

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 104

Originating Summons No 95 of 2017
(Registrar's Appeal No 91 of 2017)

Between

- (1) Josias Van Zyl
- (2) Trustees of the Josias Van Zyl
Family Trust
- (3) Trustees of the Burmilla Trust

... Plaintiffs

And

Kingdom of Lesotho

... Defendant

GROUNDS OF DECISION

[Arbitration] — [Enforcement] — [Enforcement against a State]

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Josias Van Zyl and others
v
Kingdom of Lesotho

[2017] SGHC 104

High Court — Originating Summons No 95 of 2017 (Registrar's Appeal No 91 of 2017)

Kannan Ramesh J
10; 24 April 2017

8 May 2017

Kannan Ramesh J:

Introduction

1 Must an order granting leave to enforce an arbitral award (a “leave order”) be served in accordance with s 14 of the State Immunity Act (Cap 313, 2014 Rev Ed) (“the Act”)? This was the central question in Registrar's Appeal 91 of 2017 (“RA 91”), an appeal by Josias Van Zyl and the trustees of the Josias Van Zyl Family Trust and the Burmilla Trust against the decision of the Assistant Registrar (“the AR”) in *ex parte* Summons No 924 of 2017 (“SUM 924”) in Originating Summons No 95 of 2017 (“OS 95”). The AR, in a judgment reported at [2017] SGHCR 2 (“the AR's GD”), refused the

appellants leave to serve a leave order granted in OS 95 (“the Order”) on the Kingdom of Lesotho (“the Kingdom”) by means of substituted service on Rajah & Tann Singapore LLP (“Rajah & Tann”). His principal reason for doing so was that service had to be effected through the Ministry of Foreign Affairs, pursuant to and in accordance with s 14 of the Act.

2 Was the AR correct in concluding that s 14 of the Act applies to a leave order? Having carefully considered the submissions of the appellants and their authorities, I was of the view that the answer must be in the affirmative and therefore dismissed RA 91. The issue took the appellants and the court into uncharted waters as far as Singapore jurisprudence was concerned. The case for a written judgment was therefore compelling, prompting an invitation from the appellants for one. I acceded to their invitation.

Facts

The arbitration

3 In the arbitration from which these proceedings arose, the appellants were amongst the claimants and the Kingdom was the respondent. This was an investor-state arbitration commenced pursuant to Annex 1 to the Protocol on Finance and Investment of the South African Development Community (“SADC”), concerning the Kingdom’s alleged breaches of obligations under the Treaty of the SADC and related protocols. The arbitration was administered by the Permanent Court of Arbitration, which was established by the Convention for the Pacific Settlement of International Disputes 1899, and the arbitration was determined by the tribunal presiding over it to be seated in Singapore. It was an “international arbitration” within the meaning of s 5 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“the IAA”). The

tribunal rendered two awards: a partial final award on jurisdiction and merits on 18 April 2016 and a final award on costs on 20 October 2016. It was the final award on costs that was the subject of the Order.

The proceedings in Singapore

4 The partial final award on jurisdiction and merits is the subject of proceedings in Originating Summons No 492 of 2016 (“OS 492”). Rajah & Tann represents the Kingdom in those proceedings. The Kingdom applied to set aside the partial final award on the basis, *inter alia*, that the tribunal did not have jurisdiction over the claims in the arbitration. I have heard oral arguments and have reserved judgment.

5 Shortly after oral arguments had been heard and judgment reserved in OS 492, the appellants filed OS 95 *ex parte* to enforce the final award on costs. The appellants obtained the Order pursuant to O 69A r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“the Rules of Court”) on 26 January 2017. The appellants’ solicitors then attempted to serve the Order on the Kingdom, as required by O 69A r 6(2).

The attempts at service

6 The appellants’ solicitors first wrote to Rajah & Tann on 27 January 2017 enclosing the Order. Rajah & Tann stated in a reply on 9 February 2017 that it had no instructions from the Kingdom to accept service of the Order.

7 The appellants’ solicitors then attempted to serve the Order on Webber Newdigate, by email and fax on 16 and 17 February 2017 respectively, and by post on 21 February 2017. Webber Newdigate had acted for the Kingdom in the arbitration and was authorised to act for the Kingdom in OS 492. Webber

Newdigate rejected the appellants' attempted service on the basis that it had no instructions to accept service of the Order and that in any event, such service did not comply with the procedure for effecting service on a sovereign State.

8 Frustrated, the appellants vainly through their solicitors then attempted to serve the Order on the Attorney-General of Lesotho by email and by courier to the Attorney-General's Chambers in the Kingdom on 17 February 2017. This was clearly incorrect. Unsurprisingly, on 24 February 2017, Webber Newdigate, on the instructions of the Attorney-General of Lesotho, replied rejecting service of the Order on the basis that such service was invalid for non-compliance with s 14(1) of the Act.

9 On 1 March 2017, the appellants filed SUM 924 *ex parte* for permission to serve the Order through substituted means on Rajah & Tann in Singapore. The AR dismissed SUM 924 on 14 March 2017 and the appellants appealed his decision in RA 91.

10 On 9 March 2017, the Kingdom filed Summons No 1118 of 2017 ("SUM 1118") for a declaration that, *inter alia*, the appellants' purported service of the Order was invalid and ineffective. SUM 1118 was scheduled for hearing before me at the same time as RA 91, on 10 April 2017. Counsel for both parties accepted that if I were to dismiss RA 91, it would follow that SUM 1118 ought to be allowed. I therefore heard RA 91 first. I invited Rajah & Tann, who were before me for the purpose of SUM 1118, to participate in RA 91 and make it *inter partes*. However, they declined my invitation. As such, the appeal proceeded *ex parte*. I dismissed RA 91 on 24 April 2017 with detailed oral grounds.

Decision below

11 The AR found that s 14 of the Act applied to service of the Order. Section 14 of the Act states:

Service of process and judgments in default of appearance

14.—(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Ministry of Foreign Affairs, Singapore, to the ministry of foreign affairs of that State, and service shall be deemed to have been effected when the writ or document is received at that ministry.

(2) Any time for entering an appearance (whether prescribed by Rules of Court or otherwise) shall begin to run 2 months after the date on which the writ or document is so received.

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

...

(6) Subsection (1) 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) 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 counterclaim or to an action in rem; and subsection (1) shall not be construed as affecting any Rules of Court whereby leave is required for the service of process outside the jurisdiction.

[emphasis added]

12 The AR offered five reasons in support of his decision:

(a) First, the phrase “writ or other document” was capacious and capable of including documents other than originating processes, such as a leave order (the AR’s GD at [14]).

(b) Second, a leave order was required to be served under O 69A r 6(2), and that service had the effect of instituting proceedings in

relation to the enforcement of the award against the party served (the AR's GD at [15]). In this regard the AR relied principally on *Norsk Hydro ASA v State Property Fund of Ukraine and others* [2002] EWHC 2120 (Comm) ("*Norsk Hydro*"), which was approved in *PCL and others v Y Regional Government of X* [2015] EWHC 68 (Comm) ("*PCL*"), both being decisions of the English High Court.

(c) Third, the reference to an entry of "appearance" in ss 14(2) and 14(3) of the Act did not necessarily mean that s 14 as a whole only applied to documents in response to which an appearance must be entered (the AR's GD at [18]). The AR referred to s 2(2)(b) of the Act, which he regarded as including an application to set aside a leave order.

(d) Fourth, as a matter of principle, there should be no reason to exclude enforcement proceedings from the procedural requirements of service under s 14 of the Act (the AR's GD at [19]).

(e) Fifth, while it might be true that the Kingdom had eclipsed the need for notice and time to respond by first commencing OS 492 of 2016, this was procedurally distinct from OS 95 (the AR's GD at [24]).

Analysis

13 It was the second of the AR's reasons which had the most significance to RA 91, *ie*, whether a leave order is a "writ or other document required to be served for instituting proceedings against a State" within the meaning of s 14(1) of the Act. This was ultimately a question of construction of the statutory provision, making it useful if not necessary to explore the parentage of the Act. But statutory construction aside, it seemed instinctively incorrect

that service of a leave order on a sovereign State could be effected in some other manner than that provided in s 14(1) of the Act. The inherent difficulties with adopting any other mode seemed to make the point obvious. It raised the question what could possibly be the manner in which service of a leave order would be effected as a general rule, bearing in mind that we were here not speaking of a lay party but a sovereign State. A sovereign State does not have a place of abode or registered place of business. I address this in detail later in these grounds.

14 Section 14 of the Act is *in pari materia* with s 12 of the UK State Immunity Act 1978 (“the UK Act”), on which it was modelled (see *Singapore Parliamentary Debates, Official Report* (7 September 1979) vol 39 at col 409 (Mr E W Barker, then Minister for Law and Science and Technology)). 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 s 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. The question was whether the same construction applies in Singapore. Notwithstanding the common parentage and statutory framework of the Act and the UK Act, the appellants submitted that significant differences in the procedural rules dictated a different conclusion in Singapore from that in the UK (see [27] below). First, it will be helpful to consider the reasoning employed in the UK authorities for guidance on the correct interpretation of the Act.

UK authorities

Norsk Hydro

15 In *Norsk Hydro*, the question was whether a permission order in the UK was subject to s 12(2) of the UK Act in terms of the time limited for the sovereign State to react to the order. In that case, Norsk Hydro ASA obtained an arbitral award against the Republic of Ukraine. It sought and obtained permission to enforce the award in the UK and served the permission order on the Republic of Ukraine through diplomatic channels. The order stated that the award would become enforceable in 21 days. At the expiration of this period, Norsk Hydro ASA applied for and obtained a third party debt order to enforce the award. The Republic of Ukraine applied to set aside the third party debt order, arguing that it was entitled, under s 12(2) of the UK Act, to a period of two months and 21 days to challenge the order before the award could be enforced. Rule 62.18(9) of the UK Civil Procedure Rules (“the CPR”) states that where an order giving permission to enforce an award under the UK Arbitration Act 1996 was to be served outside jurisdiction, the award must not be enforced until after the end of such period as the court might set. As Norsk Hydro ASA obtained the third party debt order before the two months and 21 days had expired (which would be the period under s 12 of the UK Act if it applied), it was argued that the third party debt order was premature and should be set aside.

16 Norsk Hydro ASA made two arguments that were relevant to the present proceedings. First, it submitted that s 12(2) of the UK Act (equivalent to s 14(2) of Singapore’s SIA) was concerned with the court’s “adjudicative jurisdiction” and not its “enforcement jurisdiction”. This was a reference to

Alcom Ltd v Republic of Colombia [1984] 1 AC 580 (“*Alcom Ltd*”), in which Lord Diplock stated at p 600:

[T]he Act ... draws a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom. Sections 2 to 11 deal with adjudicative jurisdiction. Sections 12 to 14 deal with procedure and of these, sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction.

17 Gross J rejected this argument at [25]. In his view, CPR 62.18 allowed an applicant seeking enforcement of an award to proceed by way of either an arbitration claim form or an application for a permission order. Norsk Hydro ASA’s argument could succeed only if either s 12(2) of the UK Act applied *only* to arbitration claim forms and not to a permission order (which the Republic of Ukraine did not contend for), or s 12(2) did not apply to enforcement procedures at all. The former could not be correct as a matter of logic. The latter hypothesis could not be correct as well as s 12(2) was not confined to “adjudicative jurisdiction” but appeared under the heading “*Procedure*”; accepting Norsk Hydro ASA’s submission would require reading words into s 12(2).

18 Second, Norsk Hydro ASA submitted that the two-month period in s 12(2) was appropriate in the case of service of claims on States, but inappropriate for *enforcement of an award*, since an affected State ought to already be aware of the matter giving rise to the award. The State did not require time to react to proceedings which it was well aware were likely or afoot. Gross J’s response at [25(4)] was that:

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 ss 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, where assets are or are thought to be located.

19 Finally, Gross J clarified that “time for entering an appearance” in s 12(2) of the UK Act applied to the time period to be set by the court for a defendant to seek to set aside an order for enforcement under CPR 62.18(9). He thought this was apparent from “the wording of s 12(2) standing alone but read in context” (at [25(4)]). Moreover, s 22(2) of the UK Act (identical to s 2(2)(b) of Singapore’s SIA) was also capable of supporting this construction, though Gross J suspected that s 22(2) was “primarily designed for other purposes” (at [25(5)]). As counsel for the appellants noted, Gross J did not examine the specific wording of s 12(1), *ie*, whether an order giving leave to enforce an award was a “writ or other document required to be served for instituting proceedings against a State”. However, this must be implied in his conclusion that s 12(2) applied to the permission order, which presupposed that the permission order was a document falling within the scope of s 12(1). The wording of s 12(1) was considered more closely in *PCL*, which approved *Norsk Hydro*.

PCL

20 In *PCL*, the claimants obtained a peremptory arbitral order for payment against the defendant government. The arbitral order was dated 17 October 2014 and required payment within 30 days. The claimants obtained the tribunal’s permission to apply to the court pursuant to s 42 of the UK Arbitration Act 1996 for enforcement of the arbitral order. This application was to be made by means of an arbitration claim form. On 18 November 2014 and 18 December 2014, the claimants obtained without notice court orders permitting them to serve the arbitration claim form at the address of the defendant’s solicitors, and abridging the time for filing an acknowledgment of

service to three business days. The defendant applied to set aside the court orders for non-compliance with s 12 of the UK Act. One of the claimants' arguments was that s 12(1) did not apply because the claimants were not "instituting proceedings". An application for enforcement of the arbitral order was, in substance, an application to the court *in support of* existing arbitration proceedings, not fresh proceedings instituted *against* anyone.

21 Hamblen J observed that CPR 62.2 defined an "arbitration claim" as "any application to the court under the [UK Arbitration Act 1996]". CPR 62.3(1), which was headed "Starting the claim", stated that "an arbitration claim must be *started* by the issue of an arbitration claim form in accordance with the Part 8 Procedure" [emphasis added]. CPR Part 8 governs the use of claim forms (the originating process). Hamblen J thus found at [25] that the claimants had "started" their claim, *ie*, an application for a permission order, by issuing the arbitration claim form in accordance with the requirements of CPR 62.2 and 3. In Hamblen J's view, the claimants were thereby "instituting proceedings" within the meaning of s 12(1). He stated at [28]:

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 document which institutes those proceedings and it is [sic] "must be served" for that purpose, as CPR 62.4(2) makes clear.

[emphasis added]

22 Hamblen J also referred at [38] to *Norsk Hydro* as authority to the effect that s 12 applies to enforcement proceedings. He also said that while s 12(1) would not apply to "interlocutory applications in existing court proceedings", the claimants' application for enforcement did involve the "initiation" of "separate proceedings involving the invocation of the court's

procedures and powers” (at [35]). It 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 [40]).

23 Hamblen J considered his view to be consonant with the principle underlying the time limits in s 12, which exist “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”, citing Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd Ed, 2013) at p 231.

24 It ought to be noted that there is a difference between the wording of Part 62 of the UK CPR and O 69A of our Rules of Court, which does not use the words “start” or “starting” (see [21] above). Instead, O 69A rr 3(2) and 3(3) state:

(2) Any application to which this Rule applies [including leave to enforce an award under ss 18 and 19 of the IAA] must, where an action is pending, be made by summons in the action, and in any other case by originating summons.

(3) Where the case is one of urgency or an application under section 18, 19 or 29 of the Act for leave to enforce an award or foreign award, such application may be made ex parte on such terms as the Court thinks fit.

25 Nevertheless, I did not think that this difference in wording was significant. Hamblen J’s conclusion was not premised solely on the wording of the CPR, but also on the nature and substance of the claimants’ application (see [40] of his judgment). He considered the enforcement proceedings to have been newly “instituted” by the claimants’ application, even though they arose out of ongoing arbitral proceedings. He regarded them as distinct proceedings. In my view, the same principle applied here. The appellants instituted

enforcement proceedings, which are distinct. Service of a leave order is required under O 69A r 6(2), and service is the event which triggers the running of time from which the State may apply to set aside the Order under O 69A r 6(4). The originating summons seeking the order itself is not served, being an application made *ex parte* under O 69A r 6(1). Its sole purpose is to secure a leave order, *ie*, leave to enforce the award, not to institute enforcement proceedings. It is the leave order which must be served for the purpose of instituting the enforcement proceedings within the jurisdiction, giving the State an opportunity to participate in and/or oppose those proceedings.

26 It should also be remembered that the correct comparison is not between a leave order in Singapore and an arbitration claim form in the UK, but between a leave order in Singapore and a permission order in the UK. The arbitration claim form in CPR 62.18(1) is simply the means by which the creditor applies for permission, similar to the purpose served by the originating summons under O 69A r 6. Like the arbitration claim form for a permission order, the originating summons is an *ex parte* application. Service of the arbitration claim form is therefore not required (see *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] 1 WLR 2829 (“*Gold Reserve*”) at [55]–[57]). It can hardly then be said that the originating summons is a “document required to be served for instituting proceedings”. On the other hand, the leave order, like a permission order, must be served to initiate enforcement proceedings against the State. Hence reliance on the terminology of “starting” the claim, which applies to an *arbitration claim form* and not a *permission order*, can only take us so far. It was the *permission order* which was found, correctly in my view, to constitute a “document required to be served for instituting proceedings against a State” in *Norsk Hydro* and *Gold*

Reserve. Similarly, a leave order in Singapore fulfils the same role as a permission order in the UK and is no less required to be served for the institution of enforcement proceedings. The procedural rules in the UK and Singapore in this regard are not different in any meaningful manner.

The omission of O 11 r 7

27 The appellants argued that these authorities were irrelevant to Singapore because of the difference between the UK CPR and our Rules of Court. They submitted that the UK position could not be transposed to the Singapore context because of crucial differences between CPR 62.18 and our O 69A r 6, which both deal with the enforcement of arbitral awards. This seemed to be an incorrect argument as we were concerned with construction of s 14(1) of the Act, which is primary legislation. It seemed fundamentally flawed to attempt to ascertain the width of the provision with reference to subsidiary legislation (*ie*, the Rules of Court). In any event, I did not believe that the differences advanced the appellants' cause.

28 The two statutory instruments provide for an application for permission or leave to enforce the award to be made *ex parte*. CPR 62.18(1) provides for such an application to be made by means of an arbitration claim form, while O 69A r 3 provides for it to be made by a summons (where an action is pending) or originating summons (in any other case). It will be helpful to juxtapose the UK procedure and the Singapore procedure. I will first describe the former followed by the latter.

29 Under the UK CPR, the arbitration claim form *need not* be served although the court may specify parties to the arbitration on whom the arbitration claim form must be served and they must acknowledge service. The

enforcement proceedings will then “continue as if they were an arbitration claim” (CPR 62.18(3)). If the application for permission to enforce is granted, the permission order 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 (CPR 62.18(7)). The permission order may be served out of jurisdiction without permission and “in accordance with [CPR] 6.40 to 6.46 *as if the order were an arbitration claim form*” (CPR 62.18(8)(b)) [emphasis added]. Of these, CPR 6.44 deals with “service of claim form or other document on a State”, and provides that a party wishing to serve a claim form or other document on a State must request service to be arranged by the Foreign and Commonwealth Office. CPR 6.44 is very similar to O 11 r 7, which prescribes a mode of service of originating process on a State mirroring that stipulated in s 14(1) of the Act. Following service out of jurisdiction, the defendant may apply to set aside the permission order within such period as the court may set, and the award cannot be enforced until after the end of that period (CPR 62.18(9)).

30 The position is strikingly similar but not identical under our Rules of Court. If an application for leave to enforce is successful, the leave order must be served on the debtor by delivering a copy to him personally, 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* (O 69A r 6(2)). It may be served out of jurisdiction without leave, and “Order 11, Rules 3, 4 and 6 shall apply in relation to such an order” (O 69A r 6(3)). Notably and strangely, there is no reference to O 11 r 7 in O 69A r 6(3). Following service out of jurisdiction, the debtor may apply to set aside the permission order within such period as the court may set, and the award cannot be enforced until after the end of that

period (O 69A r 6(4), which is identical in all material respects to CPR 62.18(9)).

31 Counsel for the appellants highlighted two main differences between the Singapore and UK position:

(a) First, CPR 62.18(7) permits service of the permission order to be effected by either of *only two* ways: personal service or service at the debtor's last known or usual place of abode or business. However, O 69A r 6(2) additionally permits a *third* way, *ie*, "such other manner as the court may direct".

(b) Second, and more significantly, CPR 62.18(8) stipulates that service of the leave order out of jurisdiction must comply with CPR 6.44, which is the equivalent of O 11 r 7 of our Rules of Court. However, as noted earlier, O 69A r 6(3) does *not* state that such service must comply with O 11 r 7. It only states that the leave order must be served in accordance with O 11 rr 3, 4 and 6, which have no relevance to service *on a State*.

32 Counsel for the appellants strongly emphasised the second distinction. He argued that the omission of O 11 r 7 must mean that the Singapore position is that a leave order does *not* have to comply with the procedure stipulated therein (which as pointed out earlier is essentially the same as the procedure in s 14 of the Act), unlike a permission order in the UK. In this regard, it was pointed out that O 11 r 7 is limited to originating processes, which by definition covers only writs and originating summonses, and cannot therefore be regarded as applicable to a leave order. While the appellants' argument was intuitively appealing, I did not think it was correct.

Construction of s 14 of the Act

33 First, as I noted earlier, the appellants' approach of looking to the Rules of Court to determine the scope of s 14 of the Act is incorrect. The Rules of Court are subsidiary legislation enacted by the Rules Committee and ought not to constrict the meaning of the Act, which is primary legislation enacted by Parliament. Just because O 11 r 7 is confined to originating processes does not mean that s 14 of the Act, which does not use that language, is similarly confined. How can a gap in procedural legislation rules be used to argue that Parliament did not intend the Act to apply to leave orders? Conceptually the case for restricting Parliament's intent that way is very weak. The argument is fundamentally flawed. Section 14 of the Act must be construed on its own terms and in accordance with Parliament's intention, and not with reference to O 11 r 7. In any event, the attempt to use O 69A and r 6(3) in particular to tease out the meaning of s 14(1) would be misguided as O 69A was only inserted in 1995 by the Rules of the Supreme Court (Amendment) Rules 1995 (GN No S 39/95), whereas the Act was enacted much earlier in 1979. O 69A can therefore have little if anything to say about the environment in which the Act came into force and the parliamentary intention behind its wording. Rather, the anterior question was whether s 14 was intended to govern the procedure for the service of leave orders on foreign States. That was a matter of construction of s 14. It was only if s 14 was found not to apply that the question would then arise whether the Rules of Court prescribe some other procedure for service.

34 It seems clear that the Act, like the UK Act, covers enforcement proceedings. The Preamble to the Act describes it broadly as "[a]n Act to make provision with respect to proceedings in Singapore by or against other States, and for purposes connected therewith". At first blush, there is no

reason why this should not encapsulate enforcement proceedings. In *Alcom Ltd* at p 600, Lord Diplock observed of the UK Act:

The State Immunity Act 1978, whose long title states as its first purpose to make new provision with respect to proceedings in the United Kingdom by or against other states, purports in Part I to deal comprehensively with the jurisdiction of courts of law in the United Kingdom *both* (1) to adjudicate upon claims against foreign states ("adjudicative jurisdiction"); *and* (2) to enforce by legal process ("enforcement jurisdiction") judgments pronounced and orders made in the exercise of their adjudicative jurisdiction.

[emphasis added]

35 In *AIC Limited v The Federal Government of Nigeria* [2003] EWHC 1357 (QB) ("*AIC Limited*"), Stanley Burnton J observed that the terms "adjudicative jurisdiction" and "enforcement jurisdiction" were merely "convenient shorthand references" (at [17]). He added that s 1 of the UK Act (equivalent to s 3 of the Act) did not refer to adjudicative or enforcement jurisdiction but related to the "entirety of the jurisdiction of the court", and Lord Diplock in *Alcom Ltd* did not suggest that s 1 was concerned only with adjudicative jurisdiction. In *Norsk Hydro*, Gross J firmly rejected (at [25(4)]) the notion that s 12 of the UK Act was confined to "adjudicative" proceedings.

36 There is no reason that the Act, and particularly s 14(1), should not similarly cover both what Lord Diplock termed "adjudicative" and "enforcement" proceedings. Section 14 exists for the primary purpose of stipulating the mode of service of proceedings against a State and a minimum period regarded as sufficient for the State to react to those proceedings. It also removes any doubt as to when service is effected so that the reaction time can be accurately computed, the importance of which was pointed out in para 63 of the Explanatory Report to the European Convention on State Immunity

1972 (Basle, 16.V.1972) (“the European Convention”), on which the UK Act was modelled:

[Article 16(3)] ... takes account of the interests both of the plaintiff and of the defendant State. It safeguards the plaintiffs [sic] interests by facilitating determination of the date on which service is deemed to have been effected. It safeguards the defendant State's rights by protecting it from any form of service which is deemed to have been effected by a fiction, such as service on the parquet, and from time-limits which begin to run from the date on which the document is posted.

37 Accordingly, there can be no substantive basis for distinguishing between “adjudicative” and “enforcement” proceedings for the purposes of s 14(1) of the Act.

38 The UK Act was modelled on the European Convention. However, there was a significant divergence when the UK implemented the European Convention. Article 16 of the European Convention, on which s 12 of the UK Act was based, appears to have contemplated originating processes only. The commentary on Article 16 in the Explanatory Report to the European Convention noted (at para 58) the difficulties that occur in connection with “the service of *writs* in proceedings against States” [emphasis added]. Article 16 referred to entry of appearance and judgments given in default of appearance, and the European Convention did not contain any provision extending those terms to “corresponding” procedures. Notably this was addressed by s 22(2) of the UK Act, which is *in pari materia* with s 2(2)(b) of the Act. Pertinently, the commentary on Article 12 in the Explanatory Report to the European Convention stated unequivocally (at para 51) 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”.

39 The UK Act, on the other hand, expressly provides for enforcement proceedings against States. Section 13(4) of the UK Act permits execution against the property of a foreign State *for the enforcement of an arbitral award*, provided the property is used or intended to be used for commercial purposes. By contrast, Article 23 of the European Convention contained a general prohibition against measures of execution against the property of a contracting State except by consent. The Official Reports of the UK Parliamentary Debates show that the UK's decision to partially remove immunity against enforcement was a deliberate one. I quote from United Kingdom, House of Lords, Parliamentary Debates (16 March 1978) vol 389 at cols 1516–1517, <<http://hansard.millbanksystems.com/lords/1978/mar/16/state-immunity-bill-hl>> (accessed 15 April 2017) (Lord Chancellor (Sir Elwyn Jones)):

This Amendment is intended to remove the immunity currently enjoyed by States from proceedings to enforce arbitration awards given against them. Clause 10(1) removes immunity from proceedings relating to arbitration where the State had submitted to the arbitration in the United Kingdom, or according to United Kingdom law, but by subsection (2) enforcement proceedings are excepted; that exception is now to be removed. If the Government Amendments to Clause 14 [ie, s 13 of the UK Act] are accepted, the property of a State which is for the time being in use or intended for commercial purposes will become amenable to execution to satisfy an arbitration award. However, it would not be possible to proceed to such execution without first bringing enforcement proceedings to turn the award into an order of the court on which the execution could be levied, and unless the State had waived its immunity to enforcement, Clause 10(2) would prevent the necessary steps being taken. This Amendment will delete the subsection.

40 The restriction upon Clause 10(1) (“arbitration *in the United Kingdom, or according to United Kingdom law*”) was deleted in the House of Commons (see *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at [90]), resulting in what is now s 9(1) of the UK Act. In light of this deliberate

divergence from the position taken in the European Convention, the insertion of s 22(2) of the UK Act seemed to me quite intentional and, as the AR suggested, arguably justified a “capacious” reading of s 14 of the UK Act. It would appear that s 22(2) of the UK Act was calibrated to cover *inter alia* the introduction of enforcement proceedings for arbitral awards in the UK Act. Indeed *The Supreme Court Practice* 1997 vol 2 (Richard Scott V-C gen ed) (Sweet & Maxwell, 1996) states at para 4671 that the European Convention was “not incorporated in the statute and it is doubtful whether it would be at all helpful or proper to refer to [it] in aid of the interpretation of the [UK SIA]”. It must be remembered that when enacting the Act, Parliament incorporated s 2(2), which is *in pari materia* with s 22(2) of the UK Act.

41 Next was the question of whether a leave order constitutes a “document required to be served for instituting” enforcement proceedings. As the AR rightly observed, s 14(1) of the Act does *not* refer to “originating process”, but to a “writ or other document required to be served for instituting proceedings”. In the words of Hamblen J, the wording of s 14(1) is “general and unqualified” and “not limited to proceedings seeking judgment” (*PCL* at [30]).

42 In *Embassy of Brazil v de Castro Cerqueira* [2014] ICR 703, Lewis J stated at [23] that “the purpose of [s 12 of the UK Act] is to provide for a means by which a state can be given notice of proceedings against it”. Fox and Webb in *The Law of State Immunity* ([23] *supra*) state at p 174 that:

Foreign States are not always prepared immediately to appear in the English court on receipt of notice of proceedings and ... the procedure laid down in section 12, particularly that which requires extended periods of time for service of proceedings or of any judgment in default, and for challenge to the jurisdiction, provide[s] a useful safeguard to ensure adequate

notice to the foreign State and opportunity for action through diplomatic channels.

43 The same text reiterates at p 231 that s 12 exists “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”. 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 (see also Hamblen J’s observation in *PCL* at [40]).

44 The important distinction in s 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 s 14. After it has notice of the proceedings, the procedure for service of other documents need not strictly comply with s 14 any longer. It is crucial to remember that the trigger under s 14(1) for the institution of proceedings *is the requirement of service and not the character of the document that has to be served*. Fox and Webb note in *The Law of State Immunity* at p 11 that “[s]ervice of process is a first stage in the institution of proceedings”, by which “the defendant is made aware of the claim, of the proposed court to adjudicate it, and of his required presence to answer the claim”. As I noted at [25] above, under O 69A r 6(2) of the Rules of Court (and likewise UK CPR 62.18(8)), it is the leave order which must be served for enforcement proceedings to be instituted. I thus took the view that the

Order in this case had to be served in accordance with the procedure set out in s 14 of the Act, notwithstanding the inapplicability of O 11 r 7.

45 This accorded with the underlying purpose of s 14. The two-month time period in s 12 serves to acknowledge “the reality that states do take time to react to legal proceedings”. It is not disproportionately generous, since often “an award will be made in one country but enforcement may be sought elsewhere, perhaps in a number of jurisdictions, where assets are or are thought to be located” (*Norsk Hydro* at [25(4)]). I thus agreed with the reasoning at [19] of the AR’s GD that:

States require time to respond to proceedings brought against them, and enforcement proceedings are no exception. Proceedings to enforce an award may be brought in any jurisdiction in which the respondent State has assets, independent from that jurisdiction’s connection to the underlying arbitration or the merits of the substantive dispute. The need for time and opportunity to respond applies with equal force.

46 It is true that enforcement of an arbitral award cannot be said to take a respondent State by surprise, since it would have participated in the arbitral proceedings. However, different considerations come into play when a State is faced with the potential enforcement of an arbitral award against it in a particular jurisdiction, as compared to the considerations at play in the underlying arbitral dispute. The grounds for setting aside an award at the seat of jurisdiction and for refusing enforcement in another jurisdiction are different, and Singapore courts clearly recognise the right of a party to elect between the ‘active’ remedy of setting aside at the seat of arbitration and the ‘passive’ remedy of resisting enforcement elsewhere: *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [71].

47 The appellants argued that the Kingdom clearly already had notice of their intention to enforce the award. However, the question was not whether the Kingdom had notice of the application to enforce as a matter of fact, but whether it had been afforded the procedural safeguards to which it was entitled under s 14 of the Act. That was a matter of law. The appellants could not rely on their own improper service to argue that the Kingdom had thereby been notified of their application and they no longer needed to comply with s 14(1) of the Act. The appellants were not disenfranchised of the benefits under the final costs award. They were simply compelled to comply with the method of service under the Act in order to achieve them. In this regard, it was not apparent to me why the appellants had been so resistant to doing just that, particularly in the face of the issues that they had encountered with service.

48 Finally, if the appellants are right, it would seem that there are no clear ground rules for effecting service of leave orders on a sovereign. As noted earlier, the sovereign has no place of residence or registered office like a lay defendant. The appellants' futile efforts at service illustrated the difficulties of not having a clear set of ground rules. The absence of ground rules causes uncertainty in an area that demands sensitivity and diplomacy. It seemed entirely logical to therefore conclude that such ground rules reside in s 14(1) of the Act. I have developed this point further in the discussion that follows on the omission of O 11 r 7 from O 69A r (3) which, as I have noted earlier, is the fulcrum of the appellants' arguments.

49 For the foregoing reasons I concluded that s 14 of the Act did apply to a leave order, and it was therefore irrelevant that the Rules of Court did not prescribe this procedure in O 69A r 6(3). Section 14(1) was clearly there and meant to be observed scrupulously. However, even accepting *arguendo* that the appellants were right to have regard to the Rules of Court, it quickly

became clear that the appellants' position was untenable from that angle as well.

Procedure for service under the Rules of Court

50 In the view of counsel for the appellants, O 11 r 7 of the Rules of Court and s 14 of the Act both apply only to originating processes. O 69A r 6(2) stipulates that a leave order (which is not an originating process) must be served on the debtor, but the procedure for such service would be unclear as regards service on a State, since there is no rule prescribing the procedure for service of a leave order on a State. If counsel for the appellants was right to say that there is no difference between service of a leave order on a debtor in a foreign State and on a State, the applicable provision being O 69A r 6(3), then service in accordance with O 11 rr 3, 4 and 6 would be permissible on a State. However, all three rules have no application to service of leave orders on a State. This would be a significant lacuna in Singapore's legislative infrastructure as there is no provision in the Rules of Court that regulates service of leave orders on a State. Recognising this anomaly, counsel for the appellants tried to plug the lacuna by pointing to the third of the three options for service provided in O 69A r 6(2), which allows for service of the leave order "in such other manner as the Court may direct" (this is the first difference between the UK and Singapore positions, see [31(a)] above). With respect, this could not be right.

51 First, I did not think that O 69A r 6(2) could be used in this way. It seemed to me that O 69A rr 6(2) and 6(3) are alternatives, r 6(2) applying to service of a leave order within jurisdiction and r 6(3) applying to service out of jurisdiction. The judicial discretion in O 69A r 6(2) appeared to be a residual power to customise service *within jurisdiction* where the first two methods (*ie*,

personal service and leaving a copy at the debtor's place of abode or business) proved ineffective or dissatisfactory for some reason. O 69A r 6(3), on the other hand, subjects the service of leave orders out of jurisdiction to O 11 rr 3, 4 and 6. Service of a leave order out of jurisdiction was not intended to be a matter of freestanding judicial discretion under r 6(2), but was to be separately governed by the rules pertaining to service abroad (*ie*, O 11 rr 3, 4 and 6). This is clear from the following observations:

(a) Under O 69A r 6(3), the service of leave orders out of jurisdiction is governed by O 11 rr 3, 4 or 6, which do not allow for the court to customise service. It would therefore have been strange and indeed not logical for the Rules Committee to have intended the court to be able to customise service of leave orders out of jurisdiction under O 69A r 6(2). Obviously the intent was for service of leave orders out of jurisdiction to replicate the procedure for service of originating processes out of jurisdiction.

(b) The first two modes of service under O 69A r 6(2) (delivering a copy to the debtor personally and sending a copy to his usual or last known place of abode or business) are applicable only to lay defendants. It followed from an application of the *ejusdem generis* rule that the third category of service (*ie*, such manner as the court may direct) must also be read with reference to lay defendants. Since the first two modes in O 69A r 6(2) are clearly concerned with lay defendants, it would be counter-intuitive and contrived to interpret only the third mode as impliedly extending to service on sovereigns.

(c) Similarly, the first two modes of service in O 69A r 6(2) only apply to service within jurisdiction. There is no reason to think that the

Rules Committee would have intended these to apply to service out of jurisdiction, given that O 11 r 3, which relates to service out of jurisdiction, states that service need not be personal so long as it complies with the laws of the jurisdiction of service. Hence it is also contrived to interpret the third mode of service in O 69A r 6(2) as applying to sovereign States.

(d) If the Rules Committee had intended the courts to freely configure the method of service of leave orders out of jurisdiction – which was what the appellants urged me to conclude – there would have been no need to enact O 69A r 6(3). Nor could it be said that the court’s freedom to configure service in O 69A r 6(2) was simply to be read subject to r 6(3) in the case of service abroad, because O 69A r 6(3) is in some ways broader than O 69A r 6(2). For example, pursuant to O 11 r 3 the leave order need not be served personally. It may instead be served by any method specifically authorised by the law of the foreign State for the service of foreign process, or via a consular authority (see *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2015] 4 SLR 625 (“*Humpuss*”) at [59]). Such options are obviously unavailable under O 69A r 6(2). Evidently, O 69A rr 6(2) and 6(3) prescribe separate regimes for service of leave orders within and out of jurisdiction respectively.

52 As such, I was not convinced that O 69A r 6(2) was intended to apply to the service of leave orders out of jurisdiction in the first place.

53 This view was supported by the legislative development in the UK. There was a period of about six years, from 1996 to 2001, when O 73 r 31 of

the UK's Rules of the Supreme Court (the predecessor to CPR 62.18) provided *both* for service of leave orders "in such other manner as the court may direct", *as well as* service of leave orders on a foreign State by official channels pursuant to O 11 r 7. Clearly, the judicial discretion to configure the method of service did not apply to service on a foreign State, which had to be effected in accordance with O 11 r 7. The fact that both were present in O 73 r 31 for a period of time suggests that the judicial discretion to configure service was never meant to extend to service on a sovereign. Similarly, I did not think that the judicial discretion in our O 69A r 6(2) was intended to be used for O 11 r 7-type situations.

54 Second, it was highly unlikely that Parliament in enacting the Act, and the Rules Committee in drafting O 69A, would have left the procedure for service of leave orders on foreign States – which should be a matter of political diplomacy and sensitivity – to the discretion of judges and the efforts of individual parties. The improbability of such a result becomes apparent when one considers the difficulties that a court would face in attempting to customise service in such a case. Should it, for example, direct the leave order to be served on the State's solicitors personally or even by substituted service (as the appellants sought here)? This raises a host of other issues. The solicitors' retainer might not extend that far. Would such service even be consistent with the mode of service in the sovereign State in question, on the assumption that its solicitors were located there? What about service on the Attorney-General of the State? That surely could not be in accordance with the laws of a sovereign State as a general proposition: I doubted that any sovereign State would contemplate service otherwise than through diplomatic channels. An incorrect service could lead to potentially huge repercussions. Such mode of service would probably fall foul of O 11 rr 3(2) and (3).

55 The difficulty of identifying a suitable mode of service was illustrated by the facts of the present case. Even if I agreed that I could use O 69A r 6(2) to stipulate the manner of service on the Kingdom, there was nobody on whom I could have ordered the Order to be served. Rajah & Tann did not have instructions to accept service. Nor did the Lesotho firm of Webber Newdigate, which had represented the Kingdom in the arbitration. The appellants submitted that the Kingdom had “agreed” to accept service on Webber Newdigate because the terms of Webber Newdigate’s powers of attorney were broad enough to cover the present proceedings, and hence s 14(6) of the Act exempted the appellants from having to comply with s 14(1). The appellants’ reading of Webber Newdigate’s retainer was self-servingly generous. Webber Newdigate was empowered to do whatever the Kingdom might or could do *only* in respect of OS 492 and the arbitration. The enforcement proceedings in OS 95 were procedurally and substantively distinct. Moreover, what should the court do in a case where there were no powers of attorney to begin with, or if they did not include acceptance of service? It was perhaps unsurprising that these issues and difficulties presented themselves, because we were speaking about service on not any ordinary defendant, but one which is a sovereign. Such difficulties by and large do not arise in the case of service on lay defendants, and plainly showed that the discretion in O 69A r 6(2) was not intended for service on foreign States. On the contrary, it was quite clear that the court’s discretion to stipulate the manner of service in O 69A r 6(2) must have been intended for service on lay defendants, in respect of whom it is often necessary for the court to tailor the service method to the circumstances of the individual defendant.

56 Third, this approach would be cumbersome and impractical. It must be recalled that leave is not required to serve a leave order out of jurisdiction:

O 69A r 6(3). If counsel for the appellants was right, that would mean that in every case where the court made a leave order which had to be served on a State, the creditor would have to specially seek directions from the court as to how the leave order should be served. The judicial discretion in O 69A r 6(2) would not simply be a residual discretion to be resorted to when the usual methods of service were not feasible, but the first port of call as and when a leave order was granted against a foreign State. I seriously doubted that the Rules Committee, *having dispensed with the need for leave* to serve a leave order out of jurisdiction, intended the court to have to spell out directions for service on such an *ad hoc* and haphazard basis in a given case. Such a result would be counter-productive.

57 Fourth, such an approach would be inconsistent with how service of other documents out of Singapore is effected. The procedure for service of *originating processes* on defendants in foreign States is governed by O 11 rr 3, 4 and 6. The service of *leave orders* on debtors in foreign States is subjected to these same rules pursuant to O 69 r 14(3) (in respect of awards under the Arbitration Act (Cap 10, 2002 Rev Ed)) or O 69A r 6(3) (in respect of awards under the IAA), as the case may be. The service out of Singapore of any summons, notice or order is also subject to O 11 rr 3, 4 and 6 pursuant to O 11 r 8(3). The service of *originating processes* on *foreign States* is controlled even more strictly by O 11 r 7. It could not be that the service of *leave orders* on *foreign States* was intended to be totally exempt from any such control and left to the court's direction under O 69A r 6(2). There was no apparent reason for this to be the case, when service of a leave order is evidently to be treated the same as service of originating process under O 11 rr 3, 4 and 6. If a leave order that is to be served out of jurisdiction is to be treated for the purpose of service as subject to the same requirements as an originating process, and

service of an originating process on a sovereign has to conform to s 14(1) and O 11 r 7, it was quite difficult to comprehend why service of a leave order on a sovereign, as opposed to a lay defendant, should be given a different treatment. The underlying principle must surely be that “[s]ervice of the order for enforcement out of jurisdiction ... must comply with the methods for service of originating process stipulated under the Rules of Court” (see Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 5.19; see also para 5.76).

Legislative development of the Act and Rules of Court – an oversight?

58 Finally, it was clear to me that the omission of O 11 r 7 from O 69A r 6(3) was nothing more than an oversight. The old O 69 r 7 (the predecessor of O 69A r 6(3)) preceded O 11 r 7 and was, probably for reasons unique to the limited role of arbitration at the time, never amended to refer to O 11 r 7 when it came into force. This omission was carried through into O 69A when it was enacted to complement the enactment of the IAA, and that oversight has not been rectified since. This was clear from the legislative history of the provisions, which I set out in detail below.

59 When the Rules of Court were first enacted in 1970, the Act and IAA had not yet come into existence. Each of the rules currently found in O 11 had a predecessor in the 1970 edition, *except for* O 11 r 7. The 1970 Rules did not appear to have contemplated the service of process *on* a foreign State (save for the limited O 11 r 7 of the 1970 Rules, now O 11 r 5 of the current Rules), only service *on defendants* in foreign States. Arbitration was at that time governed by the Arbitration Act (Cap 16), renamed from the Arbitration Ordinance 1953, which drew little distinction between domestic and international arbitrations (see *Arbitration in Asia* (Michael J Moser, gen ed)

(LexisNexis, 2002) Binder 2, Division IX at para 1). There was no O 69A, but O 69 (captioned “Arbitration proceedings”) stipulated the procedure for applications under the old Arbitration Act and thus straddled both domestic and international arbitrations. O 69 r 5 alluded briefly to leave to enforce domestic awards and O 69 r 6 catered for the registration of awards under the Reciprocal Enforcement of Judgments Ordinance, but O 69 did not specify any procedure for the enforcement of international awards. In 1979, the Act was enacted.

60 In 1982, a new O 69 r 7 was inserted into the Rules of Court, which provided for the enforcement of awards under s 20 of the old Arbitration Act. This new rule was the first predecessor of what is now O 69A r 6. There was, at this time, still no equivalent of what is now O 11 r 7 and no O 69A (as O 69 still applied to both domestic and international arbitrations). O 69 r 7 provided for applications for leave to enforce an award to be made *ex parte*, subject to the court directing an originating summons to be issued. O 69 r 7(4) was identical to what is now O 69A r 6(2), requiring the leave order to be served on the debtor by any of the three means stated at [31(a)] above. O 69 r 7(5) stated, “Service of the order out of the jurisdiction is permissible without leave, and Order 11, Rules 5, 6 and 8 [later amended to Rules 3, 4 and 6] shall apply in relation to such an order as they apply in relation to a writ.” O 69 r 7(5), which ultimately evolved into what is now O 69A r 6(3), did not refer to any O 11 rule for service *on a State* because *no such rule existed at the time*.

61 It was only in 1991 that O 11 r 7 was inserted by the Rules of the Supreme Court (Amendment No 3) Rules 1991 (GN No S 532/91) to give effect to the Act (see Jeffrey Pinsler, *Civil Justice in Singapore* (Butterworths Asia, 2000) at p 197). O 11 r 7 was *in pari materia* with the then O 11 r 7 of the UK Rules of the Supreme Court, which was enacted in 1980 to give effect

to the UK Act. It is not apparent why O 11 r 7 was inserted so long after the Act had been in force. However, it was inserted around the same time that O 11 underwent substantial amendments in the wake of the controversial decision of *Ong & Co Pte Ltd v Chow Y L Carl* [1987] SLR(R) 281 (“*Ong & Co*”) (see *Humpuss* at [37]–[39]). While the other amendments to O 11 liberalised the service of process out of jurisdiction (see *Humpuss* at [38]), allowing service in whatever way was permitted by the law of the foreign jurisdiction for service of its domestic process, O 11 r 7 did the opposite, ‘carving’ out special procedures to be complied with where service was to be effected on a foreign State. This was obviously necessary as the Rules of Court, being subsidiary legislation, had to provide a mode of service that was in conformity with s 14(1) of the Act.

62 However, strangely, no amendments were made to O 69 r 7, in particular r 7(5). This appears to have been an oversight; investor-state arbitration was only just beginning to take flight and it might not have been apparent that provision needed to be made to address service of a leave order *on a State*. (The first International Investment Agreement (“IIA”) was entered into in 1959 and Singapore entered into its first IIA in 1966. However, investment treaty arbitration only began to grow rapidly in the 1990s, following the “uncertainty caused by decolonisation and robust assertions by newly independent states over natural resources during the 1960s and 1970s”: see Sundaresh Menon & Denis Brock, *Arbitration in Singapore: A Practical Guide* (Sweet & Maxwell, 2014) at paras 20.006 and 20.007, as well as Petr Polášek and Sylvia T Tonova, “Enforcement against States: Investment Arbitration and WTO Litigation” in *WTO Litigation, Investment Arbitration, and Commercial Arbitration*, Global Trade Law Series, Volume 43 (Jorge A Huerta-Goldman *et al*, eds) (Kluwer Law International, 2013) p 356.)

63 On 31 October 1994, the IAA was enacted with effect from 27 January 1995, paving the way for the dual track arbitration regime that now prevails in Singapore. Shortly after, on 20 January 1995, O 69A was inserted into the Rules of Court, likewise to take effect from 27 January 1995. O 69A r 6(3) was a word-for-word replication of O 69 r 7(5) (see [59] above). In 2001, the old Arbitration Act was repealed and the current AA enacted, and O 69 was updated in 2002 to reflect the amendments.

64 This excursion into the history of the Rules of Court shows that O 69A was enacted to complement the IAA. They were to take effect from the same date. When O 69A r 6 was enacted in January 1995, it adopted the language of O 69 r 7 almost without amendment. In fact, O 69A r 6(3) adopted the language of O 69 r 7(5) (now O 69 r 14(3)) wholesale, stating that service out of jurisdiction of a leave order would have to comply with “Order 11, Rules 3, 4 and 6”. I have noted that O 11 r 7 was not included in O 69 r 6(3) simply because it did not exist at the time that O 69 r 7 was enacted ([59] above), and when it was introduced, O 69 r 7 was not revised to make reference to it. As O 69 r 7(5) did not make reference to O 11 r 7, unsurprisingly O 69A r 6(3), *being its carbon copy*, also did not make reference to it. It is very likely that the draftsmen, when borrowing the language of O 69 in drafting O 69A, overlooked the fact that O 11 r 7 had been inserted without amending O 69 r 7(5) at the same time to make reference to it. Given the circumstances, it seemed probable that the omission of O 11 r 7 from O 69A r 6(3) was accidental, *not intentional*. Counsel for the appellants’ attempt to argue that the omission of O 11 r 7 from O 69A r 6(3) reflected an intention to depart from the UK position made too much of what was in all likelihood an oversight.

65 It is also worth noting that, before 2002, the application for a leave order would have been made by originating summons *inter partes*, except in cases of urgency. It was only in the Rules of Court (Amendment No 2) Rules 2002 (GN No S 241/2002) that the words “may be made *ex parte*” were inserted into O 69A r 6(1). So even though the *leave order* was not subject to the provisions of O 11 r 7, the *application for leave* commencing the enforcement proceedings would have been brought to the debtor State’s attention by way of service of the originating summons under O 11 r 7. It was not clear why the decision was made to allow such applications to be made *ex parte*, although *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock ed) (Sweet & Maxwell Asia, 2017) states at 69A/6/1 that the amendment “allow[ed] applications for leave to enforce an arbitral award to be made *ex parte*, as is consistent with the equivalent provision in O.69, r.14(1)”. I did not think the intention could have been to dispense with the prescribed procedure for service as regards enforcement proceedings entirely by making an application that was *inter partes ex parte*. All that had changed was that it was now the leave order, rather than the originating summons, which had to be served for the enforcement proceedings. Hence it was the leave order which had to be served in accordance with s 14(1).

The relevance of immunity

66 The appellants further raised the argument in written submissions that s 14 of the Act did not apply because the Kingdom had waived its immunity, either by agreeing to arbitration under s 11 of the Act or by submitting to jurisdiction under s 4. On this view, s 14 applied *only* to those proceedings from which a State is immune. Since the Kingdom was allegedly not immune from the enforcement proceedings by virtue of ss 4 and/or 11, the appellants need not comply with s 14. However, counsel for the appellants did not press

this point in oral submissions, and for good reason. It was obvious that this interpretation could not be correct. If a State is immune, it is not amenable to the jurisdiction of the Singapore courts in the first place. There would be no point instituting proceedings against the State which is immune, much less serving process in accordance with s 14 of the Act. It is precisely when the State is *not* immune that service in accordance with s 14 of the Act becomes important. More to the point, s 14 of the Act applies to the service of process on States *in general*, notwithstanding any arguments of immunity that may be made in the substantive application. This is evident both from the structure of the Act as well as an understanding of the purpose of s 14. A perusal of the Act reveals the following structure:

- (a) Section 3 is under the heading of “Immunity from jurisdiction” and establishes a *general* immunity from jurisdiction.
- (b) Sections 4 to 13, which are grouped under the heading “Exceptions from immunity”, establish specific exceptions to s 3.
- (c) Sections 14 and 15, which are grouped under the heading “Procedure”, establish the procedure to be followed for instituting proceedings against a State.
- (d) Sections 16 to 19 are supplementary provisions.

This mirrors Lord Diplock’s description of the UK Act in *Alcom Ltd* (see [16] above).

67 Section 14 clearly pertains to *procedure*, and not to jurisdiction or immunity from jurisdiction. It makes no mention of immunity and there is no reason it should be read to apply only to immune States (or, for that matter,

States which are not immune). The purpose of s 14 is to ensure that the foreign State has adequate time and opportunity to respond to the conduct of proceedings (see [23] above), and that presumably includes time to consider potential defences in the proceedings, which may include State immunity. To say that s 14 should only apply to States which are immune or not immune requires the court to pre-judge the issue of immunity, which is properly left to the State to raise after service has been effected. Whether a State comes under the exceptions to immunity in ss 4 to 13 of the Act can be an extremely involved question, and it would seriously delay proceedings if the court were required to determine that issue prematurely – without the benefit of the State’s submissions – at the stage of service of process. It would also be a duplication of effort for the court to consider State immunity both at the service stage, on an *ex parte* basis, as well as in the substantive application. Of course if the State does not eventually enter an appearance then the court may have no choice but to consider whether the State is immune, and give effect to that immunity if found to exist: s 3(2) of the Act. But it would not do for service of a leave order to be bogged down by such considerations at the outset, particularly when there is no requirement for leave to serve the leave order out of jurisdiction.

Whether “entry of appearance” corresponds with an application to set aside an order granting leave to enforce

68 The AR referred to this point as his third reason for his conclusion, although in my view it was not so much a *justification* for interpreting s 14(1) to apply to a leave order as it was a *consequence* of it. Section 2(2)(b) of the Act states that, in the Act, “references to entry of appearance and judgments in default of appearance include references to any corresponding procedures”.

69 Section 2(2)(b) thus reconciles the provisions of s 14 with the different terminology used to describe the institution of enforcement proceedings by service of a leave order. To rely on it *in support of* the foregoing interpretation of s 14(1) is to place the cart before the horse. The anterior question must be whether s 14(1) is intended to apply to a leave order. It is only if s 14 *does* extend to such an order (which, for the foregoing reasons, I think it does) that a “corresponding procedure” must accordingly be read to extend to the time for filing an application to set aside such an order.

70 It is for this reason that I do not agree with Stanley Burnton J’s conclusion in *AIC Limited*, which the AR referred to at [18] of the AR’s GD. In *AIC Limited*, the defendants were ordered to pay a sum of money to the claimant by the Federal High Court of Nigeria. The claimant obtained an order registering the Nigerian judgment in the UK. The defendants applied for an order extending the time to apply to set aside the registration order to two months from the date of service pursuant to s 12(4) of the UK State Immunity Act. Stanley Burnton J stated at [23]:

An application to set aside the registration of a judgment is not a “corresponding” procedure to an entry of appearance. An entry of appearance is an act that precedes a judgment, whereas an application to set aside a registration is made after judgment has been entered into. The registration of a foreign judgment is not the equivalent of a judgment in default of appearance: it precedes the service of any United Kingdom proceedings on the defendant. Section 12(4) and (5) cannot be made to apply to the registration of a judgment under the 1920 Act on an application made without notice to the defendant state. An application for the registration of a judgment against a state under the 1920 Act must be made by the issue and service of a claim form. The same must apply to an application for registration of a judgment against a state under the Foreign Judgments (Reciprocal Enforcement) Act 1933.

71 This conflicts with *Norsk Hydro*, which was not cited in *AIC Limited*. In *Norsk Hydro*, “entry of appearance” was clearly equivocated with an application to set aside an order granting leave to enforce. Moreover, Stanley Burnton J’s approach appears too literal and narrow; s 2(2)(b) (equivalent to s 22(2) of the UK Act) must exist precisely to cater to such differences as Stanley Burnton J identified. In my view, the correct approach is to first ask whether the proceedings in question are intended to fall within the scope of s 14. The stages of the proceedings in question cannot be expected to be identical to the steps of entry of appearance and judgment in default in s 14. A corresponding provision need not necessarily be the same in texture and terminology. That would defeat the purpose of s 2(2)(b) of the Act. I therefore prefer the approach in *Norsk Hydro*.

72 Stanley Burnton J’s reasoning in *AIC Limited* was recently criticised by Teare J in *Gold Reserve* at [64]. Teare J took the view that there need not be total equivalence between the stages of the proceedings in question and the individual stages of service, entry of appearance and judgments in default of appearance envisaged in s 12 of the UK Act. The individual sub-sections of s 12 made “special provision with regard to the questions of service, entry of appearance and judgments in default of appearance” (at [64]). But if the particular proceedings did not involve any of those steps, the special provision of s 12 relating to that step would not apply. Just because there was no “corresponding procedure” for, say, judgments in default of appearance did not mean that the manner of service stipulated in s 12(1) was thereby rendered inapplicable. This seems to me to be correct.

73 I thus agreed with the view at [18] of the AR’s GD that “the reference to entry of an ‘appearance’ in ss 14(2) and 14(3) of the State Immunity Act

does not require that s 14 apply only to documents in response to which an appearance must be entered”. Section 14(1) applied to service of the Order.

Conclusion

74 In the circumstances, I agreed with the AR’s decision and dismissed RA 91. Since RA 91 was an *ex parte* appeal and the Kingdom chose not to participate (see [9] above), I made no order as to costs. I should add that while Rajah & Tann on behalf of the Kingdom understandably declined to participate in RA 91, their assistance would undoubtedly have benefitted me in coming to a landing on an interesting and challenging issue.

Kannan Ramesh
Judge

Alvin Yeo SC, Mak Shin Yi, Oh Sheng Loong and Tara
Radakrishnan (WongPartnership LLP) for the plaintiffs;
Paul Tan Beng Hwee and Alessa Pang Yi Ching (Rajah & Tann
Singapore LLP) for the defendant.