



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/14/4

UNIÓN FENOSA GAS, S.A. V. ARAB REPUBLIC OF EGYPT

JUDGMENT OF THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION [2020] EWHC
1723

30 June 2020

Reproduced with the permission of the International Centre for Settlement of Investment Disputes

[View the document on \[jusmundi.com\]\(https://www.jusmundi.com\)](https://www.jusmundi.com)



Table of Contents

| | |
|--|----|
| Judgment of the High Court of Justice Queen's Bench Division [2020] EWHC 1723 | 1 |
| A: INTRODUCTION | 1 |
| B: FACTUAL BACKGROUND | 3 |
| C: THE CLAIM FORM ISSUE: IS SERVICE OF A CLAIM FORM REQUIRED IN THE CONTEXT OF AN APPLICATION TO ENFORCE PURSUANT TO THE 1966 ACT AND CPR 62.21? | 7 |
| The parties' arguments..... | 8 |
| Discussion | 9 |
| D: WAS THERE A PROPER BASIS FOR TEARE J'S ORDER TO DISPENSE WITH SERVICE OF THE MALES J. ORDER? | 16 |
| Principles relating to the application to dispense with service | 16 |
| Application to the facts..... | 18 |
| The position at the time of the application | 18 |
| The facts relating to service as now known | 19 |
| E: WAS THERE A PROPER BASIS FOR THE WAKSMAN J. ORDER GRANTING ALTERNATIVE SERVICE ON CLEARY? | 21 |
| Principles relating to alternative service | 21 |
| Application to the facts..... | 22 |
| F: SHOULD THE TEARE J. AND WAKSMAN J. ORDER BE SET ASIDE BECAUSE THEY WERE PROCURED WITHOUT FULL AND FRANK DISCLOSURE? | 23 |
| Principles relating to full and frank disclosure | 23 |
| Application to the facts..... | 24 |
| (i) The dictum of the Court of Appeal in General Dynamics | 24 |
| (ii) The order of Waksman J. did not contain a statement of Egypt's right to apply to set it aside..... | 26 |
| (iii) The representation that registration of an ICSID award is 'automatic' | 26 |
| Conclusion | 27 |

Judgment of the High Court of Justice Queen's Bench Division [2020] EWHC 1723

A: Introduction

1. The present application by the Respondent ("Egypt") arises out of an "ICSID" arbitration award issued in favour of the Claimant investor ("UFG") against Egypt. ICSID refers to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention", sometimes known as the Washington Convention). The registration and enforcement of the award in English courts is governed by the Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act") and by CPR r. 62.21 which applies specifically to ICSID arbitration awards.
2. The central issue raised by the application concerns the procedure which a claimant needs to follow in order to enforce an award under CPR r. 62.21. That rule provides for a regime for the enforcement of ICSID awards which is different to the regime for enforcement under CPR r. 62.18 which applies to the vast majority of arbitration awards that are the subject of enforcement proceedings in the Commercial Court. Awards which are subject to CPR r. 62.18 are typically subject to the New York Convention: i.e. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958.
3. In the present case, the award was that of an ICSID tribunal chaired by the late distinguished arbitrator, V.V. Veeder QC. It was issued on 31 August 2018. Enforcement proceedings in this jurisdiction were commenced by UFG later that year. A without notice application was then made for registration of the award pursuant to the provisions of CPR 62.21. That application was granted by Males J. on 19 December 2018.
4. Thereafter, UFG sought to serve the order which Males J. had made. No attempt, however, was made to serve the claim form which UFG had issued in connection with its application to register the award. On Egypt's case, UFG was required to do so, and indeed should have done so prior to obtaining any order for registration of the award. UFG's case is that it was not necessary to serve the claim form : it was only required to serve the order which Males J. had made. This is the key issue raised on the present application, although a number of other points are raised as well, including whether service of the order should be dispensed with (as subsequently ordered by Teare J.).
5. The service of an order on a state (or indeed a claim form, if required) is governed by CPR r. 6.44. Pursuant to these provisions, a request for service is to be lodged in the Central Office of the Royal Courts of Justice. The request is for service to be arranged by the Foreign and Commonwealth Office ("FCO"). The Senior Master will then send the documents to the FCO with a request that it arranges for them to be served. Assuming that service is successfully accomplished, the FCO will then ordinarily in due course produce an official certificate stating that the claim form or other

document had been duly served on a specified date. This certificate is (under CPR 6.44 (5)) evidence of the fact stated.

6. In the present case, UFG did what it was required to do pursuant to CPR r. 6.44 in relation to the order of Males J. A request for service was lodged, and the relevant documents were then indeed passed to the FCO. The course of subsequent events is described in more detail below. In summary, UFG's solicitors (King & Spalding International LLP or "K&S") then encountered difficulties in finding out what had happened. No certificate was forthcoming, and K&S was in due course told that the relevant diplomatic bag sent from Egypt to London, and which would have been expected to contain the certificate, had been lost.
7. These events then led K&S to make a without notice application to the court in October 2019 for an order dispensing with service of the order of Males J. An application was also made for a declaration that UFG was not required to serve the claim form upon Egypt, since this was an issue which had by then developed in correspondence between K&S and the solicitors acting for Egypt. Teare J. granted both of these applications in an order made on 10 October 2019 ("the Teare J. order"). The Teare J. order gave Egypt the right to apply upon 14 days' notice to set aside or vary the order. Egypt now does so.
8. On 15 November 2019, a further without notice application was made to the court. UFG sought permission for alternative service in respect of, principally, the Teare J. order and the papers which had been lodged in support of it. Alternative service was sought on Egypt's solicitors, Cleary Gottlieb Steen & Hamilton LLP ("Cleary"), who had since June 2019 been corresponding on behalf of Egypt with K&S, but had not been authorised to accept service of any documents. Waksman J. granted that order ("the Waksman J. order"). This order (unlike the two previous orders) did not specifically refer to Egypt's entitlement to apply to set it aside. However, when Egypt became aware (via Cleary) of the Waksman J. order, it was readily agreed that Egypt was entitled to apply to set it aside and the parties agreed a timetable for so doing. Egypt now applies to set aside that order as well.
9. The present application therefore concerns, directly at least, the orders of Teare J. and Waksman J., rather than the original order of Males J. which granted registration. The essential reason for this is that Egypt contends that it has not yet been properly served with the order of Males J., or with the claim form required properly to initiate the present proceedings. Accordingly the time to set aside that order has not yet arisen.
10. Egypt advances three substantive grounds upon which these orders should be set aside.
11. The principal ground, which applies to both orders, is that UFG had failed to effect proper service of a claim form on Egypt, as required by CPR r. 62.21 and Part 8 of the CPR. It was this argument which was at the forefront of the submissions of Mr. Malek QC on behalf of Egypt. On behalf of UFG, Ms. Byrne did not dispute the proposition that if service of a claim form was indeed required, the two orders of Teare J. and Waksman J. should be set aside. Her argument was that it was not necessary to serve a claim form in the context of an application for registration of an ICSID award pursuant to CPR r. 62.21. She submits that such applications can properly be made without notice, and it is the resulting order which is required to be served.

12. Secondly, Egypt contends that there was no proper basis for Teare J. to dispense with service of the Males J. order. This argument arose if Egypt's primary argument was rejected: it was therefore directed at the question of service of the order for registration, rather than the claim form. In short, Egypt submitted that there are no exceptional circumstances which justified such an order. UFG submitted that, on the facts as now known, the test of 'exceptional circumstances' was not applicable. But in any event, such circumstances existed in the present case.
13. Thirdly, Egypt contended that there was no proper basis for Waksman J. to grant alternative service. Egypt again argued for a test of 'exceptional' or 'special' circumstances. But even if the test was lower, there was no good reason to allow alternative service in the present case. UFG disputed both of these propositions.
14. In addition to these substantive points, Egypt argued that UFG had failed to make full and frank disclosure on the without notice applications, and that this justified setting aside the orders even if there were no substantive grounds for doing so.

B: Factual background

15. The award which is the subject of the present proceedings was issued pursuant to the [Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt](#) (signed 3 November 1992; entered into force 26 April 1994) and the ICSID Convention in *Unión Fenosa Gas S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4).
16. The award was issued on 31 August 2018. Egypt sought to annul the award by invoking the relevant rights under the ICSID Convention. That application to annul the award is still pending, with a hearing scheduled to take place in either July or August 2020. An interim issue as to whether enforcement of the award is to be stayed was ventilated before the relevant *ad hoc* annulment Committee of ICSID, but following a decision of that Committee on 24 January 2020, the stay which had been in place on a provisional basis was terminated.
17. On 5 December 2018, UFG issued its claim form. The claim form was an "arbitration claim form" as provided for in CPR r. 62. It is not suggested by Egypt that this was an inappropriate form to use. It appears that UFG had previously sought to issue a claim form which was in a different form, but nothing turns on this. The remedy and grounds on which the claim was made, as set out in the claim form, was for registration of the award pursuant to the 1966 Act and CPR r. 62.21. The form said that the 'application is made without notice, in accordance with CPR r. 62.21(2) (b) and 74.3(2)(b)'. An additional sentence said that 'Part 8 of the CPR applies to the ... claim in accordance with CPR r. 62.21(3)'.
18. The without notice application identified in the claim form was filed with the Commercial Court. It was supported by a witness statement of a partner in K&S, Ms. Sarah Walker. The papers came before Males J., and he made his order on 19 December 2018 ("the Males J. order"). Coincidentally, this was the day after he had heard argument in a significant case concerning service on states pursuant to CPR Part 62, albeit a New York Convention case rather than an ICSID case: see *General Dynamics UK Ltd. v State of Libya* [2019] EWHC 64 (Comm). It can be inferred that Males J. was not

surprised or concerned by the fact that the application for registration was made on a without notice basis. Paragraph 1 of his order provided that:

"The Award be registered as if it had been a judgment of the High Court."

19. On 9 January 2019, UFG submitted a copy of the Males J. order (together with a certified translation) to the Royal Courts of Justice's Foreign Process Section ("FPS") for service on Egypt via the Foreign and Commonwealth Office ("FCO"). This was required by CPR r 6.44.

20. Egypt submitted in these proceedings that service of the order via the FCO was also required by s. 12(1) of the State Immunity Act 1978 ("SIA 1978"). This 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 and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or other document is received by the Ministry."

21. The decision of the Court of Appeal in *General Dynamics UK Ltd. v State of Libya* [2019] EWCA Civ 1110 indicates that this particular argument is not correct. Section 12 (1) of the SIA 1978 applies to any writ or other document 'required to be served for instituting proceedings'. In *General Dynamics*, the Court of Appeal held (in the context of enforcement of a New York Convention award) that the order permitting enforcement of the award is not the document instituting proceedings. Whilst it indeed had to be served, this was a consequence of CPR r 6.44 rather than the Act: see paragraphs [51] – [52]. In this respect, I do not consider that there is any material difference between service of an order on a state under CPR r 62.18 (e.g. in a New York Convention case), and service of a similar order under CPR 62.21 (in an ICSID case). The decision of the Court of Appeal is subject to an appeal to the Supreme Court for which permission has been granted, but the hearing has yet to take place.

22. In any event, this particular point is not of any significance in the present case, since the evidence (discussed in more detail below) shows clearly that the order was indeed transmitted through the FCO to the Ministry of Foreign Affairs of Egypt, and indeed was 'received by the Ministry'. Accordingly, even if service of the order did need to follow the requirements of s.12 (1) of the SIA 1978, such service was accomplished in the present case, or at least there is a very strong case that it was. (I address this point in greater detail in Section D below). The real issue in the present case is whether, as Egypt contends, it was also necessary to serve the claim form in order to initiate the proceedings for registration. It is undisputed that there has been no attempt to serve the claim form in the present case. Nor is it disputed that if service of the claim form is required, that is a document clearly covered both by s. 12 (1) as well as CPR r. 6.44.

23. To revert to the chronology, UFG did not include the claim form in the pack to be served on Egypt. The pack did, however, include a covering letter dated 10 January 2019 from K&S to Egypt's Ministry of Foreign Affairs. K&S advised the Ministry in that letter that the Males J. order had been obtained pursuant to an ex-parte application and that the English Civil Procedure Rules only obliged UFG to serve the order on Egypt. However, K&S offered to supply to underlying documents for review if Egypt confirmed an address for service.

24. K&S had no doubt been expecting service via the FCO to take some time (a period of 9 months is referred to in the evidence, albeit that this appears to be an indication given at a later stage). K&S received from the FCO no news prior to June 2019, at which stage Cleary appeared on the scene. On 25 June 2019, Cleary wrote to the Claimant's solicitors referring to the letter from K&S dated 10 January. Cleary stated that they had been instructed by Egypt to represent them in the proceedings, but had not been instructed to accept service. They requested nevertheless that 'any correspondence in respect of the English Proceedings be directed to us'. They also stated that, according to CPR r. 62.21(3) and its requirement that an application for registration must be made in accordance with Part 8 procedure, UFG was obliged to serve the claim form on Egypt. Since this had not been done, the time for Egypt to take any potential steps in response had not yet begun to run.
25. On 2 July 2019, K&S wrote to Cleary insisting that there was no need to serve the claim form in accordance with the Part 8 procedure, citing authorities said to support that view. K&S contended that it was now well established that where an application is made for the enforcement of an award ex parte (i.e. without notice), the document which is required to be served is the resulting order and not the underlying arbitration claim form.
26. It is not necessary to describe the subsequent correspondence between K&S and Cleary on this issue, since it is ultimately the principal issue which has been argued on the present application. It is sufficient to note that further letters or emails were exchanged between the two firms on 11, 15, 17 and 19 July 2019, and indeed there has been further correspondence between the firms including communications arising from the grant of the orders by Teare J. and Waksman J.
27. However, it is appropriate to describe the events at this time which related to K&S's attempt to discover what had happened in relation to service of the Males J. order which was (in K&S's view) the only material document that needed to be served. This was described in Ms. Walker's second witness statement dated 8 October 2019 filed in support of the application determined by Teare J. She explained that her firm had made very extensive enquiries of the FCO since July 2019. The FCO had confirmed that it received a 'package in these proceedings' returned from Egypt. The FCO had then forwarded that package, without reviewing its contents, to the FPS. Regrettably, the FPS had been unable to identify the package or confirm receipt. A member of Ms. Walker's team, Ms. Trapp, had spoken with the FCO and the FPS on more than 20 occasions between July and October 2019. On one occasion, a Mr. Batchelor of the FCO advised that whilst the FCO had not seen what had been returned from the British Embassy in Cairo, it assumed that it was a certificate of service with a return set of documents. In September 2019, the FPS advised in an email that the FCO were in contact with the Cairo embassy to ascertain whether a duplicate certificate of service would be available, but Ms. Trapp had then heard nothing in that regard.
28. The fate of the attempt to serve the order has now become clear as a result of the second witness statement of Mr. Sunil Gadhia, a partner in Cleary who has the conduct of the present matter on behalf of Egypt. That statement was served in January 2020, in the context of Egypt's present application to set aside, and some material documents were exhibited.
29. The position is that (as the FCO had advised) the order had been sent in a diplomatic bag to the British embassy in Cairo in March 2019. On 8 April 2019, the British embassy sent the order to the Ministry of Foreign Affairs under cover of consular note No. 244. This note stated:

"The British Embassy presents its compliments to the Ministry of Foreign Affairs of the Arab Republic of Egypt and has the honour to request that the attached documents be forwarded to the competent authorities for service.

Two sets of documents are attached. One is "Service Set" and the other is "Return Set".

The British Embassy avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Arab Republic of Egypt the assurances of its highest consideration"

30. A response was then received from the Egyptian Ministry of Foreign Affairs under cover of note no 4115 dated 24 April 2019. The letterhead identified the response as coming from the Assistant Foreign Minister for Consular Affairs and Egyptian Expatriates. The main part of the response read:

"It is honoured to return herewith the documents received attached to the Embassy Note No. 244 dated 22/4/2019, hoping they would be properly addressed as they do not fall within the scope of competence of the Office of the Assistant Foreign Minister for Consular Affairs and Egyptian Expatriates."

31. Mr. Gadhia says that the reason that the documents were returned and no service was effected was because the

"process for service of documents in foreign proceedings on the Defendant, as a State, requires that those documents be directed to the correct department within the Defendant's government (which is not the Assistant's Office). According to the Hague Convention 1965, pursuant to which the Claimant sought service of the relevant documents via the FCO [SYW 2/10], service was to be effected on the Defendant's Office for International Judicial Co-operation at the Ministry of Justice, Magles El Shaab St., Lazoughly Square, Laxoughly, Cairo."

32. A further document from the Ministry of Foreign Affairs confirms that documents were returned to the British Embassy on 30 April 2019.

33. At the time of the application to Teare J., however, this sequence of events was not known to K&S. Based on the application which was made to him, Teare J issued his order dated 10 October 2019. In sum, that order dispensed with the need to serve the Males J order on Egypt, and declared that the UFG was not required to serve the claim form on Egypt. It gave liberty to Egypt to apply to set aside the order on 14 days' notice.

34. Over correspondence between 15 October 2019 and 5 November 2019, K&S asked Cleary to accept service of various documents in the proceedings. Cleary declined to do so, stating that (as they had previously said) they were not instructed to accept service on behalf of Egypt.

35. This then led to UFG's an application dated 14 November 2019, seeking an order without notice for alternative service of, principally, the Teare J. order and associated documents, by way of courier to Cleary. That application was supported by Ms. Walker's third witness statement. Waksman J then

issued his order dated 15 November 2019 permitting the Claimant to serve on the Defendant's solicitors by way of (alternative) service the Teare J. order, the Claimant's application for it, the Waksman J. order itself, and the Claimant's application for it.

36. On 3 December 2019, Egypt made its applications to set aside the orders of Teare J. and Waksman J. Evidence in support of the application comprised two statements from Mr. Gadhia. His second statement responded to Ms. Walker's 4th statement. The principal argument developed, however, is essentially a question of law concerning the proper interpretation of CPR r. 62.21, and is not dependent upon the evidence served.

C: The Claim Form issue: is service of a Claim Form required in the context of an application to enforce pursuant to the 1966 Act and CPR 62.21?

37. CPR r. 62.21 provides as follows:

Registration of awards under the Arbitration (International Investment Disputes) Act 1966

62.21

(1) In this rule –

(a) 'the 1966 Act' means the Arbitration (International Investment Disputes) Act 1966¹⁶;

(b) 'award' means an award under the Convention;

(c) 'the Convention' means [the Convention on the settlement of investment disputes between States and nationals of other States](#) which was opened for signature in Washington on 18th March 1965¹⁷;

(d) 'judgment creditor' means the person seeking recognition or enforcement of an award; and

(e) 'judgment debtor' means the other party to the award.

(2) Subject to the provisions of this rule, the following provisions of Part 74 apply with such modifications as may be necessary in relation to an award as they apply in relation to a judgment to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933¹⁸ applies –

(a) rule 74.1;

(b) rule 74.3;

(c) rule 74.4(1), (2)(a) to (d), and (4);

(d) rule 74.6 (except paragraph (3)(c) to (e)); and

(e) rule 74.9(2).

(3) An application to have an award registered in the High Court under section 1 of the 1966 Act must be made in accordance with the Part 8 procedure.

(4) The written evidence required by rule 74.4 in support of an application for registration must –

(a) exhibit the award certified under the Convention instead of the judgment (or a copy of it); and

(b) in addition to stating the matters referred to in rule 74.4(2)(a) to (d) state whether –

(i) at the date of the application the enforcement of the award has been stayed (provisionally or otherwise) under the Convention; and

(ii) any, and if so what, application has been made under the Convention, which, if granted, might result in a stay of the enforcement of the award.

(5) Where, on granting permission to register an award or an application made by the judgment debtor after an award has been registered, the court considers –

(a) that the enforcement of the award has been stayed (whether provisionally or otherwise) under the Convention; or

(b) that an application has been made under the Convention which, if granted, might result in a stay of the enforcement of the award, the court may stay the enforcement of the award for such time as it considers appropriate.

The parties' arguments

38. Egypt contended that CPR r. 62.21 (3) provided, in clear terms, that an application to have an award registered under section 1 of the 1966 Act 'must be made in accordance with the Part 8 procedure'. This imported all the requirements of Part 8. Although Part 8 does not expressly provide for service of the claim form, there is a clear reference to service in CPR r. 8.2 which concludes with the bracketed words 'Rule 7.5 provides for service of the claim form'. CPR r. 8.2 also requires the claim form to state that Part 8 applies, and this is what UFG's claim form in fact stated in the present case. CPR r. 8.3 provides for acknowledgment of service, and it is therefore clear that Part 8 contemplates that a claim form will be served. CPR r. 8.5 (2) provides for service of the claimant's evidence 'with the claim form'. The only way to read these various provisions is that a Part 8 procedure applies to any attempt to register and enforce an ICSID award. That procedure can only function if a claim form is served.

39. In the course of his oral submissions, Mr. Malek initially accepted that an application for registration could be made without notice, as happened before Males J. On this basis, the procedural error, which occurred in the present case, was UFG's failure to serve the claim form subsequent to the making of the order for registration by Males J. This seemed to me to be the way that the case had been approached in the correspondence from Cleary, and in Egypt's skeleton argument. On reflection, however, Mr. Malek said that this was not right. If Part 8 was indeed applicable, then it was applicable as a whole and the ordinary process for determination of Part 8

applications should therefore be followed. A without notice application for registration was therefore impermissible.

40. Mr. Malek submitted that whilst an application under CPR r. 62.18 may not necessarily require service of the claim form, that is not the applicable rule for an ICSID award. Applications under CPR r. 62.21 always involve states, whereas applications under CPR r. 62.18 will only do so from time to time. Where a party is taking the important step of impleading a foreign state, and the court is lending its assistance to that process, it is natural and appropriate for the state to have to be given notice of the proceedings by way of service of the claim form. This is reflected in the requirement in s. 12 (1) of the SIA 1978 which requires the service of documents instituting proceedings upon a state to be accomplished via the FCO, thereby reflecting the gravity and diplomatic implications of the process.
41. On behalf of UFG, Ms. Byrne submitted that under the 1966 Act, UFG was entitled to registration of the award once it had submitted the requisite documents and information to the court. There was nothing in the 1966 Act that made registration contingent on Egypt acknowledging service or disposing of the application on an inter partes basis. The procedure was set out in CPR r. 62.21 and select parts of CPR r. 74. There was nothing in the rules which expressly required service, and it would be strange if such a requirement were to be the result of having to follow cross-references into CPR Part 8, and then into CPR Part 7. The substance of an application for registration was an application to the court rather than the initiation of a new Part 8 claim. Egypt's suggested requirement was inconsistent with the straightforward and procedural nature of applications for registration of ICSID awards, and also with the applicable procedure for the recognition of New York Convention awards. The reference to Part 8 in CPR 62.21 (3) simply identified the means by which the application was to be launched. It did not require 'full blown' Part 8 proceedings. Such proceedings prior to registration made no sense. Generally, the position is that the application is made, the order is obtained, and any contested proceeding takes place subsequently and not beforehand.

Discussion

42. The issue of the procedure to be followed when applying to register an award under s. 1 of the 1966 Act, and whether it is necessary to serve a Claim Form on the state, is ultimately a question of the interpretation of CPR r. 62.21 when considered in its proper context. There are a number of matters which I consider important.
43. First, there is nothing in CPR r. 62.21 itself which expressly requires or contemplates the service of a claim form. This is in contrast to other parts of CPR r. 62.
44. CPR Part 62 is divided into 3 parts. Part 1 is headed 'Claims under the 1996 Act', and this applies to the vast majority of arbitration-related claims, such as applications to appoint an arbitrator or to challenge an award. The 1996 Act does not generally speaking apply to proceedings pursuant to the ICSID Convention: see section 3 of the 1966 Act. In any event applications to enforce ICSID awards are specifically addressed in Part 3 of CPR Part 62.

45. It is nevertheless instructive to contrast the procedural position under Part 1 with that under Part 3. CPR r. 62.3 provides that a claim within Part 1 must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure. CPR r. 62.4(2) provides that unless the court orders otherwise, 'an arbitration claim form must be served on the defendant within one month from the date of issue'. Accordingly, there is here express provision requiring service, at least unless the court otherwise orders. An allied provision is CPR r. 62.5, which enables the court to give permission to serve that arbitration claim form out of the jurisdiction. There is no such express provision in CPR r. 62.21.
46. Part 2 of CPR 62 deals with applications to which the pre-1996 Act arbitration law applies. This too contains various express provisions dealing with service of the claim form: see e.g. CPR rr. 62.13 (3), 62.15 (1) and 62.15 (2). Express provision is also made for service out of the jurisdiction: CPR r. 62.16.
47. Part 3 of CPR Part 62 deals with enforcement. CPR r. 62.18 concerns applications for permission to enforce awards under both the 1996 Act and prior legislation. It applies, most commonly, to awards where the New York Convention is applicable. This may of course include arbitration awards against states, such as that considered in *General Dynamics*, albeit that most awards will simply be between commercial parties. Whereas the prior provisions in Parts 1 and 2 (described above) require service, or at least require service of the claim form unless the court orders otherwise, this is not the starting point under CPR r. 62.18. Here, the default position is that the arbitration claim form is not required to be served, unless the court so orders. Thus, CPR r. 62.18 (2) provides that the court 'may specify parties to the arbitration on whom the arbitration claim form must be served'. CPR r. 62.18 (4) then expressly provides for the grant of permission to serve the arbitration claim form out of the jurisdiction. Accordingly, these provisions again expressly deal with the issue of service of the claim form, albeit that this is not required unless the court so orders. There is therefore again a contrast with CPR r. 62.21.
48. Although service of the claim form under CPR r. 62.18 is not necessarily required, CPR 62.18 (7) does require service of the order giving permission to enforce an award. Service of that order out of the jurisdiction is also specifically addressed in CPR r. 62.18 (8). Permission to serve out is not required, but the ordinary service rules in CPR 6.40 – 6.46 apply. Here, for reasons which will become apparent, there is a parallel with the position under CPR r. 62.21.
49. CPR r. 62.21 deals specifically with awards under the 1966 Act. In contrast to the earlier provisions, there is here no reference at all to any claim form or service thereof. Nor is there any provision relating to service out of the jurisdiction, notwithstanding that such awards will inevitably involve an overseas state.
50. I consider that this is no accident. It reflects the different and simplified procedure which exists for registration of awards to which CPR r. 62.21 applies. This procedure is explained by the important cross-references in CPR r. 62.21 (2) to particular provisions within CPR Part 74, as further discussed below. It also reflects (also as further discussed below) the very limited circumstances in which a state may be able to resist enforcement of an ICSID award. Apart from the possibility of exceptional and extraordinary cases, those circumstances are limited to those contemplated in CPR rr. 62.21 (4) and (5): i.e. that enforcement has been stayed under the ICSID Convention, or where an application for a stay has been made.

51. There is therefore, as Ms. Byrne said, a sliding scale of service provisions within CPR 62. At the top end of the scale are ordinary applications covered by Part 1, where service of the claim form is generally required, not least because there may be many disputed issues that require resolution. Next, there are applications to enforce 'ordinary' arbitration awards, usually New York Convention awards. In such cases, service may be required and there are some, albeit limited, defences which a respondent may be able to advance. At the bottom of the sliding scale is the special regime under CPR r. 62.21 for ICSID awards, where the process is one of registration: the basic scheme set out in CPR Part 74 applies, and where a contested hearing would be most unlikely to arise.
52. Against this contextual background relating to CPR Part 62 as a whole, I agree with Ms. Byrne's submission that one would expect any requirement for service of the claim form in an ICSID award registration case to be spelt out expressly, rather than to be deduced by a journey which starts with the reference to Part 8 proceedings in CPR r. 62.21 (3).
53. Secondly, the requirement for service of a claim form, let alone a requirement for a fully-fledged Part 8 procedure leading to determination of an application for registration at a hearing, is in my view inconsistent with the regime for registration incorporated via CPR r. 62.21 (2). Uniquely within CPR Part 62, this rule applies a number of provisions of CPR Part 74. The specific rules within Part 74 are: rr. 74.1; 74.3; 74.4(1), (2)(a) to (d), and (4); rule 74.6 (except paragraph (3)(c) to (e)); and rule 74.9(2).
54. The effect of these provisions is substantially to equate, in material respects, the process of registration of an award under the 1966 Act with the process applicable to the registration of foreign judgments under the 1933 Act referred to in the rule. This is confirmed by the note to CPR r. 62.21 contained in the current edition of the White Book:
- "This rule provides the machinery for the registration of an award rendered pursuant to the Convention set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966. The procedure follows, in large measure, but with the necessary modifications, the provisions of CPR r.74, since this Act is in many respects similar to the Foreign Judgments (Reciprocal Enforcement) Act 1933."
55. A note to similar effect, materially unchanged, has been included in commentary on the current rule for well over 20 years, stretching back to the commentary on the equivalent rule in the final edition of the Supreme Court Practice dealing with the Rules of the Supreme Court.
56. A number of features of the provisions of Part CPR 74, included within the cross-reference in CPR 62.21, are of relevance. CPR 74.3 (1) provides that 'this Section provides rules about applications under' a number of statutes, including the 1933 Act, for registration of foreign judgments for enforcement in England. Significantly, CPR 74 (3)(2) then provides that applications must be made to the High Court and 'may be made without notice'. The usual practice is for applications under this rule indeed to be made without notice. Thus, note 74.6.9 (headed "Registration Practice") in the White Book says that the application to register a judgment under the 1933 Act 'should' be made without notice. Whilst it is possible, as note 74.3.1 indicates, for the court to direct that the application to register under the 1933 Act should be determined at an inter partes hearing, this would be unusual: the example given in the note, by reference to the decision in *Berhad v Fraser-*

Nash Research Ltd. [2018] EWHC 2970 (QB), is where a case has a complicated litigation history.

57. The important point for present purposes is that the logic and effect of Egypt's argument is that a without notice application for registration is simply not permissible in the case of an ICSID award. As described above, Mr. Malek's submission was, ultimately, that all such applications had to go through the full Part 8 procedure, which involved the issue of a claim form, acknowledgment of service of that claim form by the state, the service of the parties' respective evidence, and ultimately the determination of the application for registration (if contested) at an inter partes hearing. On this basis, the only application that could be made on a without notice basis would be the usual without notice application by a claimant for service of the claim form out of the jurisdiction, so as to initiate the ordinary Part 8 procedure. If, however, this is what the procedure was intended to be, it is difficult if not impossible to see why CPR 62.21 (2) expressly cross-refers to a rule (CPR 74.3) which expressly permits a without notice application for registration.
58. A further curiosity (and another indication that Egypt's argument is wrong) is that the application for permission to serve the claim form out of the jurisdiction would necessarily need to be made under CPR Part 6, since (see above) CPR r. 62.21 does not itself provide for service of the claim form out of the jurisdiction in a 1966 Act case. Given that other parts of CPR Part 62 do expressly provide for the grant of permission to serve the claim form out of the jurisdiction, it would naturally be expected that CPR r. 62.21 would do the same if, as Egypt contends, service of the claim form is required.
59. In view of these provisions, and the usual practice, it is not in my view surprising that Males J. dealt with the application for registration on a without notice basis, and made an order that 'the Award be registered as if it had been a judgment of the High Court'. Mr. Malek had initially submitted that, procedurally, there was nothing wrong with the approach Males J. had taken. This is because Mr. Malek was at that stage submitting that it was permissible for Males J. to make the order that he did, but that the procedural error occurred at a subsequent stage: i.e. when UFG failed to serve the claim form, as it allegedly should have done. I consider, however, that Mr. Malek's first instinct – that there was nothing procedurally wrong with the determination by Males J. of the application for registration on a without notice application – was correct, and that it is the sensible and appropriate reading of the cross-reference in CPR 62.21 to CPR 74.3. Indeed, even though the procedure for registering awards under the 1966 Act has now been in place for over 50 years, there is no reported example of an application for registration coming before the court initially on an ordinary inter partes application under Part 8 or its equivalent under the Rules of the Supreme Court. If there is to be a contested application, then it would be expected to arise on an application to set aside the without notice order. This is in fact what happened in the recent case of *Micula v Romania* which was ultimately determined in the Supreme Court: see [2020] UKSC 5, para [28].
60. A further relevant aspect of CPR 74, cross-referred to in CPR r. 62.21, is CPR r. 74.6. This provides for service of the 'order granting permission to register a judgment'; i.e. the order made pursuant to the without notice application. CPR r. 74.6 (1) provides that the order is to be drawn up by the judgment creditor – a further indication that what is contemplated is a without notice procedure leading to the drawing up of an order by the creditor which is then notified to the debtor. CPR r. 74.6 (2) then expressly provides that permission 'is not required to serve a registration order out of the jurisdiction'. In these respects, the process is materially the same as that which applies, in the case of an ordinary award, under CPR r. 62.18 (7) and (8).

61. Consistent with that rule, UFG did not seek permission from Males J. to serve the registration order out of the jurisdiction, but simply initiated the process of service via the FPS. Egypt's argument posits, however, that the process of registration, in the case of a 1996 Act award, must begin with an ordinary application to serve the claim form out of the jurisdiction in order to initiate the full Part 8 process. If this were right, then it is very odd that the CPR r. 62.21 expressly incorporates a provision of CPR Part 74 which requires service only of the order made on registration (there is no reference to service of a claim form), and expressly provides that permission to serve that order is not required. The fact that express provision is made for service of the order out of the jurisdiction, without the need for permission, indicates that this is the only service that is actually required.
62. These express references to CPR Part 74 therefore indicate that the procedure to be followed on an application to 'have an award registered' (the language used in CPR r. 62.21 (3) under CPR r. 62.21) is not the full-blown Part 8 procedure for which Mr. Malek contended.
63. Third, Egypt's argument (if accepted) would lead to a curious result when considering the position in relation to New York Convention awards subject to the regime in CPR r. 62.18. In the ordinary way, applications to register those awards are initially determined upon a without notice application, and no service of a claim form is required unless the court positively so orders. In the case of such awards, there are some, albeit limited, defences to enforcement: see the Arbitration Act 1996, sections 103 (2) and (3). Albeit that the defences to enforcement are limited, there is no doubt that there is a far wider opportunity to defend enforcement in such cases than there is in the case of a 1966 Act award. There are no provisions equivalent to section 103 (2) and (3) applicable to a 1966 Act award.
64. This is not surprising. Ms. Byrne rightly drew attention to section 1 (2) of the 1966 Act, which gives rise to an entitlement on the part of the investor to have an award against the state registered:
- "A person seeking recognition or enforcement of such an award shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act."
65. The 1966 Act thereby gives effect to the ICSID Convention. Section 6 of that convention provides for the 'Recognition and Enforcement of the Award'. Articles 53 and 54 provide as follows:
- Article 53
- (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
- (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.
- Article 54
- (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as

binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

66. The effect of these provisions, as stated in *Dicey, Morris & Collins: The Conflict of Laws* 15th edition paragraph 16-189, is to take ICSID awards outside the normal regime for the enforcement of arbitral awards, including the New York Convention regime, which enables recognition to be refused by national courts on specified grounds. Instead, the ICSID Convention has its own internal procedure for interpretation, revision and annulment of awards. Requests for annulment are dealt with by an ad hoc committee, and the grounds for annulment are limited. However, as *Dicey* states:

"Unless an ICSID award is annulled pursuant to this procedure, the courts of Contract States are bound to recognise and enforce it in accordance with Art.54 (1), to which effect is given in England by ss.1 and 2 of the 1966 Act".

67. The recent decision of the Supreme Court in *Micula* confirms that the ICSID Convention differs significantly from the New York Convention: see paragraph [68]. The Supreme Court considered it arguable, however, that there is:

"scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the Convention.' (Paragraph [78])."

68. It clearly remains the case, however, that such a defence, even if it exists at all (a point which is arguable but has not yet been finally determined), is far narrower in scope than the possible defences under the New York Convention. The important point for present purposes is that it would be surprising if a more cumbersome procedure had to be followed for the registration of ICSID awards under the 1966 Act, when compared to the procedure for New York Convention awards, in circumstances where the arguments available to the state (if they exist at all) are significantly more limited. Apart from the possibility of 'exceptional or extraordinary circumstances', the only available argument to the state is that the enforcement of the award has been or might be stayed. CPR r. 62.18 (4) and (5) expressly cater for this possibility, by requiring (amongst other things) the award creditor to state whether a stay has been granted or an application made for a stay.

69. All of these points lead, in my view, to the conclusion that Egypt's argument should be rejected, and that UFG's basic argument should be accepted.

70. However, it is necessary to consider the central feature of Egypt's argument, which are based upon the words in CPR r. 62.21 (3). This rule provides that:

"An application to have an award registered in the High Court under section 1 of the 1966 Act must be made in accordance with the Part 8 procedure"

Mr. Malek submitted that this must mean the full Part 8 procedure, including the service of the Claim Form out of the jurisdiction and the service of evidence leading to an inter partes determination, in the usual way of a Part 8 application, of the award creditor's entitlement to registration.

71. In my view, however, when these words are construed in their proper context as described above – in particular in the context of CPR Part 62 as a whole, including the cross-reference to CPR Part 74 – this cannot be the correct interpretation. CPR r. 8.1 (6) specifically provides that a rule or practice direction may, in relation to a specified type of proceedings, 'disapply or modify any of the rules set out in this Part as they apply to those proceedings'. I consider that this is what CPR r. 62.21(2) does, and that the reference to Part 8 in CPR r. 62.21 (3) should be read consistently with CPR r. 62.21 (2). The rule in my view clearly permits a without notice application leading to an order for registration of which notice is then given to the state. The state will then have the opportunity, as when any without notice application is made, subsequently to apply to set aside the order. This was, correctly, expressly provided for in paragraph 5 of the order of Males J.

72. This does mean, as Ms. Byrne's argument recognised, that the application of Part 8 to CPR r. 62.21 is somewhat limited, notwithstanding CPR r. 62.21 (3). She submitted that the reference to Part 8 was essentially an administrative device: the application to register an ICSID award as a judgment requires a claim form to generate a claim number, to which the application can be allocated. It follows from that argument that the provisions of CPR r. 8.2, as to the contents of the claim form, are also incorporated. This does, in my view, give sufficient content to CPR r. 62.18 (3). In fact, the reference to Part 8 may perhaps go a little further: in that it serves to make it clear that the relevant procedure is for determination of the application (including any contested inter partes hearing if an application to set aside is made) on the basis of written evidence served by the parties. Accordingly, applications to register an ICSID award do not involve the 'general' procedure of an ordinary action under Part 7 of the CPR. However, whether or not the reference goes somewhat further than Ms. Byrne suggested, I do not consider that it can go anywhere near as far as the extent for which Mr. Malek contended.

73. I do not think that this approach to CPR r. 62.21 creates any difficulties arising from the caution that is needed when other states are impleaded. Whilst it is true that the state will not receive advance notice of the application to register, that application will always take place against the background of an arbitration award resulting from an ICSID proceeding of which the state is bound to have had notice. Furthermore, the state will receive notice of the order made on the registration application as well as its right to apply to set aside. In my view this is sufficient, bearing in mind that applications for registration under CPR r. 62.21 will only arise where the state is party to ICSID Convention, and has thereby agreed to a restrictive regime for challenges to an award, as well as

to the obligations on states to recognise and enforce awards under Articles 53 and 54 set out above.

D: Was there a proper basis for Teare J's order to dispense with service of the Males J. order?

Principles relating to the application to dispense with service

74. In *General Dynamics*, the Court of Appeal held that it was permissible to dispense with service of the relevant order on a state (in that case for enforcement under CPR r. 62.18) pursuant to CPR r. 6.28. That rule does not (in contrast to CPR r. 6.16, dealing with dispensing with service of a claim form) require 'exceptional circumstances' in order to enable the discretion to be exercised. The exercise of the discretion is therefore, in principle, at large. However, the Court of Appeal indicated (at paragraph [61]) that a test of exceptional circumstances should be applied 'when the order permitting enforcement of the award is to be the first time that the foreign state receives notice of a claimant's attempt to enforce an award'.
75. I consider that UFG was correct in its argument that 'exceptional circumstances' does not control the exercise of the court's discretion in the present case. This is because UFG did not seek an order dispensing with service at the same time as applying to register the award. The application was only made in October 2019, after Egypt had already received notice of UFG's attempts to enforce the award as a result of the note and accompanying documents sent by the British embassy in Cairo in April 2019. As a result of such receipt, Egypt then instructed Cleary to deal with the proceedings on their behalf, and Cleary began its correspondence with K&S in June 2019. All of this took place many months prior to the time when UFG sought the order from Teare J. dispensing with service.
76. However, even if the applicable test were the higher 'exceptional circumstances' test, I would reach precisely the same conclusion on the facts (discussed in more detail below), namely that there was and is a proper basis to dispense with service in the present case.
77. The authorities show that 'exceptional circumstances' do not mean that service must be impossible. Rather, it is 'a broad and flexible test which should not be unduly complex to apply and should not be rigidly circumscribed': see *General Dynamics United Kingdom Ltd v State of Libya* at first instance, paragraph [83] (Males J.); *R (Certain Underwriters at Lloyds London) v HM Treasury* [2019] EWHC 3182 (Admin) at [44] (Lang J.). The test has therefore been applied in a variety of circumstances, including recently in a case where the judge held that a government had sought to delay, frustrate and thwart attempts at service: *Qatar National Bank v Government of Eritrea* [2019] EWHC 1601 (Ch) at [111], [120]-[122].
78. The exercise of the power to dispense with service can also be exercised in order to 'regularise the position and put the matter beyond doubt', as Marcus Smith J. put it in *Absolute Living Developments v D87 Ltd*. [2019] EWHC 550 (Ch), para [11]. The judge in that case (which did not concern a state) was willing to exercise the court's discretion under both CPR r. 6.16 and r. 6.28 in circumstances where he considered (without finally deciding) that there was a strong case that

there had in fact been regular service in accordance with Swiss law. Even assuming that there was a defect in service, however, it was appropriate to dispense with service where: the claimant had attempted to serve in the appropriate manner; any failure to achieve successful service was not the fault of the claimant; and the defendant had notice of the proceedings, with the service documents ending up in the hands of her Swiss lawyers. In reaching his decision, Marcus Smith J. referred (at paragraphs [12] – [13]) to earlier Court of Appeal authority concerning applications to dispense with service of a claim form retrospectively, in circumstances where a limitation period has expired: *Olafsson v Gissurarson* [2008] EWCA Civ 152. In such situations, it is very difficult for a claimant to obtain a dispensation from service, but nevertheless the court will do so where the defendant has 'in fact received, or had his attention drawn, to the claim form, by a permitted method of service' within the time permitted for service of the claim form.

79. Egypt's written submissions contained generous citation to authority concerned with the caution exercised by the court when granting orders (for example for alternative service) in relation to cases governed by the Hague Service Convention, i.e. the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters concluded on 15 November 2015. In that context, the court will generally not make such orders simply on the basis that service under that Hague Convention will cause delay: see e.g. *Evison Holdings Ltd. v International Company Finvision holdings LLC* [2020] EWCH 239 (Comm). However, Mr. Malek rightly did not press this argument in his oral submissions, accepting that (as Ms. Byrne had submitted in UFG's skeleton argument) the present case does not concern the Hague Convention. That 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, and where the appropriate procedure for service is that contained in CPR r. 6.44 and (if a claim form was required to be served) s. 12 of the SIA 1978. In any event, the circumstances relied upon by UFG in the present case go well beyond an argument based simply upon the fact that service of proceedings may take an unduly long time.
80. A further issue addressed briefly in argument concerned the extent to which it is permissible, when considering the appropriateness of the order of Teare J. and whether to set it aside, to take into account facts which have emerged subsequent to the time when the application was made. In the present case, the facts relating to the transmission of the documents by the British embassy in April 2019, and then the return of the documents by the Ministry of Foreign Affairs, were not known either to K&S or Teare J. at the time.
81. The authorities show that there is room for argument as to whether the court's decision on an application to set aside an order for dispensing with service should look exclusively at the circumstances which prevailed at the time of the application itself, or whether it can take into account subsequent events: see *General Dynamics* at [68] – [69]. Here, however, the facts now known about the service which took place in April 2019, do not concern events which have taken place subsequent to the order. Rather, they are facts which existed at the time of the order of Teare J., and which have now become known. Mr. Malek said that it would be 'super-technical' to contend that the court could disregard the actual facts relating to service in April 2019, and that he could not realistically argue that the court should decide the application without regard to the true position. That seems to me to be an appropriate approach. Indeed, if consideration of the known facts were to be excluded in the context of the application to set aside Teare J.'s order, they could nevertheless be taken into account if the court considered that they should lead to a further order

dispensing with service being granted. Accordingly I do pay regard below to the now-known facts relating to service. However, my decision would be the same even if those facts were not taken into account.

Application to the facts

82. UFG submitted that the test of exceptional circumstances, even if applicable, was satisfied in the present case on the basis of the facts as they stood at the time of the application before Teare J. UFG submits that this conclusion is now reinforced by the facts now known concerning service. I agree.

The position at the time of the application

83. UFG sought to serve the order of Males J., via the FPS and the FCO, in the proper way. The position at the time of application to Teare J. in October 2019 was that some 9 months had passed from the time that the documents had been given to the FPS in January. By June 2019, Cleary were on the scene and had specifically requested K&S to correspond with them. In the correspondence that followed, Cleary were putting forward arguments on behalf of Egypt. It was apparent that Egypt had received notice of the order of Males J. What was unclear to K&S at the time was what had actually happened. In the correspondence in June and July 2019, Cleary did not accept that the order had been properly served. But such points as were raised were in the nature of putting K&S to proof that service of the order had been effected. Cleary did not explain what had happened in April 2019, nor why it might be contended that service had not been effective at that time.
84. Over the summer of 2019, K&S made numerous enquiries of the FCO and the FPS in order to understand what had happened in relation to service. Remarkably, the relevant diplomatic bag containing important and confidential legal documents could not be located, and it appears that the FCO and FPS ultimately concluded that it had likely been lost. Neither the FCO nor the FPS was able to provide a clear explanation as to what had happened. This is, on any view, a most unusual set of circumstances.
85. As Ms. Walker explained in her witness statement on the application to Teare J. in October, there were two realistic alternative possibilities as to what had happened. The first alternative was that the diplomatic bag did indeed contain a certificate of service sent by the British embassy in Cairo, but that this had now been lost. Mr. Batchelor of the FCO in London apparently considered that this was likely to be the case, in circumstances where documents had originally been sent to the Cairo embassy for service. But neither he nor anyone else in the FCO had looked at the relevant documents in the diplomatic bag when it had been returned. The second alternative was that the documents had been served or at least attempted to be served, but that Egypt had declined to accept them and that therefore there was no certificate of service. K&S had no basis for concluding that this is what had actually happened, not least because Cleary had been corresponding on behalf of Egypt during the summer of 2019, and had not explained that Egypt had, justifiably or otherwise, rejected service of the order in April 2019. What was clear, however, was that: a very significant time had elapsed since the papers had first been lodged with the FPS; that the documents had indeed been sent to Egypt; and at least an attempt to serve must in all likelihood have taken place.

86. When the two alternatives are considered, it seems to me that an order dispensing with service was appropriate on either basis. If the order had been successfully served, but the certificate of service was lost, there was every reason for the court to regularise the position and put matters beyond doubt by making it clear that no further service was required. It is obvious that to do so could not be prejudicial to Egypt, who (on this hypothesis) had accepted the service documents and were in any event by this stage represented by their solicitors in London. I cannot see why, as Egypt has contended, UFG should have been required to start over again, with a likely further delay of around 9 months, in circumstances where (on the present hypothesis) service had taken place, and the only problem was that the certificate of service had, very unusually, gone missing.
87. If, by contrast, service had been rejected, then again an order dispensing with service was appropriate, at least unless there was a good reason for Egypt having rejected service. At the time of the application, however, no such reason was known to K&S. They had been in correspondence with Cleary for some time, and had not been told that the documents had been received but returned, let alone been given any reason for that. If service had been rejected for an unknown reason, there was every justification for seeking an order dispensing with service. There would be little or no point in UFG simply starting again, as Egypt now contends should have happened, since there would be no reason to think that a second attempt at service would be any more acceptable than the first. As Ms. Byrne asked rhetorically: what was to stop the whole thing happening again? The consequence would therefore not simply be delay, but an inability to start the proceedings.

The facts relating to service as now known

88. I have so far considered the position without reference to the facts relating to service that are now known. These facts reinforce the conclusion which I have already reached as the appropriateness of the order of Teare J. In my view, the suggestion that UFG should now be required to start again has no merit whatsoever. For the reasons which follow, I consider that there is a very strong case indeed that service of the order of Males J. was successfully and properly served. But even assuming that it was not, there is every reason for the court to regularise the position, and put the matter beyond doubt, by upholding the order of Teare J. which dispensed with service.
89. As set out in Section B above, the evidence shows that the order of Males J. was indeed transmitted from the FCO via the British embassy in Cairo to the Egyptian Ministry of Foreign Affairs. The relevant documents were clearly received by the Ministry in April 2019. They were then returned to the British embassy later in April.
90. The decision of the Court of Appeal in *General Dynamics* establishes, as described above, that it was not necessary for the order to be served pursuant to s. 12 of the SIA 1978. However, even if s.12 were to apply, the receipt by the Ministry of Foreign Affairs is established on the present evidence, and this is sufficient to fulfil the requirements of that section. In *Certain Underwriters at Lloyds v Syrian Arab Republic* [2018] EWHC 385 (Comm), Mr. Andrew Henshaw QC (as he then was) decided that the receipt of documents was sufficient. A defendant could not therefore evade service by simply declining to accept delivery: see paragraphs [19] and [23]. Although the deputy judge's decision on another point was disapproved by the Court of Appeal in *General Dynamics*, no doubt was cast upon his approach to s.12 in the present context. Mr. Malek did not submit that the deputy judge was wrong, and I do not think that he was.

91. It follows, subject to two points, that service of the order sufficient to fulfil the requirement of s. 12 (if applicable) was indeed effected, and there is on any view a very strong case that that is so. It must equally follow, in my view, that there was service sufficient to meet the requirements of CPR r. 6.44. Egypt contended that s.12 and CPR r. 6.44 go hand-in-hand, and there was therefore no suggestion that there is a more stringent requirement under CPR r. 6.44 than under s. 12 of the SIA.
92. The first of these points concerns the justification for the return of the documents which is advanced in Mr. Gadhia's second witness statement. He says, in paragraph 10 (set out in full above), that:
- "The reason the documents were returned and no service was effected was because the process for service of documents in foreign proceedings on the Defendant, as a State, requires that those documents be directed to the correct department within the Defendant's government (which is not the Assistant's Office)".
93. I do not consider that this provides a justification for the return of the documents, or provides a reason why service was not successfully accomplished. There is nothing in s. 12 of the SIA 1978, or CPR r. 6.44, which requires service to be directed to the 'correct department within the Defendant's government', save only that s.12 does refer to the 'Ministry of Foreign Affairs of the State'. In the present case, this department of state was where the documents were sent and indeed received.
94. Mr. Gadhia then goes on to refer to the Hague Convention 1965, and to the terms of a letter sent by K&S to the FPS which had erroneously referred to this convention. However, for reasons previously given, the Hague Convention 1965 is inapplicable to the present direct action against a state, and it cannot therefore provide a valid argument that service was not properly accomplished, nor a justification for returning the documents received. In any event, there is no evidence that, when returning the documents, Egypt had in mind the erroneous reference to the Hague Convention in the letter from K&S.
95. The second point, which was the one pursued by Mr. Malek in argument, was that the note from the British embassy dated 8 April 2019 asked the Ministry that the 'attached documents be forwarded to the competent authorities for service'. He submitted that the embassy was therefore not serving the documents as such, but was requesting that they be forwarded for service.
96. I do not consider that this argument provides a reason why service was not properly accomplished, nor a justification for returning the documents. This was not, as it seems to me, the point that was taken by the Ministry at the time that the documents were returned. But in any event, it is obvious that someone within the Ministry would have read the order so that he could see what it said. It would not have taken very long to do so. It would therefore have been apparent that the proceedings concerned Egypt itself, and that there was no separate competent authority to whom the documents needed to be transmitted for service on some other party. The order of Males J. expressly refers, as it is required to do, to the particular ICSID award pursuant to which it was made. The note from the Ministry does not suggest that there was any confusion about that. Rather, the only point taken was that the documents had not been properly addressed and did not fall within the scope of competence of the office of the Assistant Foreign Minister. Neither of these arguments leads, in my view, to the conclusion that the order had not been served on Egypt. If the

position was that some other individual or a different department within the Ministry, whether within the same building or otherwise, was responsible for dealing with matters arising out of the ICSID award, then in my view it was for the office of the Assistant Foreign Minister to forward the documents internally to the individuals with responsibility. The return of the documents seems to me to be indicative of an attempt to frustrate or delay service, which are circumstances which can properly justify (if required) an order dispensing with service.

97. But even if either or both of these points had any validity, they are points which in my view are of no weight or substance when it comes to the decision as to whether to set aside the order of Teare J. The fact is that the documents were received by the Ministry of Foreign Affairs as long ago as April 2019, and that such receipt took place via the permitted method of service; i.e. through transmission from the FCO. Egypt has been on notice of the present proceedings since that time, and indeed earlier. It has instructed lawyers on its behalf, who have now been engaged for at least a year. Even if there were some technical defect in the service which was effected (as to which I am unpersuaded), it is appropriate to ensure that the position is now regularised and the matter put beyond doubt.
98. I therefore decline to set aside the order of Teare J. on this ground.

E: Was there a proper basis for the Waksman J. order granting alternative service on Cleary?

Principles relating to alternative service

99. The court has power under CPR r. 6.15 to permit alternative service of a claim form if it appears to the court that there is good reason to do so. By CPR r. 6.27, this power extends to service of any document in the proceedings. The present issue concerns the order which Waksman J. made relating to service of the order of Teare J.: i.e. the order dispensing with service, and declaring that service of a claim form is not required. Waksman J. permitted alternative service of that order on Cleary.
100. The principles applicable to an application for alternative service were summarised by the Court of Appeal in *Barton v Wright Hassall LLP* [2016] EWCA Civ 177. The court is required to consider:
- a) whether there is a good reason to validate the proposed steps for service;
 - b) whether the document has come to the attention of the party intended to be served. This is the sole purpose of service, but is not itself sufficient to amount to a good reason for alternative service;
 - c) the conduct of the claimant and of the defendant – if one party is playing technical games, this will count against them.

101. In its written submissions, Egypt contended that these principles were inapplicable for two separate reasons. Neither of these points was really pursued by Mr. Malek in his oral submissions, and I therefore address them only briefly.
102. First, it was submitted that where service in a Hague Convention case is in issue, alternative service is only permitted where there were exceptional or special circumstances. However, as previously discussed, and as Mr. Malek accepted, the present case does not involve service under the Hague Convention.
103. Secondly, it was submitted that where a document is required to be served under s.12 (1) of the SIA 1978, service by an alternative method is not available. This proposition is certainly correct, and was not disputed by UFG. However, s. 12 only applies to documents 'required to be served for instituting proceedings'. In *General Dynamics*, as previously discussed, the Court of Appeal held that this did not apply to an order equivalent to the order of Males J. in the present proceedings. It necessarily follows that it cannot apply to the order of Waksman J. in the present case. Indeed, even if the Supreme Court were to overturn the decision of the Court of Appeal in *General Dynamics*, it is difficult to see how this could result in the order of Waksman J. coming within the purview of s.12 (1) of the SIA. That order was not concerned with instituting proceedings.

Application to the facts

104. UFG submits, as it submitted to Waksman J., that an order for alternative service is justified in the present case. The original order of Males J. had come to the attention of Egypt (as is now known but was not known at the time of the application to Waksman J.) as a result of the service in April described in Section D above. The order of Teare J., and the papers lodged in support of that application, had come to the attention of Egypt as well. They had been provided to Cleary, who had confirmed that they were instructed in relation to the present proceedings, had asked for correspondence to be directed at them, and had indicated (in a letter dated 17 October 2019) that they were taking instructions on the Teare J. order. The position was that Egypt was playing technical games. Egypt's authorisation of Cleary to act for them for some purposes, but not others, had unjustifiably delayed and escalated the cost of these proceedings. It would be wrong now to require UFG to follow the steps of having to serve the Teare J. order through the FCO. That process might take a further 9 months, and perhaps longer in view of potential delays resulting from the impact of Covid-19 which at one time had resulted in the effective closure of the FPS.
105. Egypt made various submissions. To a very large extent, these arguments repeated or reflected submissions which I have already rejected. In particular, Egypt relied upon UFG's failure to serve a claim form and alleged failure to start the current proceedings on the correct procedural basis. Egypt denied that it was playing procedural games. They said that it was UFG who had refused to complete the procedural steps incumbent upon it, and sought to circumvent the procedure through a series of without notice applications that depart further and further from what was described as the 'orthodox' process in s. 12(1) of the SIA and CPR r. 62.21.
106. I accept UFG's submissions as summarised above and, like Waksman J., consider that there was and is a proper basis for the order for alternative service. I have already rejected Egypt's argument that

UFG failed to follow the appropriate procedure. UFG was, for reasons explained in Section C above, entitled to make a without notice application to Males J. UFG was then required to serve the order made by Males J. via the FCO and, for reasons given in Section D above, they did so and the order was received by the Ministry of Foreign Affairs. The documents were then, unjustifiably in my view, returned to the British embassy in April. Since then Egypt has advanced various arguments concerning service, via solicitors who have acted for them for nearly a year (and who had been acting for at least 5 months at the time of Waksman J's order). I have not accepted any of these arguments. The result has been to cause delay and expense. Indeed, it is still unknown – some 18 months after Males J.'s order was made – whether Egypt intends to apply to set aside that order. All of this has happened against a background where, as Ms. Byrne correctly submitted, the 1966 Act and CPR r. 62.21 envisage a speedy registration process in relation to ICSID awards.

107. It also seems to me that there is an air of unreality arising from Egypt's submission that Teare J.'s order should now have to be served via the FCO. The primary argument advanced by Mr. Malek in relation to Teare J.'s order was, as he emphasised, the 'claim form' argument addressed in Section C above. His second argument concerned Teare J.'s order dispensing with service; i.e the argument addressed in Section D above. In circumstances where the substance of those arguments has now been addressed in detail, I can see no sense in the suggestion that there should now be further delay consequent upon the need formally to serve Teare J.'s order in a different manner.

F: Should the Teare J. and Waksman J. order be set aside because they were procured without full and frank disclosure?

Principles relating to full and frank disclosure

108. The duty of full and frank disclosure that without notice applications imply was summarised by Lawrence Collins J. in *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, at [180] as follows:

"On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350,1356-1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present."

109. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it: see Toulson J in *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), at [25].

110. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the non-disclosure is non-culpable. Thus, in *OJSC ANK Yugraneft v Sibir Energy* [2008] EWHC 2614 (Ch), Christopher Clarke J. said at [106]:

"As with all discretionary considerations, much depends on the facts...The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

Application to the facts

111. Egypt relies upon three non-disclosures. These concern

a) UFG's failure to disclose to Waksman J. a Court of Appeal dictum in *General Dynamics* that alternative service is not available where the defendant is a state;

b) Waksman J's order did not comply with CPR r. 23.9 (3) which requires that an order made without notice must contain a statement of the right to make an application to set aside or vary the order.

c) The Teare J. and Waksman J. orders were obtained on the basis of a representation that registration of an ICSID award is "automatic".

112. I will deal with these arguments briefly, since I consider that there is no substance to any of them. Furthermore, even if there had been any non-disclosure, I would not regard it as culpable or such as to warrant setting aside of orders which, for reasons given, were properly made.

(i) The dictum of the Court of Appeal in General Dynamics

113. At paragraphs [60] – [61], the Court of Appeal in *General Dynamics* aid as follows:

"Conclusion on first issue

[60]. It follows, in our judgment, that it was not mandatory in this case that either the arbitration claim form or the order permitting the enforcement of the award as a judgment had to be served through the FCO. The order permitting the enforcement of the award did, of course, have to be served pursuant to CPR 62.18(8)(b) and CPR 6.44(which deals with service of documents on a foreign state) but the court has jurisdiction in an appropriate case to dispense with service in accordance with CPR 6.16 and/or 6.28. If that course is taken it will, of course, always be appropriate to notify the state that the order has been made and, therefore, to make arrangements

(as Teare J did) to notify the state in such a way as will come to the attention of the organs of state which will be responsible for honouring the award.

[61]. We stress, however, that such notification does not amount to alternative service and must not be used as a proxy for such service which (counsel agreed) cannot be used where the respondent is a state. CPR 6.16 and 6.28 draw a distinction between dispensing with service of a claim form which may only be ordered "in exceptional circumstances" and dispensing with service in other circumstances as to which there is a general discretion. Strictly speaking, therefore, it could be said that a judge has a general discretion to dispense with service of the order permitting enforcement of the award. We nevertheless consider that, when the order permitting enforcement of the award is to be the first time that the foreign state receives notice of a claimant's attempt to enforce an award, it is only right and proper that the court should apply the test of exceptional circumstances. It is in this way that the valid policy considerations mentioned in para 58 can (and must) be taken into account, while the court is enabled to take into account the countervailing policy of enforcing awards in an appropriate case. The judge was thus quite correct to apply the test of exceptional circumstances to the question of dispensing with service in this case. That is the test which he applied when he dealt with the matter in case he was wrong on the first issue. (Emphasis supplied)"

114. Egypt drew attention to the underlined passage above, which on one reading suggests that alternative service is never available where a state is concerned. However, the *General Dynamics* case concerned an order which dispensed with service. The court was not therefore considering a case where alternative service had been ordered. At best, therefore, the relevant passage is a dictum, apparently based on an agreement between counsel.
115. I do not consider that this passage can or should be read as prohibiting an order for alternative service in all cases which involve states. Alternative service has previously been ordered in a recent decision of the Commercial Court, where the legal principles and facts were carefully set out by Bryan J.: *The European Union v The Syrian Arab Republic* [2018] EWHC 1712 (Comm), paras [46] – [58]. An earlier paragraph of that decision was referred to, with apparent approval, in *General Dynamics* itself: see paragraph [19]. Mr. Malek did not submit that this case was wrongly decided or, if so, why. Indeed, he did not seek to argue that the dictum of the Court of Appeal, if read as prohibiting all cases of alternative service, correctly represented the law.
116. It seems to me that, if (as *General Dynamics* establishes) the court can exercise its power to dispense altogether with service of particular documents upon a state, then there is no reason why it should not also exercise the less draconian power of ordering service by an alternative method.
117. Furthermore, any argument that it is impermissible to serve any document upon a state by an alternative method is inconsistent with the reasoning in the *General Dynamics* case itself. At the heart of the Court of Appeal's reasoning (see paragraph [52] of the judgment) is the proposition that the co-ordinate rules within the CPR are available to the court (including the power to dispense with service) unless the relevant document requires service as prescribed by s.12 of the SIA 1978. That reasoning must apply equally to CPR r. 6.27 as it does to the very next rule, CPR r. 6.28.
118. Accordingly, I consider that the dictum in paragraph [61], based on counsel's agreement, can only properly relate to the unavailability of alternative service in a case where s.12 of the SIA 1978

applies. Indeed, as I have said, Mr. Malek in his oral submissions did not seek to support any wider interpretation of that dictum, or to support the wider proposition that alternative service on a state was never available in respect of any document other than those covered by s.12.

119. Since the application for alternative service did not concern a document to which s.12 applied, there can have been no material non-disclosure, and in any event no non-disclosure which would warrant setting aside the order.

(ii) The order of Waksman J. did not contain a statement of Egypt's right to apply to set it aside

120. The order should have contained such a statement, and its omission was an error. It was an error of no consequence, not least because Egypt was represented by experienced solicitors who would no doubt have advised Egypt of its right to apply to set aside the order. Indeed, UFG promptly confirmed in correspondence that Egypt had the right to set aside the order, and agreed that the deadline for the application would be the same as under the Teare J. order (which did contain a statement as to the right to set aside). Egypt's application was then made within this timeframe.

121. In my view, this is not a non-disclosure point at all. It does not affect the substance of the order which Waksman J. was asked to make. Had the error – which was not deliberate and for which K&S have apologised – been spotted, then it is not as though Waksman J. would have needed to reconsider whether or not to make an order for alternative service. The only consequence would be the order would be redrawn so as to include the necessary words providing for Egypt's right to apply to set the order aside. There was therefore simply an error of procedure which does not, unless I were otherwise to order, invalidate any step taken in the proceedings: see CPR r. 3.10. It is not necessary to make any such order in the present case, because the omission was rapidly corrected in correspondence and no prejudice has resulted.

(iii) The representation that registration of an ICSID award is 'automatic'

122. In paragraphs 16- 22 of her first witness statement, in support of the application to Males J., Ms. Walker set out the legal background to the 1966 Act and CPR r. 62.21 in terms which are fair and accurate. This included the limited scope for challenge which I have addressed in Section B above. In paragraph 24, she went on to say (in a section headed 'Material Disclosure')

"Given that registration of ICSID awards is intended to be automatic, I believe that if Egypt sought to raise any of the matters below, its submissions would be without merit"

123. In her second witness statement, Ms. Walker said (when dealing with the argument as to whether a claim form needed to be served):

"It is well settled that the claim form need not be served on a defendant for the enforcement of a New York Convention award, unless the Court orders otherwise. Enforcement of ICSID Awards is intended to be a more straightforward process than enforcement of a New York Convention award – not least because, unlike in the case of a New York Convention award, the English courts do not have jurisdiction to set aside or refuse recognition of an ICSID Award".

124. There is in my view no material difference in substance between these passages and the description of the ICSID regime contained in the paragraph of *Dicey* to which I have already referred. Nevertheless, criticism is made by Egypt that these passages are too absolute in their terms. Egypt submitted, in its written submissions, that UFG had failed to note in its applications that 'an ICSID award is subject to the same limitations, and susceptible to the same challenges, under English law as a High Court judgment – if there is a basis on which such a judgment can be set aside, the equivalency between that judgment and an ICSID award means the registration of the latter may be set aside on the same basis'. Egypt's argument is, therefore, that a somewhat more nuanced approach to her description of the legal regime should have been set out in Ms. Walker's witness statement.
125. I do not consider that there is any substance to this criticism. If a party is to make an allegation of material non-disclosure, it should recognise that it is a serious allegation involving misconduct or default: see e.g. the decision of Burnett J. in *Bracken Partners Ltd. v Gutteridge* which I have considered in a recent judgment, *Public Institution for Social Security v Amouzegar* [2020] EWHC 1220 (Comm) para [143]. Allegations of non-disclosure are concerned with points which might have a real consequence for the judge who is asked to make an order on a without notice basis. In the present case, it is not said that a more nuanced analysis of the law might have led to any different result. In particular, it is not said that UFG failed properly to disclose the existence of a defence, of which they knew or ought to have known, which might arise under the more nuanced statement of the law for which Egypt contends. Had there been such a defence, then there might have been the starting point for an argument about non-disclosure, assuming that UFG knew or should have known about it. But in the absence of such a defence, the debate about whether or not Ms. Walker's description of the law is too absolute, or should have been more nuanced, is entirely academic.

Conclusion

126. Egypt's application is therefore dismissed.