Enforcement of arbitral award against sovereign state requires service through diplomatic channels

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Introduction

In *General Dynamics UK Ltd v Libya*(1) the High Court considered whether service of formal court documentation on a state party was a necessary requirement when seeking to enforce an arbitral award against it or whether service could be dispensed with.

It was held that the court's general power to dispense with service entirely did not apply to enforcement proceedings against sovereign states. Where no arbitration claim form was required to be served on the defendant, the order granting permission to enforce the arbitral award had to be served through diplomatic channels.

Facts

The default rule under the State Immunity Act 1978 is that states enjoy immunity from suit, subject to certain stated exceptions. Where an exception applies, Section 12(1) of the 1978 act provides that the claim form "or other document required to be served for instituting proceedings" must be served on the defendant state through the Foreign and Commonwealth Office. Pursuant to Section 12(2) of the 1978 act, the period in which the defendant may acknowledge service of such a document "shall begin to run two months" after receipt of the document at the relevant state ministry.

Section 12 of the 1978 act must be read in conjunction with Civil Procedure Rule 62.18. This rule, which governs the enforcement of awards, specifies that an arbitration claim form need not be served on the defendant unless the court orders the claimant to do so.

The Civil Procedure Rules provide two bases on which service can be dispensed with:

- Civil Procedure Rule 6.16 provides that service of a claim form may be dispensed with only in exceptional circumstances; and
- Civil Procedure Rule 6.28 provides that the court has an unqualified power to dispense with service of any other document.

The decision centred on two questions:

- Can an order for permission to enforce an arbitral award against a state be viewed as a document "required to be served for instituting proceedings" under Section 12(1) of the 1978 act?
- If so, can the court dispense with the requirement for that document to be served on the state?

Issues

Permission to enforce

The claimant, a UK defence company, had sought to enforce an International Chamber of Commerce award (rendered in its favour following a breach of contract) against Libya pursuant to Section 101 of the Arbitration Act 1996. The claimant's application was made without the arbitration claim form being served on Libya, as provided for by Civil Procedure Rule 62.18(1).

In his order for permission to enforce, Justice Teare dispensed with formal service of the arbitration

claim form. Instead, he ordered that the relevant documents be couriered to Libya's Ministry of Foreign Affairs to make the defendant aware of the proceedings (with no suggestion that this would constitute valid service). In addition, since it was held that no document needed to be served under Section 12(1) of the 1978 act, Teare ordered that the two-month period prescribed by Section 12(2) should run from the date of the permission order.

Challenge to permission order

The defendant challenged Teare's decision, arguing that the permission order should be regarded as the document which instituted the proceedings. As such, it should have been served on Libya through the Foreign and Commonwealth Office, with the two-month period under Section 12(2) of the 1978 act starting to run only as from the date on which the permission order had been duly received.

Decision

Was permission order required to be served for instituting proceedings?

In answering this question, Justice Males focused primarily on a textual and contextual analysis of Section 12(1) of the 1978 act. He highlighted the mandatory tone of the language used,(2) noting that when the 1978 act came into force, the court had no general power to dispense with service of a claim form.(3)

Moreover, Males emphasised the diplomatic sensitivities involved in subjecting a sovereign state to another state's jurisdiction. He found that the requirement for service through the Foreign and Commonwealth Office is an important safeguard to preserve constructive and "appropriately respectful" international relations. In these delicate circumstances, it is the executive's prerogative to decide how and when a defendant state should be notified of legal proceedings. Males described the Foreign and Commonwealth Office as "not merely an unthinking conduit", but rather as an organisation with "a legitimate role to play in the process of bringing the foreign state before the English courts", which had to take account of political realities which the courts are not qualified to consider (including whether there were circumstances in which service should be deliberately delayed – for example, during elections).(4)

The court also noted the protective effect of Section 12(2) of the 1978 act, which extends the period for the defendant's acknowledgement of service by two months. If no document must be served under Section 12(1), Section 12(2) cannot apply. As a result, the defendant state would lose a valuable grace period, which the 1978 act prescribes in mandatory terms.(5)

Finally, Males considered Sections 12(4), 12(5) and 12(6), all of which assume that service is effected in accordance with Section 12(1). Where no document is served, those subsections cannot operate independently. Viewed from a legislative perspective, this suggests that Section 12(1) was always intended to be applicable.(6)

For these reasons, the judge concluded that service of court proceedings through the Foreign and Commonwealth Office in accordance with Section 12 of the 1978 act was "essential in every case" where the English court is to exercise jurisdiction over a foreign state.(7) Because there had been no order requiring a claim form to be served, the court held that the permission order constituted the document instituting proceedings for the purposes of Section 12(1).(8)

Did court have power to dispense with service?

Although both parties accepted that the court could dispense with service under Civil Procedure Rules 6.16 and 6.28, Males specifically addressed this question.

Notwithstanding that, as a matter of English procedural law, proceedings were commenced by the issuing of an arbitration claim which did not need to be served on the defendant, he found that the court did not have power to do so when dealing with a state.

He reached this conclusion based on:

- the 1978 act's internal structure;
- the fact that the Civil Procedure Rule cannot prevail over primary legislation; and
- a review of judicial authorities that had previously discussed this point.

In *Westminster City Council v Iran*, the court held that a land charge could not be registered on the former Iranian embassy where the relevant court document (an originating summons) had not been served.(9) The fact that Iran had refused to accept service – however unsatisfactory the outcome – did not detract from the mandatory nature of Section 12 of the 1978 act. Because alternative service was not considered acceptable in *Westminster v Iran*, Males found that "the more radical step of dispensing with service altogether" would *a fortiori* be impermissible in the present case.(10)

The first direct finding that the court can dispense with service of a claim form instituting proceedings against a state was made *obiter* by Andrew Henshaw Queen's Counsel, sitting as a deputy High Court judge. In *Certain Underwriters at Lloyd's of London v Syria*,(11) the deputy judge briefly considered that where an order had been made dispensing with service of a claim form, Section 12 of the 1978 act was inapplicable.

In *Havlish v Iran*,(12) Teare followed that decision "without elaboration of the reasoning".(13) However, in contrast to *Certain Underwriters*, the judge's ruling that the court did have jurisdiction to dispense with service on a foreign state formed part of the ratio of the *Havlish* judgment.

The court declined to follow these earlier decisions, noting that:

- they were recent;
- they lacked detailed reasons; and
- they had been made in circumstances where the defendant states were not represented.

As a result, Males did not consider that there was an established line of authority allowing him to depart from the mandatory terms of Section 12 of the 1978 act.

Comment

This case illustrates the special nature of enforcement proceedings against sovereign states. The courts' unique approach to disputes involving state defendants is shaped not only by the applicable statutes, such as the 1978 act, but also by the diplomatic considerations that feature prominently in investor-state cases. Indeed, the judge expressly referred to the "unsatisfactory outcome" of having to delay enforcement.(14) He acknowledged that this is contrary to the courts' objective of prompt and efficient enforcement of arbitral awards, but stressed that such additional obstacles are part of having taken the decision to arbitrate against a state. As Males concluded, quoting King David, "[t]hose who put their trust in princes are liable sometimes to be disappointed".(15)

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Mark Feldner, trainee solicitor, assisted in the preparation of this article.

Endnotes

(1) *General Dynamics United Kingdom Limited v State of Libya* (2019) EWHC 64 (Comm).

(2) *Ibid*, 26.

(3) *Ibid*, 28.

(4) *Ibid*, 29.

(5) *Ibid*, 31.

(6) *Ibid*, 33-35.

(7) *Ibid*, 36.

(8) *Ibid*, 44.

(9) *Westminster City Council v Government of the Islamic Republic or Iran* (1986) 1 WLR 979.

(10) *General Dynamics United Kingdom Limited v State of Libya* (2019) EWHC 64 (Comm), 50.

(11) *Certain Underwriters at Lloyd's of London v Syrian Arab Republic* (2018) EWHC 385 (Comm).

(12) *Havlish v Islamic Republic of Iran* (2018) EWHC 1478 (Comm).

(13) *General Dynamics United Kingdom Limited v State of Libya* (2019) EWHC 64 (Comm), 64.

(14) *Ibid*, 91.

(15) *Ibid*.

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