Arbitration — Arbitral Tribunal of International Chamber of Commerce — Arbitral award — Damages — Failure to pay amount awarded — Enforcement proceedings — United Kingdom — Arbitration Act 1996 — Service of proceedings commenced in accordance with Arbitration Act 1996 — Whether service of proceedings must comply with State Immunity Act 1978 — Difficulty effecting service on defendant State

Comity — Comity of nations as an interpretative principle — Subjecting State to jurisdiction of the courts of another State — Procedure for service — State Immunity Act 1978 — Obligations of States in the marketplace — Commercial legal obligations of States

Human rights — Treaties — European Convention on Human Rights, 1950 — Article 6 — Access to jurisdiction of the courts — Relationship between Article 6 and State immunity — Whether requirement for service through diplomatic channels impeding Article 6 rights

Relationship of international law and municipal law — Customary international law — United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 — State Immunity Act 1978 — Treaty provisions as an aid to interpretation of domestic law — Whether international custom existing at the time of passage of domestic law

State immunity — State Immunity Act 1978 — Service — Procedure for service — Whether Section 12(1) applicable — Whether arbitration claim form or enforcement order a document required to be served — Whether court having discretion to dispense with service on defendant State — Exceptional circumstances preventing service through diplomatic channels — The law of England

General Dynamics United Kingdom Ltd *v.* State of Libya[1]

([2021] UKSC 22)

United Kingdom, Supreme Court. 25 *June* 2021

[1] The appellant was represented by Mr Harry Matovu QC and Mr Lucas Bastin, instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP. The respondent was represented by Mr Daniel Toledano QC and Mr James Ruddell, instructed by Reed Smith LLP.

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(Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Burrows and Lord Stephens, *Justices*)

SUMMARY:[2] *The facts*:—General Dynamics United Kingdom Ltd ("the respondent") was contracted by the State of Libya ("the appellant") to supply communications systems. A dispute regarding payment arose between the parties leading the respondent to commence arbitration proceedings at the arbitral tribunal of the International Chamber of Commerce ("ICC") in Geneva. The ICC tribunal found in the respondent's favour and awarded the payment of damages, including costs and interest.

The respondent commenced proceedings in the United Kingdom to enforce the arbitral award after the appellant failed to pay the sum awarded by the ICC tribunal. The respondent issued an arbitration claim form, without notice to the appellant, pursuant to the relevant provisions of the Arbitration Act 1996, and the Civil Procedure Rules. The respondent was granted permission to dispense with service of the arbitration claim form, and any order made by the Court, as diplomatic relations between the United Kingdom and Libya had broken down and service of documents on the respondent had proved difficult.

Libya applied to set aside the order granting the respondent permission to dispense with service and argued that, as a foreign State, service must be effected on Libya through diplomatic channels pursuant to Section 12(1) of the State Immunity Act 1978 ("SIA"). The judge at first instance upheld Libya's claim, finding that Section 12(1) of the SIA was mandatory and that service of Court proceedings through the Foreign, Commonwealth and Development Office ("FCDO") was essential in every case where an English court was to exercise jurisdiction over a foreign State. The Court of Appeal disagreed with this position and held that the judge hearing the enforcement proceedings was correct in finding that the court had jurisdiction in appropriate cases to dispense with service in accordance with the Civil Procedure Rules.

Libya appealed to the Supreme Court arguing that Section 12(1) of the SIA was mandatory and that the courts had no discretion to dispense with service on a foreign State. The respondent argued that the present proceedings fell outside of the scope of Section 12(1) of the SIA and that an application for permission to enforce an arbitral award was not required to be served pursuant to relevant provisions of the Arbitration Act 1996 and the Civil Procedure Rules. The respondent further argued that if it was unable to pursue its claim due to an inability to fulfil the service requirements set out in Section 12(1) of the SIA this would amount to a violation of article 6 of the European Convention on Human Rights ("the European Convention").

[2] Prepared by Mr D. Peterson.

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Held (by three votes to two, Lord Briggs and Lord Stephens dissenting):—The appeal was allowed.

Per Lord Lloyd-Jones (with whom Lord Burrows agreed): (1) A broad reading of Section 12(1) of the SIA was appropriate. The exercise of jurisdiction by the courts of one State over another State was an act of sovereignty and the defendant State should be given notice of the institution of proceedings. If an order giving permission to enforce an arbitral award was not served, the defendant State might be unaware of the proceedings and might not have the opportunity to assert immunity from enforcement before an attempt was made to seize its assets within the jurisdiction. In proceedings to enforce an arbitration award under the Arbitration Act 1996, the document required for instituting proceedings was either the arbitration claim form or the order granting permission to enforce the award. In either case, the document had to be served in accordance with Section 12(1) of the SIA (paras. 42-4).

(2) Article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 ("UNCSI"), which provided that service of documents instituting proceedings against a State must either be effected through diplomatic channels or in a manner agreed to by the defendant State, was not declaratory of pre-existing customary international law. It was instead legislative in character and attempted to resolve disparate State practice. Further, Article 22 of the UNCSI could not be considered to have crystallized an emerging rule of customary law, or to have given rise to a general practice which had generated a new rule of customary law. State practice was too diverse to support the widespread, representative, and consistent practice required for a rule of customary international law to have developed (paras. 49-57).

(3) Principles of international law and comity, including the fundamental principle of the sovereign equality of States, supported a wide reading of Section 12(1) of the SIA. There was a need to ensure that when a State was subjected to the jurisdiction of the courts of another State the jurisdiction was properly invoked and the process did not give rise to a breach of international law. There were advantages in establishing clear procedures to serve legal proceedings on a State as there was a danger that attempted service at diplomatic premises would infringe their inviolability. Section 12(1) of the SIA provided claimants with a secure and effective means of serving proceedings on a defendant State which met the requirement of international law and comity (paras. 58-62).

(4) Where the jurisdiction of United Kingdom courts was invoked in respect of a defendant State, it was always necessary to give notice of the institution of those proceedings to the defendant State. As such, there was always a document required to be served pursuant to the requirements of Section 12(1) of the SIA. Focusing on whether a particular document was required to be served under the Civil Procedure Rules was therefore inappropriate. Where proceedings were instituted to enforce an arbitral award against a defendant State, and where no order had been made for the service of the

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application for permission to enforce the award, the order for enforcement was a "document required to be served for instituting proceedings against a State" pursuant to Section 12(1) of the SIA (paras. 67 and 76).

(5) Even in exceptional circumstances, the Civil Procedure Rules did not give the court discretion to dispense with a statutory requirement. It was therefore not possible for the court to dispense with service of the enforcement order. The procedure in Section 12(1) of the SIA was intended to be mandatory and exclusive and subject only to the exception in Section 12(6) of the SIA (paras. 77-81).

(6) Although there was no obligation in international law for States to accord to other States the privilege of service of an initiating process through diplomatic channels, this privilege pursued a legitimate objective by proportionate means and did not impair the essence of the right of access to the court's jurisdiction. There was therefore no violation of Article 6 of the European Convention (paras. 82-4).

Per Lady Arden: (1) For the reasons given by Lord Lloyd-Jones, the appeal should be allowed. Whether Section 12(1) of the SIA required the arbitration claim form or the enforcement order to be served through diplomatic channels was a question of statutory interpretation. Ratifying the European Convention on State Immunity ("the ECSI") was one of the key matters considered by Parliament when enacting the SIA and was therefore an aid to its interpretation even if it had received only limited support internationally (para. 90).

(2) Section 12 of the SIA was expressed in mandatory terms. If the purpose of Section 12(1) of the SIA had been to enable substituted service, or even the dispensation of service, Parliament would have used language to enable this to happen. Such language was not present in the provision, which meant that open-textured expressions, and the concept of functional equivalence, were irrelevant. The language of Section 12(1), read in the light of the ECSI, was mandatory and must be applied despite any procedural rules to the contrary (paras. 92-6).

Per Lord Stephens (with whom Lord Briggs agreed): (1) It was a complete subversion of the purpose of Section 12(1) of the SIA to treat the requirement for diplomatic service as enabling a State which was not immune from the jurisdiction of the court to obtain *de facto* immunity by being obstructive about service (para. 109).

(2) International comity required foreign States to abide by the rules of the marketplace. An interpretation of the SIA which facilitated both foreign States, and those with whom they wished to do business, was preferred on the basis that it conformed with international comity. The default position prior to the enactment of the SIA, as a matter of international comity and as a matter of United Kingdom domestic law, was that foreign States should be subject to all the rules of the marketplace in relation to commercial transactions. An aspect of international comity relating to the restrictive doctrine of

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state immunity was that States honoured their commercial legal obligations. The SIA was based on the restrictive doctrine of State immunity and mutual respect and dignity between States demanded nothing less (paras. 145-7).

(3) Prior to the enactment of the SIA there was no relevant rule of customary international law as to the service of proceedings on foreign States. That position remained. There was no rule of customary international law which required diplomatic service on a defendant State as the sole method of serving proceedings, or which prohibited without notice proceedings to register a judgment or award. Similarly, there was no rule of customary international law which prohibited dispensing with service of proceedings on a foreign State if service was impossible or unduly difficult (paras. 164-5 and 178).

(4) When the SIA was enacted, there were a number of relevant applications which could be initiated and heard without notice. Parliament must be taken to have known that by introducing the criterion of a document which was "required to be served" into Section 12(1) of the SIA that without notice applications would remain unaffected. It was clear that Parliament was aware that by introducing the relevant criterion into Section 12(1) of the SIA, this would incorporate domestic procedural law which was subject to change, and which would exclude without notice applications. As such, the operation of Section 12 of the SIA reflected subsequent developments in procedural law (paras. 171, 176-7 and 180).

(5) Section 12(1) of the SIA did not impose a requirement for service through diplomatic channels where an arbitration claim form was not required to be served and where the enforcement order which was to be served did not institute proceedings. Whether proceedings had been instituted and whether service was required were issues which were inherently procedural and which could only be determined by reference to the procedural rules of the forum State. The Court of Appeal was correct to conclude that Parliament clearly intended the applicability of Section 12(1) of the SIA to be dependent on what was required by the relevant court rules. If the operation of those court rules did not require service of the originating document, then that document would fall outside Section 12(1) of the SIA (paras. 195-200).

(6) Although it was unnecessary to decide in the present proceedings, Section 12(1) of the SIA should be interpreted as allowing, in exceptional circumstances, directions as to service not involving diplomatic channels where a claimant's right of access to the court would otherwise be infringed. It was implicit in Article 6 of the European Convention that for civil rights and obligations to be determined at a fair and public hearing before an independent and impartial tribunal, a litigant will be allowed access to that tribunal in order to determine his claim. There was no adjudication as to whether there was State immunity unless there was access to a court in circumstances where diplomatic service was impossible or unduly difficult. Denying access to a court in such circumstances would not be proportionate to the legitimate aim (paras. 240-3).

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The following is the text of the judgments delivered in the Supreme Court:

LORD LLOYD-JONES (WITH WHOM LORD BURROWS AGREES)

1. In 2013 General Dynamics United Kingdom Ltd ("General Dynamics") commenced arbitration proceedings against the State of Libya ("Libya") in which it claimed money said to be owing to it under a contract for the supply of communications systems. On 5 January 2016 an ICC arbitral tribunal in Geneva issued an award of £16,114,120.62 plus interest and costs, in favour of General Dynamics ("the award"). Libya has made no payment of the sum awarded.

2. On 21 June 2018, General Dynamics issued an arbitration claim form and made an application without notice pursuant to section 101 (2) and (3) of the Arbitration Act 1996 ("the 1996 Act") and Civil Procedure Rules ("CPR") 6.16 and/or 6.28 for (1) permission to enforce the award in the same manner as a judgment or order of the court; (2) judgment to be entered against Libya as prescribed in the award, with interest; and (3) permission to dispense with service of the arbitration claim form, any order made by the court and any other associated documents.

3. On 20 July 2018, at a hearing without notice, Teare J made an order ("the enforcement order") whereby he granted General Dynamics permission to enforce the award in the same manner as a judgment or order of the court and entered judgment against Libya. Teare J also granted General Dynamics permission to dispense with service of the arbitration claim form, any order made by the court and any other associated documents, concluding that exceptional circumstances existed in Libya which justified the order sought. However, he directed that the arbitration claim form, any order of the court and any other associated documents be couriered to two addresses in Tripoli and one address in Paris, and that Libya should have two months from the date of the enforcement order within which to apply to set it aside.

4. By an application notice dated 19 September 2018, Libya applied to vary the enforcement order so as to (1) set aside the order granting permission to dispense with service of the arbitration claim form, the enforcement order and associated documents and the direction that they be couriered to addresses in Tripoli and Paris and (2) require that service on Libya must be effected through diplomatic process as the

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method of service in section 12 of the State Immunity Act 1978 ("SIA").

5. Following a one-day hearing in the Commercial Court on 18 December 2018, Males LJ, sitting at first instance, on 18 January 2019 set aside those parts of the enforcement order whereby General Dynamics had been granted permission to dispense with service and had been directed to courier the arbitration claim form, the enforcement order and associated documents to addresses in Tripoli and Paris: [2019] 1 WLR 2913. In his judgment Males LJ held that:

(1) Service of court proceedings through what was the Foreign and Commonwealth Office ("FCO") and is now the Foreign, Commonwealth and Development Office ("FCDO") in accordance with section 12 SIA is essential in every case where the English court is to exercise jurisdiction over a foreign state (at para. 36); and
(2) In the case of proceedings to enforce an arbitration award against a foreign state pursuant to section 101 of the 1996 Act:
    (a) The "writ or other document required to be served for instituting proceedings" within the meaning of section 12(1) SIA was either the arbitration claim form (where the court required a claim form to be served) or the order granting permission to enforce the award (where, as was the case here, the court did not require a claim form to be served); and
    (b) In either case, the relevant document had to be served on the foreign state in accordance with section 12 SIA (at para. 78).

6. As a result, Males LJ concluded that the court did not have a discretion to dispense with service of the enforcement order under CPR rules 6.16 and/or 6.28 as this would be contrary to the mandatory terms of section 12 SIA. However, he observed, obiter, that if the court did have a discretion he would have exercised it in this case.

7. General Dynamics appealed to the Court of Appeal against the decision of Males LJ with the permission of the judge. By its appellant's notice and grounds of appeal dated 6 February 2019 it submitted that Males LJ erred in concluding that:

(1) The enforcement order was a "writ or other document required to be served for instituting proceedings" within the meaning of section 12(1) SIA; and/or
(2) The court had no power to dispense with service of the enforcement order under CPR rules 6.16 and/or 6.28 if that order would otherwise fall within the terms of section 12(1) SIA.

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8. Following a one-day hearing on 13 June 2019, the Court of Appeal (Sir Terence Etherton MR, Longmore and Flaux LJJ) on 3 July 2019 allowed the appeal and set aside the order of Males LJ insofar as it had set aside or varied the enforcement order so as to require service of the enforcement order on Libya: [2019] 1 WLR 6137. In so doing, the Court of Appeal concluded that:

(1) It was not mandatory in this case that either the arbitration claim form or the enforcement order be served through the FCDO in accordance with section 12(1) SIA (at para. 60);
(2) On the basis that section 12(1) SIA did not apply, the enforcement order would, ordinarily, have to be served pursuant to CPR rules 62.18(8)(b) and 6.44, but the court had jurisdiction in an appropriate case to dispense with service in accordance with CPR rules 6.16 and/or 6.28 (at para. 60);
(3) It was not appropriate for the Court of Appeal to differ from Males LJ's obiter conclusion 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 in this case (at para. 70).

9. The Court of Appeal refused Libya permission to appeal to the Supreme Court but on 20 February 2020 the Supreme Court (Lord Hodge, Lord Lloyd-Jones and Lord Kitchin) granted Libya permission to appeal.

10. The following issues arise on this appeal:

(1) In proceedings to enforce an arbitral award against a foreign state pursuant to the 1996 Act, does section 12(1) SIA require service of a document on the foreign state by transmission through the FCDO to the Ministry of Foreign Affairs of the defendant state? In particular, is the arbitration claim form or the enforcement order a "writ or other document required to be served for instituting proceedings" within the meaning of section 12(1) SIA?
(2) In exceptional circumstances, is the court able, pursuant to CPR rules 6.16 and/or 6.28, to dispense with service of the enforcement order, notwithstanding that section 12(1) applies?
(3) Must section 12(1) SIA be construed, whether pursuant to section 3 of the Human Rights Act 1998 or the common law principle of legality, as implicitly allowing alternative directions as to service in exceptional circumstances, where a claimant's right of access to the court under article 6 of the European Convention on Human Rights ("ECHR") would otherwise be infringed?

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Relevant legislation

11. The award is a New York Convention award enforceable pursuant to section 101 of the 1996 Act. This provides:

(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.

12. CPR rule 62.18, which concerns the enforcement of arbitral awards, provides in relevant part:

(1) An application for permission under—
[. . .]
(b) 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.
(3) The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under section 1 of this Part.
[. . .]
(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.

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(10) The order must contain a statement of—
(a) the right to make an application to set the order aside; and
(b) the restrictions on enforcement under rule 62.18(9)(b).

13. The State Immunity Act 1978 provides in relevant part:

Section 12 (Service of process and judgments in default of appearance)

(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.
(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.
(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.
(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, Commonwealth and Development 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.
(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

Section 13 (Other procedural privileges)

(2) Subject to subsections (3) and (4) below—
[. . .]
(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

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[. . .]

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if—
(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under article 24 of the Convention; or
(b) the process is for enforcing an arbitration award.

Section 21 (Evidence by certificate)

A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question—
[. . .]
(d) whether, and if so when, a document has been served or received as mentioned in section 12(1) or (5) above.

14. CPR rule 6 makes provision in respect of service:

6.1 (Part 6 rules about service apply generally)

This Part applies to the service of documents, except where—

(a) another Part, any other enactment or a practice direction makes different provision; or
(b) the court orders otherwise.

[. . .]

6.16 (Power of court to dispense with service of the claim form)

(1) The court may dispense with service of a claim form in exceptional circumstances.
(2) An application for an order to dispense with service may be made at any time and—
(a) must be supported by evidence; and
(b) may be made without notice.

[. . .]

6.28 (Power to dispense with service)

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

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6.44 (Service of claim form or other document on a State)

(1) This rule applies where a party wishes to serve the claim form or other document on a State.
(2) In this rule, "State" has the meaning given by section 14 of the State Immunity Act 1978.
(3) The party must file in the Central Office of the Royal Courts of Justice—
  (a) a request for service to be arranged by the Foreign and Commonwealth Office;
  (b) a copy of the claim form or other document; and
  (c) any translation required under rule 6.45.
(4) The Senior Master will send the documents filed under this rule to the Foreign and Commonwealth Office with a request that it arranges for them to be served.
(5) An official certificate by the Foreign and Commonwealth Office stating that a claim form or other document has been duly served on a specified date in accordance with a request made under this rule is evidence of that fact.
(6) A document purporting to be such a certificate is to be treated as such a certificate, unless it is proved not to be.
(7) Where—
  (a) section 12(6) of the State Immunity Act 1978 applies; and
  (b) the State has agreed to a method of service other than through the Foreign and Commonwealth Office,
  the claim form or other document may be served either by the method agreed or in accordance with this rule.

(Section 12(6) of the State Immunity Act 1978 provides that section 12(1) enables the service of a claim form or other document in a manner to which the State has agreed.)

The evidence below in relation to effecting service

15. On the application before Teare J there was evidence before the court in the first witness statement of Mr Nicholas Brocklesby that solicitors for General Dynamics had been informed by the Foreign Process Office at the Royal Courts of Justice on 5 June 2018 that "the guideline timeframe for effecting service in Libya by [section 12(1) SIA] is 'over a year' from the time of the submission of the papers by the Foreign and Commonwealth Office into Libya". There was also evidence before Teare J that the British Embassy in Tripoli had been closed since 2014, with operations moving temporarily to Tunisia, and that there was significant political instability in Libya.

16. The application to dispense with service was made to Teare J, in part at least, on the basis that there were two competing governments

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in Libya, the Tripoli-based Government of National Accord and the Tobruk-based House of Representatives, and that there was some room for doubt as to which of the rival Ministries of Foreign Affairs was the relevant institution for the purpose of section 12 SIA. Teare J referred to the fact that there were two entities claiming to be the government of Libya in his judgment. However, Males LJ recorded in his judgment (at para. 3) that the Government of National Accord is the only government in Libya which is recognised by the United Kingdom, as well as by other States and international bodies, and that there is no doubt that the Ministry of Foreign Affairs in Tripoli is the relevant Ministry for the purpose of section 12 SIA. This has, therefore, not been a live issue in these proceedings.

17. The evidence before Males LJ on the application to set aside the order of Teare J in relation to service is summarised in the following paragraphs.

18. The second witness statement of Mr Brocklesby states that following the order of Teare J on 20 July 2018, General Dynamics took steps to notify Libya of the proceedings by delivering copies of the relevant documents by courier to the addresses in Tripoli referred to in the order. Courier delivery by DHL was attempted to each of the Tripoli addresses, twice to each, but proved unsuccessful. Delivery to each of the Tripoli addresses was then attempted on 19 and 20 September 2018 by former British Army personnel engaged by a private security company, instructed by General Dynamics, but this was unsuccessful, in part because of fighting in Tripoli and the Ministry of Foreign Affairs being subject to a police guard. However, on 23 September 2018 the agents successfully delivered the documents by hand to the Ministry of Foreign Affairs in Tripoli, but were unable to deliver the documents to the other address in Tripoli despite further attempts.

19. On 19 September 2018 Libya issued its application to set aside the order of Teare J.

20. The second witness statement of Mr Brocklesby states that on 10 October 2018 General Dynamics' solicitors were told by the Foreign Process Office at the Royal Courts of Justice that the same "guideline timeframe" applied for service on Libya in accordance with section 12(1) SIA. On the same day, General Dynamics' solicitors were told by Mr Batchelor of the Premium Service Legalisation Office at what is now the FCDO that service to the Ministry of Foreign Affairs in Libya was "not at all straightforward" and "not possible", that the task was "too dangerous" and that he had heard that the relevant Ministry was or had been surrounded by a "militia guard" and that

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there was currently no British Embassy in Tripoli which impacted upon the prospects of successful service.

21. Mr Brocklesby's evidence was that these communications with the FCDO took place against a background in which there was political instability in Libya as a result of conflict and violence between competing factions and that there were plans to hold nationwide elections in December 2018 but these were postponed following this violence.

22. Libya's solicitors then made their own enquiries of the FCDO. The second witness statement of Mr Handley states that on 22 October 2018 they spoke to Mr Crook at the Premium Service Legalisation Office at the FCDO who explained the process by which documents for service are sent from the Foreign Process Office at the Royal Courts of Justice to the FCDO and how the FCDO assesses whether and if so when service can be effected. Mr Crook explained the process as follows:

(1) On receipt of the documents, the FCDO sends an "advanced notice email" of the claim to the local British embassy, consulate or High Commission (the "consular office") "to ascertain whether the 'situation on the ground' is conducive to service of documents". The consular office then reports back to the FCDO.
(2) The consular office report and the claim documents are sent to the relevant "FCO Geographical Department". That Department "examines the Claim Documents and whether any sensitive circumstances, such as an election or a visit of the Foreign Minister of the State, are either pending or exist at the time".
(3) The FCDO then decides either (a) to transmit the claim documents to the consular office; or (b) to delay the transmission of the documents; or (c) to return the documents.
(4) These "internal processes within the FCO can take some time and they will often constitute a significant portion of the entire period required to effect service."

23. Mr Handley's second witness statement states that Mr Crook also informed Libya's solicitors that they had spoken to the "Libya Unit" within the FCDO on 4 September 2018 and that the Libya Unit had expressed the view that, since there was then a state of emergency in Tripoli, "it was not practical to forward documents on at that particular time". However the Libya Unit had also informed Mr Crook that service "may be possible when the situation calms down" as the British Embassy still maintained diplomatic staff in Libya and that it was possible to arrange meetings with the Libyan Minister of Foreign Affairs.

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24. Mr Handley's second witness statement also stated that in a further telephone conversation on 25 October 2018, Mr Crook informed Libya's solicitors that he had checked the situation in Libya with the relevant FCO Geographical Department and he had been told that the civil unrest in Tripoli "has now calmed down (at least temporarily)". Mr Crook also confirmed that, although the British Embassy in Tripoli was officially closed, there were diplomatic staff there who would be able to deliver documents to the Ministry of Foreign Affairs in Libya.

25. General Dynamics then submitted further evidence in the third witness statement of Mr Brocklesby. He stated that the position in Tripoli fluctuated. While there were moments of relative calm, the position remained unpredictable. Examples of conflict and violence in Tripoli in October and November 2018 included the illegal use of force against private and public institutions, the bombing of hospitals, attacks against its international airport and militia in-fighting following a temporary ceasefire.

26. On 17 December 2018 Libya presented further evidence from the Twitter feed and the Facebook page of the British Embassy in Tripoli. These posts included a video taken on 10 December 2018 which was said to show the British Ambassador speaking to the camera from an outdoor location in Tripoli in front of the Libyan Ministry of Foreign Affairs.

27. Males LJ handed down his judgment on 18 January 2019. In his view (paras. 84-9) the evidence before Teare J 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 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 FCDO, 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 of the presence of armed militia around the Ministry itself. Furthermore, events since the order of Teare J had demonstrated that these concerns were well-founded. There had been outbreaks of serious violence in Tripoli and the UN Support Mission in Libya had described Tripoli as being "on the brink of all-out war". It remained unstable with the potential for further large-scale conflict. There had also been times when the situation had been calmer so that

life had returned more or less to normal and that during such times delivery of documents to the Ministry of Foreign Affairs would have been possible. However, such times tended to be short lived and unpredictable in advance. The evidence suggested that the stated view of the FCDO was that service of documents on the Ministry in Libya was not at all straightforward, too dangerous and (assuming it to be possible at all) likely to take over a year. Accordingly, had Males LJ concluded that the court had power to dispense with service, he would have found that there were exceptional circumstances and would have exercised a discretion to do so.

28. By a letter dated 22 February 2019, General Dynamics' solicitors notified Libya's solicitors that General Dynamics was filing a request that day with the Foreign Process Office of the High Court to effect service of process on Libya in accordance with CPR rule 6.44. The notification was given without prejudice to General Dynamics' appeal to the Court of Appeal.

29. On 3 July 2019 the Court of Appeal restored the order of Teare J dispensing with the need to serve the relevant documents. The Court of Appeal observed (at paras. 3-4, 65-6, 69-70) that Libya was in turmoil. Armed militia groups were active in Tripoli endangering the lives and safety of civilians with a real risk of full-scale civil war. The view of the FCDO was that service of documents on the Ministry of Foreign Affairs was not straightforward, too dangerous and, even if possible at all, likely to take over a year. The Court agreed with Males LJ that, if there was a power to dispense with service in accordance with section 12(1) SIA, the exceptional circumstances justified the exercise of the discretion.

Issue 1: The scope and effect of section 12(1) SIA

30. The long title of the SIA states that it makes new provision with respect to proceedings in the United Kingdom by or against other States. Part I is entitled "Proceedings in United Kingdom by or against other States". Section 1(1) confers on a State a general immunity from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of Part I. That immunity extends to both the adjudicative and enforcement jurisdiction of the courts. Sections 2 to 11 set out exceptions to the immunity from adjudicative jurisdiction, including in section 9 an exception in the case of certain proceedings which relate to arbitrations. Sections 13(2) to (6) and 14(3) and (4) address and establish exceptions to the immunity from enforcement jurisdiction. The present case does not directly concern immunity from

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adjudicative or enforcement jurisdiction. Sections 12 and 13 confer procedural privileges. Section 12 with which we are principally concerned in this appeal confers procedural privileges in respect of, in particular, service of process and judgments in default of appearance. It was common ground before us that section 12 is not confined to adjudicative jurisdiction but applies also to enforcement jurisdiction (*Norsk Hydro ASA* v. *State Property Fund of Ukraine (Note)* [2002] EWHC 2120 (Comm); [2009] Bus LR 558, para. 25 per Gross J; *L* v. *Y Regional Government of X* [2015] EWHC 68 (Comm); [2015] 1 WLR 3948, para. 38 per Hamblen J).

31. Section 12(1) provides that "any writ or other document required to be served for instituting proceedings against a State" shall be served by being transmitted through the FCDO to the Ministry of Foreign Affairs of the State. It also provides that service shall be deemed to have been effected when the writ or document is received at the Ministry. This provision does not prevent the service of a writ or other document in any manner to which the State has agreed (section 12(6)). The applicable procedural rules are set out at CPR rules 6.44 to 6.47. The claimant must file at the Central Office of the Royal Courts of Justice a request for service to be arranged by the FCDO and a copy of the claim form or other document. The Senior Master then sends the documents to the FCDO with a request that it should arrange for them to be served. The claimant is required to undertake to meet the expenses of the FCDO in effecting service. As it is intended that service should be effected on the defendant state by transmission to the Ministry of Foreign Affairs of that State, it is necessary to comply with any requirements for service out of the jurisdiction pursuant to CPR rules 6.36 and 6.37 (section 12(7)). Where permission to serve out of the jurisdiction is required the usual practice is for an application to be made to a Master, or in the Commercial Court to a judge of that court, without notice to the intended defendant state. (See Fox and Webb, *The Law of State Immunity*, 3rd ed (2015), pp 236-7.)

32. Section 12(6) provides that section 12(1) does not prevent the service of a writ or other document in any manner to which the State has agreed. CPR rule 6.44(7) provides that where section 12(6) applies and the State has agreed to a method of service other than through the FCDO, the claim form or other document may be served either by the method agreed or in accordance with CPR rule 6.44.

33. The role of the FCDO under section 12(1) is to act as a channel of communication. In his judgment in the present case, Males LJ stated (at para. 29) that section 12 SIA "gives to the executive which is responsible for the conduct of this country's international relations a

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legitimate role in deciding whether, when and how a foreign state should be made subject to the jurisdiction of the English courts". This is a matter on which we invited written submissions from the parties following the hearing of the appeal. It may be that this observation was prompted by the evidence before the court, to which I have referred above, of statements attributed by Libya to Mr Crook of the Premium Service Legalisation Office of the FCDO, to the effect that the FCDO will ascertain whether the situation on the ground is conducive to service of documents, will examine the documents and whether any sensitive circumstances exist, and will then decide whether to transmit the claim documents, to delay their transmission or to return the documents. Even if the statements attributed to Mr Crook can be taken as an accurate statement of FCDO practice in this regard, I consider that the observation of Males LJ is far too broad and lacks any legal basis. Under section 12 SIA the FCDO is charged by Parliament with the responsibility of effecting service. It may encounter practical difficulties in effecting service, as may have occurred in the present case when an attempt was eventually made to serve via the FCDO. In such circumstances the FCDO will, no doubt, exercise its judgement, its expertise and its experience in deciding what may be attainable, and the time and manner in which it may be attainable. However, there is no general discretion in the FCDO to decline to effect service. This is a matter of great importance as a discretion of the breadth suggested by Males LJ would permit the obstruction by the executive of access to the courts. In my view, the FCDO is obliged to use its best endeavours to effect service in accordance with section 12.

34. The SIA provides in section 12(1) that service shall be deemed to have been effected when the writ or document is received at the Ministry of Foreign Affairs of the defendant state. (Differing views have been expressed at first instance as to what is meant by the writ or document having been "received" (*Certain Underwriters at Lloyd's of London* v. *Syrian Arab Republic* [2018] EWHC 385 (Comm), para. 19 per Mr Andrew Henshaw QC, sitting as a judge of the High Court; *Heiser (Estate of)* v. *Islamic Republic of Iran* [2019] EWHC 2074 (QB), para. 235 per Stewart J; *Unión Fenosa Gas SA* v. *Egypt* [2020] EWHC 1723 (Comm); [2020] 1 WLR 4732, para. 90 per Jacobs J) but the issue has not been argued before us and it is not necessary to resolve it on this appeal.) A certificate by or on behalf of the Secretary of State for Foreign, Commonwealth and Development Affairs is conclusive evidence of whether, and if so when, a document has been served or received as mentioned in section 12(1) or (5) (section 21(d) SIA, CPR rule 6.44(5)).

35. The terms employed by section 12 SIA include those associated with the Rules of the Supreme Court as they existed at the time of the enactment of the statute in 1978. Subsection (1) refers to a writ and the following subsections also refer to entering an appearance and judgment in default of appearance, matters which have long been superseded in civil procedure in this jurisdiction. The interpretation section of the SIA provides in section 22(2) that references to entry of appearance and judgments in default of appearance include references to any corresponding procedures. The precise application of section 12 to more modern procedures has on occasion given rise to difficulty. (See *Norsk Hydro*; *AIC Ltd* v. *Federal Government of Nigeria* [2003] EWHC 1357 (QB); 129 ILR 571, Fox and Webb, *The Law of State Immunity*, pp 234-5.) However, it was clearly not the legislative intention to limit the procedure for service under section 12(1) to cases involving the entry of appearance and possible judgments in default, or to corresponding procedures, as is demonstrated by the reference in section 12 (1) to an "other document required to be served for instituting proceedings against a State".

36. The rules of court governing the procedure for the enforcement of arbitration awards, including awards under the New York Convention, are contained in CPR rule 62.18. This provides that 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 (CPR rule 62.18(1)). The court may specify parties to the arbitration on whom the arbitration claim form must be served (CPR rule 62.18(2)). (CPR rule 62.3 provides that an arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part VIII procedure. That provision does not apply directly to an application to enforce an award under the New York Convention (CPR rule 62.2(2)) but CPR rule 62.18(1) provides that such an application may be made without notice in an arbitration claim form.) However, CPR rule 62.18(7) provides that an order giving permission to enforce an award must be served on the defendant by delivering a copy to him personally or sending a copy to him at his usual or last known place of residence or business. Under CPR rule 62.18(8) an order giving permission to enforce an award may be served out of the jurisdiction without permission and in accordance with CPR rules 6.40 to 6.46 as if the order were an arbitration claim form. CPR rule 62.18(9) then provides that 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, the defendant may apply to set aside the order and the award must not be

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enforced until after the end of that period or any application made by the defendant within that period has been finally disposed of. The rules referred to in CPR rule 6.18(8)(b) include CPR rule 6.44, considered above, which relates to service of a claim form or other document on a State and echoes section 12(1) SIA. If an application to set aside the order under CPR rule 62.18(9) is not made within the specified period, enforcement of an arbitration award is permitted against any property of the defendant state within the jurisdiction "which is for the time being in use or intended for use for commercial purposes" (sections 13 (2)(b) and 13(4) SIA).

37. In the absence of an agreement within section 12(6) SIA, the procedure for service via the FCDO laid down in section 12(1) is, for proceedings within its scope, the exclusive and mandatory method for service on a foreign state (Fox and Webb, *The Law of State Immunity* p 236). In *Westminster City Council* v. *Government of the Islamic Republic of Iran* [1986] 1 WLR 979; 108 ILR 557 Westminster sought to register land charges under the Land Registration Act 1925 against former embassy premises of Iran. Westminster took out an originating summons naming as defendant the government of Iran, whose solicitors declined to accept service. Peter Gibson J considered that the originating summons was a document required to be served for instituting proceedings against a State within section 12(1). He went on to observe (at p 982G-H):

> It is true that the Chief Land Registrar by his order was not insisting on an originating summons and that any other appropriate originating process could have been used . . . But whatever originating process was chosen, it must have been envisaged that the city council would be instituting proceedings as plaintiff and the only other known interested party, the Iranian government, would be defendant, and that by analogy with rule 300 of the Land Registration Rules 1925 the Iranian government would be served with the proceedings, so that it could participate in the hearing before the court. It seems to me, therefore, that the wording of the opening words of section 12(1) of the State Immunity Act 1978 is satisfied in the present case.

The judge further considered (at p 984A-D) that, notwithstanding the fact that in the exceptional circumstances then prevailing service in conformity with section 12(1) was or might be impractical, he could not rule on the question referred to the court without prior service on the Iranian government in accordance with the section 12(1) procedure.

38. Similarly, in *Kuwait Airways Corpn* v. *Iraqi Airways Co* [1995] 1 WLR 1147 the necessary documents for service on Iraq had been

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lodged at the Central Office and were sent by the Senior Master to the Secretary of State for Foreign Affairs for service in accordance with section 12(1). A letter from the FCO was sent to the Iraqi Embassy enclosing the writ and stating that, as HM Government had no representation in Iraq at that time, the FCO would be grateful if the documents could be forwarded to the Ministry of Foreign Affairs in Baghdad. The documents were received at the Embassy by Mr Ibrahim, an accredited diplomat, who did not attempt to forward to Baghdad the documents received from the FCO. A submission that service of the writ on the Iraqi Embassy was essentially service on the Iraqi Ministry of Foreign Affairs for the purpose of section 12(1) was rejected at first instance by Evans J (HC, 16 April 1992; unreported). In his view the requirement of service "at" not merely "on" the Foreign Ministry of the defendant state was required by the plain words of the subsection. Evans J cited with approval a passage from Lewis, *State and Diplomatic Immunity*, 3rd ed (1990), pp 78-9 which read:

> 9.7 . . . It would have been possible to provide for service within the jurisdiction on the Embassy, on the analogy of a foreign company carrying on business within the jurisdiction . . . However, it was no doubt considered more diplomatic that the foreign sovereign should not, by reason merely of his mission's presence here for the purpose of diplomatic intercourse between the two countries, be deemed to have a legal presence within the jurisdiction.

The decision of Evans J on this point was upheld by the House of Lords. Lord Goff of Chieveley (at pp 1155F-1156D) considered that the delivery of the writ by the FCO to the Embassy was at best a request to the Embassy to forward the writ on behalf of the FCO to the Iraqi Ministry of Foreign Affairs. On the evidence that was not done. It followed that service of the writ on Iraq was never effected in accordance with section 12(1). (See also *European Union* v. *Syrian Arab Republic* [2018] EWHC 181 (Comm), Teare J; *Certain Underwriters at Lloyd's of London* v. *Syrian Arab Republic*, Mr Andrew Henshaw QC.)

39. A key question in the present appeal is whether proceedings to enforce an arbitration award under the New York Convention fall within the scope of section 12(1) SIA. This is to be decided having regard to the ordinary meaning of the statutory provision, its purpose and its legal context, including considerations of international law and comity.

40. On behalf of the respondent Mr Daniel Toledano QC submits that the present proceedings do not fall within the scope of section 12 (1). That section applies only to service of a writ "or other document

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required to be served for instituting proceedings against a State". In his submission it has no application here because the document which initiates the proceedings (the application for permission to enforce the arbitration award) is not required to be served and the document which is required to be served (the order giving permission to enforce the award) does not initiate the proceedings. It is said that there was no obligation to serve notice of the application; under the CPR the court has the power to order service of notice of the application but it did not do so in this case. Furthermore, it is said that while under the CPR there is a requirement to serve the order, the proceedings had already been instituted. I would accept that, if the matter is viewed solely in terms of our procedural law, proceedings are instituted as a result of the issue of the arbitration claim form. However, a defendant state, although aware of the arbitration award, will normally be unaware of the attempt to enforce the award against it in the jurisdiction in question until it is given notice of the proceedings and so, from its point of view the proceedings are only instituted against it once the order is served.

41. One possible response to the respondent's submission is a narrow one founded on the procedural rules. A claimant may issue an arbitration claim form but need not serve this on the defendant state unless the court so orders. The application is usually determined without giving notice to the defendant, but the resulting order must be served on the defendant (CPR rule 62.18(7)) and the award must not be enforced until the defendant has had the opportunity to apply to set it aside (CPR rule 62.18(9)). Service out of the jurisdiction is required by CPR rule 62.18(8)(b) to be in accordance with CPR rules 6.40-6.46 which includes CPR rule 6.44 which deals with service on a State and provides for service through the FCDO and which echoes section 12 SIA. The procedure by which proceedings are instituted therefore involves two stages: first, the application for permission to enforce the arbitration award which may be made without notice in an arbitration claim form and, secondly, the court order giving such permission which must be served on the defendant. The order falls naturally within the words "other document required to be served for instituting proceedings against a State" in section 12(1).

42. There is, however, a more fundamental objection to the respondent's submission concerning the meaning of the words "other document required to be served for instituting proceedings against a State" in section 12(1). On behalf of the respondent it is submitted that these words direct one to the procedural rules in the CPR in order to determine whether there is a requirement that any given document be

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served. On this reading the content of the obligation to effect service in accordance with section 12(1) is delegated to the Rules Committee and will vary over time as procedural rules are amended. There is, however, nothing in the provision which indicates an intention to confer such a power on the Rules Committee. On behalf of the appellant it is submitted that this is far too narrow a perspective and it is submitted that the wording of section 12(1) reflects the fact that there will always be some document which is required to be served for instituting proceedings against a State.

43. The exercise of jurisdiction by the courts of one State over another State is an act of sovereignty. The institution of such proceedings necessarily requires that the defendant state should be given notice of the proceedings. The service of process on a State in itself involves an exercise of sovereignty and gives rise to particular sensibilities. Section 12 is intended to create a procedure whereby service may be effected on a State, in the interests of both parties and in a manner which accords with the requirements of international law and comity. These considerations suggest that a broad reading of section 12(1) is appropriate. The words "other document required to be served for instituting proceedings against a State" in section 12(1) are wide enough to apply to all documents by which notice of proceedings in this jurisdiction is given to a defendant state, subject only to section 12(6). Any narrower reading would necessarily exclude certain proceedings against a State with the result that in such cases no provision would be made in the SIA for notifying a defendant state of the initiation of proceedings against it.

44. In the particular context of enforcement of arbitration awards against a State, an application may be made to the court without notice (with or without issuing an arbitration claim form), in accordance with CPR rule 62.18(1), for permission to enforce. Although the court may order service of the arbitration claim form (CPR rule 62.18(2)) this is not usually required. However, under CPR rule 62.18(7) the resulting order giving permission to enforce must be served on the defendant state which may then apply under CPR rule 62.18(9) to set aside the order. If the order giving permission were not served, the defendant state may well be unaware of the enforcement proceedings and may not have the opportunity to assert immunity from enforcement before an attempt is made to attach or to seize the State's assets within the jurisdiction. As Lord Sumption explained in a different context in *Barton* v. *Wright Hassall LLP* [2018] 1 WLR 1119 (at para. 16), although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is

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done is also important. Rules must identify the precise point from which time runs for the purpose of taking further steps. Having regard to this particular procedure, there is force in the conclusion of Males LJ in the present case (at para. 78) that, in the case of proceedings to enforce an arbitration award under section 101 of the 1996 Act, a document is required for instituting proceedings against a State. That document is the arbitration claim form in a case where the court requires the claim form to be served but if it does not so require it is the order granting permission to enforce the award. In either case the document is a "document required to be served for instituting proceedings against a State" and must be served in accordance with section 12(1) SIA.

The European Convention on State Immunity

45. One reason for the enactment of the SIA was to permit the United Kingdom to become a party to the European Convention on State Immunity, Basle, 16 May 1972, ETS No 74 ("the ECSI"), a Council of Europe Convention. Section 12 SIA has its origin in article 16 of the ECSI which provides:

Article 16

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

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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.

46. The Explanatory Report to the ECSI states that article 16 safeguards the interests of both parties by providing that transmission of the most important documents to the Foreign Ministry of the defendant state constitutes effective service and by ensuring adequate time-limits (para. 58). It also states that the procedural concepts referred to in article 16 (in particular "the document by which the proceedings are instituted" and "judgment by default") are to be given the meaning they have in the lex fori, as it was not possible to reach unification of practice or even common definitions on this point (para. 60).

47. The Explanatory Report states (at para. 59) that it was originally thought that provision should be made for documents instituting proceedings to be transmitted to the Foreign Ministry of the defendant state through the diplomatic channels of that State. It observes that although this practice will probably be adopted in the large majority of cases, article 16 does not specifically mention diplomatic channels, as relations between member states of the Council of Europe are not always conducted through these channels. This note is slightly curious because article 16(2) does provide that the relevant documents shall be transmitted "through the diplomatic channel to the Ministry of Foreign Affairs of the defendant state". However, article 16(2) does not impose any obligation to use the diplomatic channels of the defendant state. This might well be thought inappropriate, for example in circumstances where the defendant state may wish to avoid service. It should be noted that section 12(1) SIA, by contrast, makes clear that the channel of communication is to be through the FCDO to the Ministry of Foreign Affairs of the defendant state. The Explanatory Note also observes (at para. 60) that the Foreign Ministry is obliged to accept writs served on it even if it believes that the proceedings brought against the State are unjustified, that the court is not competent to entertain the proceedings, or that the defendant state may claim immunity.

48. A significant difference between the SIA and the ECSI is that the latter does not permit measures of execution against the property of a State "except where and to the extent that the State has expressly

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consented thereto in writing in any particular case" (article 23). In particular, the Explanatory Report on the ECSI states (at para. 51) in relation to article 12 (which relates to disputes subject to arbitration) that "[i]t should be made clear that proceedings concerned with the enforcement of arbitral awards are outside the scope of the Convention and governed by domestic law and any international convention which may be applicable". It appears therefore that article 16 is not concerned with proceedings in connection with the enforcement of arbitral awards. By contrast section 13 SIA makes express provision for enforcement proceedings against States and section 13(4) expressly permits execution for the enforcement of an arbitral award against the property of a State which is in use or intended for use for commercial purposes. (See also *Van Zyl* v. *Kingdom of Lesotho* [2017] SGHC 104; [2017] 4 SLR 849 at paras. 38-40 where Kannan Ramesh J suggests that the interpretation provisions in section 22(2) SIA were calibrated to cover, *inter alia*, the introduction of enforcement proceedings for arbitral awards in the SIA.)

International law and comity

49. On behalf of Libya, Mr Matovu QC submits that there exists a rule of customary international law to the effect that, whenever a State is directly impleaded before the courts of another State, service of documents instituting the proceedings must be effected through the diplomatic channel or in a manner agreed to by the defendant state. This submission is founded essentially on article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004 ("UNCSI") which provides:

(1) Service of process by writ or other document instituting a proceeding against a State shall be effected:
  (a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
  (b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or
  (c) in the absence of such a convention or special arrangement:
    (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
    (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.
2. Service of process referred to in paragraph 1(c)(i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

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3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.
4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

50. The UNCSI is yet to enter into force. It requires 30 ratifications before it can come into force. As at the date of this judgment, it has been signed by 28 States but only 22 States are parties. The United Kingdom has signed the UNCSI but has not yet ratified it; Libya has done neither. Certain of its provisions may, nevertheless represent rules of customary international law binding generally on all States. It is possible to point to some general statements in the authorities supportive of the view that particular provisions of the UNCSI reflect the state of customary international law on state immunity. In *Jones* v. *Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26; [2007] 1 AC 270, Lord Bingham of Cornhill observed (at para. 26) that the UNCSI was, despite its embryonic status, "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases". Similarly, Lord Hoffmann observed (at para. 47) that UNCSI was "the result of many years work by the International Law Commission ['ILC'] and codifies the law of state immunity". It is, however, necessary to approach these statements with some caution. In *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)* [2012] ICJ Rep 99 the International Court of Justice noted (at paras. 54-5) that the UNCSI was not yet in force and that, as a result, it was necessary to identify customary international law according to the ordinary rules. The court further observed (at para. 66) that the provisions of UNCSI were relevant only in so far as they shed light on the content of customary international law. As a result, it is necessary to examine each provision of the UNCSI in order to assess whether it does reflect customary international law. As Lord Sumption observed in *Benkharbouche* v. *Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs intervening)* [2017] UKSC 62; [2019] AC 777, para. 32:

> Like most multilateral conventions, its provisions are based partly on existing customary rules of general acceptance and partly on the resolution of points on which practice and opinion had previously been diverse. It is therefore necessary to distinguish between those provisions of the Convention which were essentially declaratory and those which were legislative in the sense that

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they sought to resolve differences rather than to recognise existing consensus. That exercise would inevitably require one to ascertain how customary law stood before the treaty.

(See, also, *Belhaj* v. *Straw (United Nations Special Rapporteur on Torture intervening)* [2017] UKSC 3; [2017] AC 964, para. 25 per Lord Mance; *Boru Hatlari Ile Petrol Tasima AS* v. *Tepe Insaat Sanayii AS* [2018] UKPC 31, para. 25 per Lord Mance; Webb, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States", in *Evans* (ed), *International Law*, 5th ed (2018), pp 319-23.)

51. In order to demonstrate the existence of such a rule of customary law it would be necessary for Libya to establish both widespread, representative and consistent State practice and an acceptance by States that the practice is followed as a matter of legal obligation (opinio juris). (*North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)* [1969] ICJ Rep 3, para. 77; *Military and Paramilitary activities in and against Nicaragua (Nicaragua* v. *United States)* [1986] ICJ Rep 14; Jennings and Watts, *Oppenheim's International Law*: vol 1, 9th ed, pp 25-36.) I am unable to accept that the rule for which Libya contends is a rule of customary international law. I propose to deal with this relatively briefly because in my view it is not decisive of the outcome of this appeal.

52. In my view, the rule set out in article 22 UNCSI is clearly not declaratory of pre-existing customary international law. The UNCSI originated in the work of the ILC which had been given the task of codifying and gradually developing international law in matters of jurisdictional immunities of States and their property and was elaborated by an Ad Hoc Committee reporting to the Sixth Committee of the UN General Assembly. Stewart, in a commentary on the new Convention observed that in the absence of an agreed international scheme, the requirements and methods for valid service of process on foreign governments had been left to domestic law and the rules consequently differed significantly from State to State. The Convention was the first multilateral instrument to address these issues in the specific context of sovereign suits (Stewart, "The UN Convention on Jurisdictional Immunities of States and their Property", (2005) 99 AJIL 194, 207-8). The *travaux préparatoires* of the UNCSI demonstrate that article 22 was not intended to be declaratory of customary international law but was, rather, legislative in character, attempting to resolve disparate State practice. The rules for service initially proposed by Special Rapporteur Sucharitkul were permissive not mandatory in character (ILC Yearbook 1986 vol II(1), p 31). When the Drafting

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Committee of the ILC adopted a mandatory rule the methods of service were expanded and included in a hierarchical list service "by transmission by registered mail ... or ... by any other means" if permitted by the law of the forum and the law of the defendant state. The variety of means was intended to ensure "the widest possible flexibility, while protecting the interests of the parties concerned" (ILC Yearbook 1986 vol II(2), p 20). This version was adopted by the ILC on first reading in 1986. When submissions on the draft were requested the German Democratic Republic was the only State which considered that service should be only by diplomatic channels. Provision for service by a variety of means remained in the draft article until it was amended by Special Rapporteur Ogiso in 1990 to require service in accordance with international conventions or by diplomatic channels (ILC Yearbook 1990 vol II(1), p 20). The draft article adopted on second reading in 1991 was a compromise between the version from the first reading in 1986 and the stricter approach favoured by the Special Rapporteur in 1990. The article proposed "a middle ground so as to protect the interests of the defendant state and those of the individual plaintiff". (ILC Yearbook 1991 vol II(2), pp 59-60). (Gazzini in O'Keefe and Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property, A Commentary*, pp 348-50.)

53. Gazzini (at pp 349-50) also describes further changes made to the draft article in 2004:

> The text of draft article 20(1) remained unchanged until 2004, when it was substantially amended by the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property. The Ad Hoc Committee re-introduced reference to any special arrangement between the claimant and the State concerned, to the extent that it was not precluded by the law of the forum state, and posited it as a preferred method of service alongside any applicable international convention. If and only if no international convention applied and no special arrangement had been made, service of process was to be effected by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned or by any other means accepted by the State concerned, if not precluded by the law of the forum state. It was in this form that what had by then become article 22(1) passed into the Convention as adopted by the General Assembly later that same year.

54. Furthermore, article 22 UNCSI cannot be considered to have crystallised an emerging rule of customary law or to have given rise to a general practice which has generated a new rule of customary law. Article 16 ECSI is broadly consistent with the approach adopted in article 22 UNCSI, although it was not intended to codify customary

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international law and enjoys only limited participation. (At present only eight States including the United Kingdom are parties to the ECSI.) However, State practice is simply too diverse to support the widespread, representative and consistent practice which would be required for a rule of customary international law. While some States have a mandatory rule of service through the diplomatic channel (notably the United Kingdom and Singapore) many others do not. These include the United States of America (Foreign Sovereign Immunities Act 1976, section 1608(a)(4)), New Zealand (High Court Rules 2016, Part 6), and Australia (sections 23-5, Foreign States Immunities Act 1985; *Firebird Global Master Fund II Ltd* v. *Republic of Nauru* [2015] HCA 43, considered in detail below). Within the European Union service through the diplomatic channel is not required where Parliament and Council Regulation (EC) No 1393/2007 applies (*London Steam-Ship Owners' Mutual Insurance Association Ltd* v. *Kingdom of Spain (No 4) (The Prestige)* [2020] EWHC 1920 (Comm); [2020] 1 WLR 5279).

55. Finally in this regard, I should refer to *Wallishauser* v. *Austria* (Application No 156/04), 17 July 2012, a decision of the European Court of Human Rights ("ECtHR") on which Libya relies. In that case, the applicant had attempted to serve proceedings in an employment dispute on the United States of America through the diplomatic channel. The United States had refused to accept the summonses and to serve them on the Department of Justice as requested. The Austrian courts accepted that refusal as a sovereign act and, therefore, refused to proceed to a default judgment. The applicant brought proceedings against Austria contending that the Austrian courts' acceptance of the United States' refusal to serve the summonses issued to it violated the applicant's right of access to the court. The ECtHR considered that the Austrian acceptance of the United States' refusal served the legitimate aim of complying with international law to promote international comity. However, in addressing proportionality it stated that the Austrian courts had failed to consider whether article 20 of the ILC 1991 draft articles (which became article 22 UNCSI) had effect as a rule of customary international law. The ECtHR considered (at para. 69) that it did. It appears to have come to this conclusion on the ground that Austria had not objected to draft article 20 and had subsequently signed and ratified the UNCSI. This informed the conclusion of the ECtHR (at paras. 72-3) that Austria's acceptance of the United States' refusal to serve the summonses as a sovereign act and its refusal to proceed with the applicant's case were disproportionate with the result that there had been a violation of article 6 ECHR.

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56. *Wallishauser* v. *Austria* does not assist Libya. First, its reasoning in relation to customary international law seems to have proceeded on the basis of a notion of estoppel and makes no reference to State practice. Whether or not this is appropriate in deciding whether the conduct of Austria was proportionate, it cannot support a rule of customary international law of general application and is impossible to reconcile with the evidence of the *travaux préparatoires* and State practice referred to in the preceding paragraphs. Secondly, *Wallishauser* was, in any event, concerned with a very different issue from that in the present proceedings, namely whether there exists a rule of customary international law that service through the diplomatic channel is sufficient. It provides no support for the mandatory rule for which Libya contends.

57. For these reasons, I consider that there is no rule of customary international law which requires that service of documents instituting proceedings against a State be effected either through the diplomatic channel or in a manner agreed by the defendant state.

58. Nevertheless, considerations of international law and comity are in play here and they support the wider reading of section 12(1) SIA. The SIA is primarily concerned with relations between sovereign states and, as a result, its provisions fall to be considered against the background of established principles of international law (*Alcom Ltd* v. *Republic of Colombia* [1984] AC 580, p 597G-H per Lord Diplock).

59. The sovereign equality of States is a fundamental principle of the international legal order. This is reflected in the rules of international law governing State immunity from the jurisdiction of the courts of other States. Although the immunity of States is not absolute this is nevertheless an area of considerable sensitivity. In *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* the International Court of Justice observed:

> The court considers that the rule of state immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it. (at para. 57)

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These observations apply to both immunity from a State's adjudicative jurisdiction and immunity from a State's enforcement jurisdiction. Indeed, the latter may give rise to even greater sensitivities in view of the fact that the power of the forum state may be enlisted to seize assets of the defendant state.

60. The present case is concerned, more specifically, with how the process by which one State is subjected to the jurisdiction of the courts of another State is initiated. Clearly, there is a need to ensure that the jurisdiction is properly invoked and that the process does not give rise to any breach of international law. Serving legal proceedings on a State is a relatively unusual matter and there are advantages in establishing clear procedures by which it might be effected. There is a danger here that, otherwise, an attempt may be made to serve process on a representative of the defendant state or on diplomatic premises in a manner which gives rise to a breach of international law. In particular, there is a danger that an attempt to serve on diplomatic premises would infringe their inviolability under article 22 of the Vienna Convention on Diplomatic Relations, 1961 (Fox and Webb, *The Law of State Immunity*, p 235).

61. Such considerations were clearly influential in the thinking of the Australian Law Reform Commission in its report on state immunity in 1984 (Australian Law Reform Commission, Report No 24 (1984), *Foreign State Immunity*) which preceded the enactment of the Australian Foreign States Immunities Act 1985. The Commission noted that all the overseas legislation in its survey provided for service through the forum State's Foreign Ministry (Foreign Sovereign Immunities Act 1976 (USA) section 1608(a)(4); SIA (UK) section 12 (1); State Immunity Act 1979 (Singapore) section 14(1); State Immunity Ordinance 1981 (Pakistan) section 13(1); Foreign States Immunities Act 1981 (South Africa) section 13(1); State Immunity Act 1982 (Canada) section 9(2)). The recent overseas legislation surveyed also provided for service via a method agreed by the foreign state (in similar terms to SIA (UK) section 12(6)). With regard to service through the Foreign Ministry of the forum state the Commission observed:

> Because it is the only method of service which can be said with some certainty to be workable without the prior agreement of the foreign state, any proposal for reform must make provision for it. It is guaranteed to bring the suit to the attention of senior officials of the foreign state, fulfilling the criterion that service must give the State adequate notice. Equally importantly the diplomatic channel is least likely to cause offence to recipients. When offended by the use of other methods of service, States frequently point out that the

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diplomatic channel should have been used. It is routinely used by a number of civil law states. The Commission has been informed that the United Kingdom experience with service through the diplomatic channel under the 1978 Act, which has been reasonably extensive, has not presented significant difficulties in practice. (at para. 148, footnotes omitted)

The Commission went on to acknowledge (at para. 148) that from a claimant's point of view the main drawback of service through the diplomatic channel is the potential for delay caused by the number of links in the chain. With regard to methods agreed by the foreign state, it noted that all the recent legislation on state immunity contained a similar provision to section 12(6) SIA, although there was no equivalent in the ECSI. It then turned to consider a wider range of methods of service.

In principle the objection [to a wider range of methods of service] is that any methods, being ones to which the foreign state has not agreed, may cause offence. In this case allowing such methods to form the basis of a default judgment may be unacceptable. It is the Commission's view that for a defendant state which is prepared to be accommodating on the procedural aspects no further methods are necessary. For a State prepared to stand on its rights there are no further methods which Australia could insist on applying against all States. It seems impractical to try and set out particular methods which cannot be used in serving particular States. In addition, if an alternative method is tried and the foreign state objects or ignores the service the plaintiff would then have to seek service via the diplomatic channel. The effect of this is that the Department of Foreign Affairs would be seen as becoming involved only in those situations where problems had already arisen. It would be more difficult in such circumstance for the Department to persuade the other State that it was merely acting as a "postman" and was not in fact supporting the plaintiff. Accordingly it is recommended that there be only two methods allowed in the proposed legislation for service upon the foreign state itself, the diplomatic channel and any method to which the State has agreed. To avoid the risk of plaintiffs attempting private service in Australia and thereby harassing diplomats or visiting State representatives all other local service should be excluded. (para. 150, footnotes omitted)

62. I have referred to the report of the Australian Law Reform Commission at some length because it provides an insight into the difficulties which may be encountered in the field of foreign relations as a result of attempts to institute proceedings against a State. It also identifies the advantages of a provision such as section 12(1) SIA. In normal circumstances it provides claimants with a secure and effective means of serving proceedings on a defendant state which might not otherwise be possible. It is a workable means of notifying the defendant

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state of the proceedings and of establishing the jurisdiction of the court. A certificate by or on behalf of the Secretary of State under section 21 (d) SIA is conclusive of whether and when a document has been served or received. Clear notice of the proceedings is brought to the attention of senior officials of the defendant state which is spared the possibility of harassment arising from others attempts at service. Furthermore, "[t]he principle underlying the time limits in section 12 is clearly to ensure that the foreign state has adequate time and opportunity to respond to the conduct of proceedings in the English court of whatever nature which affect its interests" (Fox and Webb, *The Law of State Immunity*, p 234). With the exception of service in a manner agreed by the defendant state, it is the manner of service least likely to give offence. The process provides a means of commencing proceedings which meets the requirements of international law and comity, in the interests of both parties and the United Kingdom. As the Australian Law Reform Commission put it, it is "the only method of service which can be said with some certainty to be workable without the prior agreement of the foreign state". In my view, section 12 SIA is founded by Parliament on these considerations of comity.

The authorities

63. In *Norsk Hydro ASA* v. *State Property Fund of Ukraine*, Norsk Hydro made a without notice application for permission to enforce a New York Convention award as a judgment. Morison J made the order which allowed the respondents 21 days from the date of service of the order to apply to set it aside. Norsk Hydro then obtained an interim third party debt order from Andrew Smith J. The Republic of Ukraine applied to set aside both orders, *inter alia*, on the ground that by virtue of sections 12(2) and 22(2) SIA and CPR rule 62.18(9)(b) the third party debt order had been made prematurely and should not have been made less than two months and 21 days after the order to enforce the award as a judgment. In setting aside the third party debt order Gross J held that the operation of section 12(2) is not confined to the court's adjudicative jurisdiction.

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,

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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 rule 62.18. (at para. 25(4))

He went on to hold (at para. 25(5)) that the wording of section 12(2) applied to the time period to be set by the court within which the defendant state might seek to set aside an order for enforcement under CPR rule 62.18(9). He considered that section 22(2) was capable of supporting such a construction, but he preferred to arrive at the conclusion on the wording of section 12(2) standing alone but read in context.

64. Although Gross J did not refer expressly to the scope of section 12(1), it is clearly implicit in his conclusion that section 12(2) applied that the permission order was a document falling within the scope of section 12(1). (See *Van Zyl* at para. 19.) In addition, the passage cited above provides a valuable explanation of the practical advantages of holding section 12(1) applicable to proceedings to enforce an arbitral award. Furthermore, Gross J noted that CPR rule 62.18 contemplates that an applicant seeking enforcement may proceed by way of an arbitration claim form or may simply seek an order granting the relevant permission. He was clearly correct in his view (expressed at para. 25(1)) that it is immaterial for present purposes which course is followed.

65. The issue of the scope of section 12(1) was expressly addressed by Hamblen J in *L* v. *Y Regional Government of X*. By an arbitration claim form the claimants sought an order under section 42 of the 1996 Act to enforce a peremptory order made by an arbitral tribunal. The claim form was served on the defendant's solicitors pursuant to an order for substituted service. The defendant acknowledged service but subsequently applied to set aside the order for substituted service on the ground that it should have been served in accordance with section 12 (1) SIA. The claimants maintained that the claim was not "instituting proceedings" within section 12(1). In rejecting that submission, Hamblen J observed that the purpose of the arbitration claim was to seek to persuade the court to exercise its powers under the 1996 Act. The only way of invoking the powers of the court to make an order was by making such an application to the court.

In my judgment the claimants were thereby "instituting proceedings" within the meaning of section 12(1). Although the proceedings thereby instituted may be ancillary to existing arbitration proceedings they are nevertheless distinct proceedings brought in court for the purpose of invoking the powers of and obtaining an order from the court. The arbitration claim form is the

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document which institutes those proceedings and it "must be served" for that purpose, as CPR rule 62.4(2) makes clear. (para. 28)

In his view, the wording of section 12(1) was general and unqualified. It was not limited to proceedings seeking judgment. Furthermore, there was authority applying it to other types of proceedings: *Norsk Hydro* (enforcement proceedings) and *Westminster City Council* (proceedings for registering charges over land). Referring to the observation of Gross J in *Norsk Hydro*, cited above, that the two-month period in section 12(2) was an acknowledgement of the reality that States do take time to react to legal proceedings, Hamblen J stated that the reality acknowledged by the prescribed two-month period applies to any legal proceedings which are instituted, not merely to proceedings of a particular but unspecified type (at paras. 30-2). In this regard he referred to Fox and Webb, *The Law of State Immunity*, at p 231:

> The principle underlying the time limits in section 12 is clearly to ensure that the foreign state has adequate time and opportunity to respond to the conduct of proceedings in the English court of *whatever nature* which affect its interests. (Original emphasis)

It was correct that section 12(1) would not apply to interlocutory applications in existing court proceedings; that was because they involved no initiation of such proceedings. (See, in this regard, the more recent decision of Bryan J in *European Union* v. *Syrian Arab Republic* [2018] EWHC 1712 (Comm).) However, whilst the court proceedings in that case were, as the 1996 Act states, "in relation to arbitral proceedings", they were nevertheless distinct proceedings involving the invocation of the court's procedure and powers. They involved bringing the defendant before the court for the first time in order to participate in court proceedings brought for the purpose of obtaining a court order (at paras. 35, 36, 40).

66. I find this reasoning compelling and, in my view, it applies with equal force to an application for permission to enforce an arbitration award under section 101 of the 1996 Act. While it is the case that Hamblen J referred to the fact that the claimants had issued an arbitration claim form which "started" the arbitration claim in accordance with CPR rule 62.2 and 3 and which was required to be served, his reasoning is also founded on the nature and substance of the application. (See *Van Zyl* per Kannan Ramesh J at paras. 25-6.) (In the present case, as it happens, an arbitration claim form was issued but this cannot be a material distinction from a case where the claimant simply applies for permission to enforce the award.) The essential point is that in order to enforce an arbitration award it is necessary to invoke

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the jurisdiction of the forum state to enable it to exercise its powers under the 1996 Act and it is also necessary to give the defendant state notice to enable it to respond. In the present case the service of the permission order is intended to achieve those purposes and falls within the unqualified terms of section 12(1).

67. A different view was taken by Teare J in *Gold Reserve Inc* v. *Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm); [2016] 1 WLR 2829. The claimant applied to enforce a New York Convention arbitration award. The order giving permission to enforce the award was served in accordance with subsection 12(1) but the arbitration claim form was not. Venezuela applied to set aside the order giving permission, *inter alia*, on the ground that the arbitration claim form should have been served in accordance with section 12(1). Teare J (at paras. 57-8) considered that section 12(1) did not apply to all documents required to institute proceedings but only those which were required to be served. Under CPR rule 62.18 the arbitration claim form was not a document which was required to be served. Although he appeared to accept (at para. 57) that the document which was required to be served was the order to enforce, later in his judgment Teare J stated (at para. 64):

> [Section 12(1)] only applies to writs or to other documents "required to be served". If the document instituting the proceedings is not required to be served then the subsection has no application.

(See also *Unión Fenosa Gas SA* v. *Egypt*, para. 103 per Jacobs J.) This focus on whether a particular document is required to be served under the CPR is inappropriate in my view. I agree with the observation of Males LJ in the present case that where the jurisdiction of the UK courts is invoked in respect of a defendant state, it will always be necessary to give notice of the institution of the proceedings to the defendant state. There will always be a document requiring to be served and the wording of section 12(1) is intended to make clear that, subject to section 12(6), service through the FCDO is required, whatever the nature of the document.

68. In his judgment in *Gold Reserve* Teare J addressed a further issue of relevance here. Questions sometimes arise as to whether in any given case the particular procedural steps under consideration correspond to entering an appearance or a judgment in default within subsection 12 (2), (4) or (5) as extended by subsection 22(2). (See Fox and Webb, *The Law of State Immunity*, pp 234-5.) In *Norsk Hydro* Gross J held that the wording of subsection 12(2) applied to the time period to be set by the court within which the defendant state might seek to set

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aside an order for enforcement of an arbitration award under CPR rule 62.18(9). On the other hand, in *AIC* (in which *Norsk Hydro* does not appear to have been cited) Stanley Burnton J held that subsections 12 (4) and (5) SIA did not apply to an application for registration of a judgment against a State under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933, for which the issue and service of a claim form is required. As Teare J pointed out in *Gold Reserve* (at para. 63), Stanley Burnton J seems to have proceeded on the basis that section 12, which deals in various subsections with different procedural steps, must be applicable in its entirety to the proceedings in question or not at all. However, there is no warrant for such an approach. I consider that Teare J was correct in *Gold Reserve* in concluding (at para. 64) that if the particular proceedings do not involve any one of those steps, the special provision in section 12 relating to that step simply does not apply. In my view, there is nothing in the language of section 12 which requires one to read subsections 12(2), (4) or (5) as limiting the scope of subsection 12(1) to cases where there may be an appearance, a default judgment or a corresponding procedural step. Accordingly, even if subsections 12 (2), (4) or (5) cannot apply in a given case, this does not prevent the application of subsection 12(1). (See also *Van Zyl* per Kannan Ramesh J at paras. 72-3.)

69. In *Firebird Global Master Fund II Ltd* v. *Republic of Nauru* [2015] HCA 43 the High Court of Australia considered whether Part III of the Foreign States Immunities Act 1985 ("FSIA") required service of a summons on a defendant state prior to registration of a judgment under the Foreign Judgments Act 1991. Firebird obtained a judgment in Japan against Nauru. It then obtained an order from the Supreme Court of New South Wales that the foreign judgment be entered under the Foreign Judgments Act. The summons for registration was not served on Nauru. The order for registration stated the period within which Nauru could apply to have the registration of the foreign judgment set aside. Further orders were subsequently made granting permission to serve the notice of registration outside Australia and on the Secretary for Justice of the Republic of Nauru. After some delay, service was effected in accordance with the Uniform Civil Procedure Rules 2005 (NSW). After the time permitted to apply to set the registration aside had expired Firebird obtained a garnishee order against Nauru's assets. Nauru applied to set aside the registration of the foreign judgment and the garnishee order. One issue was whether the procedure adopted for service on Nauru was prohibited, expressly or impliedly, by the FSIA. Nauru submitted that section 27

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FSIA, which provides that a judgment in default of appearance shall not be entered against a foreign state unless it is proved that service of initiating process was effected in accordance with the FSIA, prohibited the entry of a judgment against it. Although the requirement in section 27(1) expressly applied only to a judgment in default of appearance and did not on its face apply to ex parte proceedings, Nauru contended for a construction that would extend its application to the entry or registration of all judgments, with the result that it should have been served with an initiating process prior to any judgment being entered or steps being taken to enforce the judgment. The submission was rejected (Gageler J dissenting).

70. In a joint judgment, French CJ and Kiefel J observed that while the definition of "initiating process" in the FSIA was wide and would include a summons for registration of a foreign judgment, none of the other relevant provisions of Part III and nothing in the report of the Australian Law Reform Commission which preceded the enactment of the FSIA supported Nauru's argument that the application of section 27 (1) should be extended to the entry or registration of all judgments. In a further joint judgment, Nettle and Gordon JJ held (at paras. 211-16) that Firebird was not required to serve Nauru before applying to register the Japanese judgment under the Foreign Judgments Act. They expressly rejected the submission that because registration of a foreign judgment gives the judgment the same effect as a judgment of the registering court it should be regarded as a default judgment or a like procedure within section 27. In a dissenting judgment Gageler J considered (at paras. 132-49) that section 27(1) operates to prevent an Australian court from making any order against a foreign state in a proceeding in which the foreign state has not appeared unless it is proved that the foreign state has been served with the initiating process in accordance with either section 23 (service with the agreement of the foreign state) or section 24 (service through the diplomatic channel).

71. Although the respondent to the present appeal relies on *Firebird* it seems to me to provide little support for its case. First, the majority declined to extend the scope of section 27 as proposed so as to require service of a summons on the defendant state before registration. It should be remembered that in this jurisdiction applications to register foreign judgments and for permission to enforce arbitration awards against a defendant state are initially made without notice to the defendant and no criticism has been made in this appeal of those procedures. Secondly, it might appear that the respondent can derive more assistance from the conclusion of the majority in *Firebird* that when Nauru was served, service was not required to be through the

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diplomatic channel or by agreement with the State. There is, here, however, an important difference between the UK SIA and the FSIA. Section 12 SIA, is mandatory and exclusive where it applies and requires that service of any writ or other document required to be served for instituting service against a State shall be through the FCDO (subsection 12(1)) or in a manner to which the State has agreed (subsection 12(6)). Sections 23 and 24 FSIA provide for service of initiating process on a foreign state by agreement or through the diplomatic channel, respectively. Section 25 FSIA provides that purported service of an initiating process upon a foreign state in Australia undertaken otherwise than in accordance with sections 23 or 24 is ineffective. However, as French CJ and Kiefel J emphasised in their joint judgment (at para. 94), section 25 is limited in its application to service in Australia. As a result, the FSIA did not prohibit the method by which service was effected on Nauru outside Australia. Thirdly, a further observation of French CJ and Kiefel J (at para. 96) is of some significance to the wider issues canvassed in the present appeal:

> No doubt there is a basis for an implication of a requirement in the Immunities Act that a foreign state be served in order that it can effectively assert its claim to immunity. Even so, it cannot be said that the procedures under the Foreign Judgments Act deny a foreign state such as Nauru that opportunity. The foreign judgment may have been registered, but that registration was liable to be set aside on the application of Nauru and upon Nauru's assertion of its immunity.

Similarly, Nettle and Gordon JJ considered (at para. 215) that it is implicit in the Foreign Judgments Act that the Australian court will require service of the notice of registration of judgment on the judgment debtor within the period within which application may be made to set aside the registration.

72. I have found the judgment of Kannan Ramesh J in the High Court of Singapore in *Van Zyl* particularly illuminating. That case concerned the provisions of the Singapore State Immunity Act (Chapter 313, (2014) revised ed) ("the Singapore Act") which was closely modelled on the UK SIA and rules of court which the judge noted were not different in any meaningful manner from those in the United Kingdom. The assistant registrar had refused permission to serve a leave order to enforce an arbitral award against Lesotho by means of substituted service, on the ground that service had to be effected through the Ministry of Foreign Affairs in accordance with section 14(1) of the Singapore Act, which is materially identical to section 12(1) SIA. Kannan Ramesh J dismissed the appeal.

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73. Having considered *Norsk Hydro*, *L* and *Gold Reserve*, the judge noted that the originating application (the equivalent of an arbitration claim form) was an ex parte application. Nevertheless, he considered that a leave order in Singapore fulfils the same role as a permission order in the United Kingdom and is no less required to be served for the institution of enforcement proceedings. In the judge's view the starting point was not the rules of court but the question whether section 14 of the Singapore Act was intended to govern the procedure for the service of leave orders on foreign states. There was no reason why section 14(1) should not cover both adjudicative and enforcement proceedings. The judge then adopted the conclusion of Hamblen J in *L* (at para. 30) that the wording of section 12(1) (section 14(1) in the Singapore Act) is general and unqualified and not limited to proceedings seeking judgment. Citing Fox and Webb, *The Law of State Immunity*, p 231, he emphasised the importance of the defendant state receiving notice of the proceedings against it so that it had adequate time and opportunity to respond to proceedings of whatever nature which affected its interests and continued:

> The same rationale applies to a leave order, since the originating summons itself is not served. Even though it is not an originating process, the leave order will often be the first hint that the respondent state has of the impending enforcement proceedings in Singapore, particularly if the award is a foreign one . . .
>
> The important distinction in section 14 is not between originating processes and non-originating processes as a matter of form, but between the "institution" of new proceedings (of which the State is unaware) and the continuation of ongoing proceedings (of which the State already has notice). In the former case, the State must be notified through the official channel stipulated in section 14. After it has notice of the proceedings, the procedure for service of other documents need not strictly comply with section 14 any longer. It is crucial to remember that the trigger under section 14(1) for the institution of proceedings *is the requirement of service* and *not the character of* the document that has to be served. (at paras. 43-4, original emphasis)

Finally in this regard, he observed that if section 14(1) did not apply there were no clear ground rules for effecting service of leave orders on a defendant state. For these reasons he concluded that section 14(1) of the Singapore Act did apply to a leave order.

74. On the basis that section 14 extended to a leave order, he went on to conclude that a "corresponding procedure" (under section 2(2)(b) of the Singapore Act which is in the same terms as section 22(2) SIA) must be read to extend to the time for filing an application to set

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aside such an order. Here he preferred the reasoning of Gross J in *Norsk Hydro* and that of Teare J in *Gold Reserve* to that of Stanley Burnton J in *AIC*.

75. I find myself in total agreement with the reasoning of Kannan Ramesh J in support of his conclusion that section 14(1) of the Singapore Act (the equivalent of section 12(1) SIA) does apply to an order giving permission to enforce an arbitration award. For the purposes of this appeal, it is not necessary to express a concluded view on the question whether an application to set aside an order granting permission to enforce an arbitration award is by virtue of section 22(2) SIA a corresponding procedure to an entry of appearance within section 12(2) SIA, the point not having been fully argued before us.

Conclusion on Issue 1

76. I consider that the procedure for service in accordance with section 12 SIA is required to be followed in all cases where proceedings are commenced against a defendant state. In particular, it applies to proceedings to enforce an arbitral award under the New York Convention pursuant to section 101 of the 1996 Act and CPR rule 62.18.

(1) Section 12 establishes special procedures and procedural privileges in cases where the defendant is a State. These apply whether the proceedings invoke the adjudicative or enforcement jurisdiction. (See para. 30 above.)
(2) In cases to which section 12(1) applies, the procedure which it establishes for service on a defendant state through the FCDO is mandatory and exclusive, subject only to the possibility of service in accordance with section 12(6) in a manner agreed by the defendant state. (See paras. 37-8 above.)
(3) A particular purpose of section 12 is to provide a means by which a State can be given notice of proceedings against it and a fair opportunity to respond. This rationale applies fully to the service of an order giving permission to enforce an arbitral award. As Kannan Ramesh J pointed out in *Van Zyl* (at para. 43), although the order is not in itself an originating process, it will often be the first notice to the defendant state of an attempt to enforce the arbitral award in the forum in question. (See also Hamblen J in *L* at para. 40.) The defendant state must be given notice of the proceedings so that it has adequate time and opportunity to apply to set aside the order for enforcement, *inter alia* on grounds of state

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immunity, before any further steps are taken to enforce the award. A document giving such notice is a document required to be served for instituting proceedings against a State within section 12(1). That document will be an arbitration claim form where the court requires it to be served. Otherwise it will be the order granting permission to enforce the award. (See paras. 41, 43-4 and 66 above.)

(4) The provisions of the ECSI cast little light on the correct reading of section 12 SIA because under the ECSI enforcement against the assets of a defendant state is generally prohibited and the SIA deliberately diverges from the ECSI in this regard, in particular in relation to the enforcement of arbitration awards against a State. (See paras. 45-8 above.)

(5) Although there is no rule of customary international law requiring that the service of a document instituting proceedings against a defendant state be served through the diplomatic channel, considerations of international law and comity strongly support a reading of section 12(1) which makes its procedure available and mandatory, subject to section 12(6), in all cases where documents instituting proceedings are to be served on a foreign state. (See paras. 49-62 above.)

(6) Although subsections 12(2), (4) and (5) make provision for entering an appearance and judgment in default of appearance, there is no reason to read section 12(1) as limited to service of proceedings which may lead to the entering of an appearance or a default judgment, or to corresponding procedures as provided for in section 22(2). On the contrary, section 12(1) is intended to establish a procedure for service of general application. As a result, even if the procedures for enforcement of an arbitral award do not correspond with those falling within sections 12(2), (4) and (5), the procedure for service in section 12(1) still applies. (See para. 68 above.)

(7) If section 12(1) has no application, there would be no procedure under the SIA by which notice of enforcement proceedings could be given to a defendant state.

(8) Where proceedings are instituted to enforce an arbitration award against a defendant state, and where no order has been made for the service of the application for permission to enforce the award, the order for enforcement is a "document required to be served for instituting proceedings against a State" and section 12(1) SIA therefore requires, subject only to section 12(6), that service be effected through the FCDO to the Ministry of Foreign Affairs of the defendant state.

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Issue 2: In exceptional circumstances, is the court able, pursuant to CPR rules 6.16 and/or 6.28, to dispense with service of the enforcement order, notwithstanding that section 12(1) applies?

77. If the procedure for service under section 12(1) SIA is mandatory, subject only to service in accordance with section 12(6), and if the initiation of the present proceedings falls within the scope of section 12(1), is it nevertheless possible for the court to dispense with service?

78. The CPR include provisions permitting the court to dispense with service. CPR rule 6.16 provides that the court may dispense with service of a claim form in exceptional circumstances. CPR rule 6.28 provides that the court may dispense with the service of "any document which is to be served in the proceedings". This presumably relates to any such document other than a claim form. The power under CPR rule 6.28 is unfettered, whereas that under CPR rule 6.16 requires exceptional circumstances. The scope of both powers is delineated by CPR rule 6.1(a) which provides that CPR Part 6 applies to the service of documents "except where . . . another Part, any other enactment or a practice direction makes different provision".

79. In the present case Males LJ held (at paras. 45-6) that the court did not have a power to dispense with service. In his view that would be contrary to the clear and mandatory terms of the SIA and would render parts of section 12 unworkable. He noted that the court certainly had no such power when the SIA was enacted and considered that the subsequent introduction of a power to dispense with service of a claim form in the CPR could not have changed that position. Rules of court could not override primary legislation and, in any event, in view of CPR rule 6.1, did not purport to do so. However, he went on to consider (at paras. 81-9) whether, if the power under CPR rule 6.16 or 6.28 were available, this would be an appropriate case in which to exercise it. He observed that if the conditions then prevailing in Libya did not amount to exceptional circumstances, it was difficult to know what would. He also referred to the strong public policy that arbitration awards should be honoured and, if not honoured, enforced. Accordingly, if the court had a power to dispense with service, he would have found that there were exceptional circumstances and would have exercised a discretion to do so.

80. On appeal, the Court of Appeal held (at paras. 62-3) that if Males LJ was right in holding that in every case section 12 required service through the FCDO of an order permitting an arbitration award to be enforced as a judgment, there was no power to dispense

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with service. The argument that if the judge dispenses with service in an appropriately exceptional case there is no document required to be served within section 12 was, in its view, an impossible construction which, if right, would give the judge a discretion to dispense with a statutory requirement. The Court of Appeal (at paras. 64-70) also agreed with Males LJ that, if there were a power to dispense with service in exceptional circumstances, that condition would have been met and this was an appropriate case in which to exercise the discretion. Libya does not appeal against the decision that the circumstances of this case would justify the exercise of such a power, if it exists.

81. Before us, Mr Toledano on behalf of the respondent submits that the decision of the Court of Appeal should be upheld on the further or alternative basis that the question whether a document is required to be served is to be answered by reference to the totality of the procedural rules, including any power in the rules given to the court to require or dispense with service and only after the court has decided whether to exercise that power. I am unable to accept this submission. First, it is founded on the view that section 12(1) SIA requires the court to refer to the relevant procedural rules to determine whether a document is one which is required to be served. Thus, Mr Toledano submits that the statutory requirement itself requires regard to be had to rules of court concerning service which must include reference to any judicial power within the rules which affects the question. For reasons stated earlier in this judgment, I have already rejected this premise. Secondly, CPR rule 6.1(a) makes clear that in this instance the rules do not purport to oust the requirements of section 12(1). Thirdly, as the Court of Appeal pointed out, in any event it cannot be correct that the CPR can give the court a discretion to dispense with what is a statutory requirement. The respondent's submission is inconsistent with the reasoning and the result in *Kuwait Airways Corpn* v. *Iraqi Airways Co*, considered earlier in this judgment. The procedure in section 12(1) SIA is intended to be a mandatory and exclusive procedure in the cases to which it applies, subject only to the exception in section 12(6) in the case of service in a manner to which the defendant state has agreed. Accordingly, statements in *Certain Underwriters at Lloyd's of London* v. *Syrian Arab Republic* (at para. 25), *Havlish* v. *Islamic Republic of Iran* [2018] EWHC 1478 (Comm) (at para. 21) and *Qatar National Bank (QPSC)* v. *Government of Eritrea* [2019] EWHC 1601 (Ch) (at para. 70) that the power to dispense with service is consistent with section 12(1) SIA cannot be considered good law.

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Issue 3: Must section 12(1) be construed, whether pursuant to section 3 of the Human Rights Act 1998 or the common law principle of legality, as implicitly allowing alternative directions as to service in exceptional circumstances, where a claimant's right of access to the court under article 6 ECHR would otherwise be infringed?

82. The respondent further submits that the effect of the construction advanced by Libya is that a claimant may be prevented by the service requirements set out in section 12(1) SIA from pursuing its claim and therefore from accessing the adjudicative and enforcement jurisdiction of the court. This, it is submitted, constitutes an infringement of article 6 ECHR and of a claimant's constitutional right of access to the court. It is submitted that in these circumstances the court should read and give effect to section 12(1) in a way compatible with Convention rights, pursuant to section 3(1) of the Human Rights Act 1998, or should decline to read general words as overriding fundamental rights in accordance with the principle of legality at common law.

83. The precise relationship of article 6 and principles of state immunity remains unclear. In this jurisdiction the view has been taken that article 6 is concerned with access to the court in the sense of access to the jurisdiction which the court enjoys in accordance with principles of international law. If international law requires the grant of immunity, the court lacks jurisdiction in this sense so article 6 is simply not engaged. No question of violation of article 6 can therefore arise (*Holland* v. *Lampen-Wolfe* [2000] 1 WLR 1573 at 1588 per Lord Millett; *Jones* v. *Ministry of the Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270, para. 14 per Lord Bingham). However, this is not the view taken by the European Court of Human Rights ("ECtHR") where the issue of immunity is viewed through the prism of article 6. In *Al-Adsani* v. *United Kingdom* (2001) 34 EHRR 11 the ECtHR (Grand Chamber) held that, although article 6 was applicable to the proceedings in question, the grant of immunity to a State in civil proceedings may pursue the legitimate aim of complying with international law to promote good relations between States through the respect of another State's sovereignty (at para. 54). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of state immunity. As a result, measures which reflected generally recognised rules of public international law on state immunity could not in principle be regarded as imposing a disproportionate restriction on the right of

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access to the court as embodied in article 6(1) (at paras. 55-6). However, in *Cudak* v. *Lithuania* (2010) 51 EHRR 15 the ECtHR (Grand Chamber) held that the recognition of state immunity in that case exceeded the margin of appreciation allowed to contracting states and violated article 6. This difference of view between courts in this jurisdiction and the ECtHR was referred to but left unresolved by Lord Sumption in *Benkharbouche* at para. 30. It is not necessary to seek to resolve it in the present case.

84. In this case we are not directly concerned with a state's immunity from the adjudicative or enforcement jurisdiction of another State but with an attendant procedural privilege accorded to States by the SIA. Nevertheless, similar considerations apply. For reasons set out earlier in this judgment, I consider that the respondent is correct in its submission that there is no obligation on States in international law to accord to other States the privilege of service of initiating process through the diplomatic channel as provided for in section 12(1). However, this privilege pursues a legitimate objective by proportionate means and does not therefore impair the essence of the article 6 right of access to the court. Service through diplomatic channels is a well-established procedure for service of States which, although not universal, is required by a large number of States and is the required method of service on a defendant state under the UNCSI and the ECSI. In view of the fact that it is the only permitted method of service on a State under the ECSI, which is a Council of Europe treaty, compliance with that provision can hardly be considered a violation of article 6 ECHR. The procedure secures benefits for both claimants and defendant states in circumstances of considerable international sensitivity and where, without such a provision, difficulties are likely to be encountered in effecting service. It is also intended to prevent attempts at service by alternative methods, for example on State representatives or on diplomatic premises, which might all too easily constitute a violation of international law. It provides a means of service which is in conformity with the requirements of both international law and comity. Furthermore, although exceptional circumstances prevented the effective operation of the procedure in the present case, this is not a sufficient basis for impugning the entire procedure. The exceptional circumstances encountered in the present case cannot diminish the value of the rule as a means of protecting the interests of both parties and the United Kingdom as the forum state.

85. For similar reasons, I consider that the common law principle of legality can have no application here. In my view, there is no justification for "reading down" section 12(1) SIA. On the contrary, the

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provision establishes a rule of general application which secures the advantages which I have identified.

Conclusion

86. For these reasons I would allow the appeal by Libya. The present case falls within a clear rule enacted by Parliament which exists for a clear purpose and which would be subverted if it were to be disapplied in the present case.

Postscript

87. On 15 June 2021, shortly before the draft judgments in this appeal were notified to the parties, solicitors for Libya informed the Supreme Court that on 31 May 2021 the British Embassy in Libya transmitted to the Ministry of Foreign Affairs in Tripoli the following documents

(1) the order of Males LJ made following the hearing on 18 December 2018 setting aside those parts of the enforcement order made by Teare J which had granted permission to dispense with service of the arbitration claim form, any order made by the court and any other associated documents and had directed General Dynamics to courier the arbitration claim form, the enforcement order and associated documents to addresses in Tripoli and Paris other than the Ministry of Foreign Affairs; and
(2) the arbitration claim form, application notice and the first witness statement of Nicholas Brocklesby seeking permission to enforce the arbitral award against Libya and to dispense with service of the arbitration claim form, any order made by the court and any other associated documents.

The collection of documents provided to the Court by the solicitors for Libya, which were said to have been transmitted by the British Embassy in Libya to the Ministry of Foreign Affairs in Tripoli, also included the enforcement order of Teare J dated 20 July 2018.

The accompanying Note Verbale from the British Embassy stated that

(1) the documents were transmitted by way of service in the matter of *General Dynamics United Kingdom Ltd* v. *State of Libya*, a proceeding instituted in the United Kingdom;
(2) receipt of these documents by the Ministry of Foreign Affairs of the State of Libya is deemed as service upon the defendant State under the State Immunity Act 1978;

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(3) the British Embassy requests that these documents be transmitted to the defendant Ministry, namely the Ministry of Justice of the State of Libya.

LADY ARDEN

88. I agree with the judgment of Lord Lloyd-Jones for the reasons he gives. I am therefore in agreement with Lord Burrows also. I add some additional words of my own as the other members of the Court are equally divided on the important questions in this appeal.

89. We are concerned with section 12 of the State Immunity Act 1978 ("the SIA"), to be found at para. 13 of the judgment of Lord Lloyd-Jones. This section sets out the procedural requirements to be followed if a foreign sovereign state is to be sued in the courts of England, Wales or Northern Ireland. (As to the geographical extent of the SIA, see section 23(6) of that Act.)

90. As I see it, issue 1 raises a question of statutory interpretation. The court has to find the meaning of section 12 of the SIA, but as part of this process the court can rely on as evidence as to the purpose of the legislation extrinsic evidence that would have been taken into account by Parliament. As Lord Lloyd-Jones has explained, one of the key matters in Parliament's consideration was the desire that the United Kingdom should ratify the European Convention on State Immunity ("the ECSI"), on which section 12 was largely modelled. Therefore, the effect of the ECSI may be treated as an admissible aid to interpretation, and Lord Lloyd-Jones has explored the assistance to be derived from that Convention. In my judgment, the ECSI is still an aid to interpretation even though the ECSI has itself received only limited support internationally.

91. An additional approach is to ask what the law was immediately before the SIA. As Lord Sumption (with whom Lady Hale, Lord Wilson, Lord Neuberger and Lord Clarke agreed) explained in *Benkharbouche* v. *Embassy of the Republic of Sudan* [2019] AC 777:

The State Immunity Act 1978

8. Before 1978, state immunity was governed in the United Kingdom by the common law. Properly speaking, it comprised two immunities whose boundaries were not necessarily the same: an immunity from the adjudicative jurisdiction of the courts of the forum, and a distinct immunity from process against its property in the forum state. During the second half of the 19th century, the common law had adopted the doctrine of absolute immunity in relation to both. The classic statement was that of Lord Atkin in *Cia Naviera Vascongada* v. *Steamship Cristina (The Cristina)* [1938] AC 485, 490:

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> The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

By 1978, however, the position at common law had changed as a result of the decisions of the Privy Council in *Philippine Admiral (Owners)* v. *Wallem Shipping (Hong Kong) Ltd (The Philippine Admiral)* [1977] AC 373 and the Court of Appeal in *Trendtex Trading Corpn* v. *Central Bank of Nigeria* [1977] QB 529. These decisions marked the adoption by the common law of the restrictive doctrine of sovereign immunity already accepted by the United States and much of Europe. The restrictive doctrine recognised state immunity only in respect of acts done by a state in the exercise of sovereign authority (jure imperii), as opposed to acts of a private law nature (jure gestionis). Moreover, and importantly, the classification of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it save in cases where that purpose threw light on its juridical character: *Playa Larga (Owners of Cargo lately laden on board)* v. *I Congreso del Partido* [1983] 1 AC 244.

92. It was against that background and against the desire to enable the United Kingdom to accede to the ECSI that the SIA was enacted. Section 12 is expressed in mandatory terms. The language is both mandatory and exclusive. If section 12 of the SIA did not provide an exclusive set of procedural provisions to apply when a complainant wishes to sue a foreign state, subsection (6) would have been unnecessary. There would have been no need to carve out an exception for other arrangements which the foreign state accepted. That is a factor which also reinforces the conclusion that section 12 is a mandatory and exclusive set of provisions.

93. Section 12 makes no provision, however, for the service of process if there is no channel for communication between the FCDO and the state to be served. This might happen if, for example, diplomatic relations have been severed, which is not the position in this case. I accept that, if section 12 is mandatory and exclusive, there will on the face of it be no means of suing the foreign state in our courts so long as that state of affairs continues. However, I express no final view on that question.

94. Is it a possible interpretation of the SIA that it authorises changes to, or even the modernisation and updating of, the substantive law of state immunity by reference to changes to rules of procedure? Lord Stephens, with whom Lord Briggs agrees, suggests that this is so. I agree that in principle the courts can adopt a dynamic construction of legislation particularly where Parliament uses open-textured expressions which are intended to apply in circumstances which may change with

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time (e.g. "unreasonable conduct"), or where such a construction is required by some other statute such as the Human Rights Act 1998. The term "open-textured" captures the concept of a word whose content by its nature evolves. To elucidate this meaning, I would at the risk of solipsism cite what is said about such expressions in somewhat analogous circumstances in the widely accepted Opinion about the statutory requirement for company accounts to be "true and fair" and the effect on it of the progressive post-legislative introduction of non-statutory accounting standards:

> 12. There is no inconsistency between [such] a change brought about by changing professional opinion and the rule that words in a statute must be construed in accordance with the meaning which they bore when the statute was passed. The *meaning* of true and fair remains what it was in 1947. It is the *content* given to the concept which has changed. This is something which constantly happens to such concepts. For example, the Bill of Rights 1688 prohibited "cruel and unusual punishments". There has been no change in the meaning of "cruel" since 1688. The definition in Dr Johnson's Dictionary of 1755 ("pleased with hurting others, inhuman, hardhearted, without pity, barbarous") is much the same as in a modern dictionary. But changes in society mean that a judge in 1983 would unquestionably characterise punishments as "cruel" which his predecessor of 1688 would not have thought to come within this description. The meaning of the concept remains the same; the facts to which it is applied have changed. (Joint Opinion of LH (now Lord) Hoffmann QC and MH Arden, 13 September 1983) (reprinted in the Annex to *Buckley on the Companies Acts* and available also on the website of the Financial Reporting Council)

95. The concept of open-textured expressions is distinguishable from that of functional equivalence. Under the latter concept, if, as happened in this case, the function of a "writ" is assumed by a "claim form", the word "writ" will in appropriate circumstances be interpreted as including a claim form: compare *Attorney General* v. *Edison Telephone Company of London* (1880) 6 QBD 244, where the Exchequer Division of the High Court (Pollock B and Stephen J) held that there was no difference between telephonic and telegrammic communication for the purposes of the Telegraph Acts 1863 to 1896 even though no-one had thought of a telephone at the date of the legislation. However, contrary to the view of Lord Stephens in his judgment (paras. 136-7), the fact that some terms in a statutory provision may properly be interpreted under the concept of functional equivalence does not automatically mean that other expressions in the same provision can be treated as open-textured provisions. The latter conclusion has to be separately justified.

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96. In my judgment, neither the concept of open-textured expressions nor the concept of functional equivalence is relevant here. The issue is whether procedural rules can authorise substituted service or even dispense with service. If that was the purpose of the provision, Parliament would have used language to enable this to happen. Section 12(1) could have begun with some such words as "Subject as provided in rules of court". But those words were not there, and in my judgment, a court cannot interpolate them. The purpose of section 12 was to give effect to article 16 of the ECSI in relation to civil proceedings and extend it to the enforcement of arbitration awards (see Lord Lloyd-Jones' judgment at paras. 45 to 48). Article 16 lays down how service of proceedings is to be effected, and it is mandatory and exclusive. The language of section 12(1), read in the light of the ECSI, is therefore mandatory, meaning that it must be applied despite any procedural rules to the contrary. The language so read also provides for an exclusive means of service on a sovereign state. For these reasons, and in respectful disagreement with Lord Stephens (see his judgment at paras. 136-7), I consider that it is inconsistent with section 12(1) to apply the concept of an "always speaking" statute to such service. So I turn to the other alternative.

97. The Human Rights Act 1998 ("HRA") gives effect in domestic law to the rights guaranteed by the European Convention on Human Rights ("the Convention"). The HRA was enacted after the SIA was passed by Parliament, but the jurisprudence of the European Court of Human Rights on the rights guaranteed by the Convention is evolutive and so it is possible that the HRA can lead to changes in the interpretation of earlier legislation. However, as explained, the terms used in section 12 of the SIA are not open-textured. Moreover, the court can only interpret primary legislation so that it complies with the Convention where the Convention-compliant interpretation is not against the grain of the existing legislation, i.e. is not inconsistent with any of its fundamental features: see *Ghaidan* v. *Godin-Mendoza* [2004] 2 AC 557. I consider this possibility in the next two paragraphs.

98. Section 3(1) of the HRA provides that "So far as it is possible to do so, primary legislation . . . must be read and given effect in a way which is compatible with the Convention rights." Lord Stephens holds that the courts might use this power of Convention-compliant interpretation to extend or modify section 12 of the SIA so that it does not violate article 6 of the Convention. Article 6 guarantees the right of access to court. In this regard, the court might seek to apply a Convention-compliant interpretation of section 12 so that it did not

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prevent the service of process on a state even where the FCDO could not physically effect service on the Libyan Minister of Justice.

99. However, I would respectfully not accept this proposition. As already explained, the court cannot adopt a Convention-compliant interpretation where to do so would go against the grain of the legislation. If I am correct that section 12 stipulates a mandatory and exclusive set of procedural requirements that must be followed when a state is sued, the mandatory and exclusive nature of the provisions is a fundamental feature of section 12 and so the interpretation proposed in the preceding paragraph would be inconsistent with that fundamental feature. Therefore, it would also go against the grain of section 12 of the SIA to interpret it as (for example) permitting substituted service, or service on the Minister of Foreign Affairs for Libya through the Libyan Embassy in London. In any event, it is not easy to apply a Convention-compliant interpretation where there are several ways of curing the non-compliance and there is a question for policymakers as to which one should be adopted.

100. For all the detailed reasons given by Lord Lloyd-Jones, and for the additional reasons in this judgment, I have concluded that this appeal should be allowed.

LORD STEPHENS (WITH WHOM LORD BRIGGS AGREES)

1. Introduction

101. In this appeal we are called upon to interpret the service of process provisions contained in section 12(1) of the State Immunity Act 1978 ("the SIA 1978"), which outlines the methods for serving process upon foreign or Commonwealth states. Specifically, we must determine whether those provisions apply in relation to a without notice application pursuant to section 101(2) and (3) of the Arbitration Act 1996 (the "1996 Act") to enforce an arbitration award so as to require service of either the arbitration claim form or of the order permitting enforcement of the award ("the enforcement order") by transmission through the Foreign, Commonwealth and Development Office ("FCDO") to the Ministry of Foreign Affairs of the State.

102. The State of Libya ("the appellant") contends that either the arbitration claim form or the enforcement order is a "writ or other

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document required to be served for instituting proceedings against a State" within section 12(1) SIA 1978 so that it has to be transmitted by the FCDO to the Ministry of Foreign Affairs in Tripoli. In this way it is submitted that formal diplomatic service of documents by the FCDO pursuant to section 12(1) SIA 1978 is mandatory in relation to the application to enforce the award even if such service is impossible or unduly difficult. In this case the appellant in accordance with its interpretation of section 12 SIA 1978 insists on formal diplomatic service of documents despite such service being impossible or unduly difficult.

103. General Dynamics United Kingdom Ltd ("the respondent") submits that compliance with section 12(1) of the SIA 1978 by service through diplomatic channels is only mandated if there is a document which is both (a) required to be served and (b) which institutes the proceedings. The respondent submits that the arbitration claim form which instituted the proceedings under section 101 of the 1996 Act was not required to be served and the enforcement order which was required to be served was not a document for "instituting proceedings". Consequently, it is submitted that neither document falls within section 12(1) SIA 1978 so that diplomatic service is not required even in circumstances where such service is not impossible or unduly difficult.

104. Consequently, *the first issue* on this appeal is whether in proceedings to enforce an arbitration award against a foreign state pursuant to section 101 of the 1996 Act the arbitration claim form or the enforcement order is a "writ or other document required to be served for instituting proceedings against a State" under section 12(1) SIA 1978 so that it has to be transmitted by the FCDO to the Ministry of Foreign Affairs of the State.

105. The respondent also contends by way of a respondent's notice that whether a document is "required to be served" within section 12(1) SIA 1978 should not be confined to what is ordinarily required by the Civil Procedure Rules ("the CPR") but rather ought to be determined by reference to any judicial power to *require or dispense* with service. In this way under CPR rule 62.18(2) if discretion is exercised to require service of the arbitration claim form then it would fall within section 12(1) SIA 1978 as it would be a document which is both (a) required to be served and (b) which institutes the proceedings. However, if the court decides to exercise the power to dispense with service, in accordance with principle and pursuant to the powers granted to it by the CPR, then it can no longer be said that a document is one that is "required to be served". It is submitted that proper effect

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is given to the statutory requirement, which expressly obliges a court to consider whether a document is one which is "required to be served" by reference to domestic procedural rules. In this way it is suggested that in appropriate circumstances a court can require a document to be served so that it becomes a document which is "required to be served". Alternatively, in exceptional circumstances where, as here, diplomatic service is impossible or unduly difficult discretion could be exercised to dispense with service so that it is no longer a document which is "required to be served".

106. Consequently, *the second issue* on this appeal is whether in determining if a document is "required to be served for instituting proceedings" so as to fall within section 12(1) SIA 1978, the court should take into account any order to require service under CPR rule 62.18(2) or dispense with service under CPR rules 6.16 and 6.28 so that, for instance if an order was made dispensing with service, then the document would no longer fall within section 12(1) so that it would not have to be transmitted by the FCDO to the Ministry of Foreign Affairs of the State.

107. The respondent raises a further issue which was not raised in the lower courts and which it seeks permission to make. It submits that the construction of section 12(1) SIA 1978 contended for by the appellant is one which would infringe article 6 of the European Convention on Human Rights ("the ECHR") and the fundamental common law right of access to the courts. It recognises that the common law right and the article 6 right of access to a court is not absolute but contends that the appellant's interpretation would be a disproportionate infringement of the respondent's article 6 right of access to the courts so that pursuant to section 3 of the Human Rights Act 1998 (the "HRA") the Supreme Court should adopt an interpretation of section 12(1) SIA 1978 which is compatible with article 6. In this way it is suggested that violation of the article should be avoided by reading down the legislation. The respondent does not seek a declaration of incompatibility. The respondent also contends that the same interpretative approach should be adopted under the common law.

108. Consequently, *the third issue* on this appeal is whether section 12(1) SIA 1978 must be construed, pursuant to section 3 of the HRA 1998 and/or common law principles, as allowing in exceptional circumstances directions as to service not involving transmission by the FCDO to the Ministry of Foreign Affairs of the State, where a claimant's right of access to the court would otherwise be infringed.

109. It can be seen that at its core this appeal raises procedural issues as to access to justice in domestic proceedings involving a

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foreign state. In any given case there may or may not be applicable forms of state immunity. For instance, it may be in issue as to whether the liability asserted against a State arises from conduct which is immune, although that is not this case. There may be other cases involving limited aspects of state immunity in that execution may only occur in respect of State property "which is for the time being in use or intended for use for commercial purposes" but not against other State property. I consider that the purpose of the requirement for service through diplomatic channels contained in section 12(1) SIA 1978 is not to bolster state immunity. Rather, the purpose of section 12(1) is to facilitate service, but it is entirely neutral in that a failure to serve through diplomatic channels cannot confer state immunity. Rather, such immunity as there may be is not taken away by service on the State. However, until there has been service, issues as to whether the State enjoys immunity or limited immunity cannot even be adjudicated upon. I consider that it is a complete subversion of the purpose of section 12(1) SIA 1978 to treat the requirement for diplomatic service as enabling a State which is not (or arguably not) immune nonetheless to obtain it *de facto* by being obstructive about service, or by putting diplomatic pressure on the United Kingdom's FCDO not to serve or to delay the service of the proceedings. To my mind this is the central aspect of the true purposive construction of section 12(1) SIA 1978.

110. Those are the issues raised in this appeal which might very well overlap with one another. However, even if the respondent can obtain an enforcement judgment the next question will be whether it can obtain its money. If judgment has been correctly entered in the terms of the arbitration award, then the focus will shift to execution where issues similar to those raised in this appeal may arise. The enforcement order entitles the respondent to execute the judgment against any property of the appellant in this jurisdiction "which is for the time being in use or intended for use for commercial purposes": see section 13(4) SIA 1978. A judgment creditor may enforce a judgment or order for the payment of money by several methods including, for instance by way of a writ of control which confers powers on an enforcement agent to take control of goods for the purpose of sale for a sum sufficient to satisfy the judgment debt and costs of the execution. Paragraph 23.13.3 of the Queen's Bench Guide 2018 ("the Guide") states that a writ of control must be served in accordance with section 12 SIA 1978. No doubt the appellant will contend that a writ of control falls within section 12 SIA 1978 so as to require transmission by the FCDO to the Ministry of Foreign Affairs in Tripoli even if that

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is impossible or unduly difficult. Also, no doubt the respondent will contend that such service is not necessary either because the writ of control does not institute proceedings or because the court can dispense with service so that it is no longer a document which is "required to be served".

2. Factual background

111. The respondent is a United Kingdom company which is part of the General Dynamics group, a global military defence conglomerate. The award which it seeks to enforce was made on 5 January 2016 by an International Chamber of Commerce ("ICC") arbitral tribunal in Geneva. The arbitral proceedings were commenced in 2013 and the appellant 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 respondent, together with interest and costs.

112. The appellant has made no payment or proposals for payment of the sum awarded. At first instance Males LJ (at para. 5) and on appeal the Court of Appeal (at para. 7) proceeded on the basis that it is a reasonable inference that the appellant does not intend to meet its obligation to pay. There was no challenge in this court to that inference but rather there was additional material to support it. The appellant's written case in this court, without condescending to any particulars and without any explanation as to why it should not meet its obligation to pay, was expressly stated to be "entirely without prejudice to its rights to raise any further claims of state immunity in the future and/or any other procedural or substantive defences to the respondent's claim to enforce the arbitration award in issue". It is clear that the appellant is intent on avoiding its liability to pay without advancing any reason as to why it will not honour its liabilities by meeting this adverse award. The appellant is plainly not abiding by the rules of the marketplace which require that those who enter into commercial transactions honour their liabilities.

113. Initially the respondent sought to enforce the award in the United States. Proceedings there for recognition and enforcement were delivered to the Ministry of Foreign Affairs in Tripoli in April 2016. It appears that there were no difficulties in serving the proceedings at that time. However, the respondent 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

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seeks to enforce in England and Wales where it believes that there are or may be such assets.

114. No payment of the sum awarded having been made the respondent, on a without notice basis, applied for and obtained an enforcement order in respect of the arbitral award from the High Court (Teare J) on 20 July 2018 pursuant to section 101(2) and (3) of the 1996 Act.

115. In accordance with CPR rule 62.18(1) the application for the enforcement order was made without notice in an arbitration claim form. Teare J had discretion to but did not require service of the arbitration claim form on the appellant before proceeding to determine the application: see CPR rule 62.18(2). There being no requirement in CPR rule 62.18(1) for it to be served and Teare J not having required service under CPR rule 62.18(2) the consequence was that prior to the hearing before Teare J the arbitration claim form, which was the document "instituting proceedings", had not been served on the appellant.

116. The position as to any requirement for service on the appellant changed on the making of the enforcement order. In accordance with CPR rule 62.18(7) the enforcement order must be served on the appellant. Ordinarily this may be done 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". CPR rule 6.44 contemplates that service on the appellant will be arranged by the FCDO at the respondent's request. However, CPR rule 6.16 provides discretion to dispense with service of a claim form in "exceptional circumstances" and CPR rule 6.28 provides discretion to dispense with service of documents other than claim forms. The respondent contended that there were exceptional circumstances which made service impossible or unduly difficult so that at the same time as applying for the enforcement order it also applied for an order dispensing with service of the order if it was made.

117. At a later stage of these proceedings the evidence as to exceptional circumstances was summarised by Males LJ as follows:

> 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 and Commonwealth Office, assuming

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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.

118. On 20 July 2018 in addition to making the enforcement order Teare J made further orders dispensing with service of the arbitration claim form, the enforcement order and any other associated documents pursuant to CPR rules 6.16 and 6.28, on the basis that exceptional circumstances existed in Libya which made service impossible or unduly difficult. However, Teare J directed that the arbitration claim form, the enforcement order and any other associated documents be couriered to two addresses in Tripoli, one of which was the address of the Ministry of Foreign Affairs, and to the address of the Sefrioui Law Firm in Paris, and he gave the appellant two months from the date of the enforcement order within which to apply to set it aside. In this way whilst there was to be no service of the documents the appellant was to be made aware of them.

119. The objective of ensuring that the content of the documents was communicated to the appellant was achieved, in that shortly after the enforcement order was made the appellant had copies of all the relevant documents, including the arbitration claim form and the enforcement order.

120. The appellant applied within the two month period to set aside those parts of Teare J's order which dispensed with service and provided for notice to be given to it, on the basis that section 12(1) SIA 1978 on a mandatory basis requires service through the FCDO of "any writ or other document required to be served for instituting proceedings against a State". The appellant submitted that either the arbitration claim form or the enforcement order was such a document and as no service in this manner had occurred, Teare J's order must be set aside. It was also submitted that the award could not be enforced until service in that manner had been achieved, even if there were exceptional circumstances which made such service impossible or unduly difficult.

121. On the hearing of the application Males LJ set aside those parts of the enforcement order on the basis that the "writ or other document required to be served for instituting proceedings" within the meaning of section 12(1) SIA 1978 was either the arbitration claim form (where pursuant to CPR rule 62.18(2) the court required a claim form to be served) or the enforcement order (where the court did not require a claim form to be served): [2019] 1 WLR 2913.

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122. On the respondent's appeal the Court of Appeal (Sir Terence Etherton MR, Longmore and Flaux LJJ) allowed the appeal: [2019] 1 WLR 6137.

123. The appellant appeals to the Supreme Court on the essential basis that formal diplomatic service of documents by the FCDO pursuant to section 12(1) SIA 1978 is a mandatory requirement even if such service is impossible or unduly difficult.

124. Both Males LJ and the Court of Appeal rejected the appellant's alternative ground of challenge to the order of Teare J that there were no exceptional circumstances which in the exercise of discretion justified dispensing with service of the enforcement order. There is no appeal to the Supreme Court in relation to whether there were exceptional circumstances or as to the exercise of that discretion. Those issues simply do not arise on this appeal.

3. Section 12 SIA 1978

125. Before summarising the judgments of Males LJ and of the Court of Appeal I set out section 12 SIA 1978. Section 12 appears under the subheading of "Procedure" and under its own heading of "Service of process and judgments in default of appearance". It provides:

(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.
(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.
(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.
(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, Commonwealth and Development 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.

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(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.
(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

4. The judgment of Males LJ

126. The judge accepted at para. 37 that "Viewed solely as a matter of English procedural law, . . . the proceedings were instituted by the issue of the arbitration claim form and that this was a document which was not required to be served on the defendant". However, at para. 38 he did not "accept that this is the perspective from which section 12 of the 1978 Act should be viewed." He continued that the section "contemplates that there will always be some document required to be served for instituting proceedings against a State" and at para. 44 he identified that document in this case as being the enforcement order. At para. 78 he concluded that the enforcement order must be served through the FCDO.

127. The judge gave three 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 SIA 1978;
  (b) the absence of the ability to obtain a default judgment;
  (c) the need for the executive (in the form of the FCDO) to have the power to control whether, when and how a foreign state should be brought before the English court;
(2) the SIA 1978 had to be construed consistently with the European Convention on State Immunity 1972 ("the European Convention") 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 SIA 1978 provides for immunity

> except as provided in the following provisions of this Part of this 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.

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128. The judge then considered at paras. 45-6 whether he had power, applying CPR rule 6.16 to dispense with service through the FCDO. He had held at para. 26 that "the language of subsection (1) makes clear that in cases to which it applies, . . ., the procedure set out in section 12 is mandatory". Therefore, he concluded further that in the light of the mandatory nature of section 12, there was no possibility of applying CPR rule 6.16 to dispense with service through the FCDO. However, he added that, if there was such a power, the circumstances were sufficiently exceptional to justify such dispensation.

129. As can be seen in arriving at this interpretation of section 12 the judge relied on the need for the executive (in the form of the FCDO) to have the power to control *whether, when and how* a foreign state should be brought before the English court. This aspect of the judge's reasoning requires amplification. The judge stated (para. 29) that "the exercise of jurisdiction by the courts of one State over another State involves particular sensitivities." He stated that this "is demonstrated by the history of state immunity in customary international law" and that section 12 "contemplates that no State will be brought before the English courts except as a result of service in accordance with section 12." He continued that section 12:

> requires that service should be effected diplomatically in both senses of the word. That ensures appropriately respectful dealings between sovereign states and gives to the executive which is responsible for the conduct of this country's international relations a legitimate role in deciding *whether, when and how* a foreign state should be made subject to the jurisdiction of the English courts. (Emphasis added)

For the proposition at para. 29 that the FCDO "is not merely an unthinking conduit but has a legitimate role to play in the process of bringing the foreign state before the English court" he did not refer to any authority but rather referred to the evidence in the present case which "demonstrates that this is a practical consideration, for example because the Foreign and Commonwealth Office will sometimes decide to delay the transmission of documents at a particularly sensitive time, such as when there is a pending election in the foreign state". He also stated at para. 29 that "The court is not qualified to make these kinds of judgments, which in any event are properly matters for the executive".

5. The judgment of the Court of Appeal

130. By a judgment and order dated 3 July 2019 the Court of Appeal allowed the appeal and set aside the Order of Males LJ. In so doing, the Court of Appeal concluded that:

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(1) it was not mandatory in this case that either the arbitration claim form or the Enforcement Order be served in accordance with section 12(1) of the SIA 1978 (at para. 60).
(2) the Enforcement Order would, ordinarily, have to be served pursuant to CPR rules 62.18(8)(b) and 6.44, but the Court had jurisdiction in an appropriate case to dispense with service in accordance with CPR rules 6.16 and/or 6.28 (at para. 60).
(3) on the exercise of any discretion, it was not appropriate to differ from the judge's obiter conclusions as to the exercise of such a discretion (at para. 70).
(4) the statutory requirement that a document is one which is "required to be served" could not be determined by reference to procedural rules enabling a court to dispense with service as this "would give the judge a discretion to dispense with a statutory requirement and that cannot be the law" (at paras. 62-3).

6. Principles guiding the proper interpretation of section 12(1) SIA 1978

131. The proper interpretation of section 12(1) SIA 1978 is central to the determination of the first issue. There are several applicable interpretative principles but for present purposes it is sufficient to refer to three.

132. First, every enactment is to be given a purposive construction. *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) at section 12.2 states: "(1) In construing an enactment the court should aim to give effect to the legislative purpose. (2) A purposive construction of an enactment is a construction that interprets the enactment's language, so far as possible, in a way which best gives effect to the enactment's purpose. (3) A purposive construction may accord with a grammatical construction, or may require a strained construction." In *R (Quintavalle)* v. *Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687 Lord Bingham of Cornhill stated at para. 8 that "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. *So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment*" (emphasis added).

133. Part of the historical context is the state of the law before the SIA 1978 was passed which in this appeal can be determined from,

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for instance *Trendtex Trading Corpn* v. *Central Bank of Nigeria* [1977] QB 529 and *I Congreso del Partido* [1983] 1 AC 244. For the reasons which I will set out a purposive construction of section 12 should facilitate not obstruct the restrictive doctrine of state immunity. The restrictive doctrine requires, where States do not enjoy immunity, access to the courts so as to permit the recognition and enforcement of judgments and arbitral awards in the same way as would occur with any non-state party. Furthermore, a purposive construction should promote international comity which requires that States entering into commercial transactions should abide by the rules of the marketplace. A fundamental aspect of the rules of the market place is that liabilities as determined by judgments or arbitral awards should be honoured.

134. Second, domestic law should conform to international law. *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed at section 26.9 states: "It is a principle of legal policy that the domestic law should be interpreted in a way that is compatible with public international law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account." Again, for the reasons which I will set out there is no rule of customary international law which (a) requires diplomatic service as the only method of service of proceedings on foreign states; (b) prohibits without notice proceedings to register a judgment or award; or (c) prohibits dispensing with service of proceedings on a foreign state if service is impossible or unduly difficult. Rather international comity requires that States entering into commercial transactions should abide by the rules of the marketplace and that there should be friendly waiver of technicalities.

135. Third, the interpretative principle of a statute that it is "always speaking". *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed at section 14.2 states: "When considering whether an enactment applies to a new state of affairs, the court will pay particular attention to the wording of the enactment, its purpose, and whether the new state of affairs is of a similar nature to that in respect of which the enactment was passed." The new state of affairs in this case involved changes to domestic procedural rules. Section 12 SIA 1978 is replete with references to, and incorporates, domestic procedural rules. At the time that section 12 was enacted those procedural rules could be changed. It is not only a fair presumption but also a certainty that Parliament's policy or intention was to allow for a construction of section 12 that continuously updates its operation to allow for domestic procedural changes

since the SIA 1978 was initially framed. Such an "always speaking" interpretation to the operation of section 12 is entirely consistent with Parliamentary intention.

136. Lady Arden at para. 94 of her judgment agrees in principle that "the courts can adopt a dynamic construction of legislation particularly where Parliament uses open-textured expressions which are intended to apply in circumstances which may change with time (e.g. 'unreasonable conduct'), or where such a construction is required by some other statute such as the Human Rights Act 1998". However, she determines that "Section 12 does not contain any relevant open-textured expressions". I respectfully do not agree that the question whether a statute is "always speaking" should be approached by asking whether the provision or word in question is "open-textured". Rather, whether a statute should be given an "always speaking" interpretation of the statute is a question of construction. Furthermore, as Lord Steyn held in *R (Quintavalle)* v. *Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687 at para. 23, statutes will generally be found to be of the "always speaking variety", because they are usually intended to operate for many years and in changing circumstances so that a statute whose meaning is tied to the circumstances existing when it was passed is exceptional. Leggatt J endorsed the general preference for an "always speaking" interpretation in *R (N)* v. *Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin); [2014] PTSR 1356. He said at para. 45:

> If the question is asked "is it reasonable to suppose that the legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted?" the answer must generally be "no". A "historical" approach of that kind would usually be perverse and would defeat the purpose of the legislation.

In the present context, whether an arbitration claim form or the enforcement order is a "writ or other document required to be served for instituting proceedings against a State" for the purposes of section 12 cannot be determined without reference to the procedural rules in force at the relevant time. Parliament must have contemplated that those rules would be subject to change. Section 12 must therefore be given an "always speaking" interpretation. Indeed, the parliamentary contemplation would not be confined to small incremental changes to procedural rules but would have extended to radical and wide-ranging changes such as were subsequently contained in the replacement of the Rules of the Supreme Court 1965 by the Civil Procedure Rules 1998. The Civil Procedure Rules 1998 swept away concepts of, for instance, a

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"writ" and an "entry of appearance", and introduced replacements which are generally not precisely equivalent. That is all the more reason for an "always speaking" interpretation.

137. In addition, even if the question were to be approached on the basis which Lady Arden favours, I consider that section 12 is open-textured. There are many cases where an "always speaking" interpretation of the statute has been applied to words or phrases whose texture is no more open than the words "writ", "service", "entering an appearance", "rule of court" or "default of appearance". In *Quintavalle* in relation to the word "embryo" the Human Fertilisation and Embryology Act 1990 was held to apply to embryos created by cell nuclear replacement. In *Chapman* v. *Kirke* [1948] 2 KB 450 at 454 an electric tramcar was held to be a "stage carriage" within Stage Carriages Act 1832 (2 & 3 Wm 4, c 120). In *Parkyns* v. *Preist* (1881) 7 QBD 313 a steam tricycle was held to be a "locomotive" for the purposes of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict c 77). In *Lake Macquarie Shire Council* v. *Aberdare County Council* [1970] HCA 32; (1970) 123 CLR 327 the High Court of Australia held that a reference to "gas" in the Local Government Act 1919-1969 (NSW) passed when there was only coal gas in common use included liquified petroleum gas. In *Federal Comr of Taxation* v. *ICI Australia Ltd* (1972) 127 CLR 529 salt-panning was held to be "mining" for the purposes of the Income Tax Assessment Act 1936-1966 (Commonwealth). In *Barker* v. *Wilson* [1980] 1 WLR 884: "bankers' books" in section 9 of the Bankers' Books Evidence Act 1879 (42 & 43 Vict c 11) was held to include microfilm. In *Nationwide Access Ltd* v. *Customs and Excise Comrs* [2000] All ER (D) 172 Dyson J held that a lorry-mounted hydraulic boom was a "mobile crane" for the purposes of section 27 of and Schedule 1 paragraph 9 to the Hydrocarbon Oil Duties Act 1979. In doing so he stated that "The nature of an ongoing Act requires the court to take account of changes in technology, and treat statutory language as modified accordingly when this is needed to implement the legislative intention". Similarly, here the SIA 1978 requires the court to take account of changes in the procedural rules the content of which change with time.

138. In order to apply those principles it is necessary to consider as at 1978 the state of (a) customary international law and the principles of international comity as to the restrictive doctrine of state immunity; (b) customary international law and the principles of international comity as to service of proceedings on foreign states; and (c) domestic law including domestic procedural law.

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(a) Customary international law and the principles of international comity as to the restrictive doctrine of state immunity

139. State immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction. In *Benkharbouche* v. *Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs intervening)* [2019] AC 777 Lord Sumption delivering the judgment of this court traced the evolution from the absolute doctrine to the restrictive doctrine of state immunity under which a State enjoys not absolute immunity from suit in the court of another State but rather restrictive immunity. He stated at para. 17 "In the modern law the immunity does not extend to acts of a private law character. In respect of these, the State is subject to the territorial jurisdiction of the forum *in the same way as any non-state party*" (emphasis added). He stated that the main impetus for this evolution was the growing significance of State trading organisations in international trade. He identified the critical moment in that evolutionary process as being the formal adoption (or re-adoption) of the restrictive doctrine by the United States Government in the Tate Letter, addressed by the Acting Legal Adviser to the State Department to the Acting Attorney General on 19 May 1952 ("the *Tate letter*"): para. 51. That letter recited the adoption of the restrictive doctrine by a growing number of States and it stated the intention of the executive to act on it. Significantly it stated that:

> the widespread and increasing practice on the part of governments of engaging in commercial activities, *makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts*. (Emphasis added)

It is clear from that letter that an objective of the restrictive doctrine is to enable persons doing business with governments who engage in commercial activities to be able to have their rights determined in the courts. That objective of the restrictive doctrine was also a feature in this jurisdiction in *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 WLR 1485 and *Trendtex Trading Corpn* v. *Central Bank of Nigeria* [1977] QB 529 and was authoritatively endorsed by the House of Lords in *I Congreso del Partido* [1983] 1 AC 244. A consistent theme of those decisions is that the rules of the marketplace under the restrictive doctrine of state immunity require access to justice for persons doing business with foreign states and that the foreign state is subject to the territorial jurisdiction of the forum in the same way as any non-state party.

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140. In addition, requiring a foreign state to answer a claim does not involve any challenge to sovereignty nor does it present a threat to the dignity of that State. There should be no suggestion that dispensing with service on a foreign state in exceptional circumstances is an affront to international comity. Rather international comity requires that foreign states should abide by the rules of the marketplace so as to "enable persons doing business with them to have their rights determined in the courts": see the *Tate letter*. That is consonant with justice rather than adverse to it.

141. In *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan, Directorate of Agricultural Supplies*, Lord Denning MR said at 1491 that if a foreign state enters into the market places of the world then "*international comity requires that it should abide by the rules of the market*" (emphasis added). The rules of the market under the restrictive doctrine of state immunity requires access to justice for persons doing business with foreign states and that the foreign state is subject to the territorial jurisdiction of the forum in the same way as any non-state party.

142. In the *Philippine Admiral (Owners)* v. *Wallem Shipping (Hong Kong) Ltd* [1977] AC 373, p 402 Lord Cross of Chelsea delivering the judgment of the Board stated that "In this country—and no doubt in most countries in the western world—the State can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not *be equally liable to be sued there in respect of such transactions*" (emphasis added). In addition to the concept of being equally liable to be sued he added at p 403 that "the restrictive theory is more consonant with justice . . .". This theme of being consonant with justice was also repeated by Lord Denning in *Trendtex* in which he referred to defining the rule of state immunity "in terms which are consonant with justice rather than adverse to it": [1977] QB 529, 553.

143. In *Trendtex* the defendant bank invoked state immunity when it was sued in respect of a letter of credit which it had issued. The Court of Appeal unanimously held that the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore in no position to rely on state immunity. But a majority (Lord Denning MR and Shaw LJ), also held that even if the bank were part of the Government of Nigeria, since customary international law no longer recognised state immunity in respect of ordinary commercial transactions, it would not be immune from the plaintiff's claim in respect of

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the letter of credit. Lord Denning recognised the complete transformation which had occurred in the functions of a sovereign state. At pp 555E-556C under the sub-heading "The doctrine of restrictive immunity" he stated that "Nearly every country now engages in commercial activities. It has its departments of state—or creates its own legal entities—which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit." Lord Denning returned to the consequence which he had stated in *Thai-Europe* as being prescribed by international comity by stating that "If a government department goes into the market places of the world and buys boots or cement—as a commercial transaction —that government department *should be subject to all the rules of the market place*" (emphasis added): p 558. I consider that the rule of the marketplace under the restrictive doctrine of state immunity requires access to justice for persons doing business with foreign states and that the foreign state is subject to the territorial jurisdiction of the forum in the same way as any non-state party.

144. The issues in *I Congreso del Partido* concerned the legal position prior to the enactment of SIA 1978. Lord Wilberforce at p 262D, stated that the restrictive doctrine has two main foundations: first, that it is "necessary in the interest of justice to individuals having [commercial or other private law] transactions with States *to allow them to bring such transactions before the courts*" (emphasis added); and secondly that "[t]o require a State to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that State".

145. The objective of enabling persons doing business with foreign states of having their rights determined in the courts in the same way as if the litigation did not involve a foreign state not only facilitates those persons but it also facilitates the ability of States to carry on trade. The adverse effect on States can be illustrated by the concluding remarks of Males LJ at first instance. The judge, whilst expressly recognising that the outcome before him was unsatisfactory, concluded by repeating the advice in Psalm 146 that those who put their trust in princes are liable sometimes to be disappointed. Such cautionary advice was directed by the judge towards those who wished to enter into or who had entered into commercial contracts with foreign states. However, it should be recognised that this advice will impact adversely on the ability of foreign states to go into the marketplaces of the world. For those States to enjoy the freedom of the marketplace then those with whom they wish to trade should not be deterred by the advice in Psalm 146. Rather, international comity requires that foreign states should abide

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by the rules of the marketplace and an interpretation which facilitates both foreign states and those with whom they wish to do business should be preferred on the basis that it conforms with international comity. The overall purpose of the restrictive doctrine of state immunity in this context is to allow trade to take place and for claims to be adjudicated. It is not to warn off traders to their detriment and to the detriment of States who wish to carry on trade.

146. In *Benkharbouche* at para. 37 Lord Sumption stated that "The rule of customary international law is that a State is entitled to immunity only in respect of acts done in the exercise of sovereign authority" adding that this was "the default position". The default position prior to the enactment of the SIA 1978 as a matter of international comity and of domestic law was that in relation to commercial transactions foreign states should be subject to all the rules of the marketplace. In this way as state immunity only exists in respect of sovereign acts a domestic court can exercise jurisdiction over a State in respect of its non-sovereign acts regardless of whether the State consents. The SIA 1978 is based on the restrictive doctrine of state immunity. A purposive interpretation of section 12 should aim to facilitate rather than obstruct that doctrine.

147. It is also an aspect of international comity relating to the restrictive doctrine of state immunity that States honour their commercial legal obligations. Mutual respect and dignity between equals demand nothing less. This is apparent from the *Tate letter*, *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan, Directorate of Agricultural Supplies*; *Philippine Admiral (Owners)* v. *Wallem Shipping (Hong Kong) Ltd*; *Trendtex* and *I Congreso del Partido*.

(b) Customary international law and the principles of international comity as to service of proceedings on foreign states

148. The test to be applied to identify a rule of customary international law was set out by Lord Sumption in *Benkharbouche* at para. 31. He stated:

> To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of States on the point in question, which is accepted by them on the footing that it is a legal obligation . . .

He added:

> There has never been any clearly defined rule about what degree of consensus is required. The editors of *Brownlie's Principles of Public International Law*,

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8th ed (2012), p 24, suggest that "Complete uniformity of practice is not required, but substantial uniformity is". This accords with all the authorities.

He also stated:

> What is clear is that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law: see *Fisheries* case (*United Kingdom* v. *Norway*) [1951] ICJ Rep 116, 131.

The search in this case is for procedural rules of customary international law which (a) require diplomatic service as the only method of service of proceedings on foreign states; (b) prohibit without notice proceedings to register a judgment or award; or (c) prohibit dispensing with service of proceedings on a foreign state if service is impossible or unduly difficult. In relation to the search for these supposed procedural rules of customary international law the enquiry is as to whether "there is a widespread, representative and consistent practice of States" as to any of those procedures, "which is accepted by them on the footing that it is a legal obligation". The search for such procedural rules includes consideration of (a) judicial decisions, procedural rules and statutes in different States together with (b) international conventions.

149. It is clear that there is no widespread, representative and consistent practice of States in relation to any of these supposed procedural rules.

150. In relation to judicial decisions, procedural rules and statutes and for present purposes, the absence of any such procedural rules can be demonstrated by reference to the United States of America, Hong Kong, New Zealand, Australia, the member states of the European Union, Germany, and Switzerland.

151. In the United States of America, diplomatic service of process is not (and has never been) required:

(a) Prior to the passing of the Foreign Sovereign Immunities Act 1976 (USA) (the "FSIA"), service had been permitted by merely posting the relevant documents to the foreign state in question, including to its embassy in Washington. The US Court of Appeals for the Second Circuit held in *Victory Transport Inc*. v. *Comisaria General* 336 F 2d 354, 364 (2d Cir 1964) that: "No rule of international law requires special treatment for serving branches of foreign sovereigns".
(b) After the passing of the FSIA, diplomatic service is still not required. Section 1608(a)(3) provides that service can occur by sending by registered mail a copy of the summons, complaint and a

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notice of suit (together with translations) directly to the foreign state by the clerk of the court. It is only if that (non-diplomatic) method fails that section 1608(a)(4) provides that service through diplomatic channels is permissible.

(c) Even in cases where the FSIA applies, federal courts in the USA have concluded that they retain a discretion to order alternative service, if the statutory service procedure is frustrated: *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co* 495 F Supp 73, 78 (SDNY 1980) (by telex and on legal representatives); *International Schools Service* v. *Government of Iran* 505 F Supp 178 (DNJ 1981) (by telex).

152. Hong Kong now adopts the absolute doctrine of state immunity. However, prior to that being established by the Hong Kong Court of Final Appeal in *Democratic Republic of the Congo* v. *FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 147 ILR 376, the English common law was assumed to apply. When applying such law, the Hong Kong Court of Appeal in *FG Hemisphere Associates LLC* v. *Democratic Republic of the Congo* [2010] HKCA 19; (2010) 142 ILR 216 upheld orders for alternative service when service by the diplomatic channels proved impossible. When the case came to the Court of Final Appeal, the minority would have upheld that order, with the majority only departing from it on the basis that Hong Kong was required to follow the approach of the People's Republic of China and adopt absolute state immunity.

153. New Zealand also applies the common law of state immunity. It has no special procedural rules which require service on foreign states through the diplomatic channels (see High Court Rules 2016, Part 6).

154. Australia has provided for service in sections 23-5 of the Foreign States Immunities Act 1985. These provisions, which are in different terms to section 12(1) SIA 1978, provide that: (a) service "may" be served either by a method agreed or by providing the initiating document to the Attorney General for transmission by the Department of Foreign Affairs to the foreign MFA; and (b) any purported service of initiating process upon a foreign state "in Australia" otherwise than as allowed or provided by section 23 or 24 is ineffective.

155. The position in Canada is governed by section 9 of the State Immunity Act (RSC, 1985, c S-18), which provides that service "may" be made on a foreign state by transmission from the Canadian Deputy Minister of Foreign Affairs or person so designated by him to "the foreign state". Like the SIA 1978, the section does not expressly require

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diplomatic service (or specify on which part of the foreign state service is to occur, or where that is to occur): see *United States of America* v. *Friedland* (1998) 120 ILR 417, 451 (Ontario Court of Justice) and *Ritter* v. *Donell* [2005] ABQB 197 (Queen's Bench of Alberta) at paras. 37-9 per Cairns J.

156. In relation to the member states of the European Union no diplomatic service is required where Regulation (EU) No 1393/2007 (the "Service Regulation") applies (which provides for a range of service methods, including by post, and has been held to supersede section 12(1) of the SIA): *London Steam-Ship Owners' Mutual Insurance Association Ltd* v. *Kingdom of Spain (No 4) (The Prestige)* [2020] EWHC 1920 (Comm); [2020] 1 WLR 5279, para. 45 per Butcher J.

157. In Germany, relevant case law suggests that if diplomatic service is proven to be "*impractical or promises no success*" then methods of alternative service such as publication could be available: see *Garden Contamination Case (No 1)* (1989) 80 ILR 367 where the plaintiff sought to serve the Soviet Union by publication. The Local Court ("*Amtsgericht*") of Bonn held that that was not possible because service by the central authority (in effect through diplomatic channels) was mandatory. However, on appeal, the Higher Regional Court ("*Oberlandesgericht*") of Cologne held that the reason why service by publication should be refused, for now, was that the evidence did not establish that service by the normal method was "impractical or promises no success". It did not adopt, and expressly distanced itself from, the lower court's view that service by publication would not be permitted, even if it all regular channels for service were frustrated.

158. Courts in Switzerland have also allowed summary attachment of state assets before any document has been served on a State, and have finalised such attachments even if diplomatic service has failed: see *United Arab Republic* v. *X* (1960) 65 ILR 385. They have also held that, when service through the diplomatic channels is not possible, then service of the document by publication is available to a claimant; see *Banque Commerciale Arabe SA* v. *Popular Democratic Republic of Algeria* (1977) 65 ILR 412. In that case, it was the Swiss authority which had declined to serve Algeria through the diplomatic channels for "reasons of political expediency". The Federal Tribunal held that service by publication should be ordered because "[w]hether a case involves a creditor domiciled in Switzerland or a person enjoying Swiss protection, such persons are not to be deprived of the exercise of rights which legal procedure seeks to ensure that they shall have" (at 416).

159. The search for "a widespread, representative and consistent practice of States . . . which is accepted by them on the footing that it is

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a legal obligation" also includes consideration of international conventions. In particular two international conventions have sought to regularise the disparate State practices which exist in relation to the service of process.

160. The first is the European Convention, dated 16 May 1972. It is a regional treaty drawn up under the auspices of the Council of Europe, which entered into force on 11 June 1976 after its ratification by three States. It was ratified by the United Kingdom in 1979 but out of the 47 countries of the Council of Europe it has now been ratified by only eight countries. It is an agreement between a limited number of States which has limited international support. It cannot amount to a widespread representative and consistent practice and it is of no value as evidence of such a consensus among nations.

161. The appellant placed reliance on article 16 of the European Convention which provides:

(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

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> 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.

162. It is clear from article 16 that its object and purpose is to facilitate both a claimant and the State. The claimant is facilitated by enabling service on the Foreign Ministry rather than on the competent authority so as to relieve the claimant of the burden of researching the State's domestic law as to service of process. Furthermore, a claimant has the benefit that service is deemed to have been effected by receipt of the relevant documents by the Ministry of Foreign Affairs. The State is facilitated by enabling the Ministry of Foreign Affairs to determine which is the competent authority so that it can pass on the proceedings to the relevant State body. Furthermore, the State has the benefit of additional time for entering an appearance or for appealing against a judgment given by default. There is nothing in article 16 which suggests that its object or purpose is to allow a State to avoid liability in circumstances where service by these means is impossible or unduly difficult. Article 16 is not a provision whose purpose was to bolster state immunity but rather it facilitates by providing a sensible means of service where such means are not impossible or unduly difficult.

163. The second international convention is the United Nations Convention on Jurisdictional Immunities of States and Their Property dated 2 December 2004 ("the United Nations Convention"). That convention is not yet in force. Twenty-eight States have signed it, including the United Kingdom. Of these, 21 have ratified it, not including the United Kingdom. It will not come into force until it has been ratified by 30 States. It also cannot yet amount to a wide-spread representative and consistent practice and is of no value as evidence of such a consensus among nations, see para. 47 of the judgment of the Court of Appeal in *Belhaj* v. *Straw (United Nations Special Rapporteur on Torture intervening)* [2014] EWCA Civ 1394; [2017] AC 964, 997.

164. The United Nations Convention was considered by Lord Sumption giving the judgment of this court in *Benkharbouche*. He stated:

> 32. In view of the emphasis placed by the European Court of Human Rights on the United Nations Convention and its antecedent drafts, it is right to point out that a treaty may have no effect qua treaty but nevertheless represent customary international law and as such bind non-party states. The International Law Commission's Draft Conclusions on Identification of Customary International Law (2016) proposes as conclusion 11(1):

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> A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallisation of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (opinio juris) thus generating a new rule of customary international law.

It would be difficult to say that a treaty such as the United Nations Convention which has never entered into force had led to the "crystallisation" of a rule of customary international law that had started to emerge before it was concluded. For the same reason, it is unlikely that such a treaty could have "given rise to a general practice that is accepted as law". These difficulties are greatly increased in the case of the United Nations Convention by the consideration that in the 13 years which have passed since it was adopted and opened for signature it has received so few accessions. The real significance of the Convention is as a codification of customary international law. In *Jones* v. *Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270, para. 26 Lord Bingham described it as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases". However, it is not to be assumed that every part of the Convention restates customary international law. As its Preamble recites, it was expected to "contribute to the codification and development of international law and the harmonisation of practice in this area". Like most multilateral conventions, its provisions are *based partly on existing customary rules of general acceptance and partly on the resolution of points on which practice and opinion had previously been diverse*. It is therefore necessary to distinguish between those provisions of the Convention which were essentially declaratory and those which were legislative in the sense that *they sought to resolve differences rather than to recognise existing consensus*. That exercise would inevitably require one to ascertain how customary law stood before the treaty. (Emphasis added)

As I have set out, before the United Nations Convention there were disparate practices as to the procedure for service of documents on foreign states. In that respect it cannot be said that it codified a rule of customary international law existing at the time when the treaty was concluded. Nor can it be said that it has led to a general practice that is accepted as law given that there have been so few accessions.

165. I consider that before the enactment of the SIA 1978 there was no procedural rule of customary international law which (a) required diplomatic service as the only method of service of proceedings on foreign states; (b) prohibited without notice proceedings to register a judgment or award; or (c) prohibited dispensing with service of proceedings on a foreign state if service is impossible or unduly difficult.

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This remains the position. The only relevant rule of customary international law in 1978 was that a State has immunity in respect of sovereign actions but no immunity in respect of non-sovereign actions: a rule which would be undermined if a State could insist on formal diplomatic service in circumstances where it was impossible or unduly difficult to achieve. The Court of Appeal's interpretation of section 12 is compatible with public international law.

166. In relation to international comity at most it could be said that service by diplomatic channels is an aspect of comity in the sense of courtesy, which courtesy, as explained in relation to article 16 of the European Convention, is also facilitative for both the claimant and for the State. If there is an aspect of international comity that requires service by diplomatic channels, then if that aspect of comity cannot in practice be achieved that aspect of comity is clearly overridden by the restrictive doctrine of state immunity and the aspect of comity that requires States who enter into the marketplace to abide by the rules of the marketplace.

(c) Domestic law including domestic procedural law

167. In 1978 in England and Wales the power to make, amend or revoke rules regulating the practice and procedure of the Supreme Court of Judicature was vested in the rules committee by section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 ("the 1925 Act"). However, Parliament retained control in that every rule had to be laid before Parliament within a month after it was made, and Parliament could procure the annulment of any rule of court within 40 days of the rule being laid before it: see section 212 of the 1925 Act.

168. In Northern Ireland prior to 2 January 1979 (when sections 54-6 of the Judicature (Northern Ireland) Act 1978 ("the 1978 Act") came into operation) the power to make, amend or revoke rules regulating the practice and procedure of the Supreme Court of Judicature in that part of the United Kingdom was contained in section 7 of the Northern Ireland Act 1962 ("the 1962 Act"). Section 7 was in very similar terms to section 99 of the 1925 Act. There was a similar requirement that the rules of court must be laid before Parliament so that Parliament could procure the annulment of the rules within a 40-day period. Just prior to the enactment of the SIA 1978 which received Royal Assent on 20 July 1978, on 30 June 1978 Parliament enacted the 1978 Act which again conferred rule making powers on a rules committee subject to a procedure for Parliamentary annulment:

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see sections 54 and 55 of the 1978 Act which came into force on 2 January 1979 by virtue of the Judicature (Northern Ireland) Act 1978 (Commencement No 2) Order 1978 (SI 1978/1829).

169. In Scotland in 1978 the rule making power was contained in sections 16-18 of the Administration of Justice (Scotland) Act 1933 by virtue of which there is a Rules Council which is similarly constituted to the rules committees in England and Wales and in Northern Ireland.

170. Clearly Parliament was aware that the procedural rules in these different parts of the United Kingdom could be changed by the relevant rule committees or by the Rules Council in Scotland. It was also aware that the rules made in England and Wales and in Northern Ireland were subject to Parliamentary scrutiny by negative resolution. By incorporating procedural rules into section 12(1) SIA 1978 it is not only a fair presumption but also a certainty that Parliament's policy or intention was to allow for a construction that continuously updates its operation to allow for domestic procedural changes since SIA 1978 was initially framed.

171. When the SIA 1978 was enacted there were a number of relevant applications which could be initiated and heard without notice. Parliament must be taken to have known that by introducing the criterion of a document which was "required to be served" into section 12(1) SIA 1978 that without notice applications would be unaffected. I agree with the Court of Appeal at para. 41 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". Indeed, there were good reasons for excluding without notice applications from any requirement of service in relation to the registration of foreign arbitral awards. Such exclusion was entirely consistent with the established policy of the law in favour of the speedy and effective enforcement of arbitral awards. This established policy was recognised by Males LJ at para. 91 and by the Court of Appeal at para. 57. Furthermore, it is entirely consistent with restrictive doctrine of state immunity that States should be subject to the jurisdiction in the same way as any non-state party, particularly if the State has agreed to arbitration, been subject to and participated, or declined to participate, in an arbitral process and had an award issued against it. In that respect I agree with the reasoning of Jacobs J in *Unión Fenosa Gas SA* v. *Egypt* [2020] EWHC 1723 (Comm); [2020] 1 WLR 4732, para. 73.

172. Order 71 rule 2(1) of Rules of the Supreme Court ("the RSC") 1965 provided that applications to register foreign judgments under the Administration of Justice Act 1920 (the "1920 Act") and the

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Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "1933 Act") "may be made ex parte, but the Court hearing the application may direct a summons to be issued". If no such direction was given, then the Court would proceed to make the order registering the judgment ex parte. Order 71 rule 5(2) provided that such an order did not need to be served. However, by Order 71 rule 7(1), notice of the registration of the judgment was required to be served.

173. Order 73 rule 8 RSC 1965 provided that the procedure outlined in para. 172 above would also extend to the registration of foreign arbitral awards from countries to which Part I of the 1933 Act applied, if the award was enforceable as a judgment in those jurisdictions. As at 1978, this applied to awards from the Australian Capital Territory, Austria, Belgium, France, Guernsey, Isle of Man, Jersey, India, Israel, Italy, The Netherlands, Norway, Pakistan and West Germany.

174. On 24 July 1978, the Rules Committee, comprising (*inter alia*) Lord Elwyn-Jones LC, Lord Denning MR and Roskill LJ made an additional rule to be added at the end of Order 73. The new rule was laid before Parliament on 1 August 1978 and came into operation on 1 September 1978. Lord Elwyn-Jones, under the then constitutional arrangements as a member of the Government, sponsored the State Immunity Bill during its passage through the House of Lords at the same time as he chaired the Rules Committee which brought in the new rule. The original Bill as introduced in the House of Lords was substantially amended as a result of criticism of it, especially by Lords Denning and Wilberforce. The SIA 1978 received Royal Assent on 20 July 1978 just four days before the new rule was made. By virtue of The State Immunity Act 1978 (Commencement) Order 1978 (SI 1978/1572) ("the Commencement Order") the SIA 1978 came into operation on 22 November 1978 some four months after the new rule was made and some three months after the new rule had been laid before Parliament. The Commencement Order in respect of the SIA 1978 was made on 26 October 1978 by Lord Elwyn-Jones at a time when the new rule had been made and had come into operation. It is clear that those involved in making the new rule were also involved in Parliament in enacting the SIA 1978. I agree with the Court of Appeal at para. 41 that this is "not insignificant" but to my mind it is not a coincidence that in the closest proximity to the enactment of the SIA 1978 a new procedural rule was being made which did not require proceedings to be served and that this new rule was being made by those actively involved in Parliament's consideration of the SIA 1978.

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175. The new rule was in the following terms:

10. Enforcement of award under section 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) . . .

176. It can be seen that the new Order 73 rule 10 made express provision for summary enforcement under section 26 of the Arbitration Act 1950, in a manner which was equivalent to that in CPR rule 62.18. Section 26 of the Arbitration Act 1950 applied both to domestic awards and to some foreign awards, including all those to which the New York Convention applied: see Arbitration Act 1975, section 3(1)(a). Order 73 rule 10(1) provided that an application for leave to enforce such an arbitral award "may be made ex parte but the Court hearing the application may direct a summons to be issued". The order giving such leave to enforce was required to be served on the defendant,

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including in any manner "as the Court may direct" and without leave if served outside the jurisdiction: see Order 73 rule 10(4) and (5). It was therefore only if the court directed that a summons be issued that any initiating document would be served.

177. It is clear that Parliament was aware that by introducing the criterion into section 12(1) that the document was "required to be served", that this would (a) incorporate domestic procedural law; (b) which was subject to change; and (c) the criterion would exclude without notice applications.

7. The first issue: The correct interpretation of section 12 SIA 1978

178. As I have set out in the preceding section, the only relevant rule of customary international law in 1978 was that a State has immunity in respect of sovereign actions but no immunity in respect of non-sovereign actions. There was no relevant rule of customary international law in 1978 as to the service of proceedings on foreign states. That remains the position. Accordingly, a purposive interpretation of section 12 SIA 1978 should facilitate the restrictive doctrine of state immunity. Such an interpretation would be consistent with international law.

179. Access to justice is also a part of the context informing the correct interpretation of section 12 SIA 1978. Access to justice is something which is basic to our common law system. I consider that the importance of upholding it generally far transcends the significance of any particular case. Blackstone wrote in his Commentaries in the 1760s, 4th ed (1876), 111: "A ... right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein."

180. Parliament must have been aware that in 1978 a procedure existed under domestic law for initiating the enforcement of foreign judgments and awards without notice. Furthermore, Parliament made the operation of section 12(1) dependent on domestic procedural law for the time being in force. In this way the operation of section 12 would reflect subsequent procedural law developments.

(a) SIA 1978 and the restrictive doctrine of state immunity

181. The SIA 1978 gives statutory force to the restrictive doctrine of state immunity. The Act deals broadly with state immunity, by

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providing in section 1 for a State to be immune from the jurisdiction of the courts of the United Kingdom except as provided in the following sections of Part I. The exceptions relate to a broad range of acts conceived to be of a private law character, including widely defined categories of commercial transactions and commercial activities, as well as contracts of employment and enforcement against State-owned property used or intended for use for commercial purposes. The SIA 1978 provides that the immunity of a foreign state from action in UK courts is not absolute but is restricted to acts of a governmental nature, and not of a commercial nature. That a State is not immune in respect of non-sovereign acts is not just an exception to the absolute immunity which a State otherwise enjoys. Rather, as Lord Sumption (with whom Baroness Hale and Lords Wilson, Neuberger and Clarke agreed) confirmed in *Benkharbouche* at para. 37, the principle defines the very scope of the immunity which exists, that immunity only extending to sovereign actions.

182. The exceptions include in section 9 proceedings which relate to an arbitration to which the State has agreed. That section provides:

(1) 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.
(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

183. In *Svenska Petroleum Exploration AB* v. *Government of the Republic of Lithuania (No 2)* [2007] QB 886 the Court of Appeal (Sir Anthony Clarke MR, Scott Baker and Moore-Bick LJJ) held that there was no basis for construing section 9 SIA 1978 (particularly when viewed in the context of the provisions of section 13 dealing with execution) as excluding proceedings relating to the enforcement of a foreign arbitral award. I consider that *Svenska* was correctly decided. The issue of state immunity in this case will arise in relation to the execution process turning on whether the process relates to "property which is for the time being in use or intended for use for commercial purposes": see section 13(4) SIA 1978. No question of state immunity arises in relation to the application under section 101 of the 1996 Act.

(b) The SIA 1978 and the European Convention

184. The long title to the SIA 1978 expressly refers to the European Convention but solely in the context of providing "for the effect of

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judgments given *against* the United Kingdom in the courts of States parties to the" European Convention (emphasis added): see *Kuwait Airways Corpn* v. *Iraqi Airways Co* [1995] 1 WLR 1147 at 1157H. The provisions of the SIA 1978 dealing with judgments against the United Kingdom are found in Part II headed "Judgments against United Kingdom in Convention States". That Part makes provision for the recognition of judgments against the United Kingdom (section 18) and exceptions to recognition (section 19). However, there are numerous references to the European Convention in Parts I and III of the SIA 1978 (see sections 13, 17, 21 and 22). So as Lord Mance stated at para. 10 of the judgment of the Board in *La Générale des Carrières et des Mines* v. *F G Hemisphere Associates LLC* [2012] UKPC 27; [2013] 1 All ER 409 "The Act was aimed at giving broad effect to (though not following precisely the wording of) the European Convention on State Immunity . . .".

185. A comparison between article 16 of the European Convention which makes provision for service on States with section 12 of the SIA 1978 demonstrates not only that the precise wording of the European Convention was not followed but also that there are substantial differences between the two provisions. For instance, the requirement in article 16(2) extends to transmission by diplomatic channels of "*any judgment given by default* against a State . . ." (emphasis added) whilst section 12(5) provides only for transmission of any judgment given against a State *in default of appearance*. Section 12(7) does not but article 16(2) would require the transmission through diplomatic channels of a counterclaim. Section 12 requires the documents to be received "at" the Ministry of Foreign Affairs of the State whilst article 16 requires transmission "to" the Ministry of Foreign Affairs of the State.

186. The most relevant difference for the purposes of this appeal is apparent by contrasting article 16(2) with section 12(1). Article 16(2) provides that "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; . . .". In this way all documents which institute proceedings shall be transmitted by diplomatic channels so that the obligation arises regardless as to whether the document is *required to be served* by virtue of the domestic procedural laws of the State of the forum. However, section 12(1) introduces the additional criterion in relation to any document that it is not only one which institutes proceedings but also that it is one which is "required to be served". In this way the only documents which are included in section 12(1) are documents which both institute proceedings and which are

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documents which are "required to be served". As the Court of Appeal held at paras. 55-6

> 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 . . . (para. 56)

I agree. Parliament deliberately departed from the wording of article 16 by adding the criterion that the document is one which is "required to be served". That criterion can only mean required to be served in accordance with the relevant domestic procedural rules for the time being in force in the particular part of the United Kingdom in question or in the particular territory to which the SIA 1978 extends.

(c) The extent of the SIA 1978

187. It is apparent that the SIA 1978 extends to the different parts of the United Kingdom and to a wide range of different territories.

188. In relation to the different parts of the United Kingdom there is a presumption that unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom. In relation to Northern Ireland there was a special drafting convention, namely that an Act should make it clear whether it did, or did not, extend to Northern Ireland. That convention was followed in section 23(6) SIA 1978 which provides that "This Act extends to Northern Ireland". In accordance with that presumption and by virtue also of section 23(6) the SIA 1978 extends to all parts of the United Kingdom including Scotland and Northern Ireland. In 1978 the procedural rules in England and Wales were not the same as the procedural rules in Scotland or in Northern Ireland (and that remains the position). In accordance with section 12(1) SIA 1978 the question as to whether service was "required" could only sensibly be determined in accordance with the procedural rules for the time being in force in the part of the United Kingdom in question. This is made express by section 22(1) SIA 1978 which provides that "In this Act 'court' includes any tribunal or body exercising judicial functions; and references to the courts or law of the United Kingdom include references to the courts or law of any part of the United Kingdom". The procedural laws of the relevant part of the United Kingdom expressly apply.

189. Furthermore, it was anticipated that the SIA 1978, which was made on 20 July 1978 and which came into operation on

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22 November 1978 could extend to territories outside the United Kingdom. Section 23(7) enabled the SIA 1978 to be extended by Order in Council with or without modification, to any dependent territory and section 22(4) defines "dependent territory" for the purposes of the SIA 1978 as including for instance any of the Channel Islands and the Isle of Man.

190. The first extension of the SIA 1978 was made by The State Immunity (Overseas Territories) Order 1979 (SI 1979/458). That order was made on 11 April 1979 and came into operation on 2 May 1979. By this order the SIA 1978 was extended to Belize, British Antarctic Territory, British Virgin Islands, Cayman Islands, Falkland Islands and Dependencies, Gilbert Islands, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, Sovereign Base Areas of Akrotiri and Dhekelia, and the Turks and Caicos Islands. There have been further extensions. The State Immunity (Guernsey) Order 1980 (SI 1980/871) extended the SIA 1978 to the Bailiwick of Guernsey. The State Immunity (Isle of Man) Order 1981 (SI 1981/1112) extended the SIA 1978 to the Isle of Man. The State Immunity (Jersey) Order, 1985 (Jersey Order in Council 5/1986) extended the SIA 1978 to the Bailiwick of Jersey. The procedural laws as to when service of proceedings is "required" will vary as between all the diverse jurisdictions to which the SIA 1978 extends. Furthermore, the procedures as to entry of appearance and judgment in default of appearance may differ.

191. It is apparent that the SIA 1978 was drafted to accommodate evolving and different procedural rules in those parts of the United Kingdom to which it extended as enacted and in the various jurisdictions to which it was anticipated it would extend. Accordingly, section 22(2) provides that "In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures". This captures corresponding procedures under the diverse domestic procedural laws to which the SIA 1978 applies but does not change the essential test as to whether a document is "required to be served" under the applicable domestic procedural law. Furthermore, "any corresponding procedures" covers procedures corresponding to "entry of appearance and judgments in default of appearance" in respect of the recognition of judgments against the United Kingdom by a court in another State party to the European Convention dealt with in Part II SIA 1978. Section 18 under which such judgments are recognised includes by virtue of section 18(1)(b) judgments "given in default of appearance" which are not liable to be set aside. In this way "corresponding procedures" captures procedures

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under the diverse domestic procedural laws of any State which is a party to the European Convention.

192. As the Court of Appeal held at para. 30 the SIA 1978 is ambulatory. Furthermore, I consider that its operation is dependent on the procedural rules of the particular part of the United Kingdom or of the territory in question.

(d) Section 12 SIA 1978

193. I have set out section 12 in full at para. 125 above.

(e) The provisions of section 12 SIA 1978 are facilitative

194. The provisions of section 12 SIA 1978 are facilitative for both the defendant state and for the claimant in an analogous way to that set out in para. 162 above in respect of article 16 of the European Convention. The purpose is to facilitate the restrictive doctrine of state immunity to enable persons doing business with States in relation to commercial transactions to have their rights determined in the courts.

(f) The consequences of a failure to comply with section 12 SIA 1978

195. I consider that section 12(1) SIA 1978 does not impose a requirement on the facts of this case as to service through diplomatic channels where the arbitration claim form which institutes the proceedings is not required to be served and the enforcement order which is to be served does not institute proceedings. On that basis neither document falls within section 12(1). Accordingly, it is not necessary to decide whether the use of the word "shall" in section 12(1) is mandatory in the sense that a failure to comply means that the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect.

196. Consideration of the classification of provisions into the categories of mandatory or directory was considered in *R* v. *Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354, 358 by Lord Woolf MR. He stated that:

> The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually

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assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. *The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance*. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. (Emphasis added)

The movement away from classifying statutory requirements as either mandatory or directory is illustrated in a number of authorities such as *Belfast City Council* v. *Miss Behavin' Ltd* [2007] 1 WLR 1420, paras. 73-4; *SM (Rwanda)* v. *Secretary of State for the Home Department* [2018] EWCA Civ 2770; [2019] Imm AR 714, paras. 51 and 52 and *North Somerset District Council* v. *Honda Motor Europe Ltd* [2010] EWHC 1505 (QB), para. 43. Males LJ in *Director of Public Prosecutions* v. *McFarlane* [2019] EWHC 1895 (Admin); [2020] 1 Cr App R 4, para. 25 stated that "the effect of procedural defects does not depend upon whether the requirements in question should be classified as mandatory or directory but on what Parliament intended to be the consequences of non-compliance." However, in *Shahid* v. *Scottish Ministers* [2015] UKSC 58; [2016] AC 429, para. 20 Lord Reed explained:

> No amount of purposive interpretation can however entitle the court to disregard the plain and unambiguous terms of the legislation. The consequence of the failure to obtain authority for continued segregation prior to the expiry of the 72-hour period is ineluctably spelled out by the legislation itself: the prisoner "shall not be subject to . . . removal for a period in excess of 72 hours from the time of the order". That consequence cannot be avoided by relying, as the courts below sought to do, on such authorities as *R* v. *Soneji* [2006] 1 AC 340. Those authorities were concerned with situations where the legislation was silent as to the consequences of failure to comply with a time limit, and where the intended consequences therefore had to be inferred from the underlying purpose of the legislation.

197. Although section 12(1) states that the proceedings "shall" be served by being transmitted through the FCDO to the Ministry of Foreign Affairs of the defendant state, it says nothing about what would happen if they are not. The consequence of that procedural failure depends on the intended consequence of non-compliance. The search is therefore for what was the intended consequence of non-compliance with section 12. Was section 12 intended to facilitate or was it intended to provide another ground of immunity if service by those means was

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not effected? There is nothing to suggest that the latter was intended. Parliament could not have intended that what should happen would be that the State would be able to avoid its commercial liabilities. That would not be in accordance with the restrictive doctrine of state immunity and would not be consonant with justice.

(g) The incorporation of domestic procedural rules by virtue of section 12 SIA 1978

198. I agree with the Court of Appeal at para. 30 that "the statute has to be read in accordance with English [and Welsh] procedural law as it is from time to time . . .". I also agree that "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 [and Welsh] procedural law" and that "The fact that some of these terms (writ, appearance) are now obsolete [in England and Wales but not for instance in Northern Ireland] means, no doubt, that the statute has to be construed [in England and Wales] 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".

199. Whether proceedings have been instituted (and by what document) and whether service is required are issues which are inherently procedural and can only be determined by reference to the procedural rules of the forum state. I consider that the Court of Appeal was correct to conclude at para. 30 that Parliament clearly intended the applicability of section 12(1) to depend on what was required by the relevant court rules. If the operation of those court rules did not require service of the originating document, then that document would fall outside section 12(1).

200. Section 12(1) provides for service by being transmitted through the FCDO only in relation to "any writ or other document required to be served for instituting proceedings against a State". Section 12(1) does not state that all documents by which a foreign state is impleaded must be served or that all documents required to be served on a State must be served in a particular way. It adopts conditional language, stating that the particular service requirements apply only in respect of documents "required to be served for instituting proceedings". That wording necessarily requires reference to be made to the relevant procedural rules. As the Court of Appeal correctly held, the relevant documents in this case do not fall within the clear statutory language. There was no document which was both: (a) required to be served; and (b) which instituted the proceedings. The arbitration claim

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form instituted the proceedings. Clearly the proceedings cannot be instituted by the enforcement order. I consider that any contrary construction would do violence to the ordinary and natural meaning of section 12 and would be inconsistent with Parliamentary intention. Furthermore, section 12 should be interpreted in a way that facilitates the restrictive doctrine of state immunity one aspect of which is that in respect of the recognition and enforcement of judgments and arbitral awards the State should be subject to the territorial jurisdiction of the forum state in the same way as any non-state party.

(h) Differences between section 12 SIA 1978 and the domestic procedural law of England and Wales in relation to the enforcement of an arbitration award under section 101 of the 1996 Act

201. The concepts in section 12 SIA 1978 are distinct from those which apply under domestic procedural law in relation to the enforcement of an arbitration award under section 101 of the 1996 Act.

202. Section 12(5) makes provision for transmission of any judgment given against a State in *default of appearance* but there is no provision for entering an appearance or now in England and Wales for acknowledging service in respect of an application under section 101 of the 1996 Act. Furthermore, there is certainly no judgment in default of appearance. According to ordinary conceptions, an enforcement order under the 1996 Act in respect of an arbitration award is not a judgment in default of appearance nor for that matter is it a default judgment. There is no *default* involved in an enforcement order. Rather it is designedly a without notice procedure seeking to recognise that the foreign state's rights and liabilities have already been determined by the relevant arbitration award. Similar reasoning was adopted by Nettle and Gordon JJ in the High Court of Australia in *Firebird Global Master Fund II Ltd* v. *Republic of Nauru* [2015] HCA 43, paras. 212-13, in the same case by French CJ and Kiefel J at para. 92 and by Stanley Burnton J in that part of the judgment in *AIC Ltd* v. *Federal Government of Nigeria* [2003] EWHC 1357 (QB); 129 ILR 871 which was set out by the Court of Appeal at para. 50.

203. There is a difference between an order made ex parte, with liberty to apply, and a writ (as that term was understood in 1978 in England and Wales and as it is presently understood in Northern Ireland). A writ is a document which commands the defendant to appear before the court. An order made ex parte on a judgment or award which has already been given against a State does not compel an

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appearance before the court. It converts an existing (and adjudicated upon) liability to pay into an order of the court and provides a liberty to apply if the State considers that it can meet one of the narrow grounds of challenge.

(i) The reasons given by Males LJ

204. I have summarised the reasons at para. 127 above. I will deal with each in turn.

205. I do not consider that the Court of Appeal's interpretation of section 12(1) would lead to any difficulties with the working of that section.

206. *Time for entering an appearance*. Section 12(2) provides that "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". The writ or document "received as aforesaid" is any writ or other document which is both (a) required to be served and (b) institutes proceedings. There is no such writ or document in this case. The plain Parliamentary intention was that the additional time in section 12(2) for entering an appearance would not apply in the circumstances of this case not only for that reason but also as no appearance is to be entered by the appellant. The lack of any statutory requirement to give additional time gives effect to sections 12(1) and (2) rather than presenting any difficulty in the workings of section 12(1). However, the enforcement order still has to be served (unless an order is made dispensing with service). If the enforcement order is served then ordinarily as a matter of course the timescale in section 12(2) should be taken into account in the exercise of discretion so as to give the State two months to set aside the order with no risk of execution meanwhile, as ordered by Teare J in this case. In this way the additional time provided by section 12(2) in the exercise of discretion can be and was afforded to the appellant.

207. *Default judgment*. Section 12(5) provides that "A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign, Commonwealth and Development 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". Males LJ at paras. 33 and 34 considered that the enforcement order made by Teare J "was, in part at least, a default judgment" but that there had "been no transmission of that judgment to the Libyan Ministry of

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Foreign Affairs through the Foreign and Commonwealth Office". For the reasons which I have set out at para. 202 above the enforcement order is not a default judgment. There is no difficulty with the working of section 12(1) in that respect.

208. *The need for the executive to have the power to control whether, when and how a foreign state should be brought before the English court*. Males LJ referred in para. 29 to section 12 as representing an important part of a careful balance requiring "that service should be effected diplomatically in both senses of the word". The judge continued that this not only "ensures appropriately respectful dealings between sovereign states" but also "gives to the executive which is responsible for the conduct of this country's international relations a legitimate role in deciding whether, when and how a foreign state should be made subject to the jurisdiction of the English courts". The judge considered that as it is responsible for safeguarding the conduct of international relations there was a legitimate role to be played by the FCDO in the process of bringing the foreign state before the English court, which extended not only to delaying service but included deciding whether to serve at all or how service was to be effected. In relation to the question as to when the foreign state should be made subject to the jurisdiction of the English courts the judge gave as an example a decision to delay the transmission of documents at a particularly sensitive time, such as when there is a pending election in the foreign state. The judge considered that "The court is not qualified to make these kinds of judgments, which in any event are properly matters for the executive" and that "If the court is able to bypass section 12 by dispensing with service, this safeguard for the conduct of international relations is illusory."

209. It is important to recognise the breadth of the approach suggested by the judge which effectively allows the executive to control access to justice in relation to cases involving foreign states. Furthermore, the approach is not limited by any consideration as to whether there is a real risk of serious harm to the United Kingdom's international relations but rather the decision as to the degree of risk or as to the seriousness of the harm would be left to the executive. If this approach is correct then cautionary advice would require to be given to all those who wished to enter into or who had entered into commercial contracts with foreign states that their access to the courts could depend on changes of perception by the executive as to the impact of the service of proceedings on the United Kingdom's international relationships or of the perception by the executive as to the impact of service on the internal position in the foreign state.

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210. The question as to whether as a matter of domestic law the executive can control the service of proceedings has not been considered by this court. However, in *Belhaj* v. *Straw (United Nations Special Rapporteur on Torture intervening)* [2017] AC 964 one of the issues which was considered by the Supreme Court on an obiter basis, was whether "embarrassment" to the United Kingdom in its international relationships as articulated by the executive should determine whether there was an applicable principle of the act of State doctrine so as to bar the claims in that case. In this way an issue in *Belhaj* was whether the executive could control whether the substantive defence of act of State was available. The concept of control by the executive was rejected by Lord Mance and doubted by Lord Neuberger, with whom Lord Wilson agreed. However, the issue in this case is an anterior one. Can the executive control the service of proceedings so that the courts cannot even consider the factual or legal merits of a case?

211. The issue in *Belhaj* was as to whether embarrassment to the UK government in its international relations was either allied to the third rule of the doctrine of act of State (namely, that there are issues which domestic courts should treat as non-justiciable or should abstain from deciding: see Lord Mance at para. 40 and Lord Neuberger at para. 123) or whether it supported a fourth rule relating to that doctrine.

212. Lord Mance considered at para. 41 the suggestion by the Court of Appeal in *Yukos Capital SARL* v. *OJSC Rosneft Oil Co (No 2)* [2014] QB 458, para. 65 that the third rule might be allied with a yet further doctrine, precluding United Kingdom courts from investigating any acts of a foreign state when and if the Foreign Office communicated the Government's view that such investigation would "embarrass" the United Kingdom in its international relations. Lord Mance continued at para. 41 by stating that "I see little attraction in and no basis for giving the Government so blanket a power over court proceedings, although I accept and recognise that the consequences for foreign relations can well be an element feeding into the question of justiciability."

213. Lord Neuberger considered at para. 124 the issue as to whether there was a fourth rule relating to the doctrine of act of State. He stated "A possible fourth rule was described by Rix LJ in a judgment on behalf of the Court of Appeal in *Yukos* . . . [at] para. 65, as being that 'the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office.'" At para. 131 Lord Neuberger stated that the

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"supposed fourth rule" derived "support from the United States". At para. 132 he stated that "There is little authority to support the notion that the fourth rule is part of the law of this country . . .". He continued "If the fourth rule exists, which I doubt (see para. 150 below), it would require exceptional circumstances before it could be invoked." Lord Neuberger recognized at para. 148 that "there will be issues on which the position adopted by the executive, almost always the Foreign Office, will be conclusive so far as the courts are concerned—for instance, the recognition of a foreign state, also the territorial limits of a foreign state and whether a state of war exists." Lord Neuberger continued at para. 149 that:

> If a member of the executive was to say formally to a court that the judicial determination of an issue raised in certain legal proceedings could embarrass the Government's relations with another state, *I do not consider that the court could be bound to refuse to determine that issue. That would involve the executive dictating to the judiciary, which would be quite unacceptable at least in the absence of clear legislative sanction*. However, there is a more powerful argument for saying that such a statement should be a factor which the court should be entitled to take into account when deciding whether to refuse to determine an issue. Some indirect support for such an argument is to be found in *In re Westinghouse Electric Corpn Uranium Contract Litigation MDL Docket No 235 (Nos 1 and 2)* [1978] AC 547, 616-17 and 639-40, and in *Adams* v. *Adams (Attorney General intervening)* [1971] P 188, 198. Again, it is a point which does not have to be decided in this case, and was not argued. In fairness to the defendants, there was some evidence to support such an argument, but it was answered in some detail, and in any event it was, rightly in my view, not pressed on their behalf in relation to the application of the Doctrine in these two cases. (Emphasis added)

214. By analogy I can see no basis for giving the government so blanket a power over whether, when and where proceedings can be served on a foreign state. Rather, as Lord Wilberforce stated in *I Congreso del Partido* [1983] 1 AC 244, 262 it is "necessary in the interest of justice to individuals having [commercial or other private law] transactions with States to allow them to bring such transactions before the courts". In any event as the Court of Appeal endorsed in *Belhaj* at para. 66 "comity is not an independent ground on which the English court can be deprived of jurisdiction which it would otherwise have to decide justiciable issues between private parties in respect of wrongs committed here". I consider that principle is equally applicable to arbitration awards which are enforceable here. I accept and recognise that the consequences for foreign relations can well be an element feeding into the questions as to *when* and *where* (but not *whether*)

proceedings are to be served. However, I consider that the example given by Males LJ of delaying service pending an election in a foreign state would have to be carefully analysed if it arose in practice taking into account the views of the FCDO and of the claimant. The first question would be whether service of the proceedings would have any influence at all on the outcome of the election. If it could then it might have to be recognised that both serving and not serving in advance of the election could influence the outcome. The questions that would then arise is why should the electorate be deprived of that information and why should that lead to any delay in proceedings? I consider that the courts are equipped to address these issues. As the Court of Appeal observed at para. 91 of *Belhaj* there has been a "striking shift in attitude which has taken place in this jurisdiction towards judicial examination of the conduct of foreign states and their agents. Judges in this jurisdiction are now frequently required to determine and rule on such conduct and, in particular, whether it is compliant with international law and international standards of human rights". The court continued by giving six examples one of which was that "Judges hearing asylum and deportation cases are daily called upon, as part of the process of assessing the risk to individuals, to determine whether foreign governments have violated human rights standards". There is no question in the context of any of those examples of the executive preventing determination of an issue on the basis that it would cause embarrassment to the United Kingdom in the conduct of international relations. Similarly, there should be no question of the executive controlling access to justice on the basis of embarrassment to the United Kingdom in the conduct of international relations.

215. The answer to the question posed in para. 210 above is that the executive cannot control the service of proceedings though it may seek to influence the exercise of judicial discretion and indeed ordinarily a court should positively invite comment from the FCDO so that its views may be taken into account in relation to *when and where* (but not *whether*) proceedings should be served. The role of the FCDO does not create any difficulties with the working of section 12 SIA 1978.

216. *An interpretation consistent with the European Convention*. There is an inconsistency with the European Convention but this was the result of the deliberate insertion by Parliament of an additional criterion that not only did the "writ or other document" have to institute proceedings but also the writ or other document had to be one which was "required to be served". Accordingly, I agree with the Court of Appeal at para. 56 that it is not "appropriate to give section 12 a strained meaning merely because of the terms of the Convention"

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and I would add particularly given that Parliament deliberately departed from it.

217. *The absence of specific provisions to the contrary*. In summary the point to be addressed is since, in the absence of specific provision to the contrary, section 1 SIA 1978 provides for immunity

> except as provided in the following provisions of this Part of this Act and since it is asserted the appellant 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. I consider that the premise is incorrect. The appellant had not been served in accordance with section 12 as there was no requirement to do so. Section 12(1) does not require service on the facts of this case as the arbitration claim form was not required to be served and the enforcement order did not institute proceedings. Accordingly, the exception as to state immunity is to be found in section 9 which is a provision which follows section 1.

(j) Authorities

218. In *Norsk Hydro ASA* v. *State Property Fund of Ukraine (Note)* [2009] Bus LR 558, Norsk Hydro ASA was awarded US$16,002,709 in arbitration proceedings. Under the award "the Republic of Ukraine, through the State Property Fund, and the Concern Primorsky, jointly and severally, shall pay to Norsk Hydro ASA the amount of sixteen million two thousand seven hundred nine US dollars (US $16,002,709)". Norsk Hydro ASA made a without notice application for permission to enforce the award as a judgment against (1) the State Property Fund of Ukraine, (2) the Republic of Ukraine and (3) Concern Primorsky. Morison J made the order which allowed the respondents 21 days from the date of service of the order to apply to set it aside. Norsk Hydro then obtained an interim third party debt order against the Republic of Ukraine from Andrew Smith J. The Republic of Ukraine applied to set aside both orders. Gross J held that the award was against "the Republic of Ukraine, through the State Property Fund of Ukraine" so that it could not be enforced against (1) the State Property Fund of Ukraine and (2) the Republic of Ukraine. On this basis the court had no jurisdiction to make an order against the Republic of Ukraine so that both Morison J's and Andrew Smith J's orders against the Republic of Ukraine should be set aside. However, on an obiter basis Gross J went on to consider whether the orders of Morison J and Andrew Smith J should be set aside on the further ground that by virtue of sections 12(2) and 22(2) SIA 1978 and CPR rule 62.18(9)(b) the third party debt order should not have been made

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less than two months after the order to enforce the award as a judgment. He held that the minimum period of two months specified by section 12(2) of the SIA 1978, before which any time for entering an appearance should begin to run, applied to the service on a State of documents relating to the court's enforcement jurisdiction under CPR rule 62.18 as much as to the service of documents relating to the court's adjudicatory jurisdiction. It followed that the 21-day period within which the respondents could apply to set aside Morison J's order should only have begun to run two months after service of that order on the Republic of Ukraine, so that as the total period had not expired when the third party debt order was made by Andrew Smith J, that order had been premature and must be set aside. As I have indicated this part of the judgment was obiter and as set out in para. 63 it is correct that the period of time as a matter of discretion should be informed by section 12(2) SIA 1978. However, the issue in this case as to whether in proceedings to enforce an arbitration award the claim form or enforcement order was a "writ or other document required to be served" under section 12(1) SIA 1978 did not arise. As the Court of Appeal stated at para. 47, Gross J "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".

219. In *L* v. *Y Regional Government of X* [2015] EWHC 68 (Comm); [2015] 1 WLR 3948, the claimants and the defendant, a constituent territory of a federal state, were parties to an arbitration taking place in London. The claimants sought an order under section 42 of the Arbitration Act 1996 to enforce a peremptory order made by the arbitral tribunal requiring the defendant to pay them a sum of money. The application for that order was commenced by an arbitration claim form which was required to be served on the defendant pursuant to CPR rule 62.4. The claimants did not serve the arbitration claim form through the FCDO in accordance with section 12(1) SIA 1978 but rather obtained an order for substituted service. The defendant applied to set aside the order for substituted service on the basis that service was required in accordance with section 12(1) SIA 1978. It was clear that the arbitration claim form was required to be served so in order to determine whether section 12(1) applied the central issue was whether the arbitration claim form also instituted proceedings. The claimants contended that bringing an arbitration claim to enforce a peremptory order was not "instituting" proceedings as an order under section 42 of the Arbitration Act 1996 was ancillary to existing arbitration proceedings. Hamblen J held that the

application under section 42 was nevertheless distinct from the existing arbitration proceedings as it involved the invocation of the court's procedures and powers (see paras. 35 and 42). On that basis the arbitration claim form was both a document which (a) was required to be served and (b) a document which instituted proceedings. Accordingly, the requirements in section 12(1) applied to the service of the arbitration claim form. The case can be distinguished as under CPR rule 62.18(1) the arbitration claim form does not require to be served so that issue 1 in this case did not arise, namely whether section 12(1) applied when the arbitration claim form was not required to be served. Issues 2 and 3 in this case were neither raised (see para. 22) nor determined.

220. In *Gold Reserve Inc* v. *Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm); [2016] 1 WLR 2829 the claimant applied to enforce a New York Convention arbitration award. The order giving permission to enforce the award was served in accordance with section 12(1) but the arbitration claim form was not. Venezuela applied to set aside the order giving permission, *inter alia*, on the ground that the arbitration claim form should have been served in accordance with section 12(1). Teare J stated (at para. 64):

> [Section 12(1)] only applies to writs or other documents "required to be served". If the document instituting the proceedings is not required to be served then the subsection has no application.

That construction is consistent with the decision of the Court of Appeal in this case.

221. *Firebird Global Master Fund II Ltd* v. *Republic of Nauru* [2015] HCA 43 concerned proceedings initiated in Australia by Firebird under Part 2 of the Foreign Judgments Act 1991 to register in Australia a judgment which it had obtained in the Tokyo District Court in the sum of ¥1,300m together with interest and costs against the Republic of Nauru ("Nauru") ("the foreign judgment"). The summons for the order for registration was not served on Nauru and the application was heard ex parte. Firebird obtained an order that the foreign judgment be registered. The order for registration stated the period within which Nauru could apply to have the registration of the foreign judgment set aside. Service of the order for registration was effected in accordance with the Uniform Civil Procedure Rules 2005 (NSW), which provide for leave to serve outside Australia. Orders were made granting leave to serve the notice of registration outside Australia and on the Secretary for Justice of the Republic of Nauru. In this way service of the notice of registration was effected outside Australia after the order for registration

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was made. After the time permitted to apply to set the registration aside had expired Firebird obtained a garnishee order against Nauru's assets. Nauru applied to set aside the registration of the foreign judgment and the garnishee order.

222. The statutory provisions in Australia as to state immunity and as to service on foreign states are contained in the Foreign States Immunities Act 1985 ("the Immunities Act"). Section 9 in Part II provides for general immunity, as follows "Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a *proceeding*" (emphasis added). Part III of the Immunities Act deals with service and judgments. Section 23 provides that "Service of initiating process on a foreign State ... *may* be effected in accordance with an agreement (wherever made and whether made before or after the commencement of this Act) to which the State or entity is a party" (emphasis added). Section 24 (1) provides that "Initiating process that is to be served on a foreign state *may* be delivered to the Attorney General for transmission by the Department of Foreign Affairs to the department or organ of the foreign state that is equivalent to that Department" (emphasis added). However, the permissive language, which I have emphasised in sections 23 and 24 is controlled by section 25 which provides that "Purported service of an initiating process upon a foreign State *in Australia* otherwise than as allowed or provided by section 23 or 24 is *ineffective*" (emphasis added). Accordingly, for the service of an initiating process *in Australia*, there must be compliance with the method of service in either section 23 or section 24. In addition section 27(1), in so far as relevant, provides that "A *judgment in default of appearance* shall not be entered against a foreign state unless: (a) it is proved that service of the initiating process was effected in accordance with this Act and that the time for appearance has expired; and (b) ..." (emphasis added).

223. I set out some of the issues which arose before the High Court of Australia in this case.

224. First it was contended by Firebird that Nauru was not entitled to immunity under the Immunities Act as a proceeding for registration and enforcement of a foreign judgment is not a "proceeding" within the meaning of that term in section 9. French CJ and Kiefel J, in a joint judgment, held that the term "proceeding" in section 9 "is apt to refer to any application to a court in its civil jurisdiction for its intervention or action; that is, some method permitted by law for moving a court to do some act according to law" (see para. 36). They concluded that an application for registration of a foreign judgment is a "proceeding"

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within the meaning of section 9 (see para. 49). Nettle J and Gordon J, in their joint judgment, also rejected Firebird's contention (see para. 185). Hamblen J had arrived at a similar conclusion in *L* v. *Y Regional Government of X*. In this appeal it is accepted that an application to register the award is a "proceeding" within section 12(1) SIA 1978. That is not the issue on this appeal.

225. Second it was contended, and the Court of Appeal had held, that Firebird was required to serve Nauru before applying to register the foreign judgment under the Foreign Judgments Act. Firebird challenged that conclusion on the basis that the application for registration was ordinarily ex parte so that there was no obligation to serve on Nauru. Furthermore, that the only obligation of service imposed by the Immunities Act was under section 27 in relation to judgments in default of appearance and it was contended by Firebird that the registration of a foreign judgment was not a judgment in default of appearance.

226. The High Court held that sections 23 and 24 are concerned with methods of service and not when it is to be effected (see para. 94). The application to register the Japanese judgment was ordinarily ex parte so there was no requirement to serve Nauru prior to registration of the Japanese judgment. I consider that a similar analysis can be adopted in relation to section 12 SIA 1978 so that service is only required to be effected if there is a document which is both (a) required to be served and (b) which institutes proceedings. The High Court also held that the registration of a foreign judgment was not a judgment in default of appearance which conclusion applies with equal force to the reference to a judgment in default of appearance in section 12(4) SIA 1978.

227. The High Court's decision in relation to this issue is also instructive in relation to the observations as to the power to require service of an application which ordinarily is made ex parte. Nettle J and Gordon J observed at para. 216 that an Australian court could require service of the summons to register the foreign judgment before proceeding to registration where that is considered to be expedient. Similar observations were made by French CJ and Kiefel J at para. 90. I consider that the consequence of requiring service of the application to register the foreign judgment would be that service would then have to be effected in accordance with either section 23 or section 24 of the Immunities Act. However, as Nettle J and Gordon J also observed this ability to require service meant that appropriate orders could be made depending on the particular circumstances of the individual case. They stated at para. 216:

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the rules in this respect are facultative. They enable appropriate orders for service to be made according to the facts and circumstances of each case, rather than imposing an inevitable and ineluctable service requirement regardless of the facts and circumstances of the case.

I consider that the rules in this jurisdiction are also facultative enabling justice to be done to accommodate any sensitivities as to service on States but without permitting a particular State to obtain *de facto* immunity by the simple expedient of being obstructive about service. The SIA 1978 should not be a charter for injustice but rather judicial discretions should be exercised in a way that accommodates potential sensitivities.

228. Third Nauru contended that service of the registration order should have been in accordance with section 23 or section 24 so that service out of Australia was ineffective in accordance with section 25. However, the High Court (Gageler J dissenting) held that section 25 only made purported service in Australia ineffective so that Nauru had been effectively served outside Australia. There had been no challenge to the grounds upon which service outside Australia had been ordered and I consider that this aspect of the High Court's decision demonstrates that procedural rules, such as permitting service outside the jurisdiction, can be utilised to enable justice to be done in the circumstances of an individual case.

229. *Van Zyl* v. *Kingdom of Lesotho* [2017] SGHC 104; [2017] 4 SLR 849 concerned the provisions of the Singapore State Immunity Act (Chapter 313, 2014 Rev Ed) which was closely modelled on the SIA 1978 and rules of court which the judge noted were not different in any meaningful manner from those in England and Wales. The registrar had refused permission to serve a leave order to enforce an arbitral award against Lesotho by means of substituted service, on the ground that service had to be effected through the Ministry of Foreign Affairs in accordance with section 14 of the Singapore Act, which is materially identical to section 12(1) SIA 1978. Kannan Ramesh J dismissed the appeal. The judge started his analysis with the proposition at para. 14 that:

> The position in the UK, as shown by the authorities, is that an order granting permission to enforce an arbitral award ("a permission order") must comply with the procedure in section 12 of the UK Act. The appellants accepted, correctly in my view, that the position in the UK was correct based on the statutory and procedural framework there.

On that basis the judge considered that the "The question was whether the same construction applies in Singapore". I consider that it is

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illogical to rely on *Van Zyl* as authority for the appellant's construction of section 12 SIA 1978, on the basis of the construction of the equivalent Singaporean provision, if the judge's starting point as to the position in the United Kingdom was wrong, which I consider it to have been.

230. This review of the authorities does not reveal any principled reason for concluding that first issue should be decided in favour of the appellant.

(k) Conclusion in relation to the first issue

231. The Court of Appeal at para. 71 set aside the order of Males LJ and restored the order of Teare J. I would dismiss the appeal in relation to the first issue thereby affirming the outcome in the Court of Appeal.

8. The second issue

232. The second issue is in determining whether a document is "required to be served" so as to fall within section 12(1) SIA 1978, does the court take into account any order to require service under CPR rule 62.18(2) or dispense with service under CPR rules 6.16 and 6.28 so that, for instance if an order was made dispensing with service, then the document would no longer fall within section 12(1) so that it would not have to be transmitted by the FCDO to the Ministry of Foreign Affairs of the State.

233. In view of my conclusion in relation to the first issue it is not necessary to decide the second issue in order to determine this appeal. However, as the second issue has been fully argued and it may impact on enforcement proceedings in this case, I consider it appropriate to express my views in relation to it albeit on an obiter basis.

234. Section 12 SIA 1978 deliberately incorporates domestic procedural law. Part of the historical context was the state of the procedural law before the SIA 1978. In 1978 in England and Wales there was an ability to require service under Order 71 rule 2(1), Order 73 rule 8 and (from 1 September 1978) under the new Order 73 rule 10. There were similar provisions in Northern Ireland. So, a part of the historical context to section 12 was that in the exercise of discretion a court could require service of a document instituting proceedings in what would otherwise have been a without notice application. The document would then be "required to be served" and section 12 would require diplomatic service. This does not alter the law. Section 12 remains unaltered. Rather, it gives effect to the legislation which

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incorporates domestic procedural rules and makes its operation dependent on them. I consider that if discretion is exercised so that the arbitration claim form is required to be served then it would then fall within section 12(1).

235. In 1978 there was no procedural rule in England and Wales which permitted the court to dispense with service of a writ or other document instituting proceedings. It can be seen that the historical context to section 12 did not include a court exercising discretion not to require service of a document instituting proceedings. However, as I have set out at paras. 167-77 above another part of the historical context to the SIA 1978 was that it was obvious that domestic procedural rules could be changed. Accordingly, by incorporating procedural rules into section 12(1) SIA 1978 it is a certainty that Parliament's policy or intention was to allow for a construction that continuously updates the operation of section 12 by reference to domestic procedural changes since SIA 1978 was initially framed.

236. In accordance with procedural rules in England and Wales discretion can now be exercised to dispense with service. CPR rule 6.16 under the rubric of "Power of court to dispense with service of the claim form" provides that "(1) The court may dispense with service of a claim form in *exceptional circumstances*" (emphasis added). Paragraph (2) provides that "An application for an order to dispense with service may be made at any time and—(a) must be supported by evidence; and (b) may be made without notice." CPR rule 6.28 applies in relation to documents other than claim forms. Under the rubric "Power to dispense with service" paragraph (1) provides that "The court may dispense with service of any document which is to be served in the proceedings." There is no requirement of "exceptional circumstances". Paragraph (2) provides that "An application for an order to dispense with service must be supported by evidence and may be made without notice."

237. The Court of Appeal at para. 61 held that the judge was correct to apply the test of exceptional circumstances to the question of dispensing with service of the enforcement order on a foreign state. Strictly speaking the enforcement order falls within CPR rule 6.28, being a document other than a claim form so that exceptional circumstances are not required under the rules. However, principles of international comity justify the adoption of the test of exceptional circumstances.

238. I consider that if discretion is exercised to dispense with service then the document is no longer "required to be served". It would then not fall within section 12(1). That is not to alter the law. Section

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12 remains unaltered. Rather, it gives effect to the legislation which requires the operation of section 12 by reference to domestic procedural law including the procedural changes which have occurred since SIA 1978 was initially framed.

239. I also consider that such an interpretation gives effect to the legislative purpose by facilitating the restrictive doctrine of state immunity which requires access to justice in circumstances, for instance where, as here the documents have been received by the appellant, no harm or prejudice has been caused to the appellant but rather the appellant is intent on evading its legal obligations by any available means. This interpretation is also consistent with the principle of international comity as to the friendly waiver of technicalities.

9. The third issue

240. The third issue on this appeal is whether section 12(1) SIA 1978 must be construed, pursuant to section 3 of the HRA 1998 and/or common law principles, as allowing in exceptional circumstances directions as to service not involving transmission by the FCDO to the Ministry of Foreign Affairs of the State, where a claimant's right of access to the court would otherwise be infringed.

241. Again, in view of my conclusion in relation to the first issue it is not necessary to decide the third issue in order to determine this appeal. However, as the third issue has been fully argued and the concepts of access to justice overlap with those in relation to the restrictive doctrine of state immunity I consider it appropriate to express short views in relation to it, albeit on an obiter basis.

242. There are exceptions to the common law principle of access to justice but none of those exceptions apply in this case which is concerned with procedural rules enabling access to a court rather than the substantive rules for determining, for instance whether there is state immunity. In order to determine whether there is state immunity one first has to be able to bring a claim before a court.

243. Article 6 ECHR provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 6 is an important part of the ECHR. It is implicit in article 6 ECHR that for civil rights and obligations to be determined at a fair and public hearing before an independent and impartial tribunal, that a litigant will be allowed access to that tribunal in order to determine his claim, see *Golder* v. *United Kingdom* (1975) 1 EHRR 524. Nor is the article

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6 right of access to a court absolute. Restrictions may be permissible "if they pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right": see *Benkharbouche* at para. 14 relying on *Ashingdane* v. *United Kingdom* (1985) 7 EHRR 528, para. 57. In this case the legitimate aim is said to be the doctrine of state immunity which doctrine "pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty": see *Al-Adsani* at para. 54. It is clear that if there is state immunity then there would be a proportionate restriction on the right of access to a court as embodied in article 6(1). However, in this case there is no question as to state immunity in relation to the enforcement order, see *Svenska*. The only question as to state immunity that will arise is under section 13(4) SIA 1978. Furthermore, the question here is an anterior one. How can there be an adjudication as to whether there is state immunity unless there is access to a court in circumstances where diplomatic service is impossible or unduly difficult? Denying access to a court in such circumstances would not be proportionate to the legitimate aim. If it had been necessary I would have interpreted section 12(1) SIA 1978 as allowing in exceptional circumstances directions as to service not involving transmission by the FCDO to the Ministry of Foreign Affairs of the State, where a claimant's right of access to the court would otherwise be infringed.

10. Overall conclusion

244. I would dismiss the appeal in relation to the first issue thereby affirming the outcome in the Court of Appeal which was to set aside the order of Males LJ and to restore the order of Teare J.

[Reports: [2021] 3 WLR 231; [2021] 4 All ER 555; [2022] 1 All ER (Comm) 113]

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