreed method, can be difficult, and the law is still developing in this area.

24. Further, the Judgment demonstrates that if (unlike in this case) it is possible, for example when transacting with a State, to agree in advance appropriate:

    - forum selection agreements;
    - waivers of immunity (in respect of suit, enforcement and/or forms of remedy/relief); and
    - methods by which documents may be served,

    it is important for a counterparty to do so.

25. There are a number of conflicting first instance judgments in relation to the validity of service on a State:

    - on the question of whether service on a State is valid if the State refuses to accept such papers[3];
    - on the question of whether service by email is valid under Section 12 of the SIA[4].

26. That may be all the more crucial an issue if service of the papers in question cannot be dispensed with. In that regard, in *General Dynamics United Kingdom Ltd v Libya* [2019] EWCA Civ 1110, the Court of Appeal recently ruled that service of an order obtained "without notice" permitting enforcement of an arbitration award, or (*obiter*) registering a foreign Court Judgment can, in theory, be dispensed with, but only in exceptional circumstances. However, it also indicated (*obiter*) that service cannot be dispensed with in respect of a claim form in proceedings:

    - to determine an underlying dispute[5]; or
    - to enforce a foreign Court judgment by means of a claim on the judgment debt (rather than via a registration process).

27. Whilst the *General Dynamics* case may well be the subject of an appeal to the Supreme Court, it appears that the validity of service issue will not be appealed in *Heiser* – perhaps given that the US Court Judgment was not recognised or enforceable in the UK in any event for other reasons. Consequently, it seems it may be necessary to await another case in which the Court of Appeal (and again possibly the Supreme Court) can resolve the validity of service issue.

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3 *Heiser v Iran* on the one hand, and *Certain Underwriters v Syrian Arab Republic* (albeit decided upon a "without notice" application) on the other.

4 *Heiser v Iran* on the one hand, and *The European Union v Syrian Arab Republic* (albeit decided upon a "without notice" application) on the other.

5 Where a State sought to avoid its legal obligations by obstructing service via the diplomatic route (by its Embassy refusing to re-legalise the documents to be served), the Master dispensed with service 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). However, the proceedings in question were commenced to determine an underlying dispute and, pursuant to the Court of Appeal Judgment in *General Dynamics*, service of such documents could not be dispensed with. Whilst *Qatar National Bank v Eritrea* was decided before that Court of Appeal Judgment was handed down, it also conflicted with the first instance decision on that point.

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