The Wealth of Nations: enforcing international arbitral awards against State parties

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As our readers will know, in international disputes, it is a fact of life that litigating to a successful outcome may only be half the battle. If the loser is not willing to pay, then contested proceedings may have to follow in one or more jurisdictions in order to enforce the fruits of the victor's success. These difficulties are often amplified in the case of States and State entities. In this bulletin, we focus on some of the difficult issues which arise in enforcing international arbitral awards against State parties, including the steps taken to serve such proceedings and executing against available assets.

In the case of arbitration, a party litigating against a State starts with something of an advantage compared to in court: by definition, if you are in arbitration, it is because the State has agreed to refer the dispute to a neutral forum which it accepts as having jurisdiction to resolve it. In general, this will mean the resulting award can be enforced with relative ease in other jurisdictions around the world under the New York Convention. This will greatly limit the disputes that arise in relevant enforcement courts as to whether the decision can be recognised or not on the basis of the status of the award debtor as a sovereign State.

This said, certain practical difficulties may arise. One particular difficulty is service of proceedings to get the enforcement process started. In many jurisdictions, court process on sovereign States is required to be served by diplomatic means. In the UK, section 12(1) of the State Immunity Act 1978 (SIA) provides that any "*writ or other document required to be served for instituting proceedings*" must be served via the Foreign, Commonwealth and Development Office (FCDO) on the Ministry of Foreign Affairs of the State concerned. This includes arbitration claim forms for applications under the AA 1996.[1]

Service by this method can be notoriously lengthy (up to a year or more in some cases). It can also cause particular difficulties if you are litigating against a State in conditions of civil war or other internal turmoil which make service difficult or even impossible. In such cases, the FCDO may simply not be able to serve court documentation on the relevant Ministry of Foreign Affairs. Examples of such cases in recent years having included Iran, Libya, and Syria. Further, diplomatic service is an inherently political act reserved to the Executive. If your case has a political hue, then the FCDO may refuse or postpone service of proceedings until an appropriate diplomatic opportunity arises.

The consensus[2] is that orders to dispense with service or for alternative service cannot be used to alleviate any of these difficulties where the Act applies. Thus, there is a real risk in many cases that service will be substantially delayed or even impossible. The practical solution is to include agreements for alternative service in any arbitration clause with a State, which will be effective pursuant to s 12(6) SIA. Great care needs to be taken in drafting these clauses; in particular, the scope of such an agreement must be explicit. Thus, for example, consent to accept documents in the arbitration is unlikely to constitute consent to court proceedings which relate to the arbitration, which could prove problematical for enforcement.[3]

In the case of service of applications to enforce arbitral awards specifically, the future position is uncertain.

In 2019, the Court of Appeal held that applications of this type are in fact exempt from service via the FCDO (*General Dynamics United Kingdom Ltd v Libya* [2019] 1 WLR 6137), although the Court agreed that the State should be given an additional two months to apply to set the Order aside once it has been served on it. This was on the basis that the relevant procedural rules[4] provide that an application for enforcement is made *ex parte* and as such there is no relevant document requiring to be served at all, although by analogy with s 12(2) SIA the State should be allowed an extended period of time to set it aside and during which the order will not take effect.

However, this decision was the subject of an appeal to the Supreme Court in December 2020 and judgment is awaited. If the Supreme Court adopts a different interpretation of s 12, this may lead to the delays discussed above and, in cases where service is impossible, the prospect that the award could not be

1. *L v Y Regional Government of X* [2015] 1 WLR 3948, [23]-[51] (Hamblen J).
2. *General Dynamics United Kingdom Ltd v Libya* [2019] 1 WLR 6137 (CA), obiter at [61] (alternative service) and [62]-[63] (dispensing with service). The case was appealed to the Supreme Court and judgment is awaited.
3. *L v Y Regional Government of X*, cited above, at [43]-[51] (Hamblen J).
4. CPR 62.18.

recognised in the jurisdiction at all.

As to post-award relief, pending recognition proceedings in a favourable jurisdiction, it is common for an award creditor to seek to protect its position by seeking certain ancillary relief from the English Courts, typically freezing relief and disclosure orders.[5] In this regard, disclosure orders are permissible, although ultimately if the State refuses to give disclosure, the Act precludes any proceedings for committal.[6] Nevertheless, States often have an incentive to comply with disclosure orders for political reasons, and breach of the order can sometimes be used to leverage other advantages in the litigation in any event.

As for freezing relief, this is more problematic. Prior to the enactment of the SIA in 1978, the English Courts were willing to grant such orders against States, at least in respect of non-sovereign acts from which the State was not immune from suit in international law,[7] but the 1978 Act stopped this practice. In particular, s 13(2)(a) precludes injunctive relief against States and therefore, in principle, freezing orders cannot be granted against a State, even for non-sovereign acts where the State is otherwise amenable to the territorial jurisdiction of the Court and has no immunity from enforcement of the award.[8]

Here, it may pay to seek relief from other jurisdictions. For example, it is understood that in the USA and Australia, federal legislation governing State immunity does not preclude injunctive relief against States. Another developing possibility in the case law is that s 13(2)(a) constitutes a violation of access to Court which must be read down under domestic principles of human rights law[9] . If so, the door may be open in the future to freezing injunctions against States in private commercial cases.

Turning to execution, even if an award is recognised, substantial further difficulties may arise in executing the award against actual assets. Service of any court proceedings for execution will usually again be necessary under the SIA. More fundamentally still, execution is limited in the case of States to property which is in use or intended for use for commercial purposes; all other property is absolutely immune from execution.[10] Practically, this means the effort to find available assets is all the more difficult, since the most obvious ones (consular buildings and bank reserves) will usually be off-limits. Even if an attractive asset is identified, there may be a substantial dispute in court as to whether the asset in question is used for commercial purposes and amenable to execution.[11]

To sum up, as Males LJ recently said, "*those who put their trust in princes are liable sometimes to be disappointed*"[12] Although this need not always be the case, and there are increasingly developments in England to make enforcement and execution against States a speedier and more effective process, commercial litigation of this kind gives rise to particular challenges which have to be carefully borne in mind. Increasingly, parties should be assessing these sorts of considerations insofar as possible before contracting, or at the very least, at the outset of any dispute.

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of other members of Twenty Essex.

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5. For the jurisdiction in this context specifically, see Konkola Copper Mines Plc v U&M Mining Zambia Ltd [2014] EWHC 3250 (Comm) per Teare J.
6. S 13(1) SIA.
7. *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 and *Hispano Americana Mercantile SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277.
8. If the State has agreed in writing to refer the dispute to arbitration (e.g. in a properly drafted arbitration clause in a commercial agreement), it will not be immune from related court proceedings: see section 9 SIA.
9. *The Prestige (No 3)* [2020] 1 WLR 4943, [189] (Henshaw J), speaking in the context of anti-suit relief.
10. S 13(2)(b) and (4) SIA.
11. See for example *LR Avionics Technologies v Nigeria* [2016] 4 WLR 120 per Males J
12. *General Dynamics UK Ltd v Libya* [2019] 1 WLR 2913, [91].