

# Court of Appeal dispenses with service of enforcement of arbitral award against sovereign state

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## Introduction

In *General Dynamics UK Ltd v Libya*(1) the Court of Appeal 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 in certain circumstances.

The Court of Appeal ruled that, in exceptional circumstances, the courts have discretion to dispense with service. The judgment overturns the earlier decision of the High Court(2) that the order granting permission to enforce an award had to be served through diplomatic channels (for further details please see "[Enforcement of arbitral award against sovereign state requires service through diplomatic channels](#)").

## Background

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 (FCO). 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 by the relevant state ministry.

Section 12 of the 1978 act must be read in conjunction with Civil Procedure Rule (CPR) 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 CPRs provide two bases on which service can be dispensed with:

- CPR 6.16 provides that service of a claim form may be dispensed with only in exceptional circumstances; and
- CPR 6.28 provides that the courts have an unqualified power to dispense with service of any other document.

## Facts

The claimant, a UK defence company, 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 CPR 62.18(1).

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, the judge ordered that the two-month period prescribed by Section 12(2) should run from the date of the permission order.

## AUTHORS

[Marie Berard](#)



[Benjamin Barrat](#)



Libya challenged the judge'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 FCO, with the two-month period under Section 12(2) of the 1978 act starting to run only from the date on which the permission order had been duly received.

Lord Justice Males heard the challenge against Justice Teare's order in the Commercial Court and overturned the order dispensing with service, finding that the court's discretion to dispense with service did not extend to enforcement proceedings against a foreign state.

Notwithstanding that, as a matter of English procedural law, proceedings had been commenced by the issuing of an arbitration claim which did not need to be served on the defendant, Lord Justice Males found that the court did not have power to dispense with service when the claim was against a state. Where no arbitration claim form was required to be served on the defendant, the order granting permission to enforce the arbitral award constituted the document instituting proceedings for the purposes of Section 12(1) of the 1978 act. As such, the permission order had to be served through the FCO.

### **Court of Appeal decision**

The Court of Appeal allowed the appeal against Lord Justice Males's decision. In doing so, the court considered the following issues.

#### ***What is the meaning of Section 12(1) of the State Immunity Act 1978?***

The court found that Section 12(1) of the 1978 act did not permit service to be dispensed with in respect of a document instituting proceedings.

In the Commercial Court, Lord Justice Males decided that for the purposes of Section 12(1), there is always a document that must "be served for instituting proceedings against a State".

However, the Court of Appeal found that neither the arbitration claim form nor the order allowing entry of a judgment in the terms of an award were documents instituting proceedings. As such, Section 12(1) did not apply.

In reaching this conclusion, the court considered the rules in place when the 1978 act had been passed. Under those rules, the originating summons did not need to be served on the award debtor. The court found that this must have meant that the legislators intended that Section 12(1) would not apply in cases of enforcement of an arbitral award. The court distinguished between the time when a foreign state is first sued and when it has fully participated in (or deliberately refused to participate in) proceedings in litigation or arbitration. In the latter scenario, the court found, the foreign state does not obviously need the protection of enforcement proceedings being transmitted through the FCO.

#### ***Does the court have the discretion to dispense with service?***

Had a document originating process needed to be served on Libya, the court was prevented by Section 12(1) from dispensing with service. In this case, the document in question was not one originating process and so Section 12(1) did not apply.

Therefore, the court considered CPRs 6.16 and 6.28. Strictly speaking, dispensing with service of the order was governed by CPR 6.28. However, where the order permitting enforcement of an award would be the first time that a state received notice of the enforcement proceedings, the court should approach an application to dispense with service on the basis of CPR 6.16 and dispense with service only in exceptional circumstances.

While Libya argued that it is necessary to show that service would be impossible, the court held that impossibility is not a condition of exceptional circumstances. In this case, the FCO had stated that service of documents on the Libyan Ministry of Foreign Affairs was:

- not straightforward;
- too dangerous; and
- likely to take more than one year, if even possible at all.

The claimant therefore did not need to serve the order on Libya; however, the court noted that the state ought to be informed nonetheless.

The court found that although the two-month period in Section 12(2) for a state to enter an appearance did not apply because no acknowledgment of service of the order was required, the court should give a state at least two months from notification to apply to set aside an enforcement order.

## **Comment**

The significant judgment of the Court of Appeal will have implications for cases in which it may be very difficult to enact service of enforcement proceedings on a state through diplomatic channels. In reaching its decision, the court stressed the importance of arbitration awards being honoured, while acknowledging the sensitivities surrounding enforcement against a foreign state. The court also emphasised that service can be dispensed with only in exceptional circumstances. As such, the court is likely to dispense with service of enforcement proceedings against a state in a limited number of future cases.

*For further information on this topic please contact [Marie Berard](mailto:marie.berard@cliffordchance.com) or [Benjamin Barrat](mailto:benjamin.barrat@cliffordchance.com) at Clifford Chance LLP by telephone (+44 20 7006 1000) or email ([marie.berard@cliffordchance.com](mailto:marie.berard@cliffordchance.com) or [benjamin.barrat@cliffordchance.com](mailto:benjamin.barrat@cliffordchance.com)). The Clifford Chance LLP website can be accessed at [www.cliffordchance.com](http://www.cliffordchance.com).*

## **Endnote**

(1) [2019] EWCA Civ 1110.

(2) *General Dynamics UK Ltd v Libya* ([2019] EWHC 64 (Comm)).

Amy Broddle, trainee solicitor, assisted in the preparation of this article.

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