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No skirting service on sovereign states: General Dynamics v Libya

The Supreme Court recently handed down judgment in *General Dynamics v Libya*[1], reversing the Court of Appeal's 2019 decision that would have paved the way for a more flexible approach to service on State parties of proceedings to enforce arbitration awards.

The Supreme Court has now decided (albeit in a 3-2 majority decision) that, in the absence of an agreement to the contrary, the procedure for service under section 12 of the State Immunity Act 1978 (the **"SIA"**) must be followed in all cases where proceedings are commenced against a defendant State.

The SIA governs proceedings in the UK by or against foreign States. Section 12(1) provides that *"[a]ny writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office [(the **"FCDO"**)] 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*."

Section 12(1) does not apply where the State against which proceedings are brought has agreed to an alternative method of service (section 12(6)).

Background

In January 2016, General Dynamics United Kingdom Ltd ("**General Dynamics**") obtained an award of £16,114,120.62 (plus interests and costs) against Libya from an ICC arbitral tribunal in Geneva. Libya failed to make payment and, in June 2018, General Dynamics issued an arbitration claim form in the High Court and applied without notice under section 101(2) and (3) of the Arbitration Act 1996 (the "**Arbitration Act**") and Civil Procedure Rule ("**CPR**") 6.16 and/or CPR 6.28 for:

1. permission to enforce the award as a judgment; and
2. permission to dispense with service of the claim form and any other order.

At an *ex parte* hearing, Teare J granted permission in respect of both of the above requests on the basis that exceptional circumstances involving violence and competing governments existed in Libya. Libya applied to vary the enforcement order so as to:

1. set aside the order granting permission to dispense with service of the arbitration claim form, the enforcement order and associated documents; and to
2. require that service be effected in accordance with section 12 of the SIA.

In granting Libya's set aside application, Males LJ concluded that the court did not have a discretion to dispense with service of the enforcement order under CPR 6.16 and/or CPR 6.28, and that such a discretion would contravene the mandatory terms of section 12 of the SIA.

Court of Appeal

General Dynamics appealed to the Court of Appeal. The appeal was allowed, and the order of Males LJ was set aside to the extent that it had set aside or varied the enforcement order so as to require service of the enforcement order on Libya in accordance with section 12(1) SIA. The Court of Appeal stated (*obiter*) that, where a document is required to be served for instituting proceedings against a State, there is no power to dispense with service of that document on that State, as the requirements of

[1] *General Dynamics United Kingdom Ltd v The State of Libya* [2021] UKSC 22

section 12 of the SIA are mandatory. However, the Court of Appeal held that, on the facts of this case, the document instituting proceedings (the arbitration claim form) did not have to be served and the document which had to be served (the order permitting enforcement) was not the document instituting proceedings. Section 12(1) of the SIA therefore did not apply and the court had the power to dispense with the service requirement under CPR rules 6.16 and/or 6.28. General Dynamics was not therefore required to serve either the claim form or the order permitting enforcement via the FCDO.

As explained in our previous article[2], a consequence of the Court of Appeal's decision was a disparity in the rules on service of proceedings against a foreign State between (a) enforcement proceedings relating to arbitration awards and foreign judgments from certain jurisdictions that can be enforced by registration (and do not necessarily involve the service of a Claim Form) and (b) fresh actions, including proceedings to enforce foreign judgments where registration is not available and a claim form must be served.

Supreme Court

The Supreme Court, by a majority of 3-2 (Lord Lloyd-Jones, Lady Arden and Lord Burrows comprising the majority; Lord Briggs and Lord Stephens dissenting), has now allowed Libya's appeal. The Supreme Court held that the procedure for service set out in section 12 of the SIA must be followed in all cases where proceedings were commenced against a State, including proceedings to enforce arbitral awards pursuant to section 101 of the Arbitration Act and CPR 62.18. States must be given proper notice of proceedings, and a document giving such notice is a document "*required to be served*" for the purposes of section 12(1). The Supreme Court's judgment addressed the following three issues.

First, the Supreme Court held that section 12 of the SIA is intended to create a procedure whereby service may be effected on a State, in the interests of both parties and in a manner which accords with the requirements of international law and comity, in an area of considerable sensitivity, and a broad reading is therefore appropriate: **section 12(1) applies to all documents by which notice of proceedings is given to a defendant State, subject only to section 12(6)**. "*Any narrower reading would necessarily exclude certain proceedings against a State with the result that in such cases no provision would be made in the SIA for notifying a defendant state of the initiation of proceedings against it.*"

Secondly, the Supreme Court agreed with the Court of Appeal that, where section 12(1) applies, **the court is not permitted to dispense with service requirements pursuant to CPR 6.16 and/or 6.28.** The scope of both CPR 6.16 and 6.28 is limited by CPR 6.1(a), which provides that CPR Part 6 applies *"except where … any other enactment … makes different provision"*, and in any event the CPR cannot give the court a discretion to dispense with a statutory requirement. The Supreme Court also made clear that – as suggested in our previous article – statements to the contrary in several first instance decisions[3] prior to the Court of Appeal's decision in *General Dynamics* cannot be considered good law.

Thirdly, the Supreme Court addressed the question of whether section 12(1) must be construed (pursuant to section 3 of the Human Rights Act 1998 or common law principles) as allowing for alternative methods of service in exceptional circumstances, where a claimant's right of access to the court under article 6 of the European Convention on Human Rights would otherwise be infringed. **The Supreme Court held that a mandatory interpretation of section 12(1) involved a procedural privilege that "*pursues a legitimate objective by proportionate means and does not therefore impair the essence of the article 6 right of access to the court*"; and that, "*for similar reasons the common law principle of legality can have no application here*".**

Commentary

From a purely legal perspective, the Supreme Court's decision makes the service requirements applicable to bringing proceedings against State parties far more certain. The procedure for service set out in section 12(1) of the SIA applies to all documents by which notice of proceedings is given to a defendant State, and the court has no discretion to alter this requirement. Lord Lloyd-Jones (who gave the leading judgment) was of the view that there are advantages in establishing clear procedures by which service of legal proceedings might be effected on a

[2] Proceedings in the English Court against foreign states

[3] *Certain Underwriters at Lloyd's of London v Syrian Arab Republic* [2018] EWHC 385 (Comm) (at para 25), *Havlish v Islamic Republic of Iran* [2018] EWHC 1478 (Comm) (at para 21) and *Qatar National Bank (QPSC) v Government of Eritrea* [2019] EWHC 1601 (Ch) (at para 70) [2019] EWCA Civ 1110

foreign State in circumstances of considerable international sensitivity. The only exception to section 12(1) is that which is stated in section 12(6), which operates where a State has agreed to an alternative method of service. The Supreme Court's decision, however, may result in practical difficulties in effecting service on foreign States given the fact that service via the FCDO is often far from simple. In the context of enforcement proceedings (i.e. relating to arbitration awards and foreign judgments enforced by registration), these practical difficulties are hard to reconcile with the general intention that such proceedings should operate more mechanistically than primary proceedings.

For example, as highlighted in our previous article, foreign States may seek to avoid service altogether by refusing to undertake necessary steps for the FCDO to arrange service (such as re-legalisation at the State's Embassy in London). Lord Lloyd-Jones and Lady Arden both acknowledged these potential practical complexities; and it is notable that both Males J at first instance and the Court of Appeal found that, if there had been a discretion to allow alternative service, it would have been appropriate to exercise such discretion on the facts of this case. However, in the view of the majority, these factors could not override the "*mandatory and exclusive*" procedure set out in section 12(1). Interestingly, Lord Lloyd-Jones held that the FCDO has "*no general discretion to decline to effect service*" and "*is obliged to use its best endeavours to effect service in accordance with section 12".* Whilst this might appear cold comfort for claimants in circumstances where the FCDO is simply unable to effect service, it is worth noting the postscript to the judgment of Lord Lloyd-Jones which suggests that service of the enforcement order was eventually effected upon Libya by the FCDO in this case (although this issue does not appear to have been determined by the Supreme Court and there may still be some debate as to whether the statement in the Note Verbale that service has been effected is correct and/or determinative of this issue).

The other issue discussed in our previous article, namely, what is meant by the writ or other document having been "*received*" at the Ministry of Foreign Affairs of the defendant State (which is when service is deemed to have been effected under section 12(1)) was left open by the Supreme Court. First instance judges have reached different views[4] but the point was not argued before the Supreme Court and so clarity on it will have to wait for another day.

Finally, given the potential practical issues raised by this decision, and the counter-arguments explored in the detailed dissenting judgment of Lord Stephens (with which Lord Briggs agreed), it is possible that Parliament may need to revisit section 12(1) at some point in the future. It is also theoretically possible that the Supreme Court might depart from this decision in future, although neither of those alternatives appear particularly likely.

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[4] *Certain Underwriters at Lloyd's of London v Syrian Arab Republic* [2018] EWHC 385 (Comm), para 19 per Mr Andrew Henshaw QC, sitting as a judge of the High Court; *Heiser (Estate of) v Islamic Republic of Iran* [2019] EWHC 2074 (QB), para 235 per Stewart J; *Unión Fenosa Gas SA v Egypt* [2020] EWHC 1723 (Comm); [2020] 1 WLR 4732, para 90 per Jacobs J

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