

July 29 2021

Supreme Court rules on procedure for service of enforcement proceedings on sovereign state

Clifford Chance | Arbitration & ADR - United Kingdom



MARIE BERARD



BENJAMIN BARRAT

- [Introduction](#)
- [Background](#)
- [Facts](#)
- [Court of Appeal](#)
- [Supreme Court](#)
- [Comment](#)

Introduction

In *General Dynamics UK Ltd v Libya*,⁽¹⁾ the Supreme Court has ruled that service of formal court documentation on a state party through diplomatic channels is a necessary requirement when seeking to enforce an arbitral award against the state and that service cannot be dispensed with.

The court's general power to dispense with service entirely does not apply to enforcement proceedings against sovereign states, particularly to proceedings to enforce an arbitral award under the New York Convention pursuant to the section 101 of the Arbitration Act 1996. Where no arbitration claim form is required to be served on the defendant, the order granting permission to enforce the arbitral award must be served through diplomatic channels. This judgment overturns an earlier decision of the Court of Appeal⁽²⁾ that, in exceptional circumstances, the courts have discretion to dispense with service (for further details please see "[Court of Appeal dispenses with service of enforcement of arbitral award against sovereign state](#)").

Background

The default rule under the State Immunity Act (SIA) 1978 means that states enjoy immunity from suit, subject to certain stated exceptions. Where an exception applies, section 12(1) of the SIA 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, Commonwealth and Development Office (FCDO). Pursuant to section 12(2) of the SIA, 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 SIA must be read in conjunction with Civil Procedure Rules (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 (ICC) 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).

In an earlier decision of the High Court, Mr Justice Teare dispensed with formal service of the arbitration claim form.⁽³⁾ 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 SIA, the judge ordered that the two-month period prescribed by section 12(2) should run from the date of the permission order.

Libya challenged the judge's decision, arguing that the permission order should be regarded as the document that instituted the proceedings. As such, it should have been served on Libya through the FCDO, with the two-month period under section 12(2) of the SIA commencing only from the date on which the permission order had been duly received.

Lord Justice Males (as he later became) 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 SIA. As such, the permission order had to be served through the FCDO.

Court of Appeal

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

Meaning of section 12(1) of SIA

The Court found that section 12(1) of the SIA did not permit service to be dispensed with in respect of a document instituting proceedings.

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

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 that the foreign state did not obviously need the protection of enforcement proceedings being transmitted through the FCDO.

Court's discretion to dispense with service

Had it been necessary to serve a document originating process on Libya, the Court of Appeal found that the court was prevented by section 12(1) of the SIA from dispensing with service. In this case, the Court ruled that the document in question was not one that originated process and consequently section 12(1) did not apply.

Therefore, the Court considered CPR 6.16 and 6.28. Technically, the Court noted, 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 found that courts 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 FCDO 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 possible at all.

Therefore, the Court of Appeal found that it had not been necessary for the claimant to serve the order on Libya; however, it held that the state ought to have been informed nonetheless.

Supreme Court

By a three-to-two majority (Lord Lloyd Jones, Lord Burrows and Lady Arden), the Supreme Court allowed Libya's appeal. In doing so, the Court considered a number of issues.

Meaning of section 12(1) of SIA

The majority of the Supreme Court agreed with the Court of Appeal that section 12(1) of the SIA did not permit service of a document instituting proceedings to be dispensed with.

However, in overturning the Court of Appeal decision, the Supreme Court ruled that for the purposes of section 12(1), the words "other document required to be served for instituting proceedings against a State" applied in the context of enforcing arbitral awards against a state, to the arbitration claim form where one is required to be served or otherwise to the order granting permission to enforce.

Section 12, the Court held, was intended to create a procedure whereby service may be effected on a state in the interests of both parties. Further, it was intended that the manner of the section 12 procedure should accord with the requirements of international law and comity. As such, a broad reading of section 12(1) was appropriate and only where a state agreed to service by some other manner pursuant to section 12(6) would the otherwise mandatory and exclusive procedure in section 12(1) not apply. If the enforcement order were not served, the Court concluded, the foreign state may be unaware of the enforcement proceedings and may not have the opportunity to assert immunity from jurisdiction.

Where section 12(1) of SIA applies, is the court able, in exceptional circumstances, to dispense with service of the enforcement order?

Libya did not appeal against the decision of the lower courts that the circumstances of the case would have justified the exercise of a discretion to dispense with service, if that discretion existed.

In any event, the majority of the Supreme Court agreed with the Court of Appeal that where section 12(1) of the SIA applied, neither CPR 6.16 nor CPR 6.28 permitted the court to dispense with service of the enforcement order.

The Supreme Court rejected General Dynamics' submission that section 12(1) required the court to refer to the relevant procedural rules to determine whether a document is one that is required to be served. As such, it was argued unsuccessfully, section 12 required consideration of the rules of court concerning service.

The Supreme Court ruled that the CPRs did not give the court a discretion to dispense with a statutory requirement. Specifically, CPR 6.1(a) made clear that the CPRs do not purport to oust the conflicting requirements of any enactment (in this case, section 12(1)).

Must section 12(1) of SIA be construed as allowing the court to make alternative directions for service in exceptional circumstances where a claimant's right of access to justice would otherwise be infringed?

General Dynamics argued that a strict interpretation of section 12(1) might have prevented it from pursuing its claim which, it submitted, would have infringed its right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). It argued that the court should interpret section 12(1) in a way that is compatible with ECHR rights, pursuant to section 3(1) of the Human Rights Act 1998, which gave effect in domestic law to those rights. In addition, it submitted that the common law principle of legality allowed the court to make alternative directions for service.

The majority of the Supreme Court held that the section 12(1) procedure did not infringe Article 6 of the ECHR or engage the common law principle of legality. The majority emphasised that the procedure for service through diplomatic channels:

secures benefits for both claimants and defendant states in circumstances of considerable international sensitivity and where, without such a provision, difficulties are likely to be encountered in effecting service.(4)

While the circumstances in the case were exceptional, preventing the effective operation of the section 12(1) procedure, those circumstances were not a sufficient basis for impugning the procedure.

In her judgment concurring with Lords Lloyd Jones and Burrows, Lady Arden found that as section 12(1) was mandatory and exclusive in

nature, and that this was a fundamental feature of the provision, the Court was not able to interpret this section so that it complied with ECHR and permitted alternative means of service.

Dissenting opinion

First issue

The minority (Lords Stephens and Briggs) agreed with the Court of Appeal that the enforcement order was not a document instituting proceedings and that it fell outside the scope of section 12(1).

Second issue

The minority was of the view that in exceptional circumstances the court can dispense with service of the enforcement order. If that discretion were exercised, the document would not be "required to be served" and as such would not fall within section 12(1). Such an interpretation, the minority found, facilitated the restrictive doctrine of state immunity.

Third issue

The minority interpreted section 12(1) as permitting the court to allow alternative service so as to prevent the claimant's right of access to justice from being infringed. Where diplomatic service is impossible or unduly difficult, denying access to a court would not be proportionate to the legitimate aim of the doctrine of state immunity, which pursues compliance with international law to promote comity and good relations between states through the respect of another state's sovereignty.

Comment

Following the Supreme Court's judgment, parties seeking to enforce an arbitral award against a foreign state will need to serve the claim form or enforcement order through the FCDO, without exception, unless the state has agreed to service by some other manner pursuant to section 12(6) of the SIA. Under subsections 12(2) and 12(4) of the SIA, enforcement within the jurisdiction does not take effect until two months after deemed service on the foreign state. This will have implications for cases in which it may be very difficult to enact service of enforcement proceedings on a state through diplomatic channels. Here, the relevant documents were transmitted by the British Embassy in Libya to the Ministry of Foreign Affairs in Tripoli late in May 2021. In reaching its decision, the Supreme Court stressed that the procedure for service of enforcement proceedings against a state secured benefits for claimants and defendant states. The Supreme Court emphasised that the procedure was in conformity with the requirements of both international law and comity.

The facts in the case were exceptional and service on a state through the FCDO is unlikely to be a problem in most other 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 or benjamin.barrat@cliffordchance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.

Endnotes

(1) [2021] UKSC 22.

(2) [2019] EWCA Civ 1110.

(3) (2019) EWHC 64 (Comm).

(4) [2021] UKSC 22, at 84.