Neutral Citation Number: [2019] EWHC 64 (Comm)

Case No: CL-2018-000422

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2019

Before :

LORD JUSTICE MALES

- -

Between :

GENERAL DYNAMICS UNITED KINGDOM LIMITED — **Claimant**

- and –

STATE OF LIBYA — **Defendant**

- -
- -

Huw Davies QC (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Defendant**
Daniel Toledano QC and **James Ruddell** (instructed by **Reed Smith LLP**) for the **Claimant**

Hearing date: 18 December 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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LORD JUSTICE MALES

Lord Justice Males :

Introduction

1. Can an arbitration award against a state be enforced by court proceedings in this country without service on that state of any formal court document? Service of court proceedings on states is governed by section 12 of the State Immunity Act 1978 which provides for service through the Foreign & Commonwealth Office of "any writ or other document required to be served for instituting proceedings against the State". The claimant says that this section does not apply because arbitration enforcement proceedings are instituted by the issue of an arbitration claim form which is not required to be served on a defendant and that the order granting permission to enforce the award, which is required to be served, is not the document which institutes the proceedings. It says, therefore, that section 12 does not apply to service of an order granting permission to enforce an award and that the court has an unfettered power to dispense with service of the order under CPR 6.28.

2. The question whether the court has power to dispense with such service and, if so, whether that power was rightly exercised, arises on an application by the State of Libya to set aside those parts of the order made by Teare J on 20 July 2018 which dispensed with service of the order for enforcement and provided that the defendant state should have two months from the date of the order within which to apply to set it aside.

3. The claimant's application to dispense with service was made to Teare J, in part at least, on the basis that there are two competing governments in Libya, namely the Tripoli based Government of National Accord and a parallel government based in Tobruk and known as the House of Representatives, and that there was some room for doubt as to which of the rival Ministries of Foreign Affairs is the relevant institution for service for the purpose of section 12. Teare J alluded to the fact that there are two entities claiming to be the Government of Libya in his short ruling, but (as I read it) did not base his decision on that fact. Nevertheless it is important to say at the outset that the Government of National Accord is the only government in Libya which is recognised by the United Kingdom, as well as by other states and international bodies, and that there is no doubt that the Ministry of Foreign Affairs in Tripoli is the relevant Ministry for the purpose of section 12.

Background

4. The claimant is a United Kingdom company which is part of the General Dynamics group, a global military defence conglomerate. The award which it seeks to enforce was made on 5 January 2016 by an ICC arbitral tribunal in Geneva. The arbitral proceedings were commenced in 2013 and the defendant state was legally represented throughout by the Sefrioui Law Firm of Paris. The dispute related to a contract between the parties for the supply of communications systems. The tribunal awarded £16,114,120.62 in favour of the claimant, together with interest and costs.

5. The defendant state has made no payment or proposals for payment of the sum awarded. It is a reasonable inference that it does not intend to meet its obligation to pay. The claimant sought initially to enforce the award in the United States. Proceedings there for recognition and enforcement were delivered to the Ministry of

Foreign Affairs in Tripoli in April 2016. It appears that there were no difficulties in serving the proceedings at that time. However, the claimant has not pursued the United States enforcement proceedings because it appears that there are no assets in the United States against which the award could be enforced. Instead it seeks to enforce in this country where it believes that there are or may be such assets.

The order of Teare J

6. The award is a New York Convention award enforceable pursuant to section 101 of the Arbitration Act 1996.

7. In accordance with the procedure set out in CPR 62.18, the claimant's application was made without notice in an arbitration claim form. That led to an oral hearing before Teare J as a result of which he made the following order:

> "(1) Pursuant to section 101(2) of the Arbitration Act 1996, the Claimant is given permission to enforce the arbitration award made on 5 January 2016 in ICC Case No. 19222/EM ('the Award') against the defendant in the same manner as a judgment or order of the Court and to the same effect.
>
> (2) Pursuant to Civil Procedure Rule 62.19, such leave shall include interest accruing in the following amounts:
>
> (a) interest at the annual rate of 5%, accruing in relation to the sum of £16,114,120.62, from 26 June 2013 until 21 June 2018, in the amount of £4,019,700.50; and
>
> (b) interest on the same sum thereafter at a daily rate of £2207.41.
>
> (3) Pursuant to section 101(3) of the Arbitration Act 1996, judgment be entered against the Defendant in the terms of the Award and comprising the following sums:
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> (a) the sum of £16,114 120.62, as prescribed in the Award;
>
> (b) the sums of EUR 115,293.98, £990,089.58, CHF 631,332.24 and US $62,200.15 as prescribed in the Award;
>
> (c) interest accruing from 26 June 2013 until 21 June 2018, in the amount of £4,019,700.50; and
>
> (d) interest thereafter at a daily rate of £2207.41.
>
> (4) Pursuant to Civil Procedure Rules 6.16 and 6.28, the Claimant has permission to dispense with service of the Arbitration Claim Form dated 21 June 2018, any Order made by the Court and other associated documents.
>
> (5) The Claimant is to courier the Arbitration Claim Form, this Order and the associated documents to the following addresses:
>
> (a) Interim General Committee for Defence, Ghaser Bin Gashour, Tripoli, Libya;

(b) The Ministry of Foreign Affairs, Ash Shatt St, Tripoli, Libya; and

(c) Sefrioui Law Firm, 72 Boulevard de Courcelles, 75017 Paris, France.

(6) The Defendant may, within two months of the date of this Order, apply to set aside this Order and the Award shall not be enforced until after the expiration of that period, or, if the Defendant applies to set aside this Order within two months of the date of this Order, until after the application has been finally disposed of.

(7) Pursuant to CPR r44.7 the Defendant shall pay the Claimant's costs of and incidental to this application, summarily assessed in the amount of £60,000.00"

8. It will be observed that the order not only gave permission to enforce the award, but also (as contemplated by section 101(3) of the 1996 Act) entered judgment in terms of the award. It contemplated that there would be no service of any kind on the defendant state, but ensured that the defendant would be made aware of the proceedings and of the order by the couriering of documents to three addresses, one of which was the address of the Ministry of Foreign Affairs in Tripoli. (I note in passing that all three addresses were associated with the Government of National Accord; whatever may have been said in the claimant's evidence and submissions about the existence of two rival governments, it is clear from the order that it was the Government of National Accord which this court was invited to and did regard as the recognised government of Libya). It was not suggested that this couriering of documents would constitute good service. The order provided also that the defendant state could apply to set it aside, the period for doing so within which the award was not to be enforced being a period of two months from the date of the order.

9. The effect of this order was that in the absence of any such application within the specified period the claimant would be entitled to enforce the judgment thus entered against any property of the State of Libya in this jurisdiction "which is for the time being in use or intended for use for commercial purposes": see section 13 of the 1978 Act.

The defendant's application

10. The proceedings did come to the attention of the defendant state which has now applied (within the specified two-month period) to set aside paragraphs 4 and 5 of the order and to vary paragraphs 6 and 7 so that the period for any application to set aside paragraphs 1 to 3 will run from the date of service of the order pursuant to section 12 of the State Immunity Act. This would mean that, in the meanwhile, the award will not be enforceable here.

Section 12 of the State Immunity Act 1978

11. Section 1 of the State Immunity Act 1978 provides that:

> "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."

12. Thus the default rule is that a state is entitled to immunity, but this is subject to a number of stated exceptions. The exceptions include "proceedings relating to a commercial transaction entered into by the State" (section 3) and proceedings which relate to an arbitration to which the state has agreed (section 9).

13. Service of court proceedings on states is governed by section 12 of the Act which provides, so far as relevant:

> "(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.
>
> (2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.
>
> …
>
> (4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.
>
> (5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.
>
> (6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner. …"

Enforcement of awards under CPR 62.18

14. The rule of court dealing with the procedure for enforcement of arbitration awards, including New York Convention awards as in this case, is CPR 62.18. This provides:

> "(1) An application for permission under … section 101 of the 1996 Act … to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form.
>
> (2) The court may specify parties to the arbitration on whom the arbitration claim form must be served.
>
> …
>
> (7) An order giving permission must –
>
> (a) be served on the defendant by –

(i) delivering a copy to him personally; or

(ii) sending a copy to him at his usual or last known place of residence or business;

(8) An order giving permission may be served out of the jurisdiction –

(a) without permission; and

(b) in accordance with rules 6.40 to 6.46 as if the order were an arbitration claim form.

(9) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set –

(a) the defendant may apply to set aside the order; and

(b) the award must not be enforced until after –

(i) the end of that period; or

(ii) any application made by the defendant within that period has been finally disposed of. …"

15. Thus the claimant may issue an arbitration claim form but need not serve this on the defendant unless the court so orders. The application may be and usually is determined without giving notice to the defendant, but the order provides that the award must not be enforced until the defendant has had an opportunity to apply to set it aside. The order must be served and, when the defendant is out of the jurisdiction, may be served in accordance with CPR 6.40 to 6.46 as if it were an arbitration claim form.

16. These rules include CPR 6.44 which deals with service of "the claim form or other document" on a state and provides for service through the Foreign & Commonwealth Office. This provision echoes the language of section 12 of the State Immunity Act. Like that section it is concerned with service of a document required to be served for instituting proceedings as distinct from other documents which may need to be served during the course of such proceedings: *European Union v Syrian Arab Republic* [2018] EWHC 1712 (Comm) at [41].

Dispensing with service

17. The Civil Procedure Rules contain two provisions enabling the court to dispense with service. CPR 6.16 provides:

"(1) The court may dispense with service of a claim form in exceptional circumstances."

18. CPR 6.28 provides:

"(1) The court may dispense with service of any document which is to be served in the proceedings."

19. Thus CPR 6.16 is limited to claim forms and requires "exceptional circumstances", while CPR 6.28 applies to any (other) document and contains no express provision limiting the circumstances in which the court's discretion may be exercised.

20. However, neither of these provisions applies "where … any … enactment … makes different provision": CPR 6.1. This spells out what in any event would be the case, namely that rules of court cannot override primary legislation.

The parties' submissions

21. Mr Huw Davies QC for the defendant state submitted in summary that:

    (1) In the circumstances of this case, the order giving permission to enforce the award should be regarded as the document which instituted the proceedings.

    (2) That was a document which was required to be served.

    (3) Although the court had power to dispense with service of the order despite the terms of section 12 of the 1978 Act, that power should only be exercised in exceptional circumstances as the order was equivalent to a claim form.

    (4) There were no exceptional circumstances in this case, in particular because the claimant had not even attempted to serve the order through the Foreign & Commonwealth Office and (if it had done so) there was no reason why the order could not have been served.

22. Mr Daniel Toledano QC for the claimant submitted, again in summary, that:

    (1) The proceedings were instituted by the issue of an arbitration claim form which was not required to be served on the defendant, while the order which was required to be served was not a document instituting the proceedings. Accordingly section 12 did not apply.

    (2) Service of the order was governed by CPR 62.18(8) and CPR 6.44 but these provisions did not turn the order into a claim form; they merely provided that it could be served as if it were one.

    (3) Accordingly the court had power to dispense with service and (because the order was not a claim form) the applicable dispensing rule was CPR 6.28 where the court's discretion is unfettered and there is no requirement to show exceptional circumstances, not CPR 6.16.

    (4) In any event the circumstances in Libya were exceptional.

23. I shall consider first whether section 12 applies in this case; next whether the court has power to dispense with service against a state; and finally (if it does) whether that power should be exercised.

Was there a document required to be served for instituting proceedings?

24. In my judgment the relevant starting point is whether there was a document in this case which was required to be served for instituting proceedings in accordance with section 12 of the State Immunity Act 1978.

25. I have set out above the terms of section 12 and would make the following observations, based primarily on the language of the section.

26. First, the language of subsection (1) makes clear that in cases to which it applies, that is to say where a writ (now claim form) or other document is required to be served for instituting proceedings against a state, the procedure set out in section 12 is mandatory.

27. Second, the section applies to a document which is "required to be served for instituting proceedings against a State". Viewing these words on their own, they might be read as meaning that if there is no document which is required to be served for that purpose, there is nothing to which the section can apply. In general, however, service of proceedings is the process by which the court exercises jurisdiction over a defendant. It is at least a reasonable inference that the section contemplates that there will always be some document required to be served for instituting proceedings against a state, and that the purpose of these introductory words is to make clear that service through the Foreign & Commonwealth Office is necessary whatever the nature of the document. As I shall show, this is the more natural reading of the section as a whole.

28. Third, in the absence of agreement by the state, there is nothing in the section itself to suggest that service by any other method than through the Foreign & Commonwealth Office is permitted, let alone that service of court proceedings on a defendant state is not necessary at all. While it is true that if the court has and exercises a power to dispense with such service there is no document required to be served, that seems an altogether too easy way to avoid the need for service through the Foreign & Commonwealth Office. It is moreover an important consideration that at the date of the State Immunity Act 1978 the court had no power to dispense with service of originating process save for a petition for a matrimonial cause (see the note at para 6.16.1 of *Civil Procedure 2018*). Accordingly Parliament would not have contemplated that proceedings could be instituted against a defendant state without service.

29. Fourth, the exercise of jurisdiction by the courts of one state over another state involves particular sensitivities. That is demonstrated by the history of state immunity in customary international law. The State Immunity Act 1978 strikes a careful balance as a matter of English law. Section 12 represents an important part of that balance. It contemplates that no state will be brought before the English courts except as a result of service in accordance with section 12. It requires that service should be effected diplomatically in both senses of the word. That ensures appropriately respectful dealings between sovereign states and gives to the executive which is responsible for the conduct of this country's international relations a legitimate role in deciding whether, when and how a foreign state should be made subject to the jurisdiction of the English courts. The evidence in the present case demonstrates that this is a practical consideration, for example because the Foreign & Commonwealth Office

will sometimes decide to delay the transmission of documents at a particularly sensitive time, such as when there is a pending election in the foreign state. The court is not qualified to make these kinds of judgments, which in any event are properly matters for the executive. If the court is able to bypass section 12 by dispensing with service, this safeguard for the conduct of international relations is illusory. It is unnecessary to consider whether or in what circumstances a decision by the Foreign & Commonwealth Office to delay transmission of documents or not to serve them at all may be susceptible to challenge, for example by judicial review. The possibility of such a challenge in appropriate (and no doubt extreme) circumstances does not detract from the point that the Foreign & Commonwealth Office is not merely an unthinking conduit but has a legitimate role to play in the process of bringing the foreign state before the English court.

30. Fifth, although as a general rule the most important purpose of service of proceedings is to ensure that the content of the document served is communicated to the defendant (see *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 at [37]), cases where the service is on a state are to some extent in a special category. Another important purpose of service in such cases is to ensure that the jurisdiction of the court is invoked against the state in question in a proper manner.

31. Sixth, the period within which a defendant state must enter an appearance (or, now, acknowledge service) is extended by section 12(2). Whatever period applies to defendants generally does not begin to run until two months from the date of service in accordance with subsection (1). This period is also expressed in mandatory terms. Any provision shortening this period, whether contained in rules of court or otherwise, must give way. However, if there is no service in accordance with subsection (1), either because the nature of the document for instituting proceedings is such that it need not be served or because service is dispensed with, there is nothing to which subsection (2) can apply and an important safeguard for defendant states is lost.

32. In this connection I would note that the order of Teare J provided that the time for applying to set the order aside would be limited to two months and would run, not from the date of service (there was to be no service) nor even from the date when the couriered documents were received, but from the date of his order. Accordingly and on any view the defendant state did not have the period of something over two months from receipt of the initiating document which the subsection contemplated it should have within which to decide how to respond to the proceedings. (It appears that Teare J was given to understand, without being taken to subsection (2), that the period specified in his order corresponded to the period which would have applied under the subsection, but that was mistaken).

33. Seventh, subsection (4) precludes any entry of a default judgment except on proof that subsection (1) has been complied with and the time for entering an appearance as extended by subsection (2) has expired. Thus if there are cases where service in accordance with section 12(1) need not occur, no default judgment will be possible. It will be impossible to prove compliance with subsection (1). Subsection (4) does not allow as an alternative that a default judgment may be entered if service in accordance with subsection (1) is unnecessary or has been dispensed with. Such a possibility is not contemplated. That is relevant in this case as the order made by Teare J not only gave permission to enforce the award but also entered judgment in terms of the award. That judgment was entered without notice to the defendant state and was plainly a

default judgment or would at least become one in the event of no application being made within the two-month period. However, the requirements of subsection (4) were not satisfied and the claimant made no attempt to explain how the entry of judgment was compatible with subsection (4).

34. Eighth and similarly, subsection (5) provides the means by which the defendant state must be notified of a default judgment and prescribes the period within which it may apply to set the judgment aside. That period runs from receipt of the judgment transmitted through the Foreign & Commonwealth Office. As just explained, the order made by Teare J in this case was, in part at least, a default judgment, but there has been no transmission of that judgment to the Libyan Ministry of Foreign Affairs through the Foreign & Commonwealth Office.

35. Ninth, subsection (6) makes clear that service in any manner to which the state has agreed remains possible, in which case subsections (2) and (4) do not apply. However, subsection (6) nevertheless assumes that the proceedings will have to be served. The disapplication of subsections (2) and (4) when there is an agreed method of service otherwise than in accordance with subsection (1) underlines that these subsections do apply in all other cases.

36. Together these considerations build up a powerful case that service of court proceedings through the Foreign & Commonwealth Office in accordance with section 12 is essential in every case where the English court is to exercise jurisdiction over a foreign state.

37. There is no doubt that as a matter of English procedural law the proceedings were started on issue of the arbitration claim form. CPR 62.3 provides that an arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure. That provision does not apply directly to an application to enforce a New York Convention award (see CPR 62.2(3)) but CPR 62.18(1) does provide that such an application may be made without notice in an arbitration claim form. Once the arbitration claim form is issued, the proceedings have been started. Further, as already noted, an arbitration claim form is not required to be served unless the court so orders, which it did not in the present case. Viewed solely as a matter of English procedural law, therefore, I would accept Mr Toledano's first submission that the proceedings were instituted by the issue of the arbitration claim form and that this was a document which was not required to be served on the defendant.

38. However, I do not accept that this is the perspective from which section 12 of the State Immunity Act 1978 should be viewed. In my judgment that section (which pre-dates both the Arbitration Act 1996 and the Civil Procedure Rules) contemplates that there will always be some document required to be served for instituting proceedings against a state. The section does not prescribe what that document should be, a matter which can be left to procedural law as it exists from time to time, but that is very different from saying that proceedings can be instituted without any service of any document whatever. I reach this conclusion for the following reasons.

39. First, there are grave difficulties with the working of the section if it is possible to institute proceedings against a state without service of a document (of whatever nature) through the Foreign & Commonwealth Office for the reasons already set out above.

40. Second, the Act must be seen in the context of the European Convention on State Immunity 1972. Section 12 is clearly modelled on Article 16 of the Convention, an international instrument which is not concerned with the niceties of English procedural law.

41. Article 16 of the Convention provides that:

> "(1) In proceedings against a Contracting State in a court of another Contracting State, the following rules shall apply.
>
> (2) The competent authorities of the State of the forum shall transmit
>
> -- the original or a copy of the document by which the proceedings are instituted;
>
> -- a copy of any judgment given by default against a State which was defendant in the proceedings,
>
> through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State, for onward transmission, where appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language or one of the official languages, of the defendant State.
>
> (3) Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.
>
> (4) The time-limits within which the State must enter an appearance or appeal against any judgment given by default shall begin to run two months after the date on which the document by which the proceedings were instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.
>
> (5) If it rests with the court to prescribe the time-limits for entering an appearance or for appealing against a judgment given by default, the court shall allow the State not less than two months after the date on which the document by which the proceedings are instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.
>
> (6) A Contracting State which appears in the proceedings is deemed to have waived any objection to the method of service.
>
> (7) If the Contracting State has not appeared, judgment by default may be given against it only if it is established that the document by which the proceedings were instituted has been transmitted in conformity with paragraph 2, and that the time limits for entering an appearance provided for in paragraphs 4 and 5 have been observed."

42. It is evident that Article 16 contemplates that in every case there will be a document by which proceedings are instituted ("the document by which the proceedings are instituted") and that this document must be transmitted through the diplomatic channel to the Ministry of Foreign Affairs of the defendant state. It does not allow for the possibility that the domestic law of the forum state may allow proceedings to be

instituted without any document needing to be served on the defendant state. That contemplation is carried through, in my judgment, to the provisions of section 12.

43. Third, it is necessary to recall that in accordance with section 1 of the 1978 Act the default rule is immunity "except as provided in the following provisions of this Part of this Act." Those following provisions include not only the sections which deal with the nature of the proceedings (e.g. proceedings relating to commercial transactions or arbitrations), but also section 12 dealing with service, that is to say with the way in which jurisdiction is to be invoked over a defendant state. The effect of section 1, therefore, is that in order for a state to be subject to the jurisdiction of the courts of the United Kingdom, two conditions must be satisfied. The first is that the proceedings are of a kind specified in the exceptions to immunity listed at sections 2 to 11 of the Act. The second is that the state has been served in accordance with the provisions of section 12, that is to say through the Foreign & Commonwealth Office or in some other manner to which the state has agreed.

44. That leaves only two possibilities in the case of an application to enforce an arbitration award against a state under section 101 of the Arbitration Act 1996. Either the court should order that the arbitration claim form must be served in accordance with the procedure prescribed by section 12(1) of the 1978 Act or the document which must be served under the Civil Procedure Rules (i.e. the order granting permission to enforce) must be regarded as the document instituting proceedings for the purpose of section 12, on the basis that it is this document by which the proceedings are formally notified to the defendant and by which the court invokes its jurisdiction over the defendant. As there was no order in this case requiring the arbitration claim form to be served, the order must be regarded as the instituting document.

Does the court have power to dispense with service?

45. The next question is whether the court has power to dispense with service of the instituting document. Despite Mr Davies' willingness to accept before me (while reserving the right to argue to the contrary elsewhere) that the court does have such power, I consider that this question must be addressed. Indeed, although Mr Davies' submissions about section 12 were notionally directed to saying that a particularly strong case would be needed in order to dispense with service, their real logic was that such dispensation would be contrary to the scheme of the section.

46. I cannot accept that the court does have power to dispense with service. That would be contrary to the clear and mandatory terms of section 12 read with section 1 and, as already explained, would render parts of the section unworkable. Certainly the court had no such power at the date when the Act was passed. The introduction of a power to dispense with service of a claim form in the Civil Procedure Rules cannot have changed this position. Rules of court cannot override that primary legislation and in any event, in view of CPR 6.1, do not purport to do so.

The authorities

47. So far I have addressed the issues as a matter of principle, based on the language and context of section 12. I consider next what guidance on these issues can be obtained from the authorities. I take them in chronological order.

48. The issue in *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 1 WLR 979 was whether a land charge could be registered on the former Iranian embassy for recovery of the city council's costs of making the building safe following the storming of the premises by the SAS to free hostages being held there. The Chief Land Registrar ruled that an originating summons should be issued but the Iranian government declined to accept service. Service in accordance with section 12 of the 1978 Act was impractical. The claimant argued that the originating summons was not a document "required to be served for instituting proceedings" but was merely a convenient way of bringing the matter before the court. Peter Gibson J rejected this submission, referring to the mandatory nature of section 12. The Iranian Government was the appropriate defendant as the only known interested party and had to be served. If section 12 applied, there could be no question of substituted (or, now, alternative) service. Nor could the Government be treated as having failed to attend when it had never been served. There was (as was the position at that time) no power to dispense with service.

49. Peter Gibson J reached this conclusion reluctantly. He described it as disquieting that the Iranian Government, having raised an objection to the registration of the land charges, could frustrate the resolution by the court of the question thereby raised by not being willing to accept service. He described these circumstances as exceptional. Nevertheless, that was the position.

50. This case holds that, where it applies, service in accordance with section 12 is mandatory and it provides some support for the view that the section contemplates that service of a document instituting proceedings will be necessary in every case. It demonstrates that alternative service against a state is not possible as that would be contrary to the mandatory procedure in section 12. That being so, it would seem odd if the even more radical step of dispensing with service altogether was available. However, the case does not deal directly with the question whether service can be dispensed with under the Civil Procedure Rules as the case pre-dates those rules.

51. *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147 confirms the mandatory nature of the section 12 procedure. The claimant sent the documents to the Foreign & Commonwealth Office which sent them to the Iraqi embassy in London with a request that they be forwarded to the Ministry of Foreign Affairs in Baghdad. However the documents were not forwarded and accordingly were never served in accordance with section 12.

52. Like the present case, *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm) was an application to enforce a New York Convention award under section 101 of the Arbitration Act 1996. The arbitration claim form was not served but the order giving permission to enforce the award was served through diplomatic channels. The primary ground on which the application failed was that the claimant had mis-named the defendant. However, there was a further point, that the order for enforcement of the award had only allowed the defendant 21 days after service of the order within which to apply to set the order side. Gross J held, albeit *obiter*, that section 12(2) dealing with the period for acknowledgement of service applies equally to proceedings for enforcement as it does to proceedings in which the court will adjudicate on the parties' rights. He rejected an argument that the two-month period referred to was unnecessary when the proceedings were to enforce a judgment or award of which the defendant state would already be aware.

53. Gross J dealt with this point at [25(4)]:

> "As it seems to me, s.12 means what it says. It deals with procedure. It is not to be confined to the court's 'adjudicative jurisdiction'. The two-month period is an acknowledgement of the reality that states do take time to react to legal proceedings. It is understandable that states should have such a period of time to respond to enforcement proceedings under ss.100 and following of the 1996 Act; not untypically, an award will be made in one country but enforcement may be sought elsewhere, perhaps in a number of jurisdictions, where assets are or are thought to be located. I therefore decline to read words into s.12 so as to preclude its application to the enforcement of awards under CPR 62.18."

54. It is at least implicit in this decision that the order giving permission to enforce was a document "required to be served for instituting proceedings". If it had not been, the question whether a period less than two months for acknowledgement of service was permitted could not have arisen. Accordingly, the case provides some support for the view that when the arbitration claim form is not required to be served in proceedings to enforce an award, the order giving permission to enforce is a document to which section 12 applies. The support is limited, however, because the contrary was not argued, the argument focusing instead on a suggested distinction between adjudication and enforcement.

55. The issue in *L v Y Regional Government of X* [2015] EWHC 68 (Comm), [2015] 1 WLR 3948 was whether section 12 of the 1978 Act applied to an application to court made in the course of arbitration proceedings under section 42 of the Arbitration Act 1996 to enforce a peremptory order made by an arbitral tribunal. Hamblen J held that it did. The application under section 42 was an invocation of the court's jurisdiction over the defendant state so that the arbitration claim form had to be served in accordance with section 12. Citing *Norsk Hydro* and also *Fox & Webb, The Law of State Immunity* (3rd edition), Hamblen J referred at [32] to the importance of the two-month period in subsection (2) for a defendant state to respond to proceedings "of whatever nature". He clearly contemplated at [38], although without needing to decide, that "the procedural rights conferred by Parliament in s.12 of the SIA were available in the case of enforcement of a final award for payment (as in the *Norsk Hydro* case)".

56. Hamblen J recognised at [41] that his decision could cause delay and disruption, but that was a consequence of agreeing to arbitrate against a state. The decision does not otherwise touch directly on the present issues, although it may be said that there was no suggestion that any such delay or disruption, however severe, could be avoided by the simple expedient of exercising a power to dispense with the requirement of service.

57. *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829 was an application for enforcement of a New York Convention arbitration award. The order giving permission to enforce the award was served in accordance with section 12(1) of the 1978 Act, but the arbitration claim form was not. The defendant state contended that it should have been. Teare J held at [53] that the proceedings were instituted by the issue of the arbitration claim form, but (at [58]) that this was not "a document required to be served". He appears (also at [58]) to have

accepted counsel's submission that the document required to be served was the order, which had been. On the other hand, he also commented at [64] that:

> "If the document instituting the proceedings is not required to be served then the subsection has no application. If an entry of appearance (now acknowledgement of service) is required then subsections (2) and (3) apply. If an entry of appearance (now acknowledgement of service) is not required then the subsections do not apply. If judgment in default of appearance (now acknowledgement of service) is sought then subsections (4) and (5) apply. If it is not sought then they do not apply."

58. These observations contemplate that (contrary to the view which I have expressed) there may be cases where there is no document required to be served so that section 12 will not apply. By implication, however, they appear also to recognise that if there are such cases, no default judgment will be possible – because if judgment in default were to be sought, there could not be compliance with subsection (4). However, these points did not really arise as it was accepted that the order had been served in a manner which complied with the requirements of section 12(1).

59. *European Union v Syrian Arab Republic* [2018] EWHC 1712 (Comm) was an application by the claimant for summary judgment on a claim for repayment of monies due under loan agreements. Teare J had already held that the claim form had been properly served in accordance with what he described as the mandatory requirements of section 12 (see [2018] EWHC 181 (Comm)). No acknowledgement of service had been filed and accordingly the question now was whether the applications for summary judgment and for permission to apply for summary judgment also needed to be served on the defendant state through the Foreign & Commonwealth Office. Bryan J held at [38] to [41] that they did not. Section 12(1) did not apply because these were not "documents for instituting proceedings", and CPR 6.44 did not apply because it too was concerned with the institution of proceedings and did not apply once the proceedings had been served. In those circumstances the claimant sought an order for alternative service under CPR 6.27, alternatively an order to dispense with service under CPR 6.28. Bryan J noted the measures which had been taken by the claimant to bring the application to the notice of the defendant state and made an order for service by an alternative method. Accordingly he did not need to consider whether to dispense with service under CPR 6.28.

60. While this case contains an interesting discussion of the procedure which may be adopted after service of the document which institutes the proceedings in the event that the defendant state does not acknowledge service, it does not address the issues arising in the present case. That is because the document instituting the proceedings had been served in accordance with section 12.

61. The first case which holds directly, albeit *obiter*, that the court has power to dispense with service of a claim form instituting proceedings against a state is the decision of Mr Andrew Henshaw QC sitting as a Deputy Judge of this court in *Certain Underwriters at Lloyd's of London v Syrian Arab Republic* [2018] EWHC 385 (Comm), a case in which (like the *EU v Syria* case) the defendant state took no part. The action was an action at common law to enforce a United States judgment which was commenced by the issue of a claim form. The Deputy Judge acknowledged at

[13] that "the requirements of section 12 are mandatory and good service cannot be made without adhering to them". He held at [23] that there had in fact been good service in accordance with these requirements.

62. However, in case he was wrong about that, he went on to consider the claimant's application for an order dispensing with service under CPR 6.16. He held that the court had power to make such an order which was not inconsistent with section 12. The totality of his reasoning on the point is contained at [25] as follows:

> "The House of Lords in *Kuwait Airways* was not asked to, and did not, consider the possibility that service might be dispensed with. If dispensing with service would be inconsistent with the mandatory nature of section 12 of the 1978 Act then the court would not have power to make such an order. However, I do not consider there to be an inconsistency. Section 12 applies to 'Any writ or other document required to be served for instituting proceedings against a State'. If, exceptionally, the court has made an order dispensing with service of the claim instituting the proceedings, then it is not a document 'required to be served' within section 12."

63. The Deputy Judge went on to find that the circumstances were exceptional.

64. This decision was followed by Teare J in *Havlish v Islamic Republic of Iran* [2018] EWHC 1478 (Comm) without elaboration of the reasoning. However, while the decision on this point in *Certain Underwriters at Lloyd's* was *obiter*, the decision in *Havlish* can be regarded as *ratio* as an order was made for dispensing with service under CPR 6.16. It was, however, another case in which the defendant state played no part.

65. Finally, in his ruling on the without notice application leading to the making of the order in the present case (see [2018] EWHC 1912 (Comm)) Teare J said at [1]:

> "I grant the order on the basis first that the order is not in conflict with section 12 of the State Immunity Act which only deals with the manner in which a foreign government should be served. It has been held in this court that the section does not deal with the question whether it is appropriate to dispense with service. The court has jurisdiction to dispense with service, and I have concluded that it is appropriate to do so in the circumstances of this case. …"

66. It appears that Teare J was referring to the *Certain Underwriters at Lloyd's* and *Havlish* cases.

67. From this review of the English authorities I would reach the following conclusions.

68. First, there is no doubt that, where it applies, service in accordance with section 12 is mandatory (*Westminster City Council*, *Kuwait Airways Corporation*, *EU v Syria*, *Certain Underwriters at Lloyd's*). However, while this is frequently stated, it must be heavily qualified if service can be dispensed with.

69. Second, there are indications in some cases that section 12 contemplates that all proceedings of whatever nature against a state must be instituted by a document which is required to be served (*Westminster City Council*, *Norsk Hydro*). In particular,

in the arbitration context, it is at least implicit in *Norsk Hydro* and *L v Y Regional Government of X* that an order giving permission to enforce an award is such a document notwithstanding that (as the judges who decided those cases would certainly have known) as a matter of domestic procedural law enforcement proceedings are started by the issue of an arbitration claim form.

70. Third, however, there are also cases going the other way which suggest that service is not required if as a matter of domestic procedural law proceedings can be instituted by the issue of a document which is not required by the rules to be served on the defendant or if service can be dispensed with (*Gold Reserve*, *Certain Underwriters at Lloyd's*, *Havlish*, and Teare J's ruling on the without notice application in the present case). It is, however, fair to say that these cases appear to take the position for granted without engaging with the considerations identified above and that in at least the first two of these cases the brief discussion of this issue was *obiter*.

71. Fourth, the requirement that the time for acknowledgment of service shall not begin to run until two months from service of the order represents an important protection for states which, in this respect, are in a different position from other defendants (*Norsk Hydro*, *L v Y Regional Government of X*).

72. Fifth, while it is clear that alternative service against a state is not possible (*Westminster City Council*, *Certain Underwriters at Lloyd's*), there are cases which hold that service of the document instituting proceedings may be dispensed with altogether (*Certain Underwriters at Lloyd's*, *Havlish*, and Teare J's ruling in the present case).

73. Sixth and importantly, there is no authority binding on me requiring me to hold either that proceedings can be commenced against a state without there being any document which is to be served on that state or that such service can be dispensed with.

74. Finally so far as the authorities are concerned, I should refer to the valuable Singapore case of *Van Zyl v Kingdom of Lesotho* [2017] SGHC 104, [2017] 4 SLR 849 which was also concerned with enforcement of a New York Convention award against a state. It does not appear to have been cited in any of the English cases mentioned above which post-date it. Section 14 of the Singapore State Immunity Act was modelled on section 12 of the United Kingdom Act and, as in this jurisdiction, the relevant Singapore procedural rules required service of the order granting permission to enforce an award but not necessarily of the originating summons which commenced the proceedings.

75. Kannen Ramesh J analysed the decision in *Norsk Hydro* and concluded (correctly in my view) that although Gross J had not examined the specific wording of section 12(1), it was implicit in his decision that an order granting permission to enforce an award was a "writ or other document required to be served for instituting proceedings against a State". He referred also to the view of Hamblen J in *L v Y Regional Government of X* and held at [25] and [26] that in the case of proceedings to enforce an award, it was the order granting permission to enforce which constituted a "document required to be served for instituting proceedings against a State".

76. Kannen Ramesh J developed this conclusion at [41] to [49], referring to the importance of the two-month period for the state to respond, the observation in *Fox &*

Webb "that service of process is a first stage in the institution of proceedings" by which "the defendant is made aware of the claim, of the proposed court to adjudicate it, and of his required presence to answer the claim", and the absence (if the section did not apply) of any "clear ground rules for effecting service of leave orders on a sovereign". In my respectful view this is powerful and apposite reasoning.

77. Mr Toledano pointed out that the procedural position in Singapore is different because the Singapore rules do not include any equivalent of CPR 62.18. However, that does not affect the force of Kannen Ramesh J's decision that it is the order granting permission to enforce an award which constitutes a document within the Singapore equivalent of section 12. That depended on the construction of the statute which, as he observed, could not be affected by subsidiary legislation such as rules of court, still less by rules of court which were only introduced after the enactment of the statute (see [27] and [33]).

Conclusion

78. I would conclude, therefore, that in the case of proceedings to enforce an arbitration award under section 101 of the Arbitration Act 1996, a document is required for instituting proceedings against a state. That document is the arbitration claim form in a case where the court requires the claim form to be served, but if (as is commonly the case and was the case here) it does not so require, it is the order granting permission to enforce the award. In either case, the document must be served in accordance with section 12 of the State Immunity Act 1978.

79. I would hold further that the court has no power to dispense with service in such a case as this would be contrary to the mandatory terms of section 12.

80. To the extent that the cases which I have discussed hold otherwise, I respectfully decline to follow them. In circumstances where the cases are very recent and their reasoning is brief, and moreover where the defendant states were not represented, these cases cannot be regarded as comprising a settled line of authority which ought without more ado to be followed by other judges at first instance. They were, moreover, decided without consideration of the Singapore authority of *Van Zyl v Kingdom of Lesotho*.

Dispensing with service

81. In case I am wrong about this, and on the assumption that the court has a power to dispense with service of the order, I should consider whether it would be appropriate to do so. I can do so relatively briefly.

82. There was a certain amount of debate before me as to whether the applicable regime for dispensing with service would be CPR 6.16 (which requires "exceptional circumstances") or CPR 6.28. Ultimately, however, I do not think that this matters. In my judgment this is clearly a case where the circumstances were exceptional.

83. Mr Davies relied on the fact that the claimant had not attempted to effect service through the Foreign & Commonwealth Office and submitted that the court should not entertain an application to dispense with service unless either (1) the claimant had at least attempted unsuccessfully to effect service in this way or (2) it was demonstrated

by clear and cogent evidence that service on the relevant Ministry of Foreign Affairs would be impossible. I do not accept these submissions. As to the first, I accept that the fact that the claimant has not attempted service through the Foreign & Commonwealth Office is a factor to be taken into account but its weight will depend on all the circumstances. It is not a fetter on the meaning of the general phrase "exceptional circumstances". In the present case it is a factor which has very little weight. As to the second submission, a requirement of impossibility sets the bar too high. There is in my judgment no need to gloss the expression "exceptional circumstances" in this way. It is a broad and flexible test which should not be unduly complex to apply and should not be rigidly circumscribed.

84. The claimant's evidence before Teare J placed some weight on the fact that, as was wrongly asserted, there was some uncertainty about which of the rival entities was to be regarded as the Government of Libya. Notwithstanding this, however, the evidence established that much of Libya was in a state of civil unrest and was violent and unstable, with armed militia groups active in the capital endangering civilian lives and safety, an atmosphere of persistent lawlessness and a real risk of a full-scale civil war. The British Embassy had closed, with diplomats moving to neighbouring Tunisia, although visits to Libya were sometimes possible and some diplomatic staff remained in the country. There was at least uncertainty as to the time which would be required to effect service through the Foreign & Commonwealth Office, assuming this was possible at all. There were some periods when it would have been dangerous to attempt to deliver documents to the Ministry of Foreign Affairs as a result, not only of the situation in Tripoli generally, but also the presence of armed militia around the Ministry itself.

85. If such conditions (and similarly conditions in Syria and Iran, the other states where orders have been made dispensing with service) do not amount to exceptional circumstances, it is difficult to know what would.

86. Events since the order of Teare J have demonstrated that these concerns were well-founded. There were outbreaks of serious violence in Tripoli in which, by September 2018, 115 people had died and 383 had been injured. Reports by the United Nations Support Mission in Libya have described Tripoli as being "on the brink of all-out war". It remains unstable with the potential for further large-scale conflict. Indeed, as I am writing this judgment there are reports of an armed attack by militants on the Ministry involving loss of life, with newspaper photographs of black smoke rising from the building.

87. This is not to deny that there have also been some times when the situation has been calmer so that life has returned more or less to normal, and that during such times delivery of documents to the Ministry of Foreign Affairs would be possible. However, such times tend to be short lived and unpredictable in advance. Indeed the evidence suggests that the stated view of the Foreign & Commonwealth Office is that service of documents on the Ministry in Libya is not at all straightforward, too dangerous, and (assuming it to be possible at all) likely to take over a year.

88. On the other hand, there is a strong public policy that arbitration awards should be honoured and, if not honoured, enforced; there was no doubt that the defendant state was aware of the award but had decided not to pay it and that measures could be taken

(as they were) to ensure that it would become aware of the court enforcement proceedings.

89. Accordingly, if I had concluded that the court has power to dispense with service, I would have found that there were exceptional circumstances and would have exercised a discretion to do so.

Disposal

90. In view of the conclusions which I have reached paragraphs 4 and 5 of the order of Teare J must be set aside. Paragraph 6 must be varied to provide that the defendant may apply to set aside the order, that the time for any such application shall run from two months after service of the order on the Ministry of Foreign Affairs, and that the award shall not be enforced in the meanwhile. Paragraph 7 of the order may stand, but likewise must not be enforced pending any application to set the order aside.

91. This may be regarded as an unsatisfactory outcome. It means that there will at best be considerable delay in the enforcement of the award, a result which flies in the face of the established policy of the law to promote the speedy and effective enforcement of arbitration awards. Nevertheless it follows in my view from the terms of section 12 of the State Immunity Act 1978 and reflects the fact that, despite the modern inroads made into the doctrine of state immunity in commercial transactions, states remain different from other litigants. Much has changed in the world since the days of King David, but his advice remains sound. Those who put their trust in princes are liable sometimes to be disappointed.