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# Court considers duty of full and frank disclosure of state immunity in proceedings to enforce award

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## Introduction

In *General Dynamics United Kingdom v The State of Libya*,<sup>(1)</sup> the Commercial Court dismissed the defendant's application to set aside an enforcement order made on an ex parte basis pursuant to section 101 of the Arbitration Act 1996. Libya had argued that the order should be set aside on account of the claimant's failure to give full and frank disclosure as to the scope of Libya's adjudicative and enforcement immunity under the State Immunity Act 1978.

The Court held that Libya had no adjudicative immunity in proceedings to enforce an arbitral award against it and strictly this did not need to be addressed in the ex parte application. As to Libya's enforcement immunity, any issues concerning immunity from execution would ordinarily arise at a subsequent stage and generally it would not be appropriate to address them at the stage of recognition and enforcement. Recognition and enforcement of an award, the Court emphasised, should be a straightforward step.

The Court nevertheless did state that it would have been preferable if, in its enforcement application, the claimant had made express reference to the extent of Libya's immunity. The significance of this omission could be reflected, however, in a costs order against the claimant and did not result in the enforcement order being set aside.

## Background

Under section 1 of the State Immunity Act, states are immune from the jurisdiction of the courts of the United Kingdom, subject to certain exceptions. One such exception is set out in section 9, which provides that states are not immune as respects proceedings in the courts which relate to arbitration in circumstances where they have "agreed in writing to submit a dispute which has arisen, or may arise, to arbitration". In the case of *Svenska Petroleum Exploration AB v Lithuania*,<sup>(2)</sup> the Court confirmed that the section 9 exception extends to recognition and enforcement proceedings under section 101 of the Arbitration Act.

Section 13 of the State Immunity Act separately provides that the property of states shall be immune from enforcement by execution of a judgment or award.

## Facts

The claimant, a UK defence company, sought to enforce on an ex parte basis an International Chamber of Commerce (ICC) award (decided in its favour following a breach of contract) pursuant to section 101 of the Arbitration Act. The claimant sought permission to enforce the ICC award, for judgment to be entered in the terms of the award, and for service to be dispensed with. The application and supporting evidence did not reference the extent to which Libya might benefit from immunity under the State Immunity Act.

Mr Justice Teare issued an order granting the claimant's application and well as its costs.

In an initial application, Libya sought to have the order set aside on the grounds that service had not been made through diplomatic channels. That application was finally determined by the Supreme Court in Libya's favour (for further details, see "[Supreme Court rules on procedure for service of enforcement proceedings on sovereign state](#)").

In the present application, the defendant sought to have the order set aside on the basis that the claimant had not complied with its duty of full and frank disclosure in making its ex parte application because it had not informed the Court, among other things, that Libya had adjudicative and enforcement immunity under the State Immunity Act, subject to certain exceptions.

Libya argued that its adjudicative and enforcement immunities should have been disclosed by the claimant on a number of grounds, which included the following:

- State immunity was a matter of great importance and ought to have been considered by the Court to avoid any breach of international norms.
- Even in circumstances where Libya was held to no longer benefit from immunity in respect of adjudicative jurisdiction, it nevertheless continued to be protected by immunity in respect of enforcement by execution, which it had at no point waived.
- The claimant could have proceeded to enforce the award without any further judicial involvement by way of a writ of control.

The claimant's arguments in response included the following:

- The duty of full and frank disclosure only applied to defences made or that were arguable. This did not apply on the facts of the case as Libya had waived its right to adjudicative immunity when it had agreed to submit to arbitration and therefore it did not have any arguable claim to such immunity.
- It was not appropriate to raise issues as to immunity against execution in an application for recognition and enforcement of an

award pursuant to section 101 of the Arbitration Act; the appropriate stage would be when particular assets or methods of enforcement are identified and an order for execution is sought on an ex parte basis.

- It was wrong that there would be no need or opportunity for the claimant to make disclosures concerning enforcement immunity if it subsequently sought an order for execution, including in respect of any writ of control.

## Decision

Mr Justice Butcher held that it was desirable for a claimant seeking ex parte relief against a state to make express reference to the immunity afforded by the State Immunity Act and why it was inapplicable in the circumstances. However, failure to do so was not of significant importance and the order was upheld.<sup>(3)</sup>

Mr Justice Butcher noted that the immunity relevant when an application is made for enforcement and recognition of an award was the defendant state's adjudicative immunity (not immunity from enforcement by execution under section 13 of the State Immunity Act). However, pursuant to section 9 of the State Immunity Act, Libya had no adjudicative immunity as it had agreed to submit the underlying dispute to arbitration. Libya had participated in the arbitral proceedings and had not disputed the applicability of the arbitration clause and or argued that it otherwise benefited from immunity in respect of recognition of the award.<sup>(4)</sup>

Mr Justice Butcher also held that, in the ordinary course of events, it would be premature to consider enforcement immunity when seeking an order for recognition and enforcement under section 101 of the Arbitration Act. An examination of immunity against execution would involve consideration of the assets it would be sought to execute against. Citing a recent judgment of the High Court of New Zealand,<sup>(5)</sup> the judge observed that there were clear reasons why such consideration of assets was not appropriate at the recognition stage; recognition of awards should be straightforward and arguments as to the immunity of assets under domestic law can take place at a later date. Additionally, if at an early stage claimants identify assets that may be targeted for execution, this could result in defendants seeking to thwart enforcement.<sup>(6)</sup>

As regards Libya's arguments that the claimant would be able to execute against state assets without further judicial intervention and bringing to the Court's attention the issue of immunities, the judge considered this argument to be "ingenious but unrealistic".<sup>(7)</sup> Mr Justice Butcher noted that ultimately the claimant's legal representatives would be subject to a professional obligation to bring Libya's immunity to the attention of the Court if execution against state assets was sought.<sup>(8)</sup>

The judge concluded that the clarity of section 9 of the State Immunity Act meant that the claimant's non-disclosure was not "of great significance, and it has not obtained any benefit for General Dynamics which it ought not to have had".<sup>(9)</sup>

Libya had also argued that the claimant had not complied with its duty of full and frank disclosure by failing to disclose that only one of two competing governments in Libya was recognised by the UK government. The judge held this argument to have no force as this was relevant only to the issue of service rather than whether the claimant was entitled to recognition and enforcement of the award.<sup>(10)</sup>

## Comment

This case illustrates the special nature of enforcement proceedings against sovereign states. The Court confirmed that it is preferable that a party seeking to enforce an award against a state on an ex parte basis should make express reference to the immunity available under the State Immunity Act and explain why it considers it to be inapplicable. Making such a disclosure may avoid challenges to enforcement and, as in this case, an adverse cost order being made against the enforcing party. Overall, however, the decision affirms the English courts' pro-enforcement and pragmatic approach, and confirms that recognition and enforcement of awards even against states should be a straightforward procedure.

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## Endnotes

(1) [2022] EWHC 501 (Comm).

(2) *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No.2)* [2007] QB 886, para 117.

(3) *General Dynamics*, para 31.

(4) Paras 31-33.

(5) *Sodexo Pass International SAS v Hungry* [2021] NZHC 371.

(6) *General Dynamics*, para 34.

(7) Para 35.

(8) Para 39.

(9) Para 45.

(10) Para 43.