CLIENT ALERT

Service on Sovereign States

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The institution of proceedings in national courts against sovereign States is an important subject, including in relation to enforcing arbitral awards against States and obtaining relief in national courts in support of arbitration. The prospect, for example, of significant claims in arbitration against the Russian Federation arising from expropriation of assets brings these issues into sharp focus. If a national court exercises jurisdiction over the State, it will have done so despite the general entitlement of foreign States to immunity in the courts of another State.[1] This includes the initiation of enforcement proceedings against sovereign States in respect of international arbitration awards.

In most (if not all) jurisdictions, the requirements for service of process on sovereign States are more onerous than for service on private parties, and will often involve service through diplomatic channels.[2] Courts around the world, including in the United States and England and Wales (as discussed below), have recently confirmed that claimants must strictly comply with these service requirements. A failure to do so may significantly delay progress of the proceedings and result in increased costs (or worse). The recent decisions that uphold strict compliance with service requirements underscore the exceptional nature of national courts exercising jurisdiction over sovereign States, and the importance of taking specialist advice prior to commencing claims against States.

Below we survey the requirements for effecting service of proceedings on sovereign States under the Hague Service Convention, United States law and English law.[3] We then set out some practical takeaways that emerge from this survey.

[1] *See, e.g.*, *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, ICJ Reports 2012, p. 99, at para. 86.

[2] *See, e.g.*, Hazel Fox and Philippa Web *The Law of State Immunity* (Revised and Updated 3rd ed, Oxford, 2015), at p. 1.

[3] Special thanks to our colleague, Kristin Bender, for reviewing our summary and analysis of US law.

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Hague Service Convention

In 1965, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention) was concluded. Seventy-nine countries are State Parties to the Hague Service Convention.[4]

The purpose of the Hague Service Convention is to simplify, expedite, and generally improve the process of serving documents abroad. The Hague Service Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (i.e., from one contracting State to another).[5] The law of the State of origin determines whether or not a document must be transmitted abroad for service in the other State.[6] The Hague Service Convention provides for one main channel of service and four alternative channels (although there is no hierarchy between any of the channels).

The main channel of service is effected via a Central Authority. Under the Hague Service Convention, each Contracting State must designate a Central Authority to receive requests for service coming from other Contracting States.[7] Each State must organise its Central Authority in accordance with its own national law. For example, in the United States the Central Authority is the Office of International Judicial Assistance at the Department of Justice,[8] and in the United Kingdom it is the Senior Master of the Royal Courts of Justice.[9]

Requests for service must be sent by the relevant authority of the State of origin to the Central Authority of the State of destination.[10] Once the Central Authority receives a request for service, it may either refuse or effect service.

(1) **Refuse service**: The Central Authority may refuse service if: (i) it considers that the request does not comply with the formal and substantive requirements of the Hague Service Convention;[11] or (b) it deems that compliance would infringe the State's sovereignty or security.[12] In either case, the Central Authority must promptly inform the applicant and specify its reasons for objecting to the request for service.

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4 *See* Status Table, last updated 17 June 2021, available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=17.

5 Article 1.

6 *See* Practical Handbook on the Operation of the Service Convention, FAQ, question 3, available at https://assets.hcch.net/docs/aed182a1-de95-4eaf-a1ae-25ade7cd09de.pdf.

7 Article 2.

8 *See* United States of America – Central Authority & practical information, available at https://www.hcch.net/en/states/authorities/details3/?aid=279.

9 *See* United Kingdom – Central Authority & practical information, available at https://www.hcch.net/en/states/authorities/details3/?aid=278.

10 Article 3. Requests for service must be in the form annexed to the Hague Service Convention and be accompanied by the documents to be served.

11 Article 4.

12 Article 13.

(2) **Effect service**: If the Central Authority does not object, it must serve the documents on the ultimate addressee by: (i) a method prescribed under its national law; or (ii) a particular method requested by the applicant (unless it is incompatible with its national law).[13] The Central Authority must then provide a certificate of service.[14]

In addition to the main channel of service, the four alternative channels of service are: (i) diplomatic or consular channels;[15] (ii) postal channels;[16] (iii) direct communication between judicial officers, officials or other competent persons;[17] and (iv) direct communication between an interested party and judicial officers, officials or other competent persons.[18] The first two alternative channels enable service of process directly upon the ultimate addressee, while the latter two do not. Before using any alternative channel of service, it is important to ensure that the State of destination has not deposited a declaration of objection to that particular method.[19]

It is important to note that the Hague Service Convention only applies where a party is seeking to transmit a document for service from one Contracting State to another. In some of the cases considered below, the parties on both sides of the dispute were from Contracting States, and in others one of the parties was not. The United States and English authorities also diverge somewhat as to whether the Hague Service Convention actually applies to service ***on*** sovereign States. As a consequence, service under the Hague Service Convention was only discussed in some of the cases below.

United States

The Foreign Sovereign Immunities Act (FSIA) provides the exclusive basis for a United States court to exercise jurisdiction over a foreign State. A foreign State is immune from the jurisdiction of the United States courts unless one of several exceptions to immunity enumerated in the FSIA applies.[20] If a suit falls within one of the exceptions, the FSIA provides a federal District Court with “[p]ersonal jurisdiction over a foreign state” where: (i) the Court has subject-matter jurisdiction; and (ii) “service has been made under section 1608” of the FSIA.[21] Accordingly, unless a State has been validly served pursuant to the FSIA, a United States court cannot exercise jurisdiction over it.

[13] Article 5.
[14] Article 6. Certificates of service must be in the form annexed to the Hague Service Convention.
[15] Articles 8(1) and 9.
[16] Article 10(a).
[17] Article 10(b).
[18] Article 10(c).
[19] Declarations of objection are available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=17.
[20] Sections 1604 and 1605-1607.
[21] Section 1330(a) and (b).

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Section 1608(a) of the FSIA governs service of process on "a foreign state or political subdivision of a foreign state."[22] Section 1608(a) provides four methods of serving a foreign State, each of which must be attempted in sequential order:[23]

(1) Delivery of a copy of the summons and complaint "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision."

(2) If no special arrangement exists, by delivery of a copy of the summons and complaint "in accordance with an applicable international convention on service of judicial documents." The Hague Service Convention is one such international convention under United States law, as discussed below.

(3) If service cannot be made under (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation into the official language of the foreign state, "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned."

(4) If service cannot be made within 30 days under (3), by sending the service packet "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia," for transmittal "through diplomatic channels to the foreign state."

In the United States, strict compliance with the service requirements set out in section 1608(a) is required. The Supreme Court's decision in *Sudan v. Harrison* is a prime example of this.[24]

Sudan v. Harrison concerned the bombing by Al Qaeda of the USS Cole in 2000. The respondents (the victims of the bombing and their family members) sued Sudan, alleging that Sudan had provided material support to Al Qaeda. The respondents were required to serve the lawsuit on Sudan in accordance with section 1608(a) of the FSIA. Service could not be made under section 1608(a)(1) or (2) as there were no agreed special arrangements and Sudan is not a party to the Hague Service Convention. The respondents sought to effect service under section 1608(a)(3). For this purpose, the clerk of the court sent the service packet to the Ministry of Foreign Affairs at the Sudanese Embassy in the United States. A signed receipt was received.

Sudan failed to appear in the proceeding and the District Court entered a US$314 million default judgment against Sudan. Sudan subsequently contested the default judgment and argued that there had been non-compliance with section 1608(a)(3). The issue before the Court was whether section 1608(a)(3) required that the service packet be sent to the

[22] Section 1608(b) governs service on "an agency or instrumentality of a foreign state."

[23] Once served, a foreign state or political subdivision has 60 days to file a responsive pleading. FSIA, section 1608(d). If the foreign state does not do so, it risks default judgment being entered against it. FSIA, section 1608(e).

[24] 139 S. Ct. 1048 (2019).

Minister of Foreign Affairs at his principal office in Khartoum, such that service could not be effected by sending it to the Sudanese Embassy in the United States.

The Supreme Court agreed with Sudan. The Court held that the respondents had not complied with section 1608(a)(3) by sending the service packet to the Minister of Foreign Affairs at the Sudanese Embassy in the United States and required instead that the service packet be sent directly to the Minister of Foreign Affairs at his principal office in Khartoum. The Court favoured a clear, administrable rule, explaining that:

> "[T]he service packet must bear the foreign minister's name and customary address and [must] be sent to the minister in a direct and expeditious way. And the minister's customary office is the place where he or she generally works, not a farflung outpost that the minister may at most occasionally visit."[25]

The Court dismissed an argument that it would be "the height of unfairness to throw out [the respondent's] judgment" for failure to properly serve Sudan in circumstances where there had been highly publicized litigation of which Sudan may have been aware.[26] The Court held that there are circumstances in which the law "demands adherence to strict requirements even when the equities of a particular case point in the opposite direction."[27] These included the service rules in section 1608(a)(3), which apply to a category of cases with sensitive diplomatic implications.[28]

As a result, the respondents were required to attempt service on Sudan again under section 1608(a)(3), and if that attempt failed, to attempt service under section 1608(a)(4).

Saint-Gobain Performance Plastics Europe v. Venezuela provides another recent example of the courts requiring strict compliance with section 1608(a).[29] The case concerned section 1608(a)(2) of the FSIA, which requires service "in accordance with an applicable international convention on service of judicial documents." The Hague Service Convention was the specific international convention at issue.[30]

Saint-Gobain arose out of an ICSID arbitration in which the tribunal had held that Venezuela had expropriated Saint-Gobain's investment and awarded Saint-Gobain US$42 million.[31] Venezuela failed to pay the award and Saint-Gobain filed a lawsuit in the District Court to enforce the award pursuant to the ICSID Convention.[32] In the absence of a special arrangement for service under section 1608(a)(1) of the FSIA, Saint-Gobain sought to serve Venezuela under section 1608(a)(2).

[25] *Harrison*, 139 S. Ct. 1048, 1057 (2019).
[26] *Harrison*, 139 S. Ct. 1048, 1062 (2019).
[27] *Harrison*, 139 S. Ct. 1048, 1062 (2019).
[28] *Harrison*, 139 S. Ct. 1048, 1062 (2019).
[29] No. 21-7019 (Jan. 25, 2022).
[30] Venezuela is a party to the Hague Service Convention.
[31] *Saint-Gobain Performance Plastics Europe*, No. 21-7019 (Jan. 25, 2022), at p. 4.
[32] Under 22 U.S.C., section 1650(a).

Saint-Gobain sent requests for service with copies of the relevant materials to Venezuela's Central Authority. Certain individuals signed for delivery of the service requests. However, Saint-Gobain did not receive a certificate of service from the Central Authority, and it was common ground that Venezuela's Attorney General had not been served. The issue in dispute was whether Saint-Gobain had properly served Venezuela under section 1608(a)(2) of the FSIA.

The Court started by referring to Article 5 of the Hague Service Convention, which requires that the Central Authority serve the defendant either: (i) by a method prescribed by national law; or (ii) by a particular method requested by the applicant (unless it is incompatible with national law). Saint-Gobain did not propose its own method of service, so the Court considered Venezuelan law to determine whether the requirement had been met. Under Venezuelan law, lawsuits against Venezuela had to be served on the Attorney-General. Because this had not been done, the Court concluded that Saint-Gobain had not effected service under Article 5 of the Hague Service Convention.

Despite this, Saint-Gobain had contended that where the foreign defendant is a State, requesting service from the Central Authority suffices for the purposes of section 1608(a)(2), because the Central Authority is the State. The Court disagreed with this contention. In the Court's view, Saint-Gobain's argument was inconsistent with the plain text of the Hague Service Convention. The Hague Service Convention provides that the Central Authority receives requests for service,[33] but does not provide that this constitutes legal service.[34]

Like the Supreme Court in *Sudan v. Harrison*, the Court explained that even when the "equities of a particular case may seem to point in the opposite direction," parties must adhere to the plain text of the FSIA and the Hague Service Convention in view of the "sensitive diplomatic implications."[35] In the circumstances, the Court ordered that Saint-Gobain must again attempt to properly effect service on Venezuela pursuant to the FSIA.[36]

England and Wales

The State Immunity Act 1976 (SIA) governs the circumstances in which foreign sovereigns or States can be subject to the jurisdiction of the English courts[37] and section 12 governs service of process on foreign States. Section 12(1) is the cardinal provision and provides:

> 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

[33] Hague Service Convention, Article 2.

[34] Hague Service Convention, Articles 4 and 13.

[35] Citing *Sudan v. Harrison*, 139 S. Ct. 1048, 1062 (2019).

[36] *Saint-Gobain Performance Plastics Europe v. Venezuela*, No. 21-7019 (Jan. 25, 2022), at p. 10.

[37] The SIA (like the FSIA) thus embodies the "restrictive doctrine" of State immunity, which permits exceptions to a general rule of immunity. Contrast this with the "absolute doctrine," which permits no exceptions to the rule that a foreign State is immune from suit in another State's courts. *See, e.g.*, the application of the absolute doctrine in Hong Kong: *Democratic Republic of the Congo v. FG Hemisphere Associates* [2011] HKCFA 41.

> of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

Section 12(6) is also relevant and 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."

The Supreme Court's judgment in *General Dynamics United Kingdom Ltd v. State of Libya* is now the leading decision on the interpretation and scope of section 12(1).[38] The case arose from General Dynamics' attempts to enforce an ICC arbitral award of approximately £16 million against Libya.

General Dynamics initially filed an arbitration claim form in the High Court and secured an *ex parte* enforcement order from Teare J. The judge also granted General Dynamics permission to dispense with service under the English Civil Procedure Rules (CPR), holding that exceptional circumstances existed (civil strife in Libya) which justified this.

Libya then applied to set aside the order dispensing with service, and sought an order requiring that service be effected through diplomatic channels pursuant to section 12(1) of the SIA. At first instance, Males LJ (sitting in the Commercial Court) granted Libya's application, holding that service of process via diplomatic channels was essential in every case in which an English court purports to exercise jurisdiction over a foreign State.

The Court of Appeal reversed that decision.[39] The Court of Appeal held that although section 12(1) ***does*** require service through diplomatic channels where the English courts purport to exercise jurisdiction over foreign sovereigns, on its terms that requirement only applied to documents that "institute[ed] proceedings" and that ***also*** are "required to be served."[40] While the arbitration claim form instituted proceedings, it did not need to be served, and while the enforcement order was required to be served under the CPR, it did not institute the proceedings.[41] Given that section 12(1) of the SIA applied to neither of the relevant documents, the Court of Appeal considered that it was entitled to have regard to the usual rules on service of process set out in part 6 of the CPR. Part 6 allows for service to be dispensed with in exceptional circumstances and the Court of Appeal found that such circumstances existed in the case (as was found by Teare J).

[38] *General Dynamics United Kingdom Ltd v. State of Libya* [2021] UKSC 22 ("General Dynamics Supreme Court Decision").

[39] *General Dynamics United Kingdom Ltd v. State of Libya* [2019] EWCA Civ 1110 ("General Dynamics Court of Appeal Decision").

[40] General Dynamics Court of Appeal Decision, at paras. 48-52.

[41] General Dynamics Court of Appeal Decision, at para. 60.

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The Supreme Court, by a bare majority of 3 to 2,[42] overturned the Court of Appeal's decision and found that a clear rule exists which requires that a party seeking to serve a sovereign State with documents that institute proceedings must do so through diplomatic channels.[43] Several key points of reasoning can be found in the majority's judgment:[44]

- ***First***, while some types of proceedings under English law are instituted by certain documents which are not required to be served under the CPR, it is improper to focus on technical procedural rules. Foreign respondent States would not be aware of these. Instead, it is appropriate to require that the documents which first provide notice of the proceedings to the respondent State are served via diplomatic channels. In any event, the words "other documents required to be served" (as used in section 12(1) of the SIA) are wide enough to apply to all documents by which notice is given of newly initiated proceedings.

- ***Second***, the Court of Appeal's interpretation of section 12(1) of the SIA would grant far too much power to the Rules Committee (the body responsible for maintaining and updating the CPR). Tying section 12(1) to the minutiae of procedural rules in force at one particular point in time and granting significant influence to the Rules Committee: (a) was not envisaged by Parliament when it enacted the SIA; and (b) would require claimants and respondent States to pay very close attention to the CPR when instituting proceedings.

- ***Third***, service of process on a State involves issues of sovereignty and comity, and thus gives rise to particularly sensitive issues. It is accordingly appropriate to give section 12(1) of the SIA a broad reading.

It is worth observing that neither the majority nor the minority in *General Dynamics* discussed the Hague Service Convention. That is understandable, given that Libya is not a State Party to the Convention. However, there seems to be an issue under English law as to whether or not the Hague Service Convention applies to service ***on*** sovereign States.[45] While there are cases which suggest that the Hague Service Convention does apply to service on States,[46] there are others which have said that the Hague Service Convention does not, and only applies to service on third parties.[47] This

[42] The majority comprised Lord Lloyd-Jones, Lord Burrows and Lady Arden. The minority, which would have dismissed the appeal, comprised Lord Briggs and Lord Stephens.

[43] General Dynamics Supreme Court Decision, at para. 70. In the same paragraph, the majority clarified that this general rule applied specifically to proceedings to enforce an arbitral award under the New York Convention.

[44] Lady Arden also gave a short concurring judgment in which she expressed her own thoughts on certain issues considered by the majority and minority. She agreed in full, however, with the leading judgment given by Lord Lloyd-Jones (which this alert now summarises).

[45] The issue is not addressed by the leading English text on state immunity: Hazel Fox and Philippa Web *The Law of State Immunity* (Revised and Updated 3rd ed., Oxford, 2015).

[46] *See, e.g.*, *Habib Bank Ltd v. Central Bank of Sudan* [2007] 1 WLR 470 (QBD), at para. 24; and *Qatar National Bank (Q.P.S.C.) v. Government of Eritrea* [2019] EWHC 1601 (Ch).

[47] *See, e.g.*, the relatively recent decision of *Unión Fenosa Gas S.A. v. Arab Republic of Egypt* [2020] EWHC 1723 (Comm), at para. 79 ("[The Hague Service Convention is concerned with the service of documents on third parties abroad via the authorities of another state. It has no application to the present case where the proceedings were brought directly against a state.").

latter position seems contrary to international orthodoxy[48] and finds no basis in the *travaux préparatoires* of the Convention.[49] It is difficult to see why the Hague Service Convention should not amount to a "manner [of service] to which the State has agreed" under section 12(6) of the SIA (and rule 6.44 of the CPR).

Practical takeaways

A number of points of practical guidance emerge from the survey conducted above.

First, there is an observable trend, at least in common law jurisdictions, requiring strict compliance by claimants with rules governing the service of proceedings on sovereign States. By way of example, in addition to the English and United States authorities surveyed above, section 14(1) of the State Immunity Act 1979 (Singapore) is in materially identical terms to section 12(1) of England's SIA. In *Van Zyl v. Kingdom of Lesotho*, the High Court of Singapore found that the requirements in section 14(1) applied to the initiation of ***all*** proceedings against foreign States.[50] Indeed, the decision was cited numerous times by the leading judgment in *General Dynamics*.

Second, given this trend, it is important for Parties initiating proceedings against sovereign States to ensure they strictly comply with the relevant requirements. If not, they could be required to attempt to effect service all over again, with associated delay and increased costs, or potentially even more drastic consequences. Given the amount of time it can take to serve States via the Hague Service Convention or diplomatic channels, claimants will benefit from getting things right the first time.

Third, as noted, there is uncertainty as to whether or not the Hague Service Convention applies to service on sovereign States under English law. Accordingly, prospective claimants in England and Wales may well choose only to attempt service on States via diplomatic channels to minimise the risk that service may later be deemed invalid. However, at least one decision has indicated that in certain cases, and depending on the State on which service is sought, service under the Hague Service Convention may be easier to effect than service via diplomatic channels.[51] As a result, prospective claimants are well advised to take specialist legal advice on this issue prior to service. We have extensive experience of issues concerning service on States and are well placed to advise on the nuanced distinctions between different States and State entities.

[48] *See, e.g.*, the U.S. decisions discussed above, the decision of the Supreme Court of the Netherlands (*Hoge Raad*) in *VS v. Delsman* dated 3 October 1997, and Hague Conference on Private International Law *Practical Handbook on the Operation of the Service Convention* (Netherlands, 2016), at paras. 23-28.

[49] Hague Conference on Private International Law *Practical Handbook on the Operation of the Service Convention* (Netherlands, 2016), at para. 23.

[50] *Van Zyl v. Kingdom of Lesotho* [2017] SGHC 104.

[51] *See Qatar National Bank (Q.P.S.C.) v. Government of Eritrea* [2019] EWHC 1601 (Ch), at para. 41.

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Finally, many observations have been made recently about potential claims arising from the Russian Federation's war in Ukraine, particularly in relation to claims under investment treaties. For example, Russia recently announced that the assets of foreign investors which suspend their operations in Russia might be transferred to third parties.[52] Russia has bilateral investment treaties in force with over 60 countries, and is also party to the Hague Service Convention.[53] If investors prove successful in arbitration against Russia and wish to enforce resulting awards, or if investors wish to litigate against Russia in national courts, they will have to grapple with the issues concerning service identified in this alert. The issues remain very topical and those parties initiating court proceedings will do well to ensure they get things right the first time by strictly complying with applicable service requirements.

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[52] Radio Free Europe/Radio Liberty, "Russia Lays Groundwork For Nationalizing Foreign Companies Amid Fallout From Ukraine War" (March 10, 2022), available at: https://www.rferl.org/a/russia-nationalize-foreign-companies/31746695.html.

[53] The Central Authority of the Russian Federation is the Ministry of Justice. *See* Russian Federation – Central Authority & practical information, available at https://www.hcch.net/en/states/authorities/details3/?aid=699.