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ENGLISH COURTS CONSIDER REQUIREMENTS FOR SERVICE OF LEGAL PROCESS UPON FOREIGN STATES

Qatar National Bank QPSC v Eritrea [2019] EWHC 1601 (Ch) and *General Dynamics United Kingdom Ltd v Libya [2019] EWCA Civ 1110*

Introduction

Two recent decisions of the English courts have raised questions regarding the English law applicable to the service of claim forms and documents upon foreign States, requiring judicial interpretation of the procedural protections foreign States enjoy by virtue of the State Immunity Act 1978, as well as English procedural law regarding proper service upon States, and whether such rules can ever be dispensed with.

Qatar National Bank QPSC v Eritrea [2019] EWHC 1601 (Ch) (27 June 2019)

Introduction

In *Qatar National Bank QPSC v Eritrea* [2019] EWHC 1601 (Ch), the English High Court held that there were exceptional circumstances justifying dispensing with the need for service of the claim form upon Eritrea and granting summary judgment in favour of the claimant. Although there was a mandatory procedure under English statute and procedure rules requiring service upon States to be undertaken through the diplomatic route, the order dispensing with service took the matter outside of that mandatory procedure.

Background

Section 12(1) of the State Immunity Act 1978 requires that "*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*". Rule 6.44 of the Civil Procedure Rules governs service of claim forms or other documents on a State.

Qatar National Bank obtained permission to serve Eritrea out of the jurisdiction. As Eritrea was not a party to the 1965 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, the court documents needed to be legalised by the UK Foreign & Commonwealth Office and then (under Eritrea's own rules) re-legalised by Eritrea's Embassy in the United Kingdom before service could be effected under the State Immunity Act 1978. When the Eritrean Embassy did not do the re-legalisation, and service could not be effected through the diplomatic route, Qatar National Bank obtained an order for service by an alternative method (allowing service on the Eritrean Embassy). Thereafter, Qatar National Bank applied for summary judgment on its claim against Eritrea for repayment of a loan.

Decision

The English High Court (Master Kaye) granted summary judgment in favour of Qatar National Bank. Eritrea was not represented at the hearing before Master Kaye.

Master Kaye held that where a document had to be served in accordance with Section 12(1) of the State Immunity Act 1978, it was invalid to effect service by an alternative method, and thus the service on the Eritrean Embassy was invalid.

The court was empowered by Rule 6.16 of the Civil Procedure Rules to dispense with service in exceptional circumstances, unless that rule was trumped by another statutory provision. Master Kaye held that the text of Section 12 of the State Immunity Act 1978 did not preclude the court's exercise of that power because a purposive interpretation of "*required to be served*" was sufficiently broad to accommodate a situation where there was no document "*required to be served*" to commence proceedings. Where service was dispensed with, Section 12 of the State Immunity Act 1978 would not apply because there was no document "*required to be served*". Following the enactment of the Civil Procedure Rules, where litigants were prevented from avoiding legal obligations by obstructing service, it could not be considered that Parliament would have intended the State Immunity Act 1978 to allow States to be able to avoid legal obligations in the same manner.

Master Kaye held that ideally service upon States should be effected through diplomatic channels. The court could dispense with service on States in exceptional circumstances, but the court should be slow to find that such exceptional circumstances existed. The evidence required to be considered included the conduct of the foreign State in question and the measures taken by the claimant to effect service. It was Eritrea's own requirement that court documents be re-legalised by the Eritrean Embassy before Eritrea could be served and thus it was incumbent on Eritrea to ensure that there was in place an appropriate process for compliance. Although Eritrea had entered into a jurisdiction agreement in favour of England as a dispute resolution forum in the instant case, Eritrea had nevertheless frustrated attempts for service to be effected upon it. Such circumstances justified an order dispensing with the need for service.

Master Kaye granted summary judgment for Qatar National Bank, subject to the qualification that it would not be enforceable until after the order dispensing with the need for service of

the claim form had been communicated to Eritrea and Eritrea had been afforded an opportunity to respond.

General Dynamics United Kingdom Ltd v Libya **[2019] EWCA Civ 1110 (3 July 2019)**

Introduction

In *General Dynamics United Kingdom Ltd v Libya* [2019] EWCA Civ 1110, the English Court of Appeal interpreted Section 12 of the State Immunity Act 1978 and held that it was not mandatory for an arbitration claim form or an order permitting enforcement of an arbitration award to be served in accordance with Section 12 of the State Immunity Act 1978.

Background

General Dynamics United Kingdom Ltd had obtained an order for permission to enforce an arbitral award in its favour against Libya, which also (given the internal conflicts in Libya) dispensed with the need for formal service upon Libya. Libya was notified of the permission order's existence by couriering documents to three separate addresses, including Libya's Ministry of Foreign Affairs, and subsequently applied successfully for the order dispensing with service to be set aside. At first instance, Males J (as he then was) held that the State Immunity Act 1978 had envisaged that there would always be some document that would be "*required to be served*" to commence proceedings, and in that situation such service had to be through the diplomatic route as per Section 12(1) of the State Immunity Act 1978. However, as the statutory provision did not itself prescribe what that document should be, the issue should be viewed from the perspective of English civil procedure. Males J held that the State Immunity Act 1978 needed to be interpreted in a manner consistent with the European Convention on State Immunity, which required transmission through the Foreign & Commonwealth Office to the foreign State's Ministry of Foreign Affairs. Section 12 of the State Immunity Act 1978 was phrased in mandatory terms, which entailed that there was no scope for the English courts to apply Rule 6.16 of the Civil Procedure Rules to dispense with service upon a State. General Dynamics appealed against the finding that the English courts had no jurisdiction to dispense with service upon a State.

Decision

The English Court of Appeal (Sir Terence Etherton MR; Longmore LJ; Flaux LJ) allowed the appeal in part.

In interpreting Section 12(1) of the State Immunity Act 1978, the Court of Appeal held that when a foreign State was first sued, it was natural that service should be via the diplomatic route. However, by the time that the proceedings had moved on to the enforcement stage, foreign States no longer required the procedural protection of transmission through the Foreign & Commonwealth Office. Given that foreign States did not have immunity from proceedings in respect of commercial transactions and/or arbitrations, or to their enforcement, there was no reason why English procedural law should not be applicable. Although an order

permitting enforcement of an arbitral award had to be served, it was not a "*document instituting proceedings*" and therefore service did not have to take place in accordance with Section 12 of the State Immunity Act 1978. Part 62 of the Civil Procedure Rules (governing service of arbitration claims) allowed service out of the jurisdiction, but that method could be dispensed with. Dispensing with service of an order permitting enforcement of an arbitration award did not require "exceptional circumstances", but merely fell for consideration in the court's general discretion. But, where such an order would entail the foreign State's first notification of an attempt to enforce an arbitral award, the court should nevertheless apply the test of "exceptional circumstances".

Having found that an order permitting enforcement of an arbitral award was not a "*document instituting proceedings*", and therefore service of it did not have to take place in accordance with Section 12 of the State Immunity Act 1978, it was not strictly necessary for the court to determine the issue of dispensing with service of document "*instituting proceedings*". Nevertheless, the Court of Appeal considered that if Males J had been correct to find that Section 12 of the State Immunity Act 1978 required service of an order permitting enforcement of an award to be done through the diplomatic route, then such a service method was mandatory and could not be dispensed with. The Court of Appeal considered that the argument that an order dispensing with service had the effect that there was no document "*required to be served*" was untenable as it would allow judges a discretion to dispense with a statutory requirement.

CONCLUDING REMARKS

The judgments mark the latest development in a series of cases that have considered the requirements for service upon foreign States for the purposes of English litigation, often where issues have arisen due to internal turmoil or conflict in the foreign State in question. As States continue to be regular litigants/defendants in the English courts, it is desirable for there to be a greater degree of certainty to this important area of procedural law.