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ENFORCEMENT OF ARBITRAL AWARDS AGAINST A SOVEREIGN STATE: UK SUPREME COURT REINSTATES THE SERVICE REQUIREMENTS IN *GENERAL DYNAMICS V LIBYA*

To Our Clients and Friends:

Introduction and Overview

On 25 June 2021, the UK Supreme Court rendered its judgment in *General Dynamics United Kingdom Limited v The State of Libya*.[1] This much anticipated decision provides important guidance concerning the interaction of State immunity principles with the rules applicable to the service of enforcement proceedings on States. The decision has significant practical consequences for the enforcement of arbitral awards against States, with the dissenting opinion of the minority making plain the difficulty faced by the courts in seeking to balance, on the one hand, the potentially competing considerations of respecting the arbitral process with, on the other hand, the traditional privileges accorded to States when responding to English proceedings.

By a majority of 3:2 (Lord Lloyd-Jones, Lady Arden and Lord Burrows comprising the majority), the Supreme Court allowed Libya's appeal and concluded that Section 12 of the State Immunity Act 1978 (the "**SIA**") requires service of either the arbitration claim form or the enforcement order made by the English court (depending on the circumstances) in order to properly institute arbitration enforcement proceedings against a State. Such service must be effected via the UK's Foreign, Commonwealth and Development Office (the "**FCDO**")[2] and the State must then respond within two months. The majority found that this formal service procedure is mandatory and cannot be dispensed with. In doing so, the majority reversed the Court of Appeal's 2019 judgment which had signalled greater flexibility in the interpretation of the strict rules on service.

Background

Arbitration Award

The arbitral award in question was rendered in relation to a dispute between General Dynamics and Libya arising from a contract for the supply of communication systems to Libya. The dispute was referred to arbitration before an ICC tribunal seated in Geneva in which Libya fully participated. On 5 January 2016, the tribunal rendered an award in excess of £16 million in favour of General Dynamics, together with interest and costs (the "**Award**"). Libya has not paid any sums under the Award.

The Enforcement Order and Set Aside Proceedings

General Dynamics applied to the English courts to enforce the Award in the United Kingdom. Civil Procedure Rules ("**CPR**") Rule 62.18, which governs applications for permission to enforce most arbitration awards,[3] permits such applications to be made without notice in an arbitration claim form.

Following an *ex parte* hearing in July 2018, an order was made by Mr Justice Teare (*i*) granting permission to enforce the Award; and (*ii*) dispensing with service of both the arbitration claim form and the enforcement order itself, pursuant to CPR Rules 6.16 and 6.28 (which allow the court to dispense with a service requirement in "*exceptional circumstances*"). Teare J found that exceptional circumstances existed due to the practical difficulties of serving Libya at the time, including because there were two competing governments as well as a state of civil unrest (which had led to the closure of the British Embassy, among other things). The Court found that there was uncertainty as to the time which would be required to effect service through the FCDO, and doubts as to whether this was possible at all.

Subsequently, Libya applied to set aside those parts of Teare J's order dispensing with service. Libya relied upon Section 12(1) of the SIA, which requires service through the FCDO of "*any writ or other document required to be served for instituting proceedings against a State*". Section 12(2) of the SIA further provides that a State cannot be required to "*enter*[] *an appearance* [in]" the proceedings until the expiry of two months after service via the FCDO.

Libya's set aside application was granted via a decision of Lord Justice Males on 18 January 2019.[4] General Dynamics appealed to the Court of Appeal.

The Court of Appeal Proceedings

In a decision dated 3 July 2019, the Court of Appeal restored Teare J's finding that Section 12(1) of the SIA did not require service of either the arbitration claim form or the order permitting enforcement.[5] The Court of Appeal's reasoning was that: (*i*) although the arbitration claim form is a document instituting proceedings under Section 12(1), CPR Rule 62.18 does not contain a requirement to serve the arbitration claim form; and (*ii*) while CPR Rule 62.18(8)(b) requires an order permitting the enforcement of an arbitral award to be served, such an order is not the document "instituting" the proceedings and therefore does fall within the remit of Section 12(1).

The Court of Appeal also found that, because there is no statutory requirement to serve either the arbitration claim form or the enforcement order, the court could dispense with service under CPR Rules 6.16 and/or 6.28. The Court of Appeal agreed with Teare J's exercise of discretion in dispensing with the requirement for service of the order permitting enforcement of the award on the basis that there were "*exceptional circumstances*" (a discretion that Males LJ had also said he would have exercised, had he found that he had the power to do so[6]). The Court of Appeal essentially approved the findings of Teare J and Males LJ regarding the dangerous and complex circumstances in Libya.

Libya appealed the Court of Appeal's judgment to the Supreme Court.

The Supreme Court Judgment

The majority allowed Libya's appeal, essentially on three bases.

Firstly, the majority focused on "*the importance of the defendant state receiving notice of the proceedings against it so that it had adequate time and opportunity to respond to proceedings of whatever nature which affected its interests*".[7] As such, it held that, in cases where Section 12(1) of the SIA applies, the procedure for service on a defendant State through the FCDO is mandatory and exclusive.[8]

The minority, on the other hand, adopted a purposive construction of Section 12 of the SIA, noting that Parliament intended the applicability of Section 12(1) to depend on what was required by the relevant court rules.[9] In their view, this interpretation would give effect to the intention of the legislature to prevent States avoiding service (and thus obstructing the enforcement of awards),[10] and to hold States to their legal obligations.[11] The minority also drew attention to the potential chilling effect of the majority's conclusion, as parties might be deterred from dealing with States (thereby restricting those States' ability to operate in the global marketplace).[12] The minority also favoured an approach promoting "*speedy and effective enforcement of arbitral awards*", and a "*restrictive doctrine of state immunity*", particularly where a State has agreed to and participated in the arbitral process.[13]

Secondly, the majority concluded that there is no power to dispense with service of an enforcement order under CPR Rules 6.16 and/or 6.28,[14] holding that the CPR cannot override the SIA and give the court a discretion to dispense with a statutory requirement found in the SIA.

Finally, the majority was not persuaded by General Dynamics' arguments on the basis of Article 6 (right to a fair trial) of the European Convention on Human Rights (the "**ECHR**"). General Dynamics argued that Section 12(1) of the SIA should be construed, pursuant to Section 3 of the Human Rights Act 1998 (the "**HRA**")[15] and/or common law principles, to allow the court to make alternative directions as to service in "*exceptional circumstances*".[16]

The majority rejected this argument, holding that the procedure prescribed by Section 12(1) of the SIA (i) is a proportionate mechanism for pursuing the legitimate objective of a workable means of service and (ii) conforms with the requirements of international law and comity, in circumstances of considerable international sensitivity. It therefore did not consider the procedure to infringe Article 6 of the ECHR, or to engage the common law principle of legality.[17]

Comment

The majority's decision has now settled that there must always be a document that is "*required to be served for instituting proceedings against a State*". In the context of enforcing arbitral awards, that document will either be the claim form (if the court requires it to be served) or the enforcement order itself. Further, such service must be via the FCDO (the FCDO, however, has no general discretion to decline to effect service).[18]

Whilst the Supreme Court's decision provides welcome clarification of the service requirements in relation to States and the interpretation of Section 12 of the SIA, the reservations expressed in the dissenting judgment make plain that the decision will not be universally celebrated. Diplomatic service via the FCDO is often far from straightforward, particularly where it involves a recalcitrant State facing a substantial arbitral award. Lord Stephens highlighted the potential for the majority's decision to embolden such States, with the potential for them to obtain "*de facto*" immunity, where they would otherwise not have it, by "*being obstructive about service*".[19] At a minimum, the decision opens the door for further delays and prejudice to award creditors, thereby potentially undermining the arbitral process even where the State against which enforcement is sought had already expressly consented to and actively participated in that process.

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[1] *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22 (Lloyd-Jones, Briggs, Arden, Kitchin and Burrows JJSC).

[2] Formerly known, and referred to in some of the lower court decisions described below, as the "Foreign and Commonwealth Office", or the "FCO".

[3] There is a separate procedure for the enforcement of International Centre for Settlement of Investment Disputes (ICSID) awards, set out at CPR Rule 62.21.

[4] *General Dynamics United Kingdom Ltd v Libya* [2019] EWHC 64 (Comm) (Males LJ).

[5] *General Dynamics United Kingdom Ltd v The State of Libya* [2019] EWCA Civ 1110 (Sir Terence Etherton MR, Longmore and Flaux LLJ).

[6] *General Dynamics United Kingdom Ltd v Libya* [2019] EWHC 64 (Comm) at [89] (Males LJ).

[7] *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22, at [73]-[75] (Lloyd-Jones JSC, *citing* the decision of Kannan Ramesh J (in the High Court of Singapore) in *Van Zyl v Kingdom of Lesotho* [2017] SGHC 104; [2017] 4 SLR 849). *See also*, *e.g.,* [65]-[66] (Lloyd-Jones JSC, *citing*, *inter alia*, Hamblen J in *L v Y Regional Government of X* [2015] EWHC 68 (Comm); [2015] 1 WLR 3948).

[8] Subject only to the possibility of service in accordance with Section 12(6) of the SIA in a manner agreed by the defendant State. *Id.*, at [37], [76(2)] (Lloyd-Jones JSC). *See also*, *id.*, at [96] (Lady Arden JSC, who engaged in more of a discussion of the concepts of "*open textured expressions*" and "*functional equivalence*" in statutory construction).

[9] *Id.*, at [165]-[166], [177], [189]-[191], [200], [231] (Stephens JSC).

[10] *See, e.g., id.*, at [109]-[110] (Stephens JSC).

[11] *See, e.g., id.*, at [134], [145] (Stephens JSC).

[12] *See, e.g., id.*, at [145], [166], [197] (Stephens JSC).

[13] *Id.*, at [171] (Stephens JSC, approving *Unión Fenosa Gas SA v Egypt* [2020] EWHC 1723 (Comm)).

[14] *Id.*, at [81] (Lloyd-Jones JSC).

[15] The HRA gives effect in UK domestic law to the rights guaranteed by the ECHR. The HRA was enacted after the SIA was passed by the UK Parliament.

[16] *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22, at [82] (Lloyd-Jones JSC).

[17] *Id.*, at [84]-[85] (Lloyd-Jones JSC).

[18] *Id.*, at [33] (Lloyd-Jones JSC) and [214]-[215] (Stephens JSC).

[19] *Id.*, at [109] (Stephens JSC).

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