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Proceedings in the English Court against foreign States

Claims against States always raise complex issues. One issue that has arisen in a number of recent cases is effective service on a State. The Court of Appeal has now – subject to any appeal to the Supreme Court – provided some clarity. But while the decision will assist those seeking enforcement in England of arbitration awards and certain foreign judgments made against foreign States, it may create issues for those wishing to bring fresh proceedings against a foreign State in the English Court, including for the enforcement of foreign judgments by way of fresh action.

How is an arbitration award made against a foreign State to be enforced?

Section 12(1) of the State Immunity Act 1978 (the "**SIA**") provides that (unless a State agrees otherwise) "*[a]ny writ or other documents required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office [the "**FCO**"] 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.*"

The Court of Appeal recently considered section 12(1) of the SIA in *General Dynamics v Libya*[1]. *General Dynamics* concerned the enforcement in England of an arbitration award made by an ICC arbitral tribunal in Geneva. In accordance with the English Arbitration Act 1996 and the relevant procedural rules, General Dynamic's application was made without notice in an arbitration claim form, which resulted in an order permitting the enforcement of the award as a judgment.

The Court of Appeal held that the document instituting the proceedings (the arbitration claim form) did not have to be served and the document which did have to be served (the order permitting enforcement) was not the document instituting proceedings. The Court of Appeal therefore decided that section 12(1) of the SIA did not apply and it was not mandatory in that case that either the arbitration claim form or the order permitting enforcement had to be served through the FCO. Accordingly, the Court could, in an appropriate case, dispense with service of the order permitting enforcement.

What about enforcement of a foreign judgment made against a foreign State?

The procedure for enforcing foreign judgments in England will depend on where the judgment originates from. We anticipate that the Court of Appeal's decision in *General Dynamics* will also apply to the enforcement in England of foreign judgments by registration.

However, there are a number of countries from which judgments can only be enforced in England by way of a fresh action. Such enforcement proceedings are instituted by the Court issuing a claim form, which is then served on the judgment debtor.

Instituting fresh proceedings against a foreign State

In *Havlish et al. v Iran et al.*[2] (decided before *General Dynamics*), the High Court considered the application of section 12(1) of the SIA in (fresh) proceedings seeking to enforce a judgment against

[1] *General Dynamics United Kingdom Ltd v The State of Libya* [2019] EWCA Civ 1110

[2] *Fiona Havlish et al. v Islamic Republic of Iran et al.* [2018] EWHC 1478 (Comm)

Iran from a US Court. The Court ordered that service of the claim form and related documents be dispensed with because there were "*exceptional circumstances*", including that the British Embassy in Tehran had been unable to serve the documents via the Ministry of Foreign Affairs in Iran and that senior individuals at the British Embassy held the view that any further attempts at service would be unsuccessful and counterproductive. In reaching its decision, the Court referred to an earlier decision of the High Court in *Certain Underwriters v Syria & Ors*[3], in which the Court held (*obiter*): "*Section 12 [of the SIA] applies to 'Any writ or other document required to be served for instituting proceedings against a State'. If, exceptionally, the court has made an order dispensing with service of the claim form instituting the proceedings, then it is not a 'document required to be served' within section 12.*"

The Court of Appeal in *General Dynamics* has now made it clear (*obiter*) that, where a document is required to be served for instituting proceedings against a State (i.e. section 12 of the SIA applies), there is no power to dispense with service of that document on the State. The requirements of section 12 of the SIA are mandatory. The Court of Appeal also stated that the (*obiter*) decision to the contrary in *Certain Underwriters* cannot be considered good law. *Havlish* must now be considered to have been wrongly decided.

What if a State refuses to accept service?

In *Qatar National Bank v Eritrea*[4], the claimant had been unable to effect service through the FCO because the claim form and other documents which were required to be served needed to be re-legalised by the Eritrean Embassy in London before the FCO would arrange for service and the Eritrean Embassy's refused to undertake such re-legalisation. The claimant had sought and obtained an order for alternative service and proceeded to serve the documents by that method.

Following the High Court decision in *General Dynamics* (which held that section 12 of the SIA is mandatory), the High Court in *Qatar National Bank* found that service by an alternative method was not valid. However, the Court went on to consider whether it could dispense with service. The Court held that it could do so in an appropriately exceptional case, and there would therefore be no document required to be served within section 12 of the SIA. This was the reasoning adopted in *Certain Underwriters*. It is not clear why the Court proceeded to determine this issue as it was aware that the appeal in *General* Dynamics was due to be heard the same month the judgment in *Qatar National Bank* was handed down. As it happened, less than a week later, the Court of Appeal handed down its judgment in *General Dynamics*. In light of the Court of Appeal's judgment, *Qatar National Bank* cannot be considered good law.

Since then, the High Court has applied the Court of Appeal's *obiter* comments in *General Dynamics* in *Heiser & Ors v Iran & Anor*[5], finding that on the facts in that case service had been effective. The *Heiser* judgment also considers the term "*received*" in the context of section 12(5) of the SIA (although, as the judgment recognises, the same term is used in section 12(1)). The Court held that a document, or anything else, cannot be "*received*" if a person expressly refuses to accept it. It will be interesting to see if this aspect of the decision is upheld on appeal. As the Court recognised, it provides a foreign State with the ability to evade service by refusing to take documents.

Conclusion

The Court of Appeal's decision in *General Dynamics* will be welcomed by those holding outstanding arbitration awards against foreign States, as well as those that have entered arbitration agreements with foreign States.

However, the Court of Appeal has made life more difficult for those looking to begin an action against a foreign State in the English Court, including for the enforcement of foreign judgments by way of fresh action. Foreign States may now be able to avoid service altogether by refusing to undertake necessary steps for the FCO to arrange service (such as re-legalisation at the State's Embassy in London) or, if *Heiser* is followed or upheld on appeal, by simply refusing to take documents.

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[3] *Certain Underwriters At Lloyds London v Syrian Arab Republic & Ors* [2018] EWHC 385 (Comm)
[4] *Qatar National Bank (QPSC) v Government of Eritrea & Anor* [2019] EWHC 1601 (Ch)
[5] *Heiser, Estate of & Ors v The Islamic Republic of Iran & Anor* [2019] EWHC 2074 (QB)

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