Neutral Citation Number: [2019] EWCA Civ 1110

Case No: A4/2019/0283

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE LORD JUSTICE MALES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2019

Before:

THE MASTER OF THE ROLLS
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE FLAUX

- -

Between:

GENERAL DYNAMICS UNITED KINGDOM LIMITED	**Appellant**
- and -	
THE STATE OF LIBYA	**Respondent**

- -
- -

Mr Daniel Toledano QC & Mr James Ruddell (instructed by **Reed Smith**) for the **Appellant**
Mr Huw Davies QC & Mr Lucas Bastin (instructed by **Curtis, Mallet-Prevost, Colt & Mosle**) for the **Respondent**

Hearing date: 13th June 2019

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Approved Judgment

Sir Terence Etherton MR, Lord Justice Longmore and Lord Justice Flaux:

Introduction

1. How as a matter of English law is an award made against a foreign state to be enforced? When the State Immunity Bill was first introduced to Parliament, the answer was clear. The exceptions to immunity specified in the bill (including that for commercial transactions) did not extend to enforcement because clause 14 provided that there was to be no execution against the property of a foreign state except against commercial ships or cargoes. That provision was dropped from what in due course became the State Immunity Act 1978 ("the 1978 Act").

2. In this case Teare J made an order on 20th July 2018 giving permission to the claimant to enforce an arbitration award made by an ICC arbitral tribunal in Geneva. The order was in what would have been a conventional form in a case between two commercial parties save perhaps that the order dispensed with the need for formal service although it provided for notice of the order to be given in such a way as would bring notice of the order to the respondent. The dispute which was the subject of the award was not, however, a dispute between ordinary commercial parties since the respondent was a sovereign state, namely the state of Libya ("Libya"). Libya has applied to set aside those parts of Teare J's order which dispense with service and provide for notice to be given to it, on the basis that section 12(1) of the 1978 Act requires service through the Foreign and Commonwealth Office ("the FCO") of

   > "any writ or other document required to be served for instituting proceedings against a State".

   Since no service in this manner of either the arbitration claim form or the judge's order giving permission to enforce the award has occurred, Libya asserts that the judge's order must be set aside and that the award cannot be enforced until service in that manner is achieved. Any assets of Libya in England, pending such service and pending any further dispute about enforcement of the award, cannot therefore be used to satisfy the award.

3. It might be thought that this is a comparatively academic application since service through the FCO should be straightforward but Libya is in turmoil. The Government of National Accord in Tripoli is the only government recognised by the United Kingdom but there is a parallel government based in Tobruk (known as the House of Representatives). The evidence established that armed militia groups are active in Tripoli endangering the lives and safety of civilians with a real risk of full scale civil war. The view of the FCO is that service of documents on the Ministry of Foreign Affairs is not straightforward, too dangerous and, even if possible at all, likely to take over a year.

4. The question whether service of the judge's order is required is therefore by no means academic and is likely to be of practical relevance whenever there is to be service on a state which is suffering internal conflict or for some other reason service through the FCO and indeed any formal service is likely to be difficult.

5. The application to set aside the relevant parts of the order of Teare J came before Males J as he then was. Males LJ, as he later became, decided that the order of the judge had

to be served through the FCO, and that there was no jurisdiction to dispense with such service. Had there been such jurisdiction he would have upheld the judge's order dispensing with service but, in the absence of such jurisdiction, the result was that the award cannot currently be enforced in England at all. He concluded his judgment by saying, with King David (who, he apparently thought, wrote Psalm 146), that those who put their trust in princes are liable to be disappointed. The claimant, in whose favour the award was made, now appeals.

Background to appeal

(1) Facts

6. 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 5th January 2016 by an ICC arbitral tribunal in Geneva. The arbitral proceedings were commenced in 2013 and Libya 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.

7. Libya 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 was no difficulty 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.

(2) Attempts to enforce

8. The award is a New York Convention award enforceable pursuant to section 101 of the Arbitration Act 1996 ("the 1996 Act"). This provides:-

> "101. (1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
>
> (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> …
>
> (3) Where leave is so given, judgment may be entered in terms of the award."

9. 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 a (without notice) 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:-
>
> > 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 £2,207.41.
>
> (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 r.44.7 the Defendant shall pay the Claimant's costs of and incidental to this application, summarily assessed in the amount of £60,000.00."

10. 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 Libya 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. (All three addresses were associated with the Government of National Accord, the recognised government of Libya). 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.

11. 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 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.

12. The proceedings did come to the attention of Libya 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.

(3) Legal background

13. One of the principal mischiefs, with which the 1978 Act was designed to deal, was the inadequacy of the common law of state immunity in relation to commercial transactions conducted by foreign states. In this respect the law of England had fallen behind the international consensus that states should be amenable to court proceedings in respect of such transactions without being hampered by debate on the question whether they had been entered into iure imperii or iure gestionis, as the law then required.

14. Section 1 of the 1978 Act 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."

15. Thus, the default rule remains 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).

16. 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

17. 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 drawn up by the Claimant; and

b) 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. …"

18. 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.

19. 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 which may need to be served for the institution of or during the course of such proceedings: European Union v Syrian Arab Republic [2018] EWHC 1712 (Comm) at [41].

Dispensing with service

20. 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."

21. CPR 6.28 provides:-

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

22. Thus CPR 6.16 is limited to claim forms and requires "exceptional circumstances", whilst 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.

23. 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 judgment

24. The judge concluded that the 1978 Act contemplates that there will always be some document which is required to be served for the purpose of instituting proceedings and that that document must be served through the FCO. In this case that document was the order permitting enforcement of the award as a judgment. He gave 3 reasons for that conclusion:-

    1) otherwise there would be grave difficulties with the working of the section; these difficulties were:-

        a) the loss of the protection afforded by section 12(2) of the Act;

        b) the absence of the ability to obtain a default judgment;

        c) the need for the executive (in the form of the FCO) to have the power to control whether, when and how a foreign state should be brought before the English court;

    2) the 1978 Act had to be construed consistently with the European Convention on State Immunity 1972 which required both the document by which proceedings were instituted and a copy of any judgment given by default against a state to be transmitted through diplomatic channels to the Ministry of Foreign Affairs of the defendant state; and

    3) since, in the absence of specific provision to the contrary, section 1 of the Act provides for immunity

    > "except as provided in the following provisions of this Part of the Act"

    and since Libya had not been served in accordance with section 12 which is one of those following provisions, the status quo (of immunity) provided for in section 1 must prevail. Since the court had made no order that the claim form be served the order granting permission to enforce the award had to be regarded as the instituting document.

25. The judge then concluded further that in the light of the mandatory nature of section 12, there was no possibility of applying CPR 6.16 to dispense with service through the FCO, although, if there was such power, the circumstances were sufficiently exceptional to justify such dispensation.

Submissions

26. Mr Daniel Toledano QC for the claimant submitted to the judge and to us first that section 12(1) of the 1978 Act only requires service of a document which institutes proceedings and is required to be served. There is no requirement that an arbitration claim form (which is the document instituting the proceedings for the enforcement of the award) be served so section 12(1) has no application to that document. The order permitting enforcement of the award as a judgment does have to be served but it is not the document instituting the proceedings so that section 12(1) does not apply to that either. Secondly he submitted that, in any event, there is still a power in the court to dispense with such service because, once a judge orders that service of a document is to be dispensed with, that document is no longer "required to be served".

27. Mr Huw Davies QC supports the judge's conclusion that the document which has to be served (namely the order permitting enforcement of the award as a judgment) must be treated as the document instituting the proceedings since, as the judge held, Parliament must have contemplated that no proceedings could be instituted without service through diplomatic channels. He also supports the judge's conclusion that there is then no power to dispense with service.

28. By a respondent's notice he submits that the judge was incorrect to hold that there were exceptional (or any) circumstances justifying dispensing with service pursuant to CPR 6.16 and that no such order should have been made even if there was no obligation to serve the order permitting enforcement of the award through the FCO.

Issue 1: The meaning of section 12(1)

29. The judge would have accepted Mr Toledano's first submission if it was right to view the matter solely from the perspective of English procedural law but he did not accept that that was the correct perspective from which section 12 should be viewed. He said (para 38):-

> "In my judgment that section (which predates 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."

30. As to this, we agree that the statute has to be read in accordance with English procedural law as it is from time to time (and is, in that sense, what para 17.9 of Bennion, Statutory Interpretation 7th ed. (2017) calls an ambulatory statute) but we cannot, with respect, agree that it is wrong to view section 12 from the perspective of English procedural

law. There is, after all, no other procedural law from the perspective of which section 12 can be viewed. The references in section 12 to "writ", "service", "entering an appearance", "rule of court" and "default of appearance" can only be understood by reference to English procedural law. The fact that some of these terms (writ, appearance) are now obsolete means, no doubt, that the statute has to be construed by reference to their modern equivalents (claim form, acknowledgement of service) but that creates no difficulty in what is agreed to be an ambulatory statute.

31. The judge's reference to the fact that the 1978 Act predates the Arbitration Act 1996 and the CPR is, of course, correct but that does not make it wrong to look at the section from the perspective of English procedural law let alone make it right to construe the section differently from its apparent meaning.

32. The most that can be said is that if the Arbitration Act 1996 or the CPR had created a new situation whereby, for the first time, the document instituting the proceedings did not have to be served and the document which did have to be served was not the document instituting proceedings then it might be right to construe section 12 in the light of the procedural law that existed at the time rather than in the light of the new regime.

33. Mr Toledano submitted that, even if the current procedural regime for enforcing awards was entirely new, the statute was still clear and should be given its natural meaning. In case, however, this submission did not find favour, he took us through the procedural picture as it existed in 1978 and submitted it was essentially no different from the position as it exists now.

Procedural background against which the 1978 Act was enacted

34. There was always a similarity between the provisions for enforcement of judgments by registration under Part II of the Administration of Justice Act 1920 ("the Act of 1920") and the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("the Act of 1933") on the one hand and, on the other hand, the provisions for the enforcement of awards under the Arbitration Act 1950. The Act of 1933 applied to judgments given in a number of countries but not, notably, the United States of America. Any foreign judgment which was not registrable could only be enforced by action and any action on a foreign judgment would therefore have been begun by a writ which was required to be served and section 12 of the 1978 Act would then apply so that the writ would undoubtedly have to be transmitted through the FCO.

35. As far as arbitral awards were concerned, they could also be enforced by action but section 26 of the Arbitration Act 1950 provided a speedier available method:-

> "(1) An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

36. After the United Kingdom acceded to the New York Convention of 10th June 1958, section 3 of the Arbitration Act 1975 provided:-

> "(1) A Convention award shall … be enforceable –

a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950."

37. RSC 1965 Order 71 (as amended in 1972) made procedural provision for reciprocal enforcement of judgments (as well as enforcement of European Community Judgments). Order 71 rule 2 provided:-

> "2. (1) An application
>
> (a) under section 9 of the Act of 1920, in respect of a judgment obtained in a superior court in any part of Her Majesty's dominions or other territory in which Part II of that Act applies, or
>
> (b) under section 2 of the Act of 1933, in respect of a judgment to which Part I of that Act applies,
>
> to have the judgment registered in the High Court may be made ex parte, but the Court hearing the application may direct a summons to be issued.
>
> (2) If the Court directs a summons to be issued, the summons shall be an originating summons.
>
> (3) No appearance need be entered to an originating summons under this rule.
>
> …
>
> 5. (1) An order giving leave to register a judgment must be drawn up by, or on behalf of, the judgment creditor.
>
> (2) Except where the order is made on summons, no such order need be served on the judgment debtor.
>
> (3) Every such order shall state the period within which an application may be made to set aside the registration and shall contain a notification that execution on the judgment will not issue until after the expiration of that period …"

Rule 7(1) required service of notice of the registration of the judgment.

Rules 17 and 20 then made similar provisions in respect of European Community Judgments.

38. RSC 1965 Order 73 rule 8 made equivalent provision for registration in the High Court of foreign awards:-

> "8. Where an award is made in proceedings on an arbitration in any part of Her Majesty's dominions or other territory to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act

1933 extends, being a part to which Part II of the Administration of Justice Act 1920 extended immediately before the said Part I was extended thereto, then, if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place, Order 71 shall apply in relation to the award as it applies in relation to a judgment given by that court, subject, however, to the following modifications:-

(a) for references to the country of the original court there shall be substituted references to the place where the award was made; and

(b) the affidavit required by rule 3 of the said Order must state (in addition to the other matters required by that rule) that to the best of the information or belief of the deponent the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."

39. On 24th July 1978, the Rules Committee, comprising (inter alia) Lord Elwyn-Jones LC, Lord Denning MR and Eustace Roskill LJ provided for an additional rule to be added at the end of Order 73 in the following terms:-

"**10. Enforcement of award under s. 26 of the Arbitration Act 1950**

(1) An application for leave under section 26 of the Arbitration Act 1950 to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made ex parte but the Court hearing the application may direct a summons to be issued.

(2) If the Court directs a summons to be issued, the summons shall be an originating summons to which no appearance need be entered.

(3) An application for leave must be supported by affidavit –

(a) exhibiting the arbitration agreement and the original award or, in either case, a copy thereof,

(b) stating the name and the usual or last known place of abode or business of the applicant (hereinafter referred to as "the creditor") and the person against whom it is sought to enforce the award (hereinafter referred to as "the debtor") respectively,

(c) as the case may require, either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

(4) An order giving leave must be drawn up by or on behalf of the creditor and must be served on the debtor by delivering a copy to him personally or by sending a copy to him at his usual or last known place of abode or business or in such other manner as the Court may direct.

(5) Service of the order out of the jurisdiction is permissible without leave, and Order 11, rules 5, 6 and 8, shall apply in relation to such an order as they apply in relation to notice of a writ.

(6) 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 fix, the debtor may apply to set aside the order and the award shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the order, until after the application is finally disposed of.

(7) The copy of the order served on the debtor shall state the effect of paragraph (6) …"

40. It can readily be seen that the rules in force at the time when the 1978 Act was passed were not materially different from the current procedural position under the CPR. Proceedings were begun ex parte by a process which did not require service, although a judge could order a summons to be issued.

41. The enactment of RSC Order 73 rule 10 so close to the date of the 1978 Act (4 days after Royal Assent was given on 20th July 1978 but well before it came into force on 22nd November 1978) may be coincidence but it is perhaps not insignificant that Elwyn-Jones LC sponsored the bill during its passage through the House of Lords at the same time as he chaired the Rules Committee which brought in the new RSC Order 73 rule 10. Whatever the position as to that, Parliament as a whole must be taken to have known in 1978 that there was a procedure for instituting registration of both foreign judgments and foreign awards without requiring service of the initiating document.

42. This construction of the 1978 Act in accordance with its terms is, moreover, eminently understandable. At the time when a foreign state is first sued, it is natural enough that such suit should be transmitted through the FCO. But if, in fact, a foreign state has fully participated in (or deliberately declined to participate in) proceedings in litigation or arbitration, it does not obviously need the protection of enforcement proceedings being transmitted through the FCO and it is difficult to see that the FCO has any particular interest in being involved in what is the continuing effort by a claimant to obtain just satisfaction. Once it is enacted that a foreign state is not immune to proceedings in respect of commercial transactions and/or arbitrations (sections 3 and 9 respectively) and no immunity is conferred in respect of enforcement, there is no reason why the ordinary procedural law of England should not apply in the ordinary way.

43. Mr Davies for Libya submitted that, if the 1978 Act is construed in this way, there are then no ground rules protecting the foreign state from immediate execution in respect of its assets. But that is not so. The order permitting enforcement of the award as a judgment still has to be served (although, since it is not the document instituting the proceedings, it does not have to be served through the FCO) and that order should, as a matter of course, give the state two months to set aside the order with no risk of

execution meanwhile as envisaged by CPR 62.18(9) and as ordered by Teare J in this case.

44. In Norsk Hydro ASA v State Property Fund of Ukraine (2002) [2009] Bus LR 558 Morison J had made an order giving permission to enforce an award not merely against the State Property Fund of Ukraine (the party to the arbitration) but also against the Republic of Ukraine itself (which had not been a party to the arbitration or named as respondent in the award). He had also included a provision in the order giving the respondents 21 days (rather than 2 months) from the date (rather than service) of the order to apply to set it aside. The order (and its associated judgment) were in fact served through the FCO on 24th July 2002. Without further notice (although well after the 21 day period) the claimant obtained an interim third party debt order from Andrew Smith J on 13th September 2002 requiring Ukraine's London bank not to pay out funds to Ukraine save in so far as they exceeded the judgment debt.

45. Ukraine applied to set the Morison J order aside because it was made without jurisdiction since Ukraine itself had never been a party to the arbitration or the award and neither section 3 nor section 9 of the 1978 Act applied to it, so it was immune.

46. Gross J upheld this first submission and discharged the order of Morison J and also the order of Andrew Smith J which depended on the earlier order. Ukraine had, however, also argued even if it was wrong on its first submission, that the Andrew Smith J order should in any event be set aside on the ground of prematurity since it had been granted less than two months after service of the Morison J order in the Ukraine, being the two months granted by section 12(2) of the 1978 Act for entering an appearance. This was issue II as set out in paragraph 13 of the judgment of Gross J which described it (para 21) as having been fully argued so that he would decide it.

47. The claimant's argument was that section 12 applied only to the court's "adjudicative jurisdiction" not to its "enforcement jurisdiction" so that section 12 did not apply at all. Gross J rejected that argument and agreed that no application for the third party debt order should have been made earlier than two months from service of the Morison J order on 24th July 2002. He was not asked to consider the issue presently before us, namely whether section 12(1) required service of either the arbitration claim form or the order permitting enforcement of the award through the FCO. He said (para 25):-

> "(4) As it seems to me, section 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 section 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 section 12 so as to preclude its application to the enforcement of awards under CPR r 62.18.
>
> (5) In so far as it remains in dispute, I am satisfied that the wording in section 12(2) of the 1978 Act, "Any time for entering

> an appearance (whether prescribed by rules of court or otherwise)" applies to the time period to be set by the court as available to a defendant to seek to set aside an order for enforcement under CPR r 62.18(9). If need be, section 22(2) of the 1978 Act ("references to entry of appearance … include references to any corresponding procedures"), though, I suspect, primarily designed for other purposes, is capable of supporting such a construction; for my part, however, I would be inclined to arrive at my conclusion on the wording of section 12(2) standing alone but read in context."

48. Males LJ said (para 54) of this passage that it was implicit in the Norsk Hydro decision that the order giving permission to enforce was a document "required to be served for instituting proceedings". But he acknowledged that the contrary was not argued. For our part, we do not consider that it was necessarily implicit in the decision of Gross J that the order permitting the enforcement of the award was a document required for instituting proceedings. Gross J was only concerned to say that section 12 of the 1978 Act applied to enforcement as much as to adjudication, as it clearly does in respect of e.g. non-registrable foreign judgments. But the precise requisites of service were not a matter he needed to (or did) address.

49. There is in any event a difficulty in relying on the requirement of acknowledgement of service within 2 months of receipt by the Ministry of Foreign Affairs of the order permitting enforcement of the award on a judgment. That is that there is no requirement (or indeed provision) for the entry of an appearance or an acknowledgement of service of a registrable foreign judgment or arbitration award unless the court specifies that the document instituting proceedings needs to be served. The relevant procedure is that the respondent has time to apply to set aside the order and no appearance or acknowledgement of service is provided for. This is as much the case when documents are transmitted through the FCO as when they are not.

50. This was a point to which Stanley Burnton J was alive in AIC Ltd v Federal Government of Nigeria 13th June 2003 unreported. AIC Ltd was attempting to enforce a judgment obtained in Nigeria under the Act of 1920. He held that Nigeria was immune under section 1 of the 1978 Act because there was immunity in respect of actions on judgments. Like Gross J he held that section 1 applied to both the court's adjudicative jurisdiction and the court's enforcement jurisdiction and that, accordingly, an order registering the Nigerian judgment under the Act of 1920 should be set aside. He then said (para 23):-

> "I add that it was assumed by those acting for AIC that the service of notice of an order for the registration of a judgment under the 1920 Act is the equivalent of a "writ or other document required to be served for instituting proceedings against the State" within the meaning of section 12(1) of the 1978 Act, and that an application by a State to set aside the registration is the equivalent of the entry of an appearance within the meaning of section 12(2). They relied on section 22(2) of the 1978 Act, which provides that references to entry of appearance and judgment in default of appearance include references to any corresponding procedures. It was on this basis that they applied

> to Master Yoxall for, and obtained, an order extending the Defendants' time to apply to set aside the order for registration to 2 months from the date of service. In my judgment, those assumptions are unfounded. An application to set aside the registration of a judgment is not a "corresponding" procedure to an entry of appearance. An entry of appearance is an act that precedes a judgment, whereas an application to set aside a registration is made after judgment has been entered into. The registration of a foreign judgment is not the equivalent of a judgment in default of appearance: it precedes the service of any United Kingdom proceedings on the defendant. Section 12(4) and (5) cannot be made to apply to the registration of a judgment under the 1920 Act on an application made without notice to the defendant state."

51. We respectfully consider Stanley Burnton J to have been right about this and that the same consideration applies to arbitral awards. The correct procedure for awards is, as set out in CPR 62.18, that, if no order is made requiring service of the claim form, the order permitting enforcement of the award as a judgment (and any associated judgment) must be served; such order must, in accordance with CPR 62.18(9), set a period within which the state may apply to set aside the order and provide for it not to be enforced meanwhile. No doubt, in the case of a foreign state, the normal such period should be two months by analogy with section 12(2) but there is no statutory requirement that that period must always be given.

52. Nor, since the order permitting the enforcement of the award is not the document instituting the proceedings, need the order be served through the FCO. CPR 62.18 provides for service out of the jurisdiction in accordance with CPR 6.40-46 as if the order were an arbitration claim form. CPR 6.44(3) provides how this is to be done but, since this is merely one rule of the CPR, service by such method may in an appropriate case be dispensed with if the relevant (co-ordinate) rule about dispensation from service applies. It would be quite different if section 12 of the 1978 Act required either the arbitration claim form or the order permitting enforcement of the award as a judgment to be served through the FCO since the CPR cannot prevail over a statutory requirement.

53. It is fair to say that other parts of the judgment of Stanley Burnton J in AIC were adversely commented on by some members of the Supreme Court in NML Capital Ltd v Republic of Argentina [2011] 2 AC 495 but there was no comment about the passage cited above.

54. It is also fair to say that in Van Zyl v Kingdom of Lesotho (8th May 2017) the High Court of Singapore has taken the view that the order permitting enforcement of the award is to be treated as a document instituting the proceedings which should, therefore, be transmitted through the equivalent of the FCO for the purpose of the Singapore State Immunity Act. But the arguments presented to us seem to be rather different from those presented to Kannan Ramesh J and the relevant Orders and Rules do not seem to be in altogether the same terms as the English CPR. We prefer to base our decision on our own view of the meaning of the statute and the relevant procedural rules.

The European Convention

55. Males LJ attached importance to the terms of the European Convention on State Immunity 1972 but the 1978 Act was never intended to replicate the Convention. The 1978 Act is more comprehensive than the Convention and applies worldwide, not just to European states. Moreover the relevant Article 16 of the Convention is in different terms from section 12 of the 1978 Act. It provides as follows:-

> "(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."

56. If Parliament had wished to replicate the Convention, it would have been easy enough to do so. It would then have been the case that the arbitration claim form which institutes the proceedings would have been required to be served through the FCO. That is not, however, what section 12 provides and, as we have said, there is good reason for that. We do not therefore consider that it is appropriate to give section 12 a strained meaning merely because of the terms of the Convention.

Policy considerations

57. It must be recognised that there are policy considerations which pull in opposite directions. One important policy is that arbitration awards should be honoured, particularly if the state has participated fully in the arbitration. Obstacles to enforcement should be few and far between.

58. As against this, there are still sensitivities about impleading a foreign state. One would like to think that normally there would be no difficulty in serving a foreign state through the FCO and the Foreign Ministry of that State. On occasion, however, there will be serious difficulties; such difficulties are perhaps more likely to arise after adjudication than before because it is at that stage that liability is quantified and the state, if it is a case of a commercial transaction or an arbitration, will be expected to pay up.

59. Both these considerations were referred to by the judge in paragraphs 29 and 88 respectively. In the circumstances the correct course for a court is to go by the deliberately chosen wording of the statute rather than adopt a meaning different from the natural reading of the words.

Conclusion on first issue

60. It follows, in our judgment, that it was not mandatory in this case that either the arbitration claim form or the order permitting the enforcement of the award as a judgment had to be served through the FCO. The order permitting the enforcement of the award did, of course, have to be served pursuant to CPR 62.18(8)(b) and CPR 6.44 (which deals with service of documents on a foreign state) but the court has jurisdiction in an appropriate case to dispense with service in accordance with CPR 6.16 and/or 6.28. If that course is taken it will, of course, always be appropriate to notify the state that the order has been made and, therefore, to make arrangements (as Teare J did) to notify the state in such a way as will come to the attention of the organs of state which will be responsible for honouring the award.

61. We stress, however, that such notification does not amount to alternative service and must not be used as a proxy for such service which (counsel agreed) cannot be used where the respondent is a state. CPR 6.16 and 6.28 draw a distinction between dispensing with service of a claim form which may only be ordered "in exceptional circumstances" and dispensing with service in other circumstances as to which there is a general discretion. Strictly speaking, therefore, it could be said that a judge has a general discretion to dispense with service of the order permitting enforcement of the award. We nevertheless consider that, when the order permitting enforcement of the award is to be the first time that the foreign state receives notice of a claimant's attempt to enforce an award, it is only right and proper that the court should apply the test of exceptional circumstances. It is in this way that the valid policy considerations mentioned in para 58 can (and must) be taken into account, while the court is enabled

to take into account the countervailing policy of enforcing awards in an appropriate case. The judge was thus quite correct to apply the test of exceptional circumstances to the question of dispensing with service in this case. That is the test which he applied when he dealt with the matter in case he was wrong on the first issue.

Issue 2: dispensing with service

62. The second issue is whether, if the judge was correct to hold that the order permitting enforcement of the award must be treated as a document required to be served for instituting proceedings against a state, an order can nevertheless be made dispensing with service and it can then be said that in the light of such dispensation the order permitting enforcement of the award is no longer a document required to be served. In the light of our decision on the first issue, the second issue does not arise. We would, however, say that if the judge was right that, in every case, section 12 of the 1978 Act requires service through the FCO of an order permitting an award to be enforced as a judgment, we would not accept that, even so, service can be dispensed with.

63. The argument is that, if the judge dispenses with service in an appropriately exceptional case, there is then no document required to be served within section 12. That is an impossible construction. If right, it would give the judge a discretion to dispense with a statutory requirement and that cannot be the law. The judge so concluded in paragraphs 78-9 of the judgment and we agree with him. It follows that the (obiter) decision to the contrary by Deputy Judge Andrew Henshaw QC in Certain Underwriters at Lloyd's of London v Syrian Arab Republic [2018] EWHC 385 (Comm) at para 25 cannot be considered good law. In the learned deputy judge's defence, we note that the state was unrepresented so that he cannot have had full argument on the point.

Issue 3: Discretion – exceptionality?

64. The judge decided that if he had had a discretion to dispense with service he would have found that the circumstances were sufficiently exceptional to justify such dispensation. Mr Davies therefore has a high hurdle to surmount in attacking this exercise of discretion.

65. He submitted that the claimant had never attempted to serve through the FCO. The judge accepted that that was the position but decided not to accord it much weight in the circumstances. Those circumstances were that (as the judge accepted) the stated view of the FCO was that service is Libya "is not at all straightforward, too dangerous and (assuming it to be possible at all) likely to take over a year" (para 87). The FCO's own lack of enthusiasm for the process is palpable.

66. The judge observed:-

> "84. …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."

67. Mr Davies submitted that the judge should only have upheld the order dispensing with service if service was impossible and that the judge had focused only on the claimant's evidence and not on the substantial body of evidence filed by the defendant state. But impossibility is not a condition of exceptional circumstances and the evaluation of the evidence was a matter for the judge not for this court. He was not obliged to set out all the evidence to which he proposed to give little weight.

68. Mr Davies submitted further that the judge was wrong to take into account matters that had arisen since the judgment of Teare J. He relied for this purpose on the decision of Hoffmann J in ISC Technologies Ltd v Guerin [1992] 2 Lloyds Rep 430, a case in which a without notice order for service out of the jurisdiction had been made and, when an application was made to set aside that order, it was sought to rely on evidence subsequent to the making of the without notice order. That learned judge said (page 434):-

> "Mr Crystal said I should look at the position today. An application under R.S.C., O. 12, r. 8 is a rehearing of the application to the Master and the exercise of a fresh discretion. It should therefore take into account whatever has since happened. I do not agree. The application is under R.S.C., O. 12, r. 8(1)(c) to discharge the Master's order giving leave to serve out. The question is therefore whether that order was rightly made at the time it was made. Of course the Court can receive evidence which was not before the Master and subsequent events may throw light upon what should have been relevant considerations at the time. But I do not think that leave which was rightly given should be discharged simply because circumstances have changed. That would mean that different

> answers could be given depending upon how long it took before the application came on to be heard. The position is quite different when the application is for a stay on the grounds of forum non conveniens. In such a case, the appropriate time to consider the matter is the date of the hearing. It follows that I agree with what Mr Justice Millett said in Mr Radcliffe's application: …
>
> On an application by the defendant to set aside leave previously granted the onus remains on the plaintiff to establish that England is the appropriate forum and the test has to be applied by reference to the same date, i.e. the date on which the order granting leave was made."

69. Even on the assumption that the same principles apply to applications to set aside orders dispensing with service as apply to orders setting aside orders for service out of the jurisdiction, we do not think that the judge can be faulted by reference to the ISC case, because the subsequent events relied on by the judge were only used to "demonstrate that the concerns of Teare J were well-founded". He was thus continuing to look at the position as it was before Teare J since, as Hoffmann J put it, those events threw light "upon what should have been relevant considerations at the time". Teare J had to consider both events which had occurred and the likely prospective position. In any event the judge's reference to subsequent events was merely an additional reason supporting the conclusion he had already reached.

70. We do not therefore think it appropriate to differ from the judge on what was effectively an exercise of discretion, albeit only on the basis that he was wrong in saying that it was necessary for the claimant to serve the order enforcing the award as a judgment through the FCO.

Overall conclusion

71. We would therefore allow the first ground of appeal, set aside the order of Males LJ and restore the order of Teare J.

Appeal No. A4/2019/0283

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE LORD JUSTICE MALES

Before:
THE MASTER OF THE ROLLS
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and

THE RIGHT HONOURABLE LORD JUSTICE FLAUX

BETWEEN:

GENERAL DYNAMICS UNITED KINGDOM LIMITED
Claimant / Appellant

- and -

THE STATE OF LIBYA
Defendant / Respondent

Order

UPON the application of the Defendant dated 19 September 2018

AND UPON the Appellant's appeal from the Order of Lord Justice Males dated 21 January 2019

AND UPON hearing from Leading Counsel for the Appellant and Leading Counsel for the Defendant

IT IS ORDERED THAT:

1. Paragraphs 1, 2, 3 and 6 of the Order of Lord Justice Males dated 18 January 2019 be set aside.

2. Paragraph 6 of the Order of Mr Justice Teare dated 20 July 2018 be varied so as to provide: "The Defendant may, within 28 days of when any appeal, following an application for permission to appeal to the Supreme Court by the Defendant, is finally disposed of, apply to set aside or vary paragraphs 1, 2 or 3 of the Order of Mr Justice Teare dated 20 July 2018 (the "**Variation Application**") and the Award shall not be enforced until after the expiration of that period, or, if the Defendant makes such a Variation Application, until after the Variation Application has been finally disposed of".

3. Paragraph 7 of the Order of Mr Justice Teare dated 20 July 2018 be varied so as to provide: "Pursuant to CPR r.44.7 the Defendant shall pay the Claimant's costs of and incidental to this application, summarily assessed in the amount of £60,000.00. This costs

order shall not be enforced until after the expiration of the period of 28 days from the date when any appeal, following an application for permission to appeal to the Supreme Court by the Defendant, is finally disposed of, or, if the Defendant makes a Variation Application, until after the Variation Application has been finally disposed of".

4. The Respondent's application for permission to appeal is refused.

5. The Defendant is to pay the Claimant's costs of and incidental to the Defendant's application dated 19 September 2018, including the costs below and of this appeal, summarily assessed in the amount of £200,000, to be paid within 21 days of the date of this order.

6. The Claimant be released from its obligation to courier the Arbitration Claim Form, the Order of Mr Justice Teare dated 20 July 2018 and the associated documents to the following address, as set out in paragraph 5(b) of the Order of Mr Justice Teare dated 20 July 2018: Interim General Committee for Defence, Ghaser Bin Gashour, Tripoli, Libya.

Dated: 3 July 2019