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ENFORCING ARBITRAL AWARDS AGAINST SOVEREIGN STATES: LATEST DECISION

General Dynamics United Kingdom Ltd v state of Libya [2021] UKSC 22

The Supreme Court has recently handed down a Judgment providing guidance and clarity on the service of proceedings to enforce an arbitral award against a Sovereign state.

Background

In 2013, General Dynamics United Kingdom Ltd ("**General Dynamics**") commenced arbitration proceedings against the state of Libya ("**Libya**") for sums due under a contract for the supply of communications systems. In 2016, it obtained an arbitral award against Libya for over £16 million, plus interest and costs.

In June 2018, General Dynamics issued an arbitration claim form and made an application for permission to enforce the award in the UK. The following month, the High Court made an order granting General Dynamics permission to enforce the award in the same way as a judgment or court order under sections 101(2) and (3) of the Arbitration Act 1996 (the "**enforcement order**"). The court also gave permission for General Dynamics to dispense with service of the arbitration claim form and the enforcement order on the basis that this was justified by the exceptional circumstances in Libya which, at the time, had two competing governments.

In September 2018, Libya successfully applied to vary the enforcement order to set aside the service dispensation and to require that service be effected through the usual diplomatic process under s.12(1) of the state Immunity Act 1978 ("**SIA**") which required service of court proceedings to be effected through the Foreign, Commonwealth and Development Office ("**FCDO**").

However, this decision was overturned on appeal and the issue was ultimately addressed by the Supreme Court.

S.12(1) of the state Immunity Act 1978

Under s.12(1) SIA, any writ or other document required to be served for instituting proceedings against a state must be transmitted through the Foreign, Commonwealth and Development Office to the relevant state's Ministry of Foreign Affairs.

The Supreme Court's Decision

The Supreme Court ruled by a majority of 3:2 that Libya's appeal should be allowed, ruling that service of the enforcement order fell within the scope of s.12(1) SIA and that service through the FCDO process is mandatory in those circumstances.

In its judgment, the Supreme Court addressed the following three issues:

1. In proceedings to enforce an arbitral award against a state, is an arbitration claim form or an enforcement order a document *"required to be served for instituting proceedings"* within the meaning of s.12(1) SIA?

2. Can the court, in exceptional circumstances, dispense with service of an arbitration claim form or an enforcement order pursuant to CPR rules 6.16 and/or 6.28, even if s.12(1) SIA applies?

3. Must s.12(1) SIA be interpreted, in accordance with section 3 of the Human Rights Act 1998, so as to permit the court to make alternative directions as to service in exceptional circumstances, where the claimant's right of access to the court under article 6 of the ECHR would otherwise be infringed?

Issue 1: application of s.12(1) SIA

The majority of the Supreme Court agreed with Harry Matovu QC (appearing for Libya) that s.12 SIA establishes special, mandatory procedures in cases where the defendant is a state. Although there is no rule of customary international law requiring service on states through diplomatic channels, the majority agreed that claims against states gives rise to considerations of particular sensitivity, especially where the powers of a forum state are being invoked in an attempt to seize assets of a defendant state (in this case, Libya). The sovereign equality of states is a fundamental principle of the international legal order, which is reflected in the rules of international law governing state immunity.

The procedures for service set out in s.12(1) SIA were intended to create a means by which service can be effected on a state in a manner which accords with the fundamental principles of international law and comity, and to provide the state with a fair opportunity to respond. Those procedures are to apply to all documents *"required to be served for instituting proceedings against a state"*.

With respect to proceedings to enforce arbitration awards, the majority confirmed that the relevant documents will be the arbitration claim form (where service of the claim form is required) or the order granting permission to enforce the award (in other cases).

Issue 2: The relationship between s.12(1) SIA and CPR 6.16 and/or 6.28

The majority also concluded that there is nothing in s.12(1) SIA to indicate that the court has any discretion to dispense with service of an enforcement order on a state under CPR rules 6.16 and/or 6.28 (which provide the court with a discretion in civil proceedings against other types of defendant).

On the contrary, the majority agreed with counsel for Libya that CPR 6.1(a) makes it clear that provisions of Part 6 of the CPR will not apply where another enactment "*makes different provision*" and that rules of court cannot in any event oust the requirements of primary legislation. Accordingly, the provisions of the CPR do not affect the requirements of s.12(1) SIA in the context of proceedings to enforce arbitral awards against a state.

Issue 3: S.12(1) SIA and Art.6 of the ECHR

General Dynamics argued in the alternative that the service requirements set out in s.12(1) SIA could prevent a claimant from pursuing its claim and that this would infringe a claimant's constitutional right of access to the Court as well as its right of access under Art.6 of the ECHR. It

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therefore argued that s.12(1) SIA should be read so as to allow the court to exercise its discretion to make alternative directions as to service where appropriate.

However, the majority of the Supreme Court again agreed with Harry Matovu QC and rejected these arguments, concluding that s.12(1) SIA did not infringe a claimant's rights of access to the court. This was because, in a claim against a state, a claimant has rights of access only to the jurisdiction which the court enjoys in accordance with international law. If international law requires the grant of immunity, the court lacks jurisdiction in this sense, so Art. 6 of the ECHR is simply not engaged.

The majority further decided that the procedure set out in s.12(1) SIA is a well-established means of service on defendant states without which difficulties would likely be encountered in effecting service. It protects the interests of claimants and defendant states and so pursues a legitimate objective by proportionate means which is in conformity with the requirements of international law and comity. Accordingly, although exceptional circumstances were encountered in this case, the relevant rules nevertheless had to be upheld.

Comment

This case provides clarification as to the interpretation of s.12(1) SIA and its mandatory nature and will be of interest to any party with a claim against a state and not just parties to contracts with states which provide for arbitration. It will also be of great interest to those advising states themselves.

The enforcement of arbitral awards against sovereign states under the New York Convention appears to be a growing area and the Supreme Court has now made it clear that, when instituting enforcement proceedings in the UK, the arbitration claim form or the order granting permission to enforce the award must be served on a sovereign state's Ministry of Foreign Affairs through the FCDO, however inconvenient or difficult this may be, unless the defendant state agrees to an alternative means of service.

Seladore is involved in a number of ongoing international arbitration cases, and its lawyers have extensive experience of disputes involving states and state-owned entities.

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