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The Road Goes Ever On: Diplomatic Service in relation to Award Enforcement Proceedings Against Foreign States: *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22

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The Road Goes Ever On: Diplomatic Service in relation to Award Enforcement Proceedings Against Foreign States: *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22

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Arbitration awards; Enforcement; Foreign Commonwealth and Development Office; Service; Singapore; State immunity

Abstract

The seemingly straightforward question of what and how a foreign state should be served when an award creditor seeks to enforce an arbitral award against the state has provoked differing views. On one hand, comity requires foreign states to be given notice of proceedings by a formal and predictable method through diplomatic processes. On the other hand, the potential for abuse by states, and practical difficulties of effecting diplomatic service, may exist in certain circumstances. This issue is of practical importance given the rise in cross-border investment with the Belt & Road Initiative and international investment instruments. This case note analyses the balance struck by the United Kingdom Supreme Court on this issue in General Dynamics United Kingdom Ltd v State of Libya*, comparing it with the approach of the Singaporean courts.*

Introduction

A recent empirical analysis by Galliard and Penushliski showed that instances of a state's non-compliance with awards rendered by tribunals in investor-state disputes remain significant.[1] Even where investors have pursued enforcement or applied diplomatic pressure, compliance may often take years to achieve.[2] All of

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[1] Emmanuel Gaillard and Ilija Mitrev Penushliski, "State Compliance with Investment Awards" (2020) 35(3) ICSID Review 540, 586.

[2] See, e.g. the history of the proceedings in *Mr Franz Sedelmayer v The Russian Federation through the Procurement Department of the President of the Russian Federation*, SCC, Arbitration Award (7 July 1998).

this translates to high costs and longer waiting time before an investment arbitration award is successfully enforced. It is therefore no surprise that the process of enforcing an investment arbitral award has been characterised as a long and winding road.

General Dynamics United Kingdom Ltd (GD) was spared no slack when it sought to enforce its award valued at over £16 million plus interest and costs against the state of Libya (Libya). In particular, it faced a hurdle in the form of a requirement for service of enforcement proceedings on Libya through diplomatic channels under s.12(1) of the United Kingdom State Immunity Act 1978 (UKSIA).[3]

Although seemingly straightforward at first glance, the United Kingdom Supreme Court (UKSC) in *General Dynamics United Kingdom Ltd v State of Libya* (*General Dynamics*)[4] came to a bare majority decision in deciding whether GD must abide by the service requirement under s.12(1) of the UKSIA when serving the enforcement order on Libya. This division all the more accentuates the tension underlying the service of proceedings against foreign states, namely the need to respect the sovereignty of states and principles of international comity on the one hand, and the facilitation of commercial dealings between states and private parties on the other, including allowing parties to enforce their contractual bargain *pacta sunt servanda*.

In Singapore, the issue was last considered in *Josias Van Zyl v Kingdom of Lesotho* (*Josias Van Zyl*),[5] but it has yet to be examined by the apex court. This note compares and contrasts *General Dynamics* with that of the prevailing Singapore approach, and considers the extent to which *General Dynamic* may be persuasive the next time a similar issue arises before the Singapore courts.

Facts

The English High Court and Court of Appeal proceedings

GD commenced arbitration proceedings against Libya pursuant to a dispute arising from a contract for the supply of communications systems. The arbitral proceeding was presided by a tribunal convened under the International Chamber of Commerce (ICC) seated in Geneva. The tribunal issued an award of £16,114,120.62 plus interest and costs, in favour of General Dynamics (the Award).

Libya did not comply with the Award. GD thus sought to enforce the Award against Libya in the United Kingdom by initiating proceedings before the London Commercial Court. Specifically, GD issued an arbitration claim form and applied without notice for permission to enforce the award as a judgment under s.101 of the English Arbitration Act 1996 read with r.62.18(1)(b) of the English Civil Procedure Rules (the CPR). Ordinarily, r.62.18(7)(b) of the CPR states that the enforcement order obtained from the court must be served onto the award debtor. In GD's case, however, it sought to dispense with service of these documents under rr.6.16(1) and 6.28(1) of the CPR.[6] Rule 6.16(1) of the CPR gives the English courts the power to dispense with service of a claim form in exceptional

[3] UK State Immunity Act 1978 (Cap. 33).
[4] *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22 (*General Dynamics*).
[5] *Josias Van Zyl v Kingdom of Lesotho* [2017] 4 S.L.R. 849 (*Josias Van Zyl*).
[6] UK Civil Procedure Rules.

circumstances, whereas r.6.28(1) gives the English courts the power to dispense with service any document which is to be served in proceedings.

Given the exceptional circumstances which existed in Libya such as the closure of the British Embassy in Tripoli and political instability in Libya which resulted in violence, at an ex parte hearing Teare J granted GD permission to enforce the Award and to dispense with service of the arbitration claim form and enforcement order (the Enforcement Order). Instead, GD was ordered to give notice of the enforcement proceedings directly to Libya. Even then, the scale of fighting in Tripoli was such that notice was provided only on the second attempt by a private security company employing former British Army soldiers, some two months following Teare J's granting of the Enforcement Order.

On September 2018, Libya applied to the English High Court to set aside the parts of the Enforcement Order that dispensed with service on the basis that this was contrary to established procedures under legislation. In particular, Libya argued that that service must be done through the relevant foreign affairs authorities in accordance with s.12(1) of the UKSIA which provides as follows:

> "(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, Commonwealth and Development 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."

Libya's application was upheld at first instance. Males LJ held that service must be effected in accordance with s.12(1) of the UKSIA. Consequently, the court did not have the discretion to dispense with service of the enforcement order under rr.6.16 and/or 6.28 of the CPR.

GD appealed against Males LJ's decision. The English Court of Appeal (CA) agreed with Males LJ on the mandatory effect of s.12 of the UKSIA. Despite this, the English CA held that the arbitration claim form, which was the relevant document which initiated the enforcement proceedings, was not required to be served on an award debtor under r.62.18 of the CPR. On the other hand, the enforcement order was not a document "instituting" the enforcement proceedings, but it must be served on the award debtor under r.62.18(8)(b) of the CPR. In other words, none of the documents fell within the plain wording of s.12(1). This also meant that the court has the power in this limited situation to dispense with the service requirement under rr.6.16 and 6.28 of the CPR. Males LJ's decision was thus reversed, and GD was not required to serve either the claim form or Enforcement Order via the Foreign, Commonwealth and Development Office (FCDO). This prompted an appeal by Libya to the UK Supreme Court (UKSC).

The United Kingdom Supreme Court proceedings

For the purposes of this note, the relevant issues before the UKSC were as follows:[7] does s.12(1) of the UKSIA require the mandatory diplomatic service of the document instituting enforcement proceedings on the foreign state? If so, which

[7] *General Dynamics* [2021] UKSC 22 at [10].

document—the arbitration claim form or the enforcement order—was "required to be served for instituting proceedings" under s.12(1) (the Service Issue)? Finally, can the CPR be applied to dispense with diplomatic service of the relevant enforcement document under exceptional circumstances (the Dispensation Issue)?

The majority's approach

On the Service Issue, GD argued that enforcement proceedings do not fall within the scope of s.12(1) of the UKSIA. This is because, under the CPR, the application which institutes the enforcement proceedings (i.e. using an arbitration claim form) may be made without notice (r.62.18(1)), whereas the document which must be served (i.e. the order giving permission to enforce the award) is not one which institutes proceedings (r.62.18(7)(b)).[8]

The majority comprising Lord Lloyd-Jones, Lady Arden and Lord Burrows disagreed on the basis that it would be too narrow an approach to define when proceedings are instituted from the perspective of procedural law. Instead, a broader reading of the words "other document required to be served for instituting proceedings against a State" in s.12(1) of the UKSIA was preferred, such that there is always some document which must be served on a respondent state at the start of proceedings. This interpretation is preferred since service of process on a state "involves an exercise of sovereignty and gives rise to particular sensibilities".[9] In this connection, the overarching purpose of the UKSIA was to govern relations between sovereign states.[10] Specifically, the purpose of s.12(1) was to avoid any breaches of international law arising from the English court's invocation of jurisdiction to hear disputes involving a foreign state.[11] Where enforcement proceedings are commenced against a foreign state, therefore, the state must be given adequate notice to respond to proceedings which affected its interests.[12]

Additionally, the majority held that nothing in s.12(1) of the UKSIA shows that Parliament's intention was to leave the law on diplomatic service of proceedings to the UK Civil Procedure Rules Committee's determination.[13] Hence, the approach towards interpreting s.12(1) cannot be influenced by the view under the CPR on what constitutes the institution of arbitral enforcement proceedings.

The phrase "instituting proceedings" must therefore be considered from a respondent state's point of view, such that an enforcement proceeding would only be deemed as having commenced where the respondent state was served with the enforcement order.[14] Accordingly, an enforcement order would be a document that falls to be served within s.12(1).[15]

In support of this conclusion, the majority referred, inter alia, to Hamblen J's dicta in *L v Y Regional Government of X* (*L v Y*).[16] There, the issue was whether the applicant must serve an arbitration claim form for enforcing a peremptory order

[8] *General Dynamics* [2021] UKSC 22 at [40].
[9] *General Dynamics* [2021] UKSC 22 at [43].
[10] *General Dynamics* [2021] UKSC 22 at [58].
[11] *General Dynamics* [2021] UKSC 22 at [43] and [60].
[12] *General Dynamics* [2021] UKSC 22 at [44] and [62], citing Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd edn (Oxford: Oxford University Press, 2013), p.234.
[13] *General Dynamics* [2021] UKSC 22 at [42].
[14] *General Dynamics* [2021] UKSC 22 at [40].
[15] *General Dynamics* [2021] UKSC 22 at [41].
[16] *L v Y Regional Government of X* [2015] 1 W.L.R. 3948 (*L v Y*).

made by the arbitral tribunal on the respondent state. Specifically, the phrase "instituting proceedings" under s.12(1) of the UKSIA was considered. In Hamblen J's view, the starting position was to examine the nature of the proceedings brought by the applicant. On the facts, although the application was ancillary to an ongoing arbitration, it involved the "initiation" of "separate proceedings" for invoking "the court's procedures and powers" for the first time against the respondent state.[17] This, coupled with the "general and unqualified" wording of s.12(1),[18] led Hamblen J to conclude that the arbitration claim form was a document which instituted proceedings and must be served to the respondent state.

Although *L v Y* involved an application under s.12(1) of the UKSIA for the service of an arbitration claim form and not an enforcement order, the majority in *General Dynamics* held that Hamblen J's dicta "applies with equal force" to an enforcement order.[19] What mattered was the nature and substance of an application to invoke the court's procedure and powers in support of the arbitral process. In particular, the Enforcement Order obtained by GD fulfils the dual purpose of invoking the English court's jurisdiction over GD's enforcement claim against Libya, whilst also giving notice to the latter of the same. The Enforcement Order was therefore a document which instituted proceedings against Libya and must be served under s.12(1).[20]

Turning to the Dispensation Issue, the UKSC held that where s.12(1) applies, the court cannot dispense with the service requirements by invoking rr.6.16 and/or 6.28 of the UKCPR. This is because r.6.1(a) of the CPR provides that Part 6 of the CPR applies "except where … any other enactment … makes different provision". In any event, it is established law that subsidiary legislation cannot override requirements laid out in primary legislation.[21]

The minority's approach

The minority Lord Stephens (with whom Lord Briggs agreed) opted for a narrower interpretation which excluded *both* the arbitration claim form and enforcement order from the scope of s.12(1) of the UKSIA.

First, the minority adopted a purposive interpretation of s.12(1) in light of principles of international comity relating to the restrictive doctrine of state immunity.[22] These included the requirement that states "abide by the rules of the marketplace" if they wish to enjoy the benefits of the free market, the certainty for commercial persons or entities dealing with states to obtain access to justice,[23] and a state's honouring of their commercial legal obligations through treating foreign investors with "mutual respect and dignity".[24] Section 12(1) would thus have to be read in a manner that facilitates these principles.[25]

[17] *L v Y* [2015] 1 W.L.R. 3948 at [28], [35] at [40].
[18] *L v Y* [2015] 1 W.L.R. 3948 at [30].
[19] *General Dynamics* [2021] UKSC 22 at [66].
[20] *General Dynamics* [2021] UKSC 22 at [66].
[21] *General Dynamics* [2021] UKSC 22 at [81] and [93].
[22] *General Dynamics* [2021] UKSC 22 at [133].
[23] *General Dynamics* [2021] UKSC 22 at [140]–[141].
[24] *General Dynamics* [2021] UKSC 22 at [146].
[25] *General Dynamics* [2021] UKSC 22 at [178].

Secondly, the minority was of the view that any interpretation of s.12(1) must conform to international law.[26] In this regard, a survey of state practice and *opinio juris* showed that nothing under customary international law: (i) required mandatory diplomatic service of proceedings on foreign states; or (ii) prohibited the dispensation of service on a foreign state if service is impossible or unduly difficult.[27] Since customary international law practices relating to service of proceedings on foreign states is non-existent, it was not appropriate to impose mandatory diplomatic service under s.12(1).

Finally, the minority held that the operation of s.12(1) must be interpreted in light of the context in which it was enacted.[28] Emphasis was placed on two key factors: first, that by referencing procedural matters of service in s.12(1), there was a "fair presumption" that the UK Parliament's intention was to allow for such procedural matters to be interpreted in line with UK procedural law;[29] and second, that at the time UKSIA was enacted civil procedure applications could be initiated without giving notice to the respondent party. The phrase "required to be served" under s.12(1) must therefore exclude applications that were served without notice.[30]

The minority thus concluded that the arbitration claim form and enforcement order fell beyond the scope of s.12(1) since the former was a document that need not be served, whereas the latter was not a document which instituted proceedings.[31]

As to the Dispensation Issue, the minority observed that if r.6.28 of the CPR operated to dispense with service of the enforcement order, then that document is no longer "required to be served" under s.12(1).[32] Coupled with the minority's conclusion that s.12(1) must be read together with domestic law, an enforcement order which service is dispensed with will no longer be a document falling under the scope of s.12(1).

Analysis

A broader interpretation of s.12(1) of the UKSIA preferred

It is a fundamental rule of domestic procedural law that national courts are seised of jurisdiction over disputing parties when the relevant documents which initiates court process has been served by the claimant to the respondent.[33] In the case of proceedings brought against a foreign state, an oft relied upon defence involves the foreign state invoking the doctrine of sovereign immunity. As Lord Sumption in *Benkharbouche v Embassy of the Republic of Sudan* observed, "[s]tate immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction".[34] This defence, however, is not absolute. That is

[26] *General Dynamics* [2021] UKSC 22 at [134].
[27] *General Dynamics* [2021] UKSC 22 at [148]–[149], [165].
[28] *General Dynamics* [2021] UKSC 22 at [135].
[29] *General Dynamics* [2021] UKSC 22 at [170].
[30] *General Dynamics* [2021] UKSC 22 at [171] and [180].
[31] *General Dynamics* [2021] UKSC 22 at [195].
[32] *General Dynamics* [2021] UKSC 22 at [238].
[33] Under Singapore law, the basis of the jurisdiction of the High Court in Singapore is entirely statutory, and the provisions of the relevant statutes must be satisfied before the court has jurisdiction to hear the case: see, e.g. *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 S.L.R. 453 at [20]–[21]. Under s.16(1) of the Supreme Court of Judicature Act, jurisdiction is properly founded if the defendant has been served, whether in Singapore or abroad.
[34] *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs intervening)* [2019] A.C. 777 at [17].

why s.1 of the UKSIA provides State Immunity Actides that a foreign state may not raise the defence of immunity in the various situations prescribed by the UKSIA. One such instance is under s.9(1) of the UKSIA, which states:

> "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

Given the broad wording of s.9(1) of the UKSIA, a state is arguably not immune to subsequent enforcement proceedings where that state had agreed in writing to submit the dispute to arbitration.[35] Indeed, Butcher J took the opportunity to consider this point in a subsequent dispute between GD and Libya. Following the UKSC's decision in *General Dynamics*, the dispute was brought back to the English High Court, where this time Libya sought to set aside the ex parte order which Teare J granted. Specifically, Libya alleged that GD failed to comply with its duty of full and frank disclosure by failing to inform the court, amongst others, that Libya may be entitled to both adjudicative and enforcement immunity under the UKSIA. That challenge was dismissed by the Butcher J.[36] In particular, Butcher J accepted GD's argument that its failure to disclose potential issues of immunity which Libya may be entitled when applying for the ex parte order before Teare J was irrelevant. This was because the process of obtaining leave to enforce an arbitral award is the final stage in rendering the arbitral procedure effective, such that it falls under the scope of s.9(1).[37] Accordingly, no issues of immunity arise for consideration.

Complications may arise, however, when a state argues that it did not agree to submit the dispute to arbitration in the first place or otherwise challenges the arbitration agreement on other grounds.[38] Regardless of the merits of the state's case, an argument could be made that the state is still entitled, at the outset, to the procedural privileges afforded to states under s.12(1) of the UKSIA for mandatory diplomatic service. This is the position taken by the Singapore courts so far: to say s.12(1) should only apply to states which are immune or not immune requires the court to pre-judge the issue of immunity, which is properly left to the state to raise after service has been effected.[39]

This brings us neatly to the problem presented in the case at hand. The issue lies in the mismatch of procedural requirements between the commencement of arbitration-related court proceedings through service of the relevant documents in general, and the service requirements under s.12(1). As regards the latter, a plain reading of the phrase "documents required to be served for instituting proceedings against a State shall be served" leads one to conclude that the mandatory service requirement under s.12(1) only applies to those (a) which must be served; and (b) which institutes proceedings.

[35] See, e.g. *Eiser Infrastructre Ltd v Kingdom of Spain* [2020] 142 ACSR 616 (Federal Court of Australia) at [181]–[200]. In that case, the Federal Court of Australia held that by submitting to arbitration under the relevant investment treaties, Spain had also submitted to the jurisdiction of the Federal Court for the purposes of enforcement of the awards rendered. This also meant that Spain had waived any reliance on foreign state immunity from the jurisdiction of such courts in proceedings to recognise and enforce such awards.

[36] *General Dynamics United Kingdom Ltd v State of Libya* [2022] EWHC 501 (Comm) (*General Dynamics* [2022]).

[37] *General Dynamics* [2022] at [31]–[33], citing *Svenska Petroleum Exploration v Lithuania (No.2)* [2007] Q.B. 886 at [117].

[38] See, e.g. *General Dynamics* [2022] at [33]. Butcher J observed that issues regarding state immunity may arise in the process of enforcing an arbitral award where a state disputes the applicability of the arbitration clause.

[39] *Josias Van Zyl* [2017] 4 S.L.R. 849 at [67].

The two documents relevant for commencing enforcement proceedings, i.e. the arbitration claim form and the enforcement order granted by the court, on the other hand, do not fulfil the conjunctive requirements. In relation to the arbitration claim form, it is essentially the first document which the award creditor must prepare and file before the English courts to enforce an award pursuant to r.62.18(1) of the CPR. An enforcement proceeding thus commences only when an application is filed using the arbitration claim form. However, given that such an application is made "without notice" by default, it is usually not required to be served unless the court expressly specifies otherwise under r.62.18(2) of the CPR. As for the enforcement order, r.62.18(7)(b) of the CPR mandates the service of that order on the award debtor, which in this case is the respondent state. Since the enforcement order is only granted following the initiation of the proceedings, characterising that order as a document that "institutes" proceedings is awkward and unnatural.

Taken to its logical conclusion, an award creditor need not serve either document to a respondent state whenever the former seeks to enforce its arbitral award against assets of the state in countries that adopt such procedural rules. Practically speaking, such an outcome would deprive the state of notice of, and the opportunity to resist, enforcement proceedings in relation to its targeted assets, as the majority in *General Dynamics* noted.[40]

It is arguable that such an approach is incompatible with the importance placed on respecting sovereign immunity within the sphere of public international law.[41] Comity requires foreign states to be given notice of English proceedings brought against them by a predictable method, namely service through the FCDO.[42] The minority's argument that states who enter into the marketplace must abide by the rules of the marketplace[43] has been criticised: first, the authorities that the minority relied upon does not clearly support the application of this concept of a "marketplace" in the context of service of proceedings under s.12(1) of the UKSIA; and second, that since the UKSIA is concerned with more than simply subjecting foreign states to the rules of the "marketplace", it follows that the majority's broader conception of comity is more consistent with the underlying policies of the UKSIA.[44]

A valid concern raised by the minority and the way forward

That being said, interpreting s.12(1) of the UKSIA to encompass enforcement orders may also give rise to another practical concern. Recall that under s.9(1) of the UKSIA, a state's agreement to arbitrate a commercial or investment matter amounts to a waiver of its immunity from arbitration-related proceedings. This arguably includes the enforcement of any subsequently rendered arbitral award.[45]

[40] *General Dynamics* [2021] UKSC 22 at [43].
[41] Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) [2012] ICJ Rep. 99 at [57].
[42] *General Dynamics* [2021] UKSC 22 at [59]–[62].
[43] *General Dynamics* [2021] UKSC 22 at [166].
[44] Christoper Harris QC and Cameron Miles, "General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, [2021] 3 WLR 231" (2022) 116(1) *The American Journal of International Law* 157 at 161–162.
[45] *Svenska Petroleum v Government of the Republic of Lithuania* [2006] EWCA Civ 1529 at [67]–[71] and [117]; *NML Capital Limited v Republic of Argentina* [2011] UKSC 31 at [89]–[90]. Indeed, a state's submission to the enforcement procedures before domestic courts may also be implied from various international conventions, bilateral investment treaties and arbitral institutional rules. For instance, art.53(1) of the ICSID Convention requires the disputing parties to "abide by and comply with the terms of the award", whereas art.54(1) obliges every ICSID Contracting Party to recognise ICSID awards as binding. For non-ICSID Convention awards, art.III of the 1958

However, by mandating that award creditors adhere to the diplomatic service of proceedings on respondent states under s.12(1), this opens up a risk that the latter would conduct itself in an uncooperative and even dilatory manner by refusing the receipt of service, thereby reintroducing through the backdoor a "de facto" form of immunity.

This was why the minority in *General Dynamics* observed that by mandating diplomatic service of proceedings, foreign states may "obtain immunity *de facto* by being obstructive about service, or by putting diplomatic pressure on the [relevant government agency] not to serve or to delay the service of the proceedings".[46] Put another way, critics of the majority view argue that the majority's view will open the door for abuse by states to frustrate enforcement attempts. One may argue that this concern is more apparent than real. After all, a state's interest in securing a steady stream of foreign direct investments, especially in developing countries, may mean that there is no incentive to behave in an obstructive manner for fear of reputational repercussions.[47] The reality, however, is that the amounts involved in investor-state disputes are often in the range of hundreds of millions to even billions of dollars.[48] The sums that states are ordered to pay may result in some choosing to pursue all available means to resist the enforcement of awards.

As with all things, the key is finding the delicate balance between giving states requisite notice so that they have a fair opportunity to resist enforcement, and at the same time minimise attempts by states to abuse this procedural privilege. One possible solution suggested here is to introduce the concept of substituted service, such that, if despite genuine attempts, service cannot be effected diplomatically via the foreign ministry involved, service can be deemed effected if, for instance, the documents are sent through email and/or courier to the government legal officers who represented the state in the underlying arbitration.

Ultimately, the root cause of this entire matter stems from the language of the relevant statutory provisions under both the UKSIA and the CPR relating to the service of enforcement orders on foreign states, which are apt to confuse. Short of legislative intervention, the court could, at the very least, consider adopting a broader interpretation of the phrase "service shall be deemed to have been effected when the writ or document is received at the Ministry" under s.12(1) of the UKSIA. Although the interpretation of the term "received" was not dealt in *General Dynamics* given the majority's conclusion, Lord Lloyd-Jones nevertheless referenced several English High Court decisions which considered when a foreign state can be said to have "received" a writ or document under s.12.[49]

Convention on the Recognition of International Arbitral Awards provides that states are obligated to recognise arbitral awards as binding. Article 34(2) of the 2010 Arbitration Rules of the United Nations Commission on International Trade Law and art.35(6) of the 2017 International Chamber of Commerce Court of Arbitration's Rules of Arbitration also require parties to "carry out" arbitration awards "without delay".

[46] *General Dynamics* [2021] UKSC 22 at [109].

[47] Other reasons may include adherence to an international rule-based system; pressure or fear of retribution from the investor's home state or from other international actors; to avoid penalties in the sovereign bond arena; or to appease domestic political structures: Moshe Hirsch, "Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach" (2016) 19 J. Intl Econ. L. 681.

[48] See, e.g. the *Gold Reserve v Venezuela* arbitration, where Gold Reserve was awarded more than US$746 million in damages; the *Crystallex v Venezuela* arbitration, where Crystallex obtained an award of US$1.38 billion in damages; and in the *Union Fenosa Gas v Egypt* case, US$2 billion in damages was awarded in favor of Union Fenosa Gas against Egypt.

[49] *General Dynamics* [2021] UKSC 22 at [34].

In *Certain Underwriters at Lloyds London v Syrian Arab Republic* (*Certain Underwriters*), the court held that it is not sufficient for the relevant documents to be transmitted from the FCDO; rather, they must actually reach the relevant ministry, although acceptance is not necessary since the recipient could evade service by declining to accept delivery.[50] This reasoning was endorsed by Jacobs J in *Union Fenosa Gas SA v Egypt* Unión Fenosa Gas SA v Egypt (*Unión Fenosa*).[51]

On the other hand, the English High Court in *Estate of Michael Heiser v Islamic Republic of Iran* held that "a document … cannot be received if a person expressly refuses to accept it".[52] Such a conclusion, according to Stewart J in that case, was supported by the plain meaning of the word "receive".[53]

Given the policy consideration concerning the potential for abuse, and as a matter of practicality, it is submitted that the decision in *Certain Underwriters* and *Unión Fenosa* should be expressly preferred. Accordingly, the relevant test ought to be whether all relevant steps have been taken to bring notice of the proceedings to the relevant foreign state's ministry of foreign affairs (or an equivalent office), such that no further step could have been taken or was needed to effect proper service.[54] In *Certain Underwriters*, the court held that the arrival of the documents within the Syrian Ministry of Foreign Affairs' premises constituted valid receipt under s.12(1) of the UKSIA, notwithstanding that Ministry's representative insisted on their immediate removal.[55] Likewise, in *Unión Fenosa*, the court held that there was valid service of the proceedings from the FCDO via the British embassy in Cairo to the Egyptian Ministry of Foreign Affairs, despite the respondent state returning the documents to the British embassy. Jacobs J rejected the argument that the documents ought to be returned because service was not directed to the correct department within the respondent state's government, since s.12 of the UKSIA only required the documents to be served to the "Ministry of Foreign Affairs of the State".[56] Further, that the documents had not been properly addressed did not render the receipt of the documents invalid.[57]

The approach in other foreign jurisdictions

Besides the UK, a few other common law jurisdictions have legislatively prescribed for a similar rule of service through diplomatic channels on states.[58] Singapore is one such jurisdiction.

Section 14(1) of the State Immunity Act 1979 (SGSIA)[59] governs the procedural requirements for service of process on foreign states under Singapore law. It is *in pari materia* with s.12(1) of the UKSIA. Indeed, in so far as the requirements for service of enforcement orders are concerned, which is governed by Ord.69A rr.3

[50] *Certain Underwriters at Lloyds London v Syrian Arab Republic* [2018] EWHC 385 (Comm) (*Certain Underwriters*) at [19]–[21], citing *Pocket Kings v Safenames* [2009] EWHC 2529 (Ch).
[51] *Union Fenosa Gas SA v Egypt* Unión Fenosa Gas SA v Egypt [2020] EWHC 1723 (Comm) (*Unión Fenosa*) at [90].
[52] *Estate of Michael Heiser v Islamic Republic of Iran* [2019] EWHC 2074 (QB) at [235].
[53] *Michael Heiser* [2019] EWHC 2074 (QB) at [235].
[54] *Certain Underwriters* [2018] EWHC 385 (Comm) at [23].
[55] *Certain Underwriters* [2018] EWHC 385 (Comm) at [23].
[56] *Unión Fenosa* [2020] EWHC 1723 (Comm) at [93].
[57] *Unión Fenosa* [2020] EWHC 1723 (Comm) at [96].
[58] See, e.g. s.1608(a)(4) of the United States' Foreign Sovereign Immunities Act 1976; Part 6 of the New Zealand High Court Rules 2016; and ss.23–25 of the Australian Foreign States Immunities Act 1985.
[59] State Immunity Act 1979 (Cap. 313, 2020 Rev. Edn).

and 6(2) of the Singapore Rules of Court (ROC) 2014, they are substantially the same as rr.6.16 and 6.28 of the CPR.[60]

The interpretation of s.14(1) of the SGSIA was considered by the Singapore High Court in *Josias Van Zyl*. Kannan Ramesh J held that an order granting leave to enforce an arbitral award issued by the Singapore High Court, i.e. a leave order, must be served in accordance with the requirements under s.14(1) of the SGSIA. Accordingly, the Singapore court does not have the discretion to dispense with service of the leave order, nor the power to order that service be effected via alternative means.[61] This conclusion was premised on the following reasons:

- Since s.14(1) is a primary legislation, it must be construed on its own terms and in accordance with Parliament's intention. Its interpretation must not be limited by the ROC, which is essentially subsidiary legislation.[62]
- The primary purpose of s.14(1) is to provide the mode of service of proceedings against a state and to give the respondent state adequate time to react to the conduct of proceedings.[63] It is a form of procedural safeguard afforded to states.[64]
- Given that the wording of s.14(1) is general and unqualified, the rationale underlying s.14(1) must apply to a leave order. Since the originating summons which kickstarts the enforcement proceedings is not served, the leave order is often the first hint that the respondent state has of the impending enforcement proceedings.[65]

Although *Josias Van Zyl* was distinguished by the English Court of Appeal in *General Dynamics* on the basis, inter alia, that the English CPR and the Singaporean ROC were not the same,[66] Ramesh J's reasoning was nevertheless cited with approval by the majority on appeal to the UKSC. Indeed, the majority in *General Dynamics* observed that the SGSIA "was closely modelled on the UKSIA and rules of court which … were not different in any meaningful manner from those in the United Kingdom".[67] As for the risk that foreign states may abuse their procedural privileges in evading service of proceedings, this issue did not arise for consideration before Ramesh J, although it is presently unlikely that the Singapore courts will grant a dispensation of service or substituted service order given the absolute rejection of any such judicial discretion by Ramesh J.

Ramesh J's observations were affirmed in the recent Singapore High Court decision of *CNX v CNY* (*CNX*), where S. Mohan J observed that a leave order was a document that had to be served in accordance with s.14(1) of the SGSIA, and that this was a relatively uncontroversial point which the plaintiff did not dispute.[68] Questions concerning the risk of dilatory tactics employed by a state to delay the enforcement proceedings as discussed above did not arise for consideration before

[60] The provision for dispensation of service under the Rules of Court 2014 is found under Ord.62 r.11, which is similar to r.6.28 of the Civil Procedure Rules.
[61] *Josias Van Zyl* [2017] 4 S.L.R. 849 at [54].
[62] *Josias Van Zyl* [2017] 4 S.L.R. 849 at [33].
[63] *Josias Van Zyl* [2017] 4 S.L.R. 849 at [36], [44]–[45].
[64] *Josias Van Zyl* [2017] 4 S.L.R. 849 at [47].
[65] *Josias Van Zyl* [2017] 4 S.L.R. 849 at [41]–[46].
[66] *General Dynamics United Kingdom Ltd v State of Libya* [2019] 1 W.L.R. 6137 (EWCA) at [54].
[67] *General Dynamics* [2021] UKSC 22 at [72]–[75].
[68] *CNX v CNY* [2022] SGHC 53 (*CNX*) at [11].

Mohan J. Nevertheless, the suggestions made in the context of the UKSIA above should apply to the Singapore context with equal force.

Additional observations on the processes for enforcement of arbitral award against foreign states

For completeness, it is worth mentioning two points. The first relates to the situation where the state has expressly agreed to a specific method of service. Both s.14(6) of the SGSIA and s.12(6) of the UKSIA provide that the requirement for diplomatic service does not prevent the service of a writ or other document in any manner to which the state has agreed. For instance, in *AN International Bank Plc v Republic of Zambia*, the English Commercial Court observed (albeit implicitly) that service of writ onto Zambia's designated agent pursuant to a clause found in a refinancing agreement between Zambia and the applicant bank would have constituted valid service under s.12(6) of the UKSIA.[69] This leaves the room for argument that any statement by a government department or officials that they are authorised to receive papers related to a particular treaty by courier or email could, for instance, be deemed as an alternative mode of service that was agreed to the state.

The second issue relates to the computation of the time limit for a foreign state to challenge an enforcement order or a leave order. Section 12(2) of the UKSIA and s.14(2) of the SGSIA both state that "any time for *entering an appearance* … shall begin to run 2 months after the date on which the writ or document is so received" (emphasis added). Further, both s.22(2) of the UKSIA and s.2(2)(b) of the SGSIA state that "references to entry of appearance … include references to any corresponding procedures". The question, therefore, is whether an application to challenge a leave order should be construed as a corresponding procedure to an entry of appearance, such that the two-month period under s.12(2) of the UKSIA and s.14(2) of the SGSIA apply to confer on the state additional time to consider the enforcement proceedings brought by an award creditor. If so, how would this two-month period interact with any further time limit that may be provided under the specific terms of the leave order or enforcement order?

The position under English law in relation to this question remains unsettled, with two English High Court decisions rendering contrasting decisions. In *Norsk Hydro ASA v State Property Fund of Ukraine*, Gross J held that the state was entitled to the two-month period under s.12(2) of the UKSIA plus the additional time given under the enforcement order to set aside the order.[70] In contrast, Burnton J in *AIC Ltd v The Federal Government of Nigeria* (*AIC*) held that an application to set aside the registration of a foreign judgment was not a "corresponding" procedure to an entry of appearance.[71] According to Burnton J, 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.[72] On that premise, the state was not entitled to an additional two-month period under s.12(2) of the UKSIA.

[69] *AN International Bank Plc v Republic of Zambia* [1997] LexisCitation 1168.
[70] *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] All E.R. (D) 269.
[71] *AIC Ltd v The Federal Government of Nigeria* [2003] EWHC 1357 (QB).
[72] *AIC Ltd* [2003] EWHC 1357 (QB) at [23].

This issue remains unsettled under English law, with the UKSC in *General Dynamics* making observations on this issue but declining to express any concluded view on whether an application to set aside a leave order is a corresponding procedure to an entry of appearance under s.12(2) of the UKSIA.[73]

On the other hand, this issue was the subject of determination in *CNX*. There, the award creditor sought to enforce a final award against the foreign state. The leave order granted stated, amongst others, that the state "may apply to set aside the order to be made herein within 21 days after service of the order on [the state]". The state filed an application seeking, amongst other things, a declaration that it was entitled to a timeline of two months and 21 days from when the leave order was served on it to apply to set aside the leave order. In support, the state relied on the two-month period under s.14(2) of the SGSIA, which it argued should be added to the 21 days provided for in the leave order.

In finding for the state, Mohan J accepted that s.14(2) of the SGSIA applied to a state's application to set aside the leave order because such an application was similar in substance to an entry of appearance.[74] Since the state in *CNX* expressed an intention to challenge the leave order, it was clear that s.14(2) of the SGSIA applied. Critically, Mohan J held that where a state has been served with a leave order to enforce an arbitral award, the effect of s.14(2) is that the state has two months under the SGSIA to set aside the leave order, *plus* any further time afforded to it by the court in exercise of its discretionary powers under the Rules of Court (e.g. 21 days as stated in the leave order in this case).[75] In England, this point remains open, but it is highly likely that the English courts will follow a similar approach since the UKSC in *General Dynamics* has expressed doubts on Burnton J's reasoning in *AIC*.[76]

[73] *General Dynamics* [2021] UKSC 22 at [75].
[74] *CNX* [2022] SGHC 53 at [29].
[75] *CNX* [2022] SGHC 53 at [43].
[76] *General Dynamics* [2021] UKSC 22 at [68].