



Max Planck Institute
LUXEMBOURG
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Max Planck Institute Luxembourg for Procedural Law

Research Paper Series | N° 1 (2020)

The Aftermath of the 9/11 Litigation: Enforcing the US *Havlish* Judgments in Europe

Dr Stephanie Law
Lecturer in Law
University of Southampton

Dr Vincent Richard
Senior Research Fellow
Max Planck Institute Luxembourg
for Procedural Law

Dr Edoardo Stoppioni
Senior Research Fellow
Max Planck Institute Luxembourg
for Procedural Law

Ms Martina Mantovani
Research Fellow
Max Planck Institute Luxembourg
for Procedural Law

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Max Planck Institute Luxembourg for Procedural Law Research Paper Series
ISSN: 2309-0227



Max Planck Institute
LUXEMBOURG
for Procedural Law

4, rue Alphonse Weicker
L-2721 Luxembourg
www.mpi.lu

The 9/11 Iranian Litigation in Luxembourg Courts: Private and Public International Law

Stephanie Law, Vincent Richard, Edoardo Stoppioni
and Martina Mantovani

Max Planck Institute Luxembourg for Procedural Law

Article last updated: December 2019

Abstract

The paper takes stock of the attempts made by the families of the victims of the 9/11 terrorist attacks to enforce, in Europe, the judgment rendered by the Southern District Court of New York in *In Re Terrorist attacks on September 11, 2001, Fiona Havlish and others v Usama Bin Laden and others*. It brings together four different contributions, focusing on specific aspects of the *Havlish* saga. To set the scene for the proper understanding of the *Havlish* litigations, Stephanie Law analyses the development of the U.S. legal framework on the state-sponsored terrorism exception and its impact on the U.S. proceedings, which resulted in the judgment whose recognition and enforcement is being sought in Europe.

The ruling in March 2019 by a Luxembourg court which has refused recognition and enforcement of the *Havlish* judgment is thoroughly analysed by Vincent Richard and Edoardo Stoppioni, who deal in turn with the arguments set forth *vis-à-vis* non-State parties and with the use, by the Luxembourg Court, of the law on State immunity as it applies to the Iranian State and its emanations. Martina Mantovani addresses the parallel attempts made by the U.S. claimants to enforce the *Havlish* judgments in other European Jurisdictions, which have given rise to ongoing *exequatur* procedures in England and in Italy.

Keywords

State immunity (exceptions to); State-sponsored terrorism exception; domestic tests of indirect jurisdiction; recognition and enforcement of default judgments; recognition and enforcement of judgments rendered against sovereign states; service of process upon a sovereign State; customary international law in Luxembourg courts

Cite as

Stephanie Law, Vincent Richard, Edoardo Stoppioni, and Martina Mantovani, 'The Aftermath of the 9/11 Litigation: Enforcing the US *Havlish* Judgments in Europe' (2020) MPILux Research Paper Series 2020 (1), [www.mpi.lu]

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Introductory remarks

In March 2019, a Luxembourg court refused to enforce a judgment rendered by the Southern District Court of New York against the State of Iran, some of its emanations and other non-State parties.¹ If recognized, this U.S. judgment, which awarded USD 1.3 billion of compensatory damages and USD 4.7 billion of punitive damages to the victims of the Sept. 11, 2001 terrorist attacks and/or their families, would have enabled the claimants to seize Iranian assets held with a Luxembourg-based clearing house.

This event prompted a broader discussion on the current state of several attempts made by these U.S. claimants to recover, in Europe, the sums awarded by the U.S. courts. As it is, Luxembourg is only one of the European *fora* in which the U.S. claimants have actively tried to enforce the U.S. judgment, parallel attempts having been made both in England and Italy.

Falling outside the scope of the existing EU uniform instruments dealing with the recognition and enforcement of judgments,² the *exequatur* proceedings initiated for this purpose are governed by the domestic rules of private international law of the Forum State. A set of common elements can nonetheless be found in all the European *exequatur* procedures, to the extent that each court has to deal with identical legal issues stemming from the specific nature of the U.S. *Havlish* judgments (as decisions rendered (*inter alia*) against a foreign State on the basis of the State-sponsored terrorism exception *and* in default of appearance) as well as from Iran's apparent policy of resisting and obstructing service of process in cases which it believes to be against its interests and "politically motivated".³

This paper stems from a fruitful discussion between the two Departments of the Max Planck Institute Luxembourg, on the occasion of their monthly meeting in a joint *Referentenrunde*. Members of each Department contributed to the analysis of the judgment of the *Tribunal d'Arrondissement* and of its broader context with its specific expertise in international and comparative procedural law, additionally profiting from the valuable inputs given by several external experts from Luxembourg, who were invited to attend the meeting. Against this backdrop, Stephanie Law's article sets the scene in **part 1**, by giving an account of the development of U.S. legal framework on the State-sponsored terrorism exception and its impact on the *Havlish* proceedings, which resulted in the judgment whose recognition and enforcement was sought in Luxembourg. Vincent Richard analyses, in **part 2**, the reasoning developed by the Luxembourg Court to refuse recognition of this judgment *vis-à-vis* non-State parties, while Edoardo Stoppioni examines the use of the law of State immunity as it applies to the Iranian State and its emanations (**part 3**). Martina Mantovani addresses, in **part 4**, the parallel attempts made by these U.S. claimants to enforce the *Havlish* judgments in other European jurisdictions, notably England and Italy.

¹ The judgment of the Luxembourg court is available (in French) at <https://justice.public.lu/dam-assets/fr/actualites/2019/jgt20190327-exequatur-anonyme.pdf> Cf. B. Hess, Keine juristische Fussnote: Klagen aus 9/11 vor luxemburgischen Gerichten, 39 *Praxis des internationalen Priv- und Verfahrensrechts* 442 (2019).

² Notably of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which only applies to judgments in civil and commercial matters rendered by courts of EU Member States.

³ As explained by the English court in *Fiona Havlish Et Al. v Islamic Republic of Iran Et Al.* [2018] EWHC 1478 (Comm) (08 June 2018), § 6-13

The Background to the 9/11 Iranian Litigation: A Short Explainer of Legislative and Judicial Developments

Stephanie Law

The decision of the *Tribunal d'arrondissement* on the 9/11 Iranian litigation⁴ opens up different avenues of analysis, some of which are explored in this reaction paper, including the scope for recognition and enforcement of US judgments under Luxembourgish procedural law, and the use of customary international law by Luxembourgish courts. The decision is the first of its kind by the Luxembourgish courts; that is to say, it is the first in which an attempt has been made to recognise and enforce a US judgment in Luxembourg in which it has been found that Iran has supported terrorist activities (the 9/11 attacks) on US soil, and for which a US court has awarded damages to the plaintiffs. It is unlikely to remain an anomaly however. This short commentary aims to outline the key developments in the US courts, advanced in large part by the US legislature, which have made this type of civil litigation possible and increasingly likely, with consequences not only in the US but also internationally. The focus here is on the scope to establish jurisdiction over a foreign State in US courts⁵. The use of civil litigation by US plaintiffs to obtain damages from foreign States that have allegedly supported terrorist activities is a controversial practice, for which the founding of jurisdiction in US courts is a necessary preliminary and foundational step.

Over the course of the previous couple of decades, US-based plaintiffs have initiated numerous civil actions in US courts against foreign States – including Cuba, Syria, Saudi Arabia and Iran amongst others – as well as corporations, central banks and individuals. They have claimed both compensatory and punitive damages for injury arising from various terrorist activities and attacks, alleging that those States should be held accountable for their sponsorship and provision of material or indirect support to terrorist groups like al Qaeda. The relevant terrorist activities extend beyond the 9/11 attacks and include various bombings that occurred in the 1980s and 1990s⁶. In light of legislative and judicial developments in the US, the scope for similar awards to be made against both Iran and Saudi Arabia is likely to increase in years to come. To the extent that Iranian and Saudi assets might also be held outside the US, the international impact of these US judgments is also likely to grow. That is to say, not only will the Luxembourgish judgment be appealed but it is likely that we will see this type of executory action replicated not only in Luxembourg but in other European Union Member States, including England⁷, in which Iranian and Saudi assets might be found.

⁴ Judgment of March 27, 2019, available at: <https://www.justice.public.lu/dam-assets/fr/actualites/2019/jgt20190327-exequatur-anonyme.pdf>

⁵ Generally on State immunities, see H Fox and P Webb, *The Law of State Immunities* (OUP, 3rd edn., 2015), 238-283 on the legal framework applicable in the US; G Born and P B Rutledge, *International Civil Litigation in United States Courts* (Kluwer, 6th edn., 2018), 215-346.

⁶ For background, see H Koh, 'Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation' (2016) 50 *Texas International Law Journal* 661.

⁷ See <https://www.bsflp.com/news-events/911-victims.html>

1.1 Developments before the International Court of Justice

It is worth noting that this litigation has also had ripple effects at the international level. Two cases are currently pending before the International Court of Justice (‘ICJ’) concerning the US and Iran⁸. In what is now known as *Certain Iranian Assets*⁹, Iran argued that the founding of jurisdiction in US courts for claims against Iran on the basis of the State-sponsored terrorism (‘SST’) exception, the seizure of Iranian assets and the attachment of property of companies owned by the Iranian State, including Bank Markazi, violates customary international law and the 1955 US-Iran Treaty of Amity¹⁰. The US advanced preliminary objections, which the ICJ ruled on in February 2019, and in which it allowed for certain of the Iranian claims to proceed to the merits stage.

The US contested the ICJ’s jurisdiction due to a lack of consent¹¹. Per Art 36 Statute of the ICJ, as a general rule, the court only has jurisdiction in contentious disputes when the relevant States have agreed to submit the dispute to it; such consent might be made in advance or ad hoc, in relation to a particular case¹². Iran argued that the US had consented to the ICJ’s jurisdiction through Art XXI(2), the dispute resolution provision of the Treaty of Amity¹³. Iran asserted that all of its claims were based on violations of the Treaty; in particular, it asserted that the civil lawsuits brought on the basis of the SST exception violated the Treaty provisions that aim to afford protection to Iranian companies and citizens against such litigation, including Art IV(2). The US argued that Iran’s claims fell outside of the scope of the Treaty of Amity, and that the Treaty was being engaged to trigger the jurisdiction of the ICJ, amounting to an abuse of process in light of Iran’s support for terrorist activities¹⁴. It is worth noting

⁸ The second is *Alleged Violations of the 1955 Treaty of Amity*, concerning the US’s withdrawal from the Joint Comprehensive Plan of Action (JCPOA; Joint Comprehensive Plan of Action between China, France, Germany, the Russian Federation, the United Kingdom, the United States, the EU and the Islamic Republic of Iran, 14 July 2015 (http://eeas.europa.eu/archives/docs/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf)) and its application of sanctions; *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*.

⁹ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 13 February 2019.

¹⁰ Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, August 15, 1955 (<https://www.state.gov/wp-content/uploads/2019/05/Treaty-of-Amity-Economic-Relations-and-Consular-Rights-between-the-United-States-of-America-and-Iran-Aug.-15-1955.pdf>)

¹¹ The US’s preliminary objections, 1 May 2017 (<https://www.icj-cij.org/files/case-related/164/164-20170501-WRI-01-00-EN.pdf>). It is worth noting that while in October 2018; the U.S. indicated its intention to withdraw from the Treaty of Amity, this does not negate the potential jurisdiction of the ICJ (The US Secretary of State announced the intention of the U.S. to terminate the 1955 Treaty of Amity on 3 October, 2018 (<https://www.state.gov/remarks-to-the-media-3/>)), following the ICJ’s ruling in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Islamic Republic of Iran v United States)*, Request for the Indication of Provisional Measures, Order, 3 October 2018).

¹² While challenges to jurisdiction often arise at an early stage of proceedings, it remains open to the ICJ to make further findings on the issue of jurisdiction at later stages of the adjudication.

¹³ Article XXI(2), the relevant clause, provides: “Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means”.

¹⁴ Amongst other objections which are less relevant for the purposes of this analysis.

that the ICJ refused to declare Iran's claims as inadmissible as an abuse of process, it having acted with unclean hands given its funding of and provision of support for terrorism¹⁵.

Fundamentally, the ICJ held that the issue of State immunities fell outside the scope of the Treaty¹⁶. As such, it declined to examine on the merits Iran's claims concerning the jurisdiction of the US courts in the claims brought against it. The ICJ held that the relevant understanding of what is "required by international law" in Art IV(2) is to be understood as that which "defines the minimum standard of protection for property belonging to the 'nationals' and 'companies'" of one State party engaging in economic activities within the territory of another State party, and not that governing the protections enjoyed by State entities by virtue of the principle of sovereign equality of States¹⁷. Article IV(2) should not be understood as "incorporating, by reference, the customary rules on sovereign immunities"¹⁸. As regards the seizure and attachment of assets, Iran also argued that Bank Markazi, its central bank, should be understood as a "company" under the Treaty, and thus entitled to protections under it; this protection includes, amongst others, "fair and equitable treatment", and an avoidance of "unreasonable or discriminatory measures" that would impair their 'legally acquired rights and interests'¹⁹ in the other State. Iran contested that the bank should essentially be entitled to State immunity. The ICJ allowed this claim to proceed to the merits stage, for an examination of the nature of the bank's activities; the bank could be considered a "company" per the Treaty "to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities"²⁰. Additional claims made by the US and Iran will also proceed to the merits²¹.

1.2 The 9/11 Litigation and the Judgment Sought to be Recognised and Enforced in Luxembourg

The key defendant States in the 9/11 litigation are Iran and Saudi Arabia; while numerous claims have been brought against both, thus far, judgments have only been rendered against Iran, for reasons –

¹⁵ Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, 13 February 2019, paras 100 – 124.

¹⁶ Criticisms of the ICJ's rejection of customary international law on State immunities has been set out in the limited commentaries on the judgment on preliminary objections; see for example K Hosseinejad and P Askary, 'Interpretation of Implication: Some Observations on the Recent ICJ Decision in the Case of Certain Iranian Assets' *OpinioJuris*, 1 March 2019 (Available at: <http://opiniojuris.org/2019/03/01/interpretation-of-implication-some-observations-on-the-recent-icj-decision-in-the-case-of-certain-iranian-assets/>; Last accessed: 01/08/2019).

¹⁷ Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, 13 February 2019, para 57.

¹⁸ Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, 13 February 2019, para 58.

¹⁹ Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, 13 February 2019, para 58.

²⁰ Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, 13 February 2019, para 92.

²¹ The US also argued that the Treaty includes exemptions for measures amounting to arms control or those necessary to protect "essential security" and that these exemptions negate ICJ jurisdiction and US liability. The ICJ has not yet ruled on this issue; instead it referred to previous case law concerning the US and Iran, in which it had found that "the Treaty of Amity contains no provision expressly excluding certain matters from its jurisdiction" (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 1. C. J. Reports 1996, p. 803, 2 December 1996, para 20).

that will be elucidated below – concerning the founding of jurisdiction against Saudi Arabia. According to a 2016 research paper prepared for the US Congress, over the last twenty years approximately 92 judgments have been rendered in default by US federal courts in respect of various instances of terrorist attacks in which Iran has been found to be involved; approximately 54bn USD in judgments have been awarded against Iran and remain outstanding²².

The judgments relevant to the decision rendered by the *Tribunal d'arrondissement – Havlish v Bin Laden*²³ – were given between 2011 and 2012 in the US District Court for the Southern District of New York²⁴. The US court awarded over 6bn USD to the plaintiffs. These cases were brought by families of 9/11 victims to hold alleged material sponsors and supporters of the al Qaeda terrorist organisation accountable, and by insurers who sought to recover the billions they paid out in compensation for property and other damage following the attacks. Initiated as early as August 2002, numerous lawsuits were consolidated in multi-district litigation proceedings²⁵ in the US District Court for the Southern District of New York, along with other claims initiated against other States. This case, and indeed every case brought against Iran in the US courts, resulted in judgments rendered in default; that is to say, Iran has never appeared as a defendant in a case against it, but has objected (out of court) to the founding of jurisdiction in the US courts, alleging that it is entitled to State immunity. At the same time, Iran rejects the claim that it has sponsored or supported terrorist activities in the US.

As noted above, one key foundational question is that of jurisdiction, and the exclusion arising from the doctrine of State immunity. The Foreign Sovereign Immunities Act (FSIA)²⁶ sets out the limitations as to when a foreign sovereign State might be sued in US courts, the exceptions to the principle of State immunity²⁷ and the exclusive bases upon which a suit might be brought against a foreign sovereign in the US courts. Jurisdiction in the actions against Iran was established on the basis of the SST exception of FSIA²⁸ as Iran is listed by the US Department of State as a State engaged in supporting terrorist activities. This basis of jurisdiction is examined further below. It is worth noting that the founding of jurisdiction is more complex with regards to claims brought against Saudi Arabia; as it has not been listed by the State Department as a State sponsor of terrorism, there is no SST exception to State immunity to allow for jurisdiction to be founded in the US courts. This absence of jurisdiction

²² Congressional Research Service, *'In Re Terrorist Attacks on September 11, 2001: Claims Against Saudi Defendants Under the Foreign Sovereign Immunities Act (FSIA)*, 17 May 2016. Available at: <https://fas.org/sgp/crs/misc/RL34726.pdf>; Last accessed: 22 May 2019.

²³ The default judgment finding Iran to be liable was rendered on the 22 December 2011 (*Havlish v Bin Laden* 2011 US Dist. LEXIS 15899) and that on the quantification of damages was rendered on the 3 October 2012 (*Havlish v Bin Laden* 2012 US Dist. LEXIS 1432525).

²⁴ It is worth noting that other default judgments have been rendered in 2016 and 2018 by the same judge, Judge Daniels against Iran for billions of dollars of damages for injury arising from the 9/11 attacks. In 2016, Judge Daniels rendered a default judgment against Iran (*Ashton, et al v. Al Qaeda Islamic, et al*, No. 1:2002cv06977 - Document 785 (S.D.N.Y. 2016), and in April 2018 (*Thomas Burnett, Sr et al v. The Islamic Republic of Iran et al*, No. 1:15-cv-09903 (S.D.N.Y. 2018)) for 6bn USD.

²⁵ In *Re Terrorist Attacks on September 11, 2001*, Civil Action No. 03-MDL-1570. Multi-district litigation is made up of several civil cases involving at least one common question of fact being heard in different districts; generally the actions are transferred – by the US Judicial Panel on Multidistrict Litigation in accordance with 28 US Code § 1407 – to a district at the convenience of the parties and witnesses with the aim of enhancing the efficiency of the proceedings and scope for justice to be done.

²⁶ The FSIA has been codified at 28 US Code § 1330, 1332, 1391(f), 1441(d), and 1602–1611.

²⁷ 28 US Code § 1604.

²⁸ States currently included on the State Department's list are Iran, North Korea, Sudan and Syria.

has led to the Justice Against Sponsors of Terrorism Act (JASTA)²⁹, discussed further below. A second key question concerns the recovery of damages awarded to the US-based plaintiffs against Iran. Almost all of the damages awards made against Iran have not yet been recovered. It is for this reason that the US plaintiffs attempted to have their 6bn USD award recognised and enforced in Luxembourg, thus enabling them to recover the damages from the Luxembourg-based entity Clearstream. At the same time, the US legislator has introduced other regimes to fulfil compensatory damages to plaintiffs.

1.3 Developments in US Legislation as Regards Jurisdictional State Immunities

Until the 1950s, the US maintained a policy of absolute State immunity³⁰. This subsequently shifted to one which was restrictive, with the aim of protecting US companies acting abroad and to ensure that public bodies engaged in commercial activities would not be able to avoid liability in private law arising from those activities. The State Department determined when immunity should apply, a regime that was criticised for its inconsistency and uncertainty. In 1976, Congress adopted the FSIA, which provides for jurisdictional immunities to foreign sovereign nations and protects against civil liability – with limited exceptions. Foreign States are “presumptively immune” from the jurisdiction of the US courts unless an exception can be satisfied³¹. FSIA provides at 28 US Code § 1604) that “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign State shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter”. Thus – until JASTA, briefly set out below – the FSIA was the only basis on which US courts could found jurisdiction over a foreign State³². The limited exceptions to State immunity have evolved over time³³.

One of the most significant amendments was introduced in 1996. Congress amended the FSIA by the Antiterrorism and Effective Death Penalty Act, creating the SST exception³⁴. By virtue of this amendment, it was intended that US plaintiffs could bring an action for monetary damages in the US courts against foreign States that allegedly sponsored terrorism. The Act provides that a foreign State is not immune where “money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources”³⁵.

²⁹ Justice Against Sponsors of Terrorism Act Pub.L. 114-222.

³⁰ For an overview of the development of the concept of State immunity, see H Koh, ‘Foreign Official Immunity After Samantar: A United States Government Perspective’ (2011) 44 *Vand.J.Transnat’l L.* 1141, 1142-1146.

³¹ 28 US Code § 1604.

³² The FSIA transferred the power to make the determination as regards immunity from the executive to the courts.

³³ A foreign State will not be immune where (1) the foreign State has waived its immunity; (2) the claim is a specific type of admiralty claim; (3) the claim involves commercial activities; (4) the claim implicates property rights connected with the United States; (5) the claim arises from tortious conduct that occurred in the United States; (6) the claim is made pursuant to an arbitration agreement; or (7) the claim seeks money damages against a designated State sponsor of terrorism for injuries arising from a terrorist act.

³⁴ 28 US Code § 1605(a)(7), as part of the Antiterrorism and Effective Death Penalty Act Pub.L. 104-132.

³⁵ 28 US Code § 1605(a)(7).

A subsequent amendment was made in the same year following a court finding that the AEDPA did not create a federal cause of action. This amendment (the Flatow amendment)³⁶ intended to introduce a federal cause of action for the type of State conduct set out at 28 US Code § 1605(a)(7)³⁷. It was long a question of controversy whether the Flatow amendment introduced a cause of action against foreign States themselves or only against their employees, officials or agents³⁸. Indeed, it was only following the 2004 decision of the DC Circuit Court in *Cicippio-Puleo*, in which it held that the cause of action introduced by the Flatow amendment only created a federal right of action against individuals and thus found there to be no federal right of action against foreign States³⁹, that Congress made subsequent legislative amendments. Thus, in 2008, the SST was extended via the National Defense Authorization Act to create a federal cause of action for damages (compensatory or punitive) against the foreign State, as well as its agents, officials and employees⁴⁰. It is worth noting that the 2008 ACT also replaced 28 US Code § 1605 with 28 US Code § 1605A. The content as regards jurisdiction remains the same and § 1605A has retroactive application. This is key as regards the amendments made to the claim and the lack of service of those third amended claims and the execution of the judgment in Luxembourg.

The SST exception only applies, and a “claim under this section” shall be heard, only if “the foreign State was designated as a State sponsor of terrorism” at the relevant time⁴¹. The 2008 amendment also extended the scope of the plaintiffs beyond US citizens to US nationals⁴², member of the armed forces or a US Government employee at the time of the relevant attacks⁴³. The State Department’s list of State sponsors of terrorism was employed by Congress as a means to promote coherence with the exercise of foreign relations. The Secretary of State may be entitled to include a State on this list if it can be determined that the government of the State has repeatedly provided support for acts of international terrorism⁴⁴.

1.3.1 The Proceedings before the US Courts in *Havlish v Bin Laden*

³⁶ The Flatow amendment was named after Alisa Flatow, who was killed in a suicide bomb attack in Palestine in 1995. Her father lobbied Congress to pass the amendment, and related legislation. He later brought a series of cases against Iran, including *Flatow v Iran*, 999 F. Supp. 1 (1998) in which he was awarded approximately 250 million USD against Iran.

³⁷ The Flatow amendment was introduced as part of the Omnibus Consolidated Appropriations Act, Pub.L. 104-208, § 589, 110 Stat. 3009, 3009-172 (1996). It allows plaintiffs to seek punitive damages, with the aim of punishing and deterring States from supporting terrorism.

³⁸ J Keller, ‘The Flatow Amendment and State-Sponsored Terrorism’ (2005) 28 *Seattle University Law Review* 1029, p 1031, citing, see, e.g., *Cronin*, 238 F. Supp. 2d at 230-31; *Kilburn*, 277 F. Supp. 2d at 36-37, finding that the amendment does provide a cause of action against the foreign State itself; and *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032-33 (D.C. Cir. 2004); *Acree v. Republic of Iraq*, 370 F.3d 41, 59-61 (D.C. Cir. 2004), finding that it creates only a right of action against the foreign State’s officials, employees or agents.

³⁹ *Cicippio-Puleo v Iran*, 353 F.3d 1024, 1029 (D.C. Cir. 2004).

⁴⁰ This amendment in National Defense Authorization Act, Pub.L. 104-208, Section 589, 110 (1996).

⁴¹ 28 US Code § 1605A(a)(2)(i)(I).

⁴² As defined in the Immigration and Naturalization Act 8 USCA §§ 1101 et seq. (2012).

⁴³ 28 US Code § 1605A(a)(2)(A)(ii) and 28 US Code § 1605A(c)(3).

⁴⁴ 28 US Code § 1605A(h)(6); under Section 6(j) of the Export Administration Act of 1979, Section 620A of the Foreign Assistance Act of 1961 (22 US Code § 2371), Section 40 of the Arms Export Control Act (22 US Code § 2780), amongst others.

As noted above, numerous sets of claims have been brought against Iran in the US courts. The proceedings in *Havlish* were also complicated in themselves, being initiated in a first summons served in 2002, in relation to which a second amended complaint was filed in 2006. Both the US and the Luxembourgish judgments establish that this complaint was properly served on both the Iranian State and the other State-owned bodies pursuant to 28 US Code §1608. Since none of the defendants made an appearance or otherwise responded to either summons, in December 2007 the Clerk of Court entered a Clerk's Certificate for Default as to each defendant.

Following the legislative amendments in 2008 that extended the SST exception, the plaintiffs again amended their claim. As noted, after this amendment – and introduction of the SST exception in 28 US Code § 1605A⁴⁵, which had retroactive application – the plaintiffs amended their claim in a Third Amended Complaint, in order to conform to these FSIA provisions. As we will see below, it was accepted that this amended complaint, on which the jurisdiction of the US DC for the SDNY had been founded both against Iran and the relevant State bodies, had never been served on the defendants.

The US District Court for the SDNY thus held that jurisdiction in the *Havlish* case could be founded on the basis of 28 US Code § 1605A, the SST exception⁴⁶. It was however also necessary to establish subject matter and personal jurisdiction; the former establishes the court's power as regards the particular claims submitted to it while the latter concerns its power over the particular defendants in the case before it. For the SST exception to apply, the foreign State must be designated by the US Department of State as a "State sponsor of terrorism" at the time when the terror act took place. Iran had been listed as such since January 1984. The plaintiffs also have to be US nationals, member of the armed forces or a US Government employee at the time of the relevant attacks⁴⁷. The District Court found that subject matter jurisdiction was deemed to be established as the claim against Iran both fell within the SST exception in 28 USC s1605A as Iran was (and is) included in the list of State sponsors of terrorism⁴⁸.

Personal jurisdiction must also be satisfied; this has two dimensions. The first is statutory, which is satisfied where there is subject matter jurisdiction under the FSIA⁴⁹. The second is constitutional in that the Fifth Amendments standards of due process have to be satisfied. There is a need to establish "certain minimum contacts" between the defendants and the court asserting jurisdiction and that the establishment of jurisdiction would not "offend traditional notions of fair play and substantial justice"⁵⁰. The FSIA sets out the procedure for service at 28 US Code § 1608(a)⁵¹; it is necessary that the plaintiff

⁴⁵ *Havlish v Bin Laden* 2011 US Dist. LEXIS 15899, p 46; it is worth noting that the court found the case also fell within the tort exception of 28 US Code § 1605(a)(5).

⁴⁶ *Havlish v Bin Laden* 2011 US Dist. LEXIS 15899, p 46; it is worth noting that the court found the case also fell within the tort exception of 28 US Code § 1605(a)(5).

⁴⁷ 28 US Code § 1605A(a)(2)(A)(ii) and 28 US Code § 1605A(c)(3).

⁴⁸ *Havlish v Bin Laden* 2011 US Dist. LEXIS 15899, p 46-47; see *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) ("At the threshold of every action in a district court against a foreign state, ... the court must satisfy itself that one of the [FSIA] exceptions applies,' as 'subject-matter jurisdiction in any such action depends' on that application" (quoting *Verlinden v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1962)).

⁴⁹ 28 US Code § 1330(b), 1608.

⁵⁰ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁵¹ In the case of *Havlish*, the plaintiffs served the defendants via diplomatic means essentially. As the US does not have diplomatic relations with Iran, a motion has to be filed with the Secretary of State, which deposits those motions with the Swiss, who do have such relations.

properly serves the defendant in line with this provision. While it was common ground that the Third Amended Complaint had not been served on the defendants, the District Court found that the plaintiffs had satisfied the personal jurisdiction requirement to provide the defendant States with notice of their claim through “proper service of process”. Per its judgment, the Court found that service had been made properly on all of the defendants, who did not respond or make an appearance within 60 days and that personal jurisdiction could thus be established⁵². In order to justify this lack of service, the plaintiffs appealed to article 5(a)(2) of the Federal Rules of Procedure, authorising the claimants to dispense with service on a party who is already in default of appearance. It is worth noting that the issue of proper service constituted the key problem for the Luxembourgish court, as the court of exequatur, in line with the amended claims, a matter to which the reaction paper returns below.

1.3.2 The Enforcement of the US Judgment(s)

This commentary does not speak to the merits of the case. It is worth noting however that once the judgment had been made in their favour, one of the key difficulties faced by the plaintiffs concerned the (im)possibility of collecting on the judgment. As of 2016, the US courts have rendered numerous judgments with a total value of approximately 54bn USD against Iran⁵³; this is at least 60bn USD since the judgments rendered in 2018. While a large part of this amount comprises punitive damages⁵⁴, various attempts have been made to execute and enforce these judgments (at least without the punitive damages dimension, as was the situation in Luxembourg) abroad – including in Luxembourg, Italy and England, amongst others.

It is also worth noting that with the objective of making funds available, the US Congress has attempted to provide exceptions to the immunity of the institutions – including banks and central security depositories – holding the assets of States and central banks⁵⁵. In 2002, Congress passed the Terrorism Risk Insurance Act, which aimed to make compensation available and facilitate the attachment of assets of foreign States that have been sued under the SST exception⁵⁶. This provision allowed the US to use Iran’s frozen assets to pay the compensatory damages to successful plaintiffs. In 2012, 22 US Code § 8772 was passed, providing a possibility to facilitate the recovery of assets from States sponsoring terrorism, namely Iran. This law allowed the plaintiffs in one particular case – *Peterson v Islamic Republic of Iran*⁵⁷, in which a default judgment had been rendered against Iran – to tap a Citibank account, in which Bank Markazi assets were held, in order to satisfy their judgment. The

⁵² *Havlish v Bin Laden* 2011 US Dist. LEXIS 15899, p 47-49.

⁵³ Congressional Research Service, *In Re Terrorist Attacks on September 11, 2001: Claims Against Saudi Defendants Under the Foreign Sovereign Immunities Act (FSIA)*, 17 May 2016. Available at: <https://fas.org/sgp/crs/misc/RL34726.pdf>; Last accessed: 22 May 2019.

⁵⁴ On this issue, and a proposal to remove the possibility for punitive damages, see E Perot Bissell V and J R Schottenfeld, ‘Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act’ (2018) 127 *Yale Law Journal* 1890.

⁵⁵ 22 US Code § 8772 and 28 US Code § 1610(f) as regards the execution of judgments, against States listed by the State Department, against frozen assets of those States as well as US-based funds appropriated for the purpose of executing such judgments.

⁵⁶ Terrorism Risk Insurance Act of 2002 Pub.L.107-297, codified at 28 US Code § 1610.

⁵⁷ *Peterson v Islamic Republic of Iran* No. 10 Civ. 4518 (S.D.N.Y., 2013) and 758 F.3d 185 (2nd Cir., 2014); *Peterson v Bank Markazi, aka the Central Bank of Iran* 136 S. Ct. 1310.

legislation was subject to challenge before the US Supreme Court on the basis of a separation of powers question – can Congress essentially take a decision that will change procedural rules to shape the outcome of litigation? The Supreme Court upheld the law as constitutional in April 2016⁵⁸. In 2015, Congress established the Justice for United States Victims of State Sponsored Terrorism Fund, which also aims to compensate plaintiffs who have obtained a judgment in their favour against foreign State sponsors of terrorism; while on the one hand, only compensatory damages are available from this fund, on the other, a significant proportion of funds have been claimed by lawyers as a result of contingency fee agreements⁵⁹.

1.3.3 Further Legislative Developments: The JASTA and Jurisdiction in Cases Against Saudi Arabia

This brief explanation of US legislative developments in State immunity can be concluded with a short account of the Justice Against State Sponsors of Terrorism Act (JASTA). Introduced initially in 2009, JASTA passed the Senate in May 2016, the House in September 2016 and was vetoed by Obama later the same month. Congress then voted to override Obama's veto on the 28th September 2016. JASTA amends the US Code to extend the State immunity exception and remove procedural (jurisdictional) obstacles that precluded victims of terrorism from bringing claims in the US courts against foreign States that were not listed as terrorist supporters by the US State department⁶⁰. JASTA's passing was controversial and was criticised both domestically and internationally⁶¹. In light of the US's global presence, one which remains unrivalled, it was suggested that the Act would open the US up to lawsuits in foreign courts brought by foreign citizens⁶², and might undermine US diplomatic relations and counter-terrorism partnerships.⁶³

⁵⁸ The US Congress has the power to determine the jurisdiction of all US federal courts, with the exception of the SCOTUS. (*Bank Markazi v. Peterson* 2016 U.S. LEXIS 2799; Holding: A law that only applied to a specific case, identified by docket number, and eliminated all of the defences one party had raised did not violate the separation of powers in the United States Constitution between the legislative (Congress) and judicial branches of government; since it pertained to the immunity of assets of a foreign State, it was also justified as a valid exercise of Congress' authority in foreign policy matters. Roberts and Sotomayor dissenting (Roberts – Congress can undermine the separation of powers by enacting laws that provide for the removal of procedural defences in specific lawsuits) that it amounted to changing the rules to end a case in the favour of one party.

⁵⁹ Justice for United States Victims of State Sponsored Terrorism Act 2015, codified at 34 US Code § 20144.

⁶⁰ Essentially, it aims to extend the exception to State immunity so that foreign States do not enjoy immunity from jurisdiction where they have allegedly been involved in terrorist attacks on US territory by providing material support (directly or indirectly) to foreign organisations or persons engaged in terrorist activities against the US, even if they are not listed as State sponsors of terrorism by the State Department; 28 US Code § 1605B.

⁶¹ In a letter from the EU Delegation to the US, the challenge of JASTA to international law was set out: "The possible adoption and implementation of the (bill) would be in conflict with fundamental principles of international law and in particular the principle of State sovereign immunity" (Available at: <https://www.washingtonpost.com/news/powerpost/wp-content/uploads/sites/47/2016/09/EU-on-JASTA.pdf?noredirect=on>; Last accessed: 24 May 2019).

⁶² Given the US' carrying out of drone strikes, its provision of military aid to Israel, engaged in war crimes in Palestine and so on.

⁶³ See D Hamer and L Green, 'JASTA Keeps Saudi Arabia on Trial for 9/11 Terror Attacks: The US and its Foreign Sovereign Immunity Issue', EJIL:Talk!, 17 April 2018 (Available at: <https://www.ejiltalk.org/jasta-keeps-saudi-arabia-on-trial-for-9-11-terror-attacks-the-us-and-its-foreign-sovereign-immunity-issue/>; Last accessed: 01 August 2019).

JASTA aims to allow for jurisdiction to be found in US courts in claims brought against foreign States by victims of terrorist activities where the SST exception in FSIA does not apply, as that State had not been listed by the US State Department. Relevant cases include 9/11-related actions, predominantly against Saudi Arabia, which had also been consolidated in MDL proceedings⁶⁴ but previously dismissed for a lack of jurisdiction. JASTA was first applied in a case brought initially in 2003; the US Court of Appeals for the Second Circuit affirmed dismissals of claims against Saudi Arabia, a Saudi-based charity and a Saudi banker and Saudi princes in their personal capacity for a lack of jurisdiction in 2008⁶⁵. In the course of the plaintiffs' further appeal on jurisdiction⁶⁶, JASTA was enacted by Congress. The Court of Appeal for the Second Circuit thus vacated a 2015 dismissal, which sent the case back to the District Court to assess and determine whether JASTA allows for jurisdiction to be found in the US courts. In March 2018, Judge Daniels found that the plaintiffs' allegations allowed the court to establish jurisdiction on the basis of JASTA⁶⁷, its first application.

1.4 Looking Forward

In light of these legislative developments, and the increased possibility for compensation (and punitive damages) to be sought by US nationals via private civil litigation, different questions arise. On the one hand, is the question of whether an approach based on civil law actions – as opposed to one based on diplomatic negotiation – the correct one? On the other hand, is the question of whether the US Congress is the actor or institution best placed to make such a determination or whether the Executive is not better placed, not only in terms of being able to assess the scope for developments in light of diplomatic solutions but also as regards the scope for determining whether private lawsuits should be allowed to proceed? The overarching concern of the separation of powers of course also comes to the floor⁶⁸.

⁶⁴ In *Re Terrorist Attacks on September 11, 2001*, Civil Action No. 03-MDL-1570

⁶⁵ *Terrorist Attacks III* 538 .3d 71 (2d Cir. 2008), 80. Finding that no FSIA exception could be established, the Second Circuit considered whether there might be a tort exception (the Second Circuit found that the tort exception should not apply as its purpose was rather to, eg, provide a basis for liability for traffic accidents that occur in the US. A later panel of the Second Circuit sent the case back to the District Court to determine if the tort exception should apply) or a commercial activities exception (the FSIA sets out that commercial activity is “a regular course of commercial conduct or a particular commercial transaction or act”, where the SCOTUS has held that the assessment should be made of “the type of actions by which a private party engaged in ‘trade and traffic or commerce’” and on the action's nature as opposed to purpose. With this, the Second Circuit found that charitable contributions could not be understood as commercial activities, even if they had a money laundering purpose, but found while they were “potentially relevant”, they did not apply to found jurisdiction.

⁶⁶ The Second Circuit in 2013 then ordered the claims to be re-instated in order to determine whether the tort exception in the FSIA would apply in the case. In 2015, following an application by the defendants to dismiss the action for lack of jurisdiction, the District Court found that the plaintiffs had not alleged or established an exception to sovereign immunity provided for in the FSIA. In *Re Terrorist Attacks on September 11, 2011* (Terrorist Attacks) 134 F. Supp. 3d 774 (SDNY 2015). <https://www.scribd.com/document/283217055/Saudi-Ruling>

⁶⁷ *In Re Terrorist Attacks on September 11, 2001* (03-MDL-1570(GBD), S.D.N.Y. 28 March 2018. In the same ruling, the judge considered he had no jurisdiction in certain claims, dismissing actions against two Saudi banks, and a construction company with connections to Osama bin Laden.

⁶⁸ See C Keitner, 'World Court Rules on Iran Challenge to US Suits for Acts of Terrorism; An Explainer' Justice Security, 19 February 2019 (Available at: <https://www.justsecurity.org/62604/unpacking-icj-judgment-certain-iranian-assets/>; Last accessed: 01/08/2019).

The Decision of the Luxembourg District Court of March 2019: Refusing Enforcement of the *Havlish* Decision Against Non-Sovereign Defendants

Vincent Richard

The exequatur procedure before the district court of Luxembourg (*Tribunal d'arrondissement*) opposed the 152 original claimants against 16 Iranian defendants that were gathered into five groups. The first group comprised only the Iranian Central Bank while the second group was made up of the Iranian State and various State representatives and ministries. Enforcement of the US judgment against defendants from these two groups was refused on grounds of jurisdictional immunity and the reasoning of the Luxembourgish court on this issue is examined in part 3.

The third group was composed of several Iranian public entities⁶⁹ while the National Iranian Oil Company was put in the fourth group and the Hezbollah in the fifth. The legal reasoning of the Luxembourgish court against these three groups of non-sovereign defendants was identical and it is examined below without further distinction.

Exequatur proceedings aim at declaring foreign judgments enforceable on the national territory, so that they can produce their effect outside of the jurisdiction in which they were rendered. In order to be eligible for exequatur, the foreign judgment must be capable of enforcement meaning that it has to order someone to do something or to pay a precise sum of money. In the case at hand, plaintiffs submitted four judgments rendered by the New York District Court in October 2011, December 2011, October 2012 and September 2013. The parties and the court agreed that only the judgment of October 12th, 2012 contained a precise monetary conviction and was therefore enforceable. They also agreed that this judgment could only be understood if read together with the judgment of December 22nd, 2011, assessing defendants' liability and the *Memorandum Decision and Order* of October 3rd, 2011 determining the different categories of damages the plaintiffs were entitled to. However, the Luxembourgish court considered that the *Order* of September 12th, 2013 declaring that the judgment of 2012 was enforceable in the US, was irrelevant to the enforcement in Luxembourg. The court also verified that the US judgments had not been already fully enforced and declared that the exequatur procedure was admissible.

Regarding enforcement of foreign judgments, Luxembourg follows the regularity requirements established by French case law and the court applied them to the case at hand. We will shortly examine the arguments that were considered but rejected by the District Court of Luxembourg (2.1) before analyzing how recognition of the US judgments was denied for lack of service of the claim following a change of legal basis and absence of service of the reasoning of the decision (2.2).

⁶⁹ The National Iranian Tanker Corporation, the National Iranian Gas Company, Iran Airlines, the National Iranian Petrochemical Company.

1.5 Defences rejected by the Luxembourgish court

The Iranian defendants argued that the New York District Court was not competent to adjudicate the case, that the damages were excessive and therefore contrary to public policy, that their right of access to a court was not upheld and that the New York decisions were not reasoned. None of these arguments were followed by the Luxembourgish court.

Regarding the competence of the New York District Court, Luxembourg private international law follows the French *Simitch*⁷⁰ test according to which the court has to verify that there is a substantial connection between the case and the foreign tribunal⁷¹. This test does not take into account the foreign rules on jurisdiction nor does it try to apply its own jurisdictional rule to determine whether the foreign court was competent. The test is both simpler and more tolerant, only asking whether there is a sufficient connection between the court and the case. In the present case, the litigation dealt with the defendant's involvement in the terrorist attacks that took place in New York on 9/11 and there was therefore no doubt that there was a sufficient connection with the New York district court that rendered the decision according to Luxembourgish private international law.

Secondly, the Iranian defendants argued that the damages awarded were excessive and therefore contrary to Luxembourg substantive public policy. The New York judgment awarded around 6 billion USD of damages to the plaintiffs but, in Luxembourg, plaintiffs only asked for a partial exequatur of the decision and did not try to enforce the part of the judgment awarding punitive damages (nearly 4.7 billion USD)⁷². The defendants still argued that the compensatory damages (around 1.3 billion USD) would be contrary to Luxembourgish substantive public policy because the amount was excessive. The Luxembourgish court recognized that the damages awarded were largely superior to what a Luxembourgish judge would have awarded but considered that they were not punitive or deterrent in nature and therefore not contrary to public policy⁷³.

Thirdly, defendants argued that they did not have access to an independent and impartial court in the US. Their argument mostly relied on the operation of rule 28 US Code §1605A and the involvement of the executive branch in the designation of State sponsoring terrorism. The Luxembourgish court held that this argument failed to show how the US judge seized of the case would have been partial and considered that Iranian defendants were still able to appear and defend themselves in front of the foreign judge. The content of US law on this issue was not deemed relevant to consider that the right of access to court was violated.

⁷⁰ French Court of cassation, 1st civil chamber, February 6th, 1985, n°83-11241

⁷¹ J.-C. Wiwinius, *Le droit international privé au Grand-Duché du Luxembourg*, ed. Paul Bauler, 2011, p.336. See also D. Bureau and H. Muir Watt, *Droit international privé, tome I*, p.311 and p.324

⁷² There is no clear case-law on the recognition of punitive damages in Luxembourg but it is worth mentioning that the French Supreme Court has declared, in 2010, that punitive damages were not, *per se*, contrary to French public policy (Civ. 1st, 1 Dec. 2010, n°09-13303). For an overview of the issue in several Member States, see S. Bariatti, L. Fumagalli, and Z. C. Reghizzi, *Punitive damages and private international law: state of the art and future developments*, Wolters Kluwer, 2019. For a discussion on the Italian case-law, see below, part 1.10.4

⁷³ See also CJEU, 23 October 2014, flyLAL-Lithuanian Airlines AS v. Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS, C-302/13, where the court declared that "it must be held that the mere invocation of serious economic consequences does not constitute an infringement of the public policy of the Member State in which recognition is sought, within the meaning of Article 34(1) of Regulation No 44/2001."

Fourthly, defendants argued that the US decisions were not reasoned but this argument was rather formal and relied on the fact that the *instrumentum* of the decision did not contain explanation but were only referencing documents that did. The Luxembourgish court considered that this was only a matter of judicial practice, that the reasoning was to be found in other judicial documents within the same procedure and that this was sufficient to be compatible with Luxembourgish public policy.

1.6 Refusal of exequatur for lack of service following a change in legal basis and lack of service of the reasoning of the decision

Two arguments put forward by the Iranian defendants were successful in denying exequatur in Luxembourg: the absence of service of the *Third Amended complaint* and the absence of service of the findings of facts and conclusions of law.

Firstly, the defendants argued that they were not sufficiently aware of the legal basis on which the US procedure was grounded. It was not debated that the Iranian public entities were not part of the proceedings in 2002 but they were included in the *Second Amended Complaint* of September 7th, 2006 which was served upon them. In that regards, the Luxembourgish tribunal observed that the defendant did receive notification of the lawsuit, in 2007 through DHL and were therefore informed. The tribunal underlined that this method is perfectly adequate to inform the defendant and the test does not involve looking at the foreign rule on service. The question was not to know whether service was made in accordance with the foreign law but whether service was sufficient to inform the defendant⁷⁴. The tribunal concluded that it was. However, the Iranian defendant never appeared in front of the New York court and, in December 2007, the court declared them in default. Pursuant to article 5(a)(2) of the Federal Rules of Civil Procedure, the subsequent legal documents were not served on the defaulting parties. The crucial point here is that, following the 2008 amendment of §1605A US Code 28, the legal basis was substantially changed. The 2006 *Second Amended Complaint* was grounded on the Torture Victim Protection Act and sought liability of the defendants for acts of torture and extrajudicial killing. Following the 2008 amendments, the legal basis of the *Third Amended Complaint* also included aircraft sabotage, hostage taking and the provision of material support or resources for these acts. According to the Luxembourgish court, the right to a fair trial requires service on the defendant of all procedural documents containing a new claim, a new legal basis, or new legal argumentation capable of influencing the conditions of his liability. In the case at hand, the court considered that the change in legal basis between the second and third amended complaint was significant and warranted an additional notification to the defendants⁷⁵. The absence of such notification was deemed contrary to Luxembourgish public policy.

Finally, the Luxembourgish court held that although the US decisions themselves were served upon the defendant, the *Findings of Fact and Conclusions of Law* from December 2011 were not. The court considered that this document was essential to understand the US decision and that the absence of

⁷⁴ The same solution applies in European law since regulation n°44/2001. See H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, 6th ed., LGDJ, 2018, p.633

⁷⁵ Trib. Arr. *cit.* p.127

service of this document was a violation of the right of the defence of the Iranian defaulting defendants⁷⁶.

The Iranian defendants' strategy to avoid service and to default before the US courts was not without risk but it was ultimately rewarded by the Luxembourgish court. Decisions rendered in default are often difficult to enforce abroad⁷⁷, and plaintiff should pay a particular attention to notify, or at least try to notify, the defaulting defendants of every procedural document, including a full reasoning of the decision. In the absence of any international treaty between the US and Europe on recognition of judgments⁷⁸, enforcement of US judgments in European jurisdictions is never easy, particularly when they are rendered in default and they are subject to a different set of conditions in each European State. These conditions would be harmonised with the entry into force of the Hague Judgment Convention although its application in the case at hand is debatable⁷⁹. In any event, the Convention allows the enforcement of a foreign decision that is incompatible with the public policy of the requested State to be refused⁸⁰ and the final outcome would have likely been the same.

⁷⁶ *Ibid*, p.131

⁷⁷ On this issue, see V. Richard, *Le jugement par défaut dans l'espace judiciaire européen*, *forthcoming*

⁷⁸ The difficulties of ratifying the Hague Choice of Court Convention of 2005 in the US do not bode well for the Judgments Convention. See T. Folkman, <https://lettersblogatory.com/2017/01/11/coca-bad-news-on-us-ratification/> (last accessed 9/12/2019)

⁷⁹ Because of the characterization of the decision as civil and commercial according to the Convention. On this issue, see, Prel. Doc. N°4 of December 2016 available at <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission> (last accessed 9 Dec 2019)

⁸⁰ Art. 7(1.)(c) of the Hague Convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters.

Customary International Law and State Immunities Before the Luxembourg Judge

Edoardo Stoppioni

From the perspective of public international law, the *9/11* Iranian litigation decision of the *Tribunal d'arrondissement* enriches the very scarce Luxembourgish case law on customary international law (1). Nevertheless, it missed the opportunity to contribute more fruitfully to the ongoing debates on the contours of State immunities (2).

1.7 The Luxembourg Judges and Customary International Law

Throughout its history, Luxembourgish judicial system has undergone an important evolution concerning the role of unwritten international law. In a first phase, the judges treated unwritten sources of international law with mistrust. A decision of the *Cour d'appel* of 1947 had stated that customary international law had no legal value unless it had been incorporated in national law⁸¹. In 1949, the *Cour de cassation* confirmed an old case law according to which unwritten rules of international law did not qualify as a cause of cassation for violation of the law⁸².

Progressively, judges have established an important particularism of the Luxembourgish legal order: the primacy of international over national law, Constitution included. This trend was already present in the case law since 1917, but the aforementioned case law had blurred its contours. In 2001, the *Cour d'appel* affirmed that the provisions of treaties having direct effect always prevail over national law, because of the principle established in Article 27 VCLT⁸³. It is interesting to note that the legal reasoning of the Court is based on the customary rule of general international law according to which a State cannot use its own internal law to escape to an international obligation. This approach, taking the perspective of public international law instead of that of constitutional law to solve the conflicts of norms between normative systems, is rare from a comparative perspective and was criticized by scholars⁸⁴. There is not enough case law to clarify the status of customary international law in the

⁸¹ *Cour d'appel*, arrêt du 23 avril 1947, *Office des séquestres/ Entinger*, *Pas. lux.*, vol. XIV, p. 280 : « dans la réalité juridique les prescriptions du droit international (...) ne valent que pour autant qu'elles ont été incorporées dans la législation nationale ».

⁸² *Cour de cassation*, arrêt du 4 février 1921, *X./Ministère public*, *Pas. lux.*, vol. XI, p. 540 ; *Cour de cassation*, arrêt du 18 novembre 1949, *H. et consorts/ Ministère public*, *Pas. lux.*, vol. XIV, p. 593.

⁸³ *Cour d'appel*, arrêt du 13 novembre 2001, *Ann. dr. lux.* 12 (2002), p. 454 : « une fois le traité approuvé et ratifié conformément aux procédures constitutionnelles et aux règles de droit international l'État est engagé sur le plan international et ne peut pas en application de la Convention de Vienne sur le droit des traités invoquer les dispositions de son droit interne pour justifier la non-exécution d'un traité, la norme de droit international conventionnel d'effet direct doit prévaloir sur la norme de droit interne, peu importe sa nature législative ou conventionnelle ».

⁸⁴ P. Kinsch, « Le rôle du droit international dans l'ordre juridique luxembourgeois », *Pas. lux.*, vol. XXXIV, 2010, p. 415 : « Son fondement juridique formel (par opposition, le cas évident, à son fondement politique) est en tout cas fragile logiquement, la Convention de Vienne – qui ne peut régler la question des relations entre droit international et droit interne que du point de vue du droit international public – ne peut résoudre la question, avec effet pour le droit constitutionnel interne, qu'à condition que celui-ci accepte de se subordonner aux règles de droit international public. Comme le montre le droit comparé, cette auto-subordination du droit constitutionnel est loin d'aller de soi et est exclue par la plupart des ordres juridiques nationaux ».

national legal system. Nevertheless, as it stands, this reasoning developed for treaty law could be transposed to unwritten rules of international law⁸⁵. This peculiar form of monism is a characteristic feature of the attitude of Luxembourg Court towards international law.

As far as the applicability of international law in the Luxembourg legal system, it should be noted that case law was quite demanding concerning the need for the precision of that treaty norm. This is what the *Cour d'appel* confirmed in the criminal proceedings against *Augusto Pinochet*⁸⁶. Concerning general international law norms, Luxembourg courts declared the impossibility of prosecuting Pinochet before them due to the absence of any customary rule establishing a universal criminal jurisdiction against perpetrators of crimes against humanity. In order to do so, the Court specified that to assess the existence of a customary rule, the national judge had to verify the existence of a general practice supported by an *opinio iuris*, in conformity with general international law standards⁸⁷.

The decision of the Tribunal in the *9/11* Iranian litigation is interesting in this regard. On the one hand, the judges used the test established in a doctrinal article to explain the monist attitude of Luxembourg judges towards customary international law⁸⁸. By so doing, they confirmed that customary international law is of direct application and that the national judge uses the public international law methods to establish its existence. Customary law also becomes part of the *iura novit curia* principle and Luxembourg judges have the duty to verify its content. One could also say that, by validating the reasoning of Prof. Kinsch based on the particular national monism, the Tribunal definitely abandoned the 1947 case law and confirmed indirectly that customary international law has internally the same status as treaty law and enjoys primacy over constitutional norms. The Tribunal did not go *stricto sensu* as far as establishing absolute monism in its decision, nevertheless its use of the doctrinal justification in this sense could confirm a generalized approach of the public law doctrine in Luxembourg going in this direction⁸⁹.

There is a caveat in the decision. The judges stressed the instability of unwritten law in a changing international society. Confirming their duty to verify *proprio motu* the content of the customary rule, they refused to consider that invoking a decision of an international court or a doctrinal position is a

⁸⁵ Association Henri Capitant, *Droit du Luxembourg*, Paris, LGDJ, 2016, p. 22 : « Les règles de la coutume internationale sont appliquées par les autorités luxembourgeoises mais, faute de jurisprudence pertinente, leur rang hiérarchique par rapport aux lois internes est inconnu ; on peut seulement supposer qu'il n'est pas différent de celui des traités internationaux ».

⁸⁶ « une norme de l'ordre juridique international, pour être dotée d'applicabilité directe dans l'ordre interne, doit répondre à deux conditions. D'abord il faut que telle ait été l'intention des parties, intention qui se déduit de l'interprétation des dispositions du traité (ou convention) et des conditions pratiques dans lesquelles il a été exécuté. Il faut ensuite que le contenu de cette norme soit suffisamment précis et ne comporte pas la nécessité de recourir à des mesures d'application internes ».

⁸⁷ Cour d'appel, arrêt du 11 février 1999, *Ann. dr. lux.* 10 (2000), p. 369 : « pour la formation d'une règle coutumière internationale, il faut d'une part la preuve d'une pratique générale, constante et uniforme et, d'autre part, celle de l'*opinio iuris sive necessitatis*, de la conscience des États de se conformer à une règle de droit (...). Ces deux éléments constitutifs de la coutume comme source du droit international ne sont pas établis en l'espèce ».

⁸⁸ Tribunal d'arrondissement, *cit.*, p. 31 : « Le statut de la coutume internationale en droit luxembourgeois est décrit par un auteur comme suit : 1° à condition qu'elle existe en droit international, une règle coutumière sera reconnue par le juge luxembourgeois ; 2° le droit international public coutumier est d'application directe devant le juge interne ; 3° les tribunaux constatent l'existence d'une règle coutumière par leurs propres moyens, sans se référer à des actes du pouvoir législatif ou du pouvoir exécutif ; 4° la constatation de l'existence d'une norme coutumière n'exige pas, à proprement parler, que la partie qui l'invoque en fasse la preuve : une règle coutumière est une règle de droit, et non un élément de fait du litige (Le rôle du droit international dans l'ordre juridique luxembourgeois, Patrick Kinsch, Pas. 34, p. 410) ».

⁸⁹ See on this point C. Sauer, *Contrôle juridictionnel des lois au Luxembourg*, Larcier, 2019.

sufficient element to prove the existence of a rule⁹⁰. Nevertheless, we see that that is precisely what the decision did, using Prof. Kinsch's article and the ICJ decision in *Germany vs. Italy* as primary sources for its analysis of customary international law.

1.8 The Luxembourg Judge and Customary Rules on State Immunity

The history of the evolution of customary rules on State immunities is well known. Many famous doctoral dissertations have been dedicated to this topic⁹¹, showing that State immunity was initially conceived as the emanation of the traditional conception of sovereignty and was therefore absolute. This configuration had given birth to iniquitous situations, most notably with the intervention of the State in the economy: authors had denounced such a "*privilège odieux*" (J.F. Lalive), "*institution vicieuse*" (G. Scelle) leading to an unbearable denial of justice (B. Oppetit). In this line, Belgian and Italian judges catalysed, starting from the end of the XIXth century, an evolution of the customary rules on State immunity that became relative and based on the famous dichotomy between *acts iure imperii* and *acta iure gestionis*.

The *Tribunal d'arrondissement* confirmed this vision of the evolution of customary law of State immunities that it linked to the emergence of the role of the individual in the international legal order and rightly pointed out that the delimitation of the two categories is still debated⁹². What is more, the contours of the integrity of the immunity for *acta iure imperii* are more and more challenged, most notably in case of egregious violations of human rights or humanitarian law. The decision is rendered in a context of profound evolution of this legal regime.

It is well known that the International Court of Justice refused to change the perimeter of the *acta iure imperii* immunity in its 2012 *Germany v. Italy* decision, using a highly formalistic distinction between immunity as a procedural rule and the substance of the rule allegedly violated in the merits (no matter if it is of peremptory nature). As Judge Yusuf beautifully described in his dissenting opinion, these exceptions to immunity can be compared to the holes of a Swiss cheese:

⁹⁰ Tribunal d'arrondissement, *cit.*, p. 32 : « Le tribunal retient à ce stade que la coutume est par essence changeante et qu'en l'absence de consécration dans un texte de droit écrit, la règle de droit qui s'en dégage est à tout moment susceptible de se modifier au regard notamment de l'évolution des concepts juridiques, politiques, économiques et sociaux. Des acteurs importants de ces mutations sont les cours et tribunaux, qui ne sauraient s'arrêter à la teneur de la coutume telle qu'elle est décrite à un moment donné par un autre tribunal ou par les auteurs de doctrine ».

⁹¹ B. Hess, *Staatenimmunität bei Distanzdelikten - Der private Kläger im Schnittpunkt von zivilgerichtlichem und völkerrechtlichem Rechtsschutz*, München 1992 ; I. Pingel-Lenuzza, *Les immunités des Etats en droit international*, Bruxelles, 1997; M. Cosnard, *La soumission des États aux tribunaux internes et la théorie des immunités des États*, Paris, 1994. More recently, see H. Fox, P. Webb. *The law of state immunity*, OUP Oxford, 2013.

⁹² Tribunal d'arrondissement, *cit.*, p. 33 : « Le régime coutumier de l'immunité de juridiction a évolué au fil des siècles d'une immunité absolue vers une immunité relative, cette évolution étant la manifestation du recul de l'Etat national et de l'émergence de l'individu comme acteur et sujet de droits. La portée absolue de l'immunité de juridiction a été entamée tout d'abord par la distinction entre les actes *iure imperii*, qui ouvrent le bénéfice de l'immunité de juridiction, et les actes *iure gestionis*, qui sont soustraits au privilège de l'immunité. On peut admettre que cette distinction fait aujourd'hui partie de la coutume internationale. Seule la délimitation entre les deux catégories d'actes donne encore lieu à discussion ».

State immunity is, as a matter of fact, as full of holes as Swiss cheese. Thus, to the extent that customary norms of international law are to be found in the practice and *opinio juris* of States, such practice clearly attests to the fact that the scope and extent of State immunity, particularly in the area of violations of human rights and humanitarian law, which is currently characterized by conflicting decisions of national courts in its interpretation and application, remains an uncertain and unsettled area of international custom, whose contours are ill-defined.

When jurisdictional immunities come into conflict with fundamental rights consecrated under human rights or humanitarian law, for which a forum State has an obligation to secure and enforce in its territory, and whose realization reflects basic values of the international community, it is much more appropriate to have regard to the manner in which, under contemporary international law, “[a] balance . . . must be struck between two sets of functions which are both valued by the international community” (see Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal, p. 85, para. 75). In today’s world, the use of State immunity to obstruct the right of access to justice and the right to an effective remedy may be seen as a misuse of such immunity⁹³.

The *Tribunal d’arrondissement* interestingly evaluated all these currently discussed claims concerning the evolution of the immunity regime.

1.8.1 The “tort exception”

The ICJ had admitted that the jurisdictional immunity rules could be considered as not covering certain claims concerning reparation for torts committed in the forum State. Nevertheless, it did not apply this sort of exception as it considered that “customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict”⁹⁴.

In this regard, the Luxembourg judge similarly confirmed that a tort exception could be considered as existing under customary international law, even if it should be considered as an exception of restrictive interpretation.

*Les nécessités tenant à une application restrictive des exceptions au principe de l’immunité juridictionnelle et à une application coordonnée de l’exception telle que figurant dans les deux conventions appellent à devoir inclure cette condition dans le droit international public coutumier. Par ailleurs, elle doit être appliquée comme requérant la présence de l’Etat ou de ses agents sur le territoire de l’Etat du for à l’époque du fait dommageable et en rapport avec l’accomplissement du fait dommageable*⁹⁵.

⁹³ ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Dissenting Opinion of Judge Yusuf, para 26 and 28

⁹⁴ ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 3 February 2012, para. 78.

⁹⁵ Tribunal d’arrondissement, *cit.*, p. 51.

On this particular point, the dissenting opinion of *ad hoc* Judge Giorgio Gaja⁹⁶ is particularly interesting. He persuasively relied on the evolution of State practice: the legislative practice of various States over more than 30 years (the United States, the United Kingdom, Singapore, South Africa, Australia, Israel) and jurisdictional practice (Canada, Ireland and Italy). This shift motivated the content of Article 12 of the UN Convention.

If one takes into consideration all these elements of practice, one has to reach the conclusion that the nature of the obligation under international law which is at the origin of the claim does not per se provide sufficient evidence that jurisdiction may be exercised over foreign States in case of a claim for reparation for the breach of an obligation under a peremptory norm wherever committed. On the other hand, one cannot infer from this practice that the nature of the obligation breached negatively affects the applicability of the “tort exception”. It would indeed be extraordinary if a claim could be entertained on the basis of the “tort exception” when the obligation breached is of a minor character while this exception would not apply to claims relating to breaches of obligations under peremptory norms⁹⁷.

Nevertheless, the judges did not have to elaborate more on the regime of the exception as in the instant case it was considered that this exception was not applicable. As the parties agreed on the theoretical existence of the tort exception, the Luxembourg judge could have elaborated more on the legal regime of this question so as to develop the state of international law. Instead, it finally followed the example of the ICJ.

1.8.2 The *ius cogens* exception

Concerning the *ius cogens* exception, the tribunal followed strictly the ICJ and its formalism to decide that the existence of immunity is not affected by the nature of the substantive rule allegedly violated⁹⁸.

From this perspective, the Italian Constitutional Court rendered a discussed decision criticizing the status of customary international law and considering that, for the time being, this customary rule could not be integrated into the Italian Constitutional legal order, being in conflict with its most fundamental principles⁹⁹.

We hear very often in the legal debate that the Constitutional Court did not recognize the authority of the ICJ in assessing the content of customary international law¹⁰⁰. It is important to underline that none of the Italian judges has ever questioned the role of the ICJ, as clearly stated in the Constitutional Court decision: “the Florentine judge, albeit recognizing that the ICJ has ‘absolute and exclusive competence’ as to the interpretation of international law, questions the constitutionality of the domestic norm corresponding to the customary international norm – which is limited by the fundamental principles

⁹⁶ Dissenting opinion of Judge *ad hoc* Gaja Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 3 February 2012.

⁹⁷ Dissenting Opinion of Judge *ad hoc* Gaja, para 11.

⁹⁸ Tribunal d’arrondissement, *cit.*, p. 53-54.

⁹⁹ Italian Constitutional Court, Decision n°238/2014.

¹⁰⁰ See A. Peters, Anne, et al., eds. *Immunities in the age of global constitutionalism*, Martinus Nijhoff Publishers, 2014 and B. Hess, *The Private-Public Law Divide in International Dispute Resolution*. Brill Nijhoff, 2018, p. 3888, paras 33 et seq.

and constitutionally guaranteed inviolable rights, including the right to judicial protection of inviolable rights – as well as of the relevant incorporation provisions”.

What the Court did is to render a decision based on a dualist reasoning¹⁰¹ and to block the penetration of the Italian constitutional order, in a fashion that very much recalls the CJEU *Kadi* case. It might not be a coincidence that the *juge rapporteur* was Giuseppe Tesauro.

The Constitutional Court did not invent, unexpectedly, a fundamental principle in order to disregard international law but it tried to make customary international law evolve with a contestation of its present normative content¹⁰². On this point, it is interesting to see how Alain Pellet, during his pleadings for India before the ITLOS in the *Enrica Lexie* case, instrumentalized the decision to ask the tribunal to pay attention to the fact that Italy may, in the current state of affairs, use its constitutional principle to not respect their decision¹⁰³.

This analysis entails disregarding the Constitutional history of Italy. It is not by chance that the Court crafted its discourse in a such a way so as to inscribe the principle of access to the judge as a core principle of Italian constitutional adjudication. The Court starts from recalling its very first decision, in which it declared that the Constitution is not a simply political declaration but needs to be seen as a legal remedy, and inserts the fundamental principle in this precise tradition. I tend to see this move of the Constitutional judge as yet another step taken by national judges to push the evolution of customary rules in a healthy direction. And it is with regret that the Luxembourg judge missed the opportunity to push in the same direction, at least in the *in abstracto* analysis of the law. There, I have to agree with Judge Yusuf: “The assertion of jurisdiction by domestic courts in those exceptional circumstances where there is a failure to make reparations, and where the responsible State has admitted to the commission of serious violations of humanitarian law, without providing a contextual remedy for the victims, does not, in my view, upset the harmonious relations between States, but contributes to a better observance of international human rights and humanitarian law”¹⁰⁴.

¹⁰¹ See A. Peters, “Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order”, <https://www.ejiltalk.org/let-not-triempel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/>: “Superficially, the Sentenza No. 238 strengthens the position of the individual against the state. But on a more profound level, it strengthens unilateralism over universalism: It gives priority to one (state’s) national outlook about what constitutes a proper legal order over the universal standard pronounced by an international court. Concededly, this ICJ-standard is unsatisfactory and seems to be biased in favour of the stability of an inter-state system. On the other hand, it still has the merit of being universal. The lack of an ultimate arbiter tends to result in the political dominance of the more powerful actors which are normally the domestic ones such as the Italian Constitutional Court. And a stiff dualism à la Triepel and Tesauro bears the real risk of reinforcing the perception that international law is only soft law or even no law at all. Despite its staunch dualism, the Corte insinuates that (somehow), the two legal circles (to use Triepel’s term) may interact: “At the same time, however, this [declaration of unconstitutionality] may also contribute to a desirable – and desired by many – evolution of international law itself” (ibid., in “The law”, para. 3.3.). However: You cannot have the cake and eat it, too”.

¹⁰² E. Stoppioni, “Theorizing National Contestations against the Legal Reasoning of International Courts and Tribunals”, ESIL Athens presentation, forthcoming, 2020.

¹⁰³ ITLOS, *The “Enrica Lexie” Incident (Italy v. India)*, Case n 24, Provisional Measures, Oral Pleadings, [ITLOS/PV15/C24/2/10 August 2015 p.m.](https://www.itlos.org/fileadmin/itlos_cases/cases_2015-2019/24_Italy_v_India/24_Italy_v_India_Oral_Pleadings_20150810.pdf), p. 40-41: “in that judgment the Court refers to article 2, relating to the guarantee of “inalienable human rights”, and article 24 of the Italian Constitution, on the right of access to the courts, on which Italy may very well rely in the present case in order to release itself from the obligation to comply with the future award by the arbitral tribunal”.

¹⁰⁴ Dissenting Opinion of Judge Yusuf, para 59.

1.9 Concluding remarks

As a young and probably naïve international lawyer, I cannot but believe that it is our role as lawyers to remain critical and work to raise awareness about the use of the language that we use as native speakers, that is international law. For this reason, the *Tribunal d'arrondissement* expression according to which the content of a customary rule falls under the scope of application of the *iura novit curia* principle should be praised. However, the current attitude to simply quote the ICJ to assess its existence should be criticized. Mentioning the ICJ is not enough as a method for the national judge to handle customary international law, which is a legal norm that has to be interpreted according to the methods of its legal order of origin. While the national judge is not supposed to contest that the ICJ has 'absolute and exclusive competence' as to the interpretation of international law, to quote the above-mentioned Florentine judges, the Luxembourg judge has a duty to consider whether customary international law is evolving in another direction than the one formalistically pointed out by the ICJ. As Belgian and Italian courts have done in the past, national contestations can lead to the development of the normative content of customary international law, reasoning that would be in any case more productive than simply replicating the formalistic "procedure vs substance" divide used by the ICJ to avoid the problem.

Moreover, our language has to evolve and incorporate the teachings of history. I hardly see how we can still maintain today that an *ius cogens* exception, limited with the Host State rule, should not be recognized. I struggle to see how to maintain otherwise would not amount to seeing the immunity as an odious institution, allowing an odious privilege, to paraphrase what Georges Scelle had defended back then.

Follow-Up: Ongoing Attempts at Enforcing *Havlish* in Italy and in England

Martina Mantovani

In *Havlish*,¹⁰⁵ as in almost every case that has been brought against Iran under the STT exception, Iran has chosen not to appear in US courts and thus defaulted. There is much speculation regarding the reasons behind this procedural behaviour. While this is sometimes interpreted as a silent objection to the legitimacy of US jurisdiction over these cases, others speculate that the difficulties experienced by claimants in collecting on SST judgments creates, in practice, little incentive for Iran to show up and defend itself in US courthouses.¹⁰⁶

The difficulties generally experienced in recovering sums awarded under the STT exception in the U.S.,¹⁰⁷ may explain why the European strand of the *Havlish* case has spread well beyond Luxembourg's courts. To the knowledge of the author, *exequatur* proceedings relating to the US *Havlish* judgments¹⁰⁸ have been initiated *at least* in Italy and in England and Wales.

From the standpoint of European courts, the recognition and enforcement of the US judgments may be problematic for at least two different reasons: firstly, the fact that those judgments are rendered, *inter alia*, against a foreign State and its emanations, which implies a decision on the extent of and authorised limitations to the public international law doctrine on State immunity and, secondly, because of their nature as default judgments, demanding an assessment of the effective respect of the rights of the defence in the State of origin.

1.10 The Italian proceedings

Italy might be, at least *prima facie*, a particularly appealing jurisdiction due to the existence of a consistent domestic case law, sanctioning the existence of an exception to the custom of immunity of foreign States in case of particularly serious crimes. For this reason, from the standpoint of the US claimants, the Italian *exequatur* proceedings¹⁰⁹ may yield a more favourable outcome as concerns the

¹⁰⁵ In Re Terrorist attacks on September 11, 2001, Fiona Havlish and others v Usama Bin Laden and others, Civil Action No. 03 MDL 1570 (GBD) (FM); 03-CV-9848 (GBD) (FM).

¹⁰⁶ See Troy C. Homesley III, "Towards a Strategy of Peace": Protecting the Iran Nuclear Accord Despite \$46 Billion in State-Sponsored Terror Judgments, 95 N.C. L. Rev. 795 (2017).

¹⁰⁷ See *ibid* and Jennifer K Elsea, CRS Report for Congress on Suits Against Terrorist States by Victims of Terrorism, Appendix A and B, available at <https://fas.org/sgp/crs/terror/RL31258.pdf>. See also: <https://uk.reuters.com/article/uk-usa-iran-650-fifth-avenue/u-s-verdict-allowing-seizure-of-iran-linked-manhattan-skyscraper-is-overturned-idUKKCN1UZ1YD>

¹⁰⁸ In Re Terrorist attacks on September 11, 2001, Fiona Havlish and others v Usama Bin Laden and others, Civil Action No. 03 MDL 1570 (GBD) (FM); 03-CV-9848 (GBD) (FM).

¹⁰⁹ Service of these proceedings was accomplished in three different ways: first, service on the Iranian Embassy in Rome, which returned the papers to the claimants' Italian solicitors; second, service through diplomatic channels by the Italian Ministry of Foreign Affairs, who delivered the documents to the Iranian Embassy Rome under a note verbale dated 4 February 2018, with service acknowledged by a reply note verbale dated 5 March 2018 disputing various points; and third, pursuant to a court order by courier on Bank Markazi, which is the central bank of Iran.

limited issue of Iran's immunity (3.1.2). Nonetheless, the problem regarding the effective respect of the rights of the defence noted by the Luxembourgish court might still lead to a denial of *exequatur* in Italy (3.1.3), although it went undetected in the interim and *prima facie* assessment made by the Court of Appeal of Rome in a freezing order granted in June 2018 (3.1.1). Furthermore, within the framework of the actual *exequatur* procedure, some other residual issues, which were never brought before the Luxembourgish court, might deserve due consideration by the Italian court (3.1.4).

1.10.1 The freezing order of June 2018

According to a consistent national case law, during the course of *exequatur* proceedings it is possible to grant provisional measures in order to secure the credit recognized by a foreign judgment which has not yet been recognized and declared enforceable in Italy.¹¹⁰ On this basis, the US claimants requested an injunction, aiming at freezing all assets held in Italy by an Iranian State-owned bank, Bank Markazi, on the basis of alleged attempts to shield or remove funds from the Italian jurisdiction.

The freezing order was granted on 14 June 2018.¹¹¹ This is, as of June 2019, the only publicly available document from the Italian *exequatur* proceedings relating to the *Havlish* judgment.¹¹² The details of the order reveal that the American plaintiffs sought the recognition of *at least* US judgment No n.2624/2012 issued by the New York Southern District Court on 12th October 2012, and that they provided the Italian courts with additional documents, namely the US enforcement order of 12th September 2013 and the certificate of non-appeal of 14 September 2017¹¹³.

For the purposes of the present paper, it is important to note the freezing order granted on 14 June contains a prognostic assessment of the outcome of the *exequatur* proceedings pending before that same Court,¹¹⁴ as an integral part of the assessment of the *fumus boni iuris* required, under Italian law,¹¹⁵ for granting a provisional measure. The summary assessment as to whether the creditor's right is *prima facie* existent and well-founded shall in fact be conducted by testing the *Havlish* judgments

¹¹⁰ Court of Appeal of Trieste, Judgment of 20 June 1993, in (1998) *La Nuova Giurisprudenza Civile Commentata*, 300; Court of Appeal of Milan, Judgment of 13 March 1998, in (1998), I, *Giustizia Civile*, 2943; Court of Appeal of Rome, Judgment of 15 July 2003, in (2004), I, II *Foro Italiano*, 1935.

¹¹¹ Court of Appeal of Rome, Order No 8714/17 of 14 June 2018.

¹¹² The Court of Appeal's order was made available, together with the subsequent decision of the rehearing panel, by the claimant lawyers at: <https://int.nyt.com/data/documenthelper/723-wolosky-italy-letter/2b36bf15b095a868f631/optimized/full.pdf#page=1>

¹¹³ This document proves that the *Havlish* judgment has become final in the US legal order.

¹¹⁴ The freezing order was later vacated by the rehearing panel of the Court of Appeal, with a reasoning which, however, focuses exclusively on the requirement of the *periculum in mora*, deemed not sufficiently substantiated in the original order. Having already ascertained the possibility of voiding the order on this ground, the rehearing panel did not re-examine the issue of the *fumus boni iuris*. The perceived conformity of the US judgment with the conditions set by article 64§ 1, letters (a) and (g) of the Italian Act on PIL, as determined in the freezing order, was therefore never explicitly challenged by the rehearing panel.

¹¹⁵ Article 671 of the Italian Code of Civil Procedure

against the requirements set out by article 64 of the Italian Act on PIL¹¹⁶ for the recognition and enforcement of foreign judgments.¹¹⁷

Having easily established that the US judgment had become *res judicata*, that it did not conflict with any other final judgement pronounced by an Italian court, and that there were no prior proceedings pending in Italy between the same parties and on the same issue (as required by article 64 *sub d*), e) and f) of the Italian law on PIL), the Chamber of the Court of Appeal dealing with this application went on to assess the indirect jurisdiction of the US court (article 64 *sub a*)), and the conformity of the *Havlish* judgment with Italian substantive and procedural public policy (article 64 *sub c*), d) and g)).

Concerning the indirect jurisdiction of the US court, the Court of Appeal referred to the *Ferrini* case law of Court of Cassation as a legitimate ground for setting aside the custom on sovereign immunity vis-à-vis State “behaviors which...are so extremely serious as to constitute international crimes under customary rules of international law, insofar as they affect universal values which transcend the interests of individual state communities”.¹¹⁸

Concerning procedural public policy, it remarked that the defendant’s default was pronounced in conformity with the applicable US procedural rules, that service had been regularly performed and that there had not been, in the US proceedings, “any *manifest or disproportionate violation of the right to be heard and of the rights of the defence*”.

Finally, as concerns compliance with Italian substantive public policy, the reasoning of that Court focused on the issue of punitive damages. The fact that the Court of Appeal performed such an assessment might signal that, contrary to the strategy implemented in Luxembourg,¹¹⁹ in Italy the plaintiffs were seeking a broader *exequatur*, covering the part of the *Havlish* judgment also awarding punitive damages. Referring to a recent judgment of the Court of Cassation¹²⁰, the Court of Appeal reiterated that punitive damages are recognisable in Italy if they respect the general requirements of legality, typicality, and predictability, which were deemed satisfied in the case at hand.¹²¹

Nonetheless, this assessment of the conformity of the US judgment with the requirements under article 64 of the Italian law of PIL has for now been made *only incidentally*, within the framework of a summary procedure aiming at the delivery of a provisional measure. It is therefore necessarily different, in terms of thoroughness and accuracy, from the analogous assessment which will be performed by that same Court within the framework of the actual *exequatur* proceedings.

¹¹⁶ Article 64 Law No 218/1995 of 31 May 1995 on the Reform of the Italian System of Private International Law (hereinafter the “PIL Act”).

¹¹⁷ Court of Appeal of Rome, Order No 8714/17 of 14 June 2018 §4.

¹¹⁸ Italian Court of Cassation, Judgment No 5044 of 11 March 2004, *Ferrini v Federal Republic of Germany*, § 7.1 See C Focarelli, *Denying State Immunity for Commission of International Crimes: the Ferrini Decision*, in (2005) ICLQ, vol 54, 951; A Gattini, *War Crimes and the State Immunity in the Ferrini Decision*, in (2005) 3 Journal of International Criminal Justice, 224.

¹¹⁹ See *supra* part 1.5

¹²⁰ Court of Cassation, Judgment No 16601 of 2017, accepting for the first time the recognition in Italy of a foreign judgment granting this kind of damages. See O Vanin, *L'incidenza dei diritti fondamentali in materia penale sulla ricostruzione dell'ordine pubblico internazionale: il caso del riconoscimento delle decisioni straniere attributive di punitive damages*, in *Rivista di diritto internazionale*, 2017, 4, pp. 1190 ss.

¹²¹ Court of Appeal of Rome, Order No 8714/17 of 14 June 2018 §4.

1.10.2 Immunity of a foreign State within the framework of the Italian exequatur proceedings

According to article 64 (1)(a) of the Italian Act on PIL, a foreign judgment can be recognised in Italy, “without the need of any special procedure”, if the court which rendered the judgment “had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law”. In relation to claims directed against a foreign State for *acta iure imperii*, such as those at stake in *Havlish*, this provision requires a two-pronged test. Firstly, the requested court shall consider whether, were it seized in relation to merits of the case, it would have granted or refused immunity under Italian law.¹²² Secondly, the Italian judge of the *exequatur* should assess whether the court of origin would have had the power to adjudicate on the dispute had it applied the rules of jurisdiction set out by article 3 of the Italian Act on PIL, accordingly bilateralised to suit the purpose.¹²³

Against this backdrop, the *Ferrini*¹²⁴ case law acquires indisputable significance with respect to the first prong of the test. This judgment, rendered by the Italian Court of Cassation, is hailed by many as marking a decisive turning point in the law on immunity of foreign States, insofar as it established the possibility of setting aside the international custom on immunity *vis-à-vis* extremely serious State behaviours affecting universal values (i). Subsequent case law of the Court of Cassation confirmed that this exception is also available in relation to the recognition and enforcement of a judgment establishing the responsibility of a foreign State for acts of terrorism (ii).

1.10.2.1 The Ferrini exception

As a general rule, the international custom on State immunity is fully operative within the Italian legal order under Article 10§1 of the Constitution.¹²⁵

According to the *Ferrini* ruling of the Italian Court of Cassation, however, in the case of State “behaviours which...are so extremely serious as to constitute international crimes under customary rules of international law”, the granting of immunity would “hinder, rather than further, values whose protection must be considered fundamental for the international community as a whole”.¹²⁶ As a result, any conflict between such values and the custom on State immunity shall be solved in favour of the former, since, in the Cassation’s view, “fundamental human rights” have acquired, in current

¹²² Court of Cassation, Judgment No 21946 of 28 October 2015, *Flatow Francine e altri v Repubblica Islamica dell'Iran*, §2.2 in fine.

¹²³ The Italian judge of the *exequatur* shall *not*, in particular, assess whether the court of origin had correctly applied its own private international law rules in order to assert jurisdiction on the case. M Maresca, Artt 64-66, in S Bariatti (ed), *Legge 31 Maggio 1995, N 218. Riforma del sistema di diritto internazionale privato. Commentario*, Le nuove leggi civili commentate No 5-6, Cedam.

¹²⁴ Italian Court of Cassation, Judgment No 5044 of 11 March 2004, *Ferrini v Federal Republic of Germany*.

¹²⁵ Cfr Italian Court of Cassation, Judgment No 1653 of 6 June 1974, *Associazione dei cavalieri italiani del sovrano Ordine di Malta v Piccoli*, in *Il Foro Italiano* (1975) Vol. 98, No. 6, 1471; Judgment No 3062 of 26 May 1979, in (1981) *Rivista di diritto internazionale*, 169; Judgment No 5565 of 8 June 1994, in (1995) *Rivista Italiana di diritto internazionale privato e processuale*, 402; Judgment No 919 of 3 February 1996, in (1997) *Rivista Italiana di diritto internazionale privato e processuale*, 137; Judgment No 328 of 12 June 1999, in (2000) *Rivista Italiana di diritto internazionale privato e processuale*, 727; Judgment No 11225 of 27 May 2005, in (2006) *Giustizia Civile*, 1, I, 83.

¹²⁶ Italian Court of Cassation, Judgment No 5044 of 11 March 2004, *Ferrini v Federal Republic of Germany*, §7.2. After *Ferrini*, the same exception was applied in twelve decisions rendered on 29 May 2008 (Nos 14201 to 14212) and in judgment No 1072 of 2009, *Criminal Proceedings v Joseph Max Milde*. The principle was additionally recalled, but not applied, in Court of Cassation, Preliminary order on jurisdiction No 4461 of 25 February 2009, *Stati Uniti v Tissino*, in 92 *Riv Dir Int*, 857.

international law, the status of “fundamental principles of the international legal order”, protected by peremptory norms of general international law which occupy, in the international hierarchy, a higher rank than the “ordinary” customary rules such as the rule on jurisdictional immunity.¹²⁷

In 2012, the ruling of the ICJ in *Germany v Italy*¹²⁸ put a temporary halt to this interpretation of the international customary law on immunity by the Court of Cassation, which temporarily changed its case law to conform with the current state of public international law, as defined by the judges in The Hague.¹²⁹

In 2014, however, the Italian Constitutional Court¹³⁰ reinstated *Ferrini*, by ruling that “in an institutional context characterized by the centrality of human rights ... the denial of judicial protection of fundamental rights of the victims of the crimes at issue, determines the completely disproportionate sacrifice of two supreme principles of the Constitution”, namely the right to judicial protection of fundamental rights (Articles 2 and 24 Constitution). Therefore, in cases where an evident contrast exists between international law, as defined by the ICJ, and those Constitutional provisions, the referral of Article 10, para. 1 of the Constitution cannot operate and the law of immunity is prevented from entering the Italian legal order.

On the basis of this judgment, the most recent case law of the Court of Cassation went back to the *Ferrini* approach, asserting Italian jurisdiction over claims for damages filed against the Federal Republic of Germany in relation to crimes committed by Nazi troops during WWII.¹³¹

The exception carved out by *Ferrini* is not, strictly speaking, limited to violations of international norms of *ius cogens*. While *Tissino*¹³² stated that this exception shall be limited to “ascertained behaviours [of the foreign State] of such seriousness as to constitute *international crimes*”,¹³³ the wording used by the Court of Cassation¹³⁴ in other cases is much broader, referring to crimes “which threaten humanity as a whole and undermine the very foundations of international co-existence”,¹³⁵ and which arise out of “a gross or systematic breach of fundamental rights of individuals”.¹³⁶ While subsequent case law refers to “war crimes” or “crimes against humanity”, the Court has recently held, in an *obiter*, that this

¹²⁷ *Ibid*, §9.2

¹²⁸ ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 3 February 2012

¹²⁹ In the aftermath of the ICJ judgment *but* prior to the subsequent intervention of the Italian Constitutional Court, the Court of Cassation gave effect to the ICJ ruling by declining Italian jurisdiction vis-à-vis claims for compensation directed against the Federal Republic of Germany for acts allegedly committed by the Reich between 1943 and 1945: Court of Cassation, (criminal chamber), Judgement No 32139 of 9 August 2012 and Court of Cassation (s.u), Judgment No 1136 of 21 January 2014.

¹³⁰ Italian Constitutional Court ruling No 238/2014 of 23 October 2014.

¹³¹ Court of Cassation, Judgment No 15812 of 29 July 2016, *Gamba e altri v Federal Republic of Germany*; Court of Cassation, Judgment No 762 of 13 January 2017, PD, CT, CS v Presidenza del Consiglio dei Ministri e Federal Republic of Germany.

¹³² Court of Cassation, Preliminary order on jurisdiction No 4461 of 25 February 2009, *Stati Uniti v Tissino*, in 92 Riv Dir Int, 857.

¹³³ On this basis, the Court recognized that, as opposed to forced labour and deportation, at stake in *Ferrini*, the deployment of nuclear weapons at a military base was conversely not an international crime. The *Ferrini* exception was therefore not triggered.

¹³⁴ Equally broad is the wording used by the Constitutional Court, which merely refers to “acts considered *iure imperii* that violated international law and fundamental human rights” (§3.5)

¹³⁵ Italian Court of Cassation, Judgment No 5044 of 11 March 2004, *Ferrini v Federal Republic of Germany*, refers, on this point, to a ruling of the Hungarian Constitutional Court (No 53 of 12 October 1993): *ibid* §9.

¹³⁶ Reference is made to article 40 of the 2001 Draft articles on the Responsibility of States for Internationally Wrongful Acts: *ibid* §9

exception could equally apply vis-à-vis acts of terrorism¹³⁷, whose characterization as a violation of *ius cogens* remains debated.

Equally unfit seems the characterization of the “*Ferrini* exception” as an instance of universal civil jurisdiction.¹³⁸ In *Ferrini*, what contributed to authorize the exercise of jurisdiction by Italian courts was the fact that the criminal acts took place, at least in part, on the territory of the forum State.¹³⁹ In subsequent case law, however, the Court of Cassation, further extended the scope of this exception to international crimes entirely committed on foreign territory against Italian citizens.¹⁴⁰ Nonetheless, the fact that “a sufficient” connection with Italy seems, in any event, required by the Court, serves to distinguish the *Ferrini* exception from universal civil jurisdiction in its purest form. This found express confirmation in the case law of the Court of Cassation applying the *Ferrini* exception within the framework of the test on indirect jurisdiction set out by article 64§1(a) of the Italian act of PIL.

1.10.2.2 *The application of the Ferrini exception in the test governing the recognition of foreign judgments*

In the recent case *Flatow Francine e altri v Repubblica Islamica dell'Iran*,¹⁴¹ the Italian Court of Cassation had to examine a request for exequatur filed by a group of US plaintiffs seeking the recognition of a US judgment rendered against the Islamic Republic of Iran, awarding damages to the relatives of an American tourist killed, in Israel, by a terrorist attack claimed by Hamas. The Court of Cassation rendered its decision in 2015, *i.e.* after the Constitutional Court's judgment reinstated the *Ferrini* exception in the Italian legal order.

An *obiter* of the *Flatow* decision establishes that the terrorist attack which occurred in Israel can be counted among “the crimes against humanity, insofar as it amounted to a criminal act undertaken within the framework of a systematic and deliberate attack against unarmed civilians, motivated by racial, ethnical political and religious hatred, apt to seriously undermine international peace and security”.¹⁴² As a result, the Islamic Republic of Iran would not have been entitled to jurisdictional immunity, had an Italian court been seized with the substance of the case.

Despite the uncertain and debated status of the prohibition of terrorism as *ius cogens*, this *obiter* in *Flatow* should explicitly allow the triggering of the *Ferrini* exception in the test for the assessment of the indirect jurisdiction of the US court in *Havlish*. It is difficult to imagine that a different characterization will be retained by the Court of Appeal of Rome in relation to the 9/11 attacks, which

¹³⁷ Court of Cassation, Judgment No 21946 of 28 October 2015, *Flatow Francine e altri v Repubblica Islamica dell'Iran*.

¹³⁸ For such a characterization, see ECtHR, Grand Chamber, Judgment of 15 March 2018, *Nait Liman v. Switzerland*, § 75.

¹³⁹ Here, the Court of Cassation went out of its way to distinguish the facts underpinning *Ferrini* from other foreign or international cases where the immunity was granted even vis-à-vis international crimes, particularly *Al-Adsani v United Kingdom*, ECtHR Judgment of 21 November 2001 and *Regina v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet*, [2000] 1 A.C. 147.

¹⁴⁰ C Focarelli, *Diritto Internazionale* (Vol I) (2nd ed, CEDAM 2012), 401.

¹⁴¹ Court of Cassation, Judgment No 21946 of 28 October 2015, *Flatow Francine e altri v Repubblica Islamica dell'Iran*.

¹⁴² *Ibid*, § 5 in fine.

were motivated by similar reasons and resulted in many more fatalities than the Kfar Darom bus attack, at issue in *Flatow*.

In *Flatow*, the Court of Cassation also confirmed that the *Ferrini* case law has no bearings on the second prong of the test required under article 64§1(a). As it is, the ruling of the Constitutional Court of 23 October 2014 *does not* have the effect of setting aside the need to find a viable jurisdictional connection in one or more of the Italian rules of jurisdiction. According to the Court of Cassation, the Constitutional Court's ruling did not intend to dispense with the indirect jurisdiction test and to recognize a universal civil jurisdiction over claims for compensations relating to *delicta imperii*. Rather, it was only meant to prevent the applicability of the customary norm on State immunity vis-à-vis claims relating to the commission, in the forum State, of war crimes and crimes against humanity.¹⁴³

In *Flatow*,¹⁴⁴ none of the rules of jurisdiction set forth by the Italian Act on PIL would have authorized the US court to assert jurisdiction over the dispute giving rise to the judgment whose recognition was sought. In fact, the dispute referred to a harmful event which occurred in Israel, which was the *locus commissi delicti*, under article 5 n 3 of the Brussels Convention, to which the Italian Act on PIL refers,¹⁴⁵ and it involved a defendant who was neither domiciled in the US, nor did it have an authorized representative with capacity to be a party to legal proceedings in that State.¹⁴⁶ The *exequatur* was consequently denied.¹⁴⁷

The situation in *Havlish* is nonetheless considerably different. Here, the US court of origin would certainly have been competent under the *locus commissi delicti* criterion, the terrorist attack at stake having occurred in New York. This is all that is needed to satisfy the test under article 64§1(a). It is worth remembering that the Italian court is prevented from questioning the actual role and involvement of either Iran or these public bodies in the 9/11 attacks, in the light of the prohibition of review on the merits of a foreign judgment.

1.10.3 The lack of service of the Third Amended Complaint from the standpoint of the Italian *exequatur* proceedings

To sum up the argument used by the Luxembourgish court to deny the *exequatur* vis-à-vis the Iranian public bodies: their right of defence has allegedly been violated due to the lack of service of the Third

¹⁴³ *Ibid*, § 6.6

¹⁴⁴ *Ibid*

¹⁴⁵ Albeit localized in the US, the moral damage suffered by the victim's relatives is, according to the Court of Cassation, unsuitable to ground jurisdiction under the Italian rules of jurisdiction, which give exclusive relevance to "direct" damage, to the exclusion of the indirect consequences of the harmful event: *ibid*, § 6.5 *in fine*.

¹⁴⁶ As it would have been required under article 352 of the Italian Act of PIL: cfr *ibid*, § 6.4.

¹⁴⁷ In this respect, the judgment of the Court of Cassation effectively supersedes the approach previously adopted by the Court of Appeal of Rome in that same case, where it granted the *exequatur* to said US judgment on the basis of an interpretation of the "place where the damage occurs" which evidently included the place where the indirect damage materializes: Court of Appeal of Rome, 12 May 2014, *Cittadini statunitensi v Repubblica Islamica dell'Iran*. In that case (reported by M Bordoni, *Esecuzione delle sentenze all'estero e accesso alla giustizia in caso di gravi violazioni dei diritti fondamentali dell'uomo*, in F Francioni, M Gestri, N Ronzitti and T Scovazzi (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'unione europea*, (Giuffrè 2008), 357, 378), the Court of Cassation subsequently voided the *exequatur* granted by the Court of Appeal due to a problem relating to the service of the document instituting the *exequatur* proceedings: cfr *Flatow Francine*, n 137, §1.2.

Amended Complaint, based on a new and broader legal basis. In particular, following a substantive amendment in the US legislation on State immunity, these defendants had not been duly informed that they had become the direct addressees of a federal cause of action which was simply unavailable to the claimants under the previous version of the FSIA, as interpreted by *Cicippio-Puleo*.¹⁴⁸ Due to this lack of information, the US proceedings did not meet, according to the Luxembourgish judge of the *exequatur*, the “standard set out by fundamental conceptions of Luxembourg procedural law in relation to the protection of the rights of the defence and the right to a fair trial”.¹⁴⁹

The Italian Act on PIL also considers non-conformity with procedural public policy as a possible defence against the recognition and enforcement of foreign judgements. Article 64§1(b) requires the Italian court of the *exequatur* to check whether “the act instituting the proceedings was served upon the defendant in accordance with the law of the place where the proceedings took place and essential rights of defence were not violated”. According to the Court of Cassation, this provision entails two independent tests:¹⁵⁰ one relating to the formal regularity of service **(i)** and the other relating to respect, in the State of origin, of the right to a fair trial **(ii)**.

(i) The formal regularity of service

The first test set out by article 64§1(b) requires the Italian judge to check the formal regularity of service of the act instituting the proceedings pursuant to the *lex fori* of the court of origin. In this respect, the Court of Cassation has also specified that an eventual divergence between the conditions set forth by this law and the Italian provisions governing service is without consequence, and cannot prevent, as such, the recognition of the foreign judgment.¹⁵¹

This requirement, which finds no equivalent in Luxembourg’s domestic rules on recognition of judgments, entails that the Court of Appeal of Rome will have to check, *inter alia*, whether the lack of notification of the Third Amended Complaint was effectively justified under rule 5(a)(2) of the US Rules of Federal Procedure. As mentioned above, this provision provides that a party in default, who has never appeared before the court, is not entitled to be served with “a pleading filed after the original complaint”, including an amended complaint or an amended answer. The *Gensler* Commentary explains, in this respect, that formal service can be dispensed with for these downstream pleadings since the parties have already been brought under the court’s power.¹⁵² Nonetheless, rule 5(a)(2) specifies that formal service under rule 4 is still required “as to any pleading asserting new or additional claims” against the party in default. This is because the fact that a party chooses not to appear and defend as to one set of claims does not necessarily signal that the party would not wish to appear and defend against other claims.¹⁵³

¹⁴⁸ *Cicippio-Puleo v Islamic Republic of Iran*, 353 F.3d 1024 (D.C.Cir 2004)

¹⁴⁹ Tribunal d’arrondissement du Luxembourg, Judgment No 177266 of 27 March 2019, §3.2.2.2.1, *in fine*.

¹⁵⁰ Court of Cassation, Judgment No 13662 of 22 July 2004; Court of Cassation, Judgment No 7582 of 26 March 2013

¹⁵¹ Court of Cassation, Judgment No 16978 of 25 July 2006, Court of Cassation, Judgment No 7582 of 26 March 2013; Court of Cassation, Judgment No 9677 of 22 April 2013; Court of Cassation, Judgment No 6276 of 31 March 2016

¹⁵² S. S. Gensler, *Federal rules of civil procedure, rules and commentary* (Reuters 2018), Vol I, 87.

¹⁵³ *Ibid.*

As concerns the Italian *Havlish* proceedings, the essential question will be whether the change in the legal basis of the Third Amended Complaint amounts to a “new or additional claim” vis-à-vis the Iranian public bodies, as understood under rule 5(a)(2) of the Federal Rules of Procedure.

Lacking full access to the documents of the proceedings, it is impossible to formulate even a speculative hypothesis on this point. It seems nonetheless, the Luxembourgish Court identified an overall change in the legal basis – i.e. a change in the law – liable to effect, *in theory*, a considerable change in the nature and extent of the liability of the defendants. Conversely, it is not clear whether, following this legislative amendment, the plaintiff also broadened their claim, notably by asserting “a new claim for relief”. The US court evidently believed that this was not the case, and that service could have been legitimately dispensed with.¹⁵⁴

In practice, article 64 (1)(b) of the Italian Act of Pil puts the Italian court of the *exequatur* in the very awkward position of checking whether the court of origin correctly applied its own rules of civil procedure. It is easy to see why most countries’ *exequatur* procedures have by now abandoned the requirement of formal conformity with the foreign law on service, focusing instead on a more general check of compatibility of the foreign procedure as a whole with the fundamental notions of the requested State vis-à-vis respect of the rights of the defence and the right to a fair trial.

Such a check is required also under the Italian legal order, under the second test set out by article 64§1(b).

(ii) Compliance with the right to be heard and the right to a fair trial

According to the Court of Cassation, even where the court of origin has conformed to the law and formalities relating to service, the *exequatur* could still be denied if there were ascertained breaches of the rights of the defence liable to impinge on fundamental notions of the Italian legal order in relation to the right to a fair trial.¹⁵⁵ Since this second check of the test required under article 64§1(b) is to be made by the Italian court in application of the more familiar principles and values derived from the Italian and EU legal orders, rather than on the basis of an unfamiliar procedural law on service of process, it seems likely that the lack of service of the Third Amendment Complaint will be dealt with by the Italian courts from this second perspective.

In this respect, it seems undisputable that the change in the legal basis that occurred from the Second to the Third Amended Complaint is liable to significantly aggravate, at least in principle, the substantive and procedural position of the defaulting parties. In fact, under the Torture Victim Protection Act – upon which the Second Amended Complaint was based – a foreign nation which “subjects an individual to extrajudicial killing” could have been liable, in a civil action, “for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death”. Conversely, under §1605A, used in the Third Amended Complaint, such foreign nation shall be liable not only

¹⁵⁴ *In Re Terrorist attacks on September 11, 2001, Fiona Havlish and others v Usama Bin Laden and others*, Civil Action No. 03 MDL 1570. Findings of Fact and Conclusions of Law of 22 December 2011, Conclusions of law, point A.12

¹⁵⁵ Court of Cassation, Judgment No 13662 of 22 July 2004 and Tribunale di Arezzo , 07/04/2011

towards a different and potentially wider range of subjects,¹⁵⁶ but also for a wider range of conducts¹⁵⁷ and money damages.¹⁵⁸

In order to assess whether the lack of service of the Third Amended Complaint constitutes a violation of “essential rights of the defence”, capable of triggering the Italian public policy exception, reference should be made to the threshold currently set by national case law, which is heavily influenced by EU law, the case law of the CJEU, and notably by *Gambazzi*.¹⁵⁹

It is common ground that respect for the rights of the defence does not constitute an unfettered prerogative and may be subject to restrictions.¹⁶⁰ It can be subject, in particular, to moderate limitations “in case the judgment whose recognition is sought had been issued against a subject who has had, in any case, the opportunity to actively participate in the process, at least at an earlier stage than the one having resulted in said judgment”.¹⁶¹ It is also commonly held that not any procedural violation can justify a denial of *exequatur*. Rather, the Italian judge should check whether non-compliance with a provision or principle aiming at protection of the defendant’s right to participate in the process is of such a magnitude that it constitutes an infringement of the rights of the defence throughout the whole process.¹⁶² In a recent case concerning the request for *exequatur* of a US judgment,¹⁶³ the Court of Cassation stressed, again, that the breach of the rights of the defence must have been of such gravity as to affect concretely and disproportionately “the very substance” of those rights. Furthermore, it recalled that – in extra-EU cases as in intra-EU cases – a party cannot rely on the *exequatur* proceedings to formulate its defences, but it should rather raise these objections during the trial held in the State of origin, in which it had been duly summoned.¹⁶⁴

In the end, in the *Havlish* case, the Italian judge of the *exequatur* should check whether, despite the regular summons of both Iran and the Iranian State bodies with the Second Amended Complaint and their conscious choice not to take part in those proceedings, the US procedure as a whole violated “the very substance” of the rights of the defence. In addition to the aforementioned change in the legal basis, which was never communicated to the defendants, due regard should also be had to the fact that, according to the Luxembourgish court, the *Findings of Fact and Conclusions of Law* were never

¹⁵⁶ Pursuant to 28 U.S. Code §1605A(c), “a foreign State...shall be liable to (1) a national of the United States, (2) a member of the armed forces, (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment, or (4) the legal representative of a person described in paragraph (1), (2), or (3).

¹⁵⁷ In addition to acts of torture and extrajudicial killing – already covered by the Torture Victim Protection Act, the FSIA permits the grounding of jurisdiction vis-à-vis aircraft sabotage, hostage taking and the provision of material support or resources for such acts.

¹⁵⁸ In an action brought under §1605A, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign State shall be vicariously liable for the acts of its officials, employees, or agents.

¹⁵⁹ CJEU, C-394/07, *Marco Gambazzi v Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company*, 2009 ECR I-02563. The use of the CJEU case law in the identification of the procedural public policy exception has been expressly extended to non-EU judgments by the Court of Cassation, Judgment No 16601 of 2017, § 2.2

¹⁶⁰ Cfr Tribunale di Milano, 25/10/2018, n. 10773; Court of Cassation, Judgment No. 17519 of 3 September 2015.

¹⁶¹ *Ibid.*

¹⁶² Court of Cassation, Judgment No. 17519 of 3 September 2015.

¹⁶³ Court of Cassation, Judgment No 16601 of 2017, § 2.3.

¹⁶⁴ *Ibid.*

served upon the defendant after the conclusion of the US proceedings.¹⁶⁵ This document was considered by that court as essential to understand both the US procedure and the resulting judgments of October 2012 (which were, conversely, duly served on the defendants). If it is true that a party cannot rely on the *exequatur* procedure to file objections which should have been properly filed before the court of origin, the fact remains that this party should also be given an effective possibility to understand and challenge the judgement in the State of origin.

Again, it is impossible to make a plausible prognosis as to the possible concrete outcome of the Italian proceedings on this point. While the *Findings of Fact and Conclusions of Law* are publicly available, the 2012 judgments are not. It will be for the Italian court to determine what decisions were actually notified to the defendants and whether the documents served were, content-wise, sufficient to allow these defendants to challenge the decision in the State of origin.

Finally, it is worth noting that, were a fundamental breach of essential rights of the defence detected by the Italian judge of the *exequatur*, it would determine the refusal of recognition of the *Havlish* judgment *not only* vis-à-vis the Iranian public bodies – as it did in Luxembourg¹⁶⁶ – but also vis-à-vis the Iranian State and Ministries. In fact, it is common ground, that neither the Third Amended Complaint nor the *Findings of Fact and Conclusion of Law* were ever notified to *any* of the defaulting parties. In Luxembourg, the lack of service on the Iranian State parties merited no further investigation, the application directed against them having already been dismissed on the basis of immunity. In Italy, however, where the *Ferrini* exception prevents an analogous solution, the effective respect for the rights of defence of said party must be duly assessed by the judge of the *exequatur*.

1.10.4 Residual issues to be dealt with by the Italian Court: substantive public policy

If the US plaintiffs are effectively trying to enforce, in Italy, the part of the *Havlish* judgments awarding *punitive damages* – amounting to nearly 4.7 billion USD, as opposed to the 1.3 billion awarded as compensatory damage – the Italian *exequatur* procedure must assess their conformity with Italian substantive public policy according to the principles set out by the Court of Cassation in 2017.¹⁶⁷

¹⁶⁵ The decision of the US court was scattered over time and delivered through several documents: an *order and judgment* of 22 December 2011, granting the Plaintiffs' Motion for Judgement by Default Against Sovereign Defendants and entering a final judgement on liability in favour of all Plaintiffs and against all Sovereign Defendants; the *Findings of Fact and Conclusions of Law* of 22 December 2011, identified as the reasoning of the subsequent judgment of 12 October 2012 (object of the *exequatur*). This judgment awards specific amounts of damages in favour of the plaintiffs, which were previously fixed in the *Memorandum decision and order* of 3 October 2012. In turn, the reasoning and motivation of this order is to be found in the *Report and Recommendation to the Honorable George B. DANIELS* of 30 July 2012. According to the Luxembourgish Court, these documents should be considered as “a single and inseparable” whole, whose integral knowledge is essential to the understanding of the American procedure in order to preserve the rights of the defendants: cfr Judgment No.177266 of 27 March 2019, p 131.

¹⁶⁶ In the Luxembourgish *exequatur* proceedings a distinction was made between two categories of foreign actors. *Vis-à-vis* the State of Iran and its governmental departments, recognition of the US judgment was denied on the basis of the international custom on foreign State immunities, determining the inadmissibility (*irrecevabilité*) of the application for *exequatur*. Conversely, *vis-à-vis* the Iranian State-owned public bodies, the issue of immunity was never considered, the denial of *exequatur* having depended, rather, on a fundamental violation of the rights of the defence, amounting to a breach of Luxembourgish procedural public policy.

¹⁶⁷ Court of Cassation, Judgment No 16601 of 2017, § 7.

This Court established, firstly, the need for an express provision of law allowing the Court of origin to award punitive damages in relation to a given tortious conduct. In particular, there must be precise boundaries of the case (typicality) and a clear definition of the quantitative limits of the penalties that can be imposed (predictability). Secondly, it also required that the general principle of proportionality between crime and penalties, enshrined in article 49 of the Italian constitution, be respected. Its application vis-à-vis punitive damages entails, according to the Court of Cassation, that there should be proportionality between reparatory-compensatory damages and punitive damages, as well as between the latter and the nature and effects of tortious conduct.

In the 2017 case,¹⁶⁸ where the Court of Cassation accepted in principle the possibility of recognizing punitive damages, it was noted that the US practice “was gradually shifting away from the so-called grossly excessive damages”.¹⁶⁹ However, this is arguably not the case for punitive damages awarded within the framework of the STT exception.¹⁷⁰

In the freezing order rendered in the *Havlish* case, the Court of Appeal of Rome deemed that the punitive damages awarded therein were *prima facie* compliant with Italian public policy, the requirement of typicality being met by virtue of the provision enshrined in 28 U.S. Code §1605 A. Concerning the proportionality, that Court was satisfied by the fact that the ratio between punitive and compensatory damages was 3.44, “which corresponds, according to the *Memorandum decision and Order*, to the standard ratio applicable in cases of terrorist attacks”¹⁷¹. It must be noted, however, that the fact that this relationship of proportionality is considered as “standard” in the US does not necessarily make it compliant with proportionality as understood for the purposes of article 49 of the Italian Constitution. In rendering its decision in *Havlish*, the Court of Appeal of Rome should therefore duly elaborate on this point, a task which might admittedly be complicated by the scarcity of case law on punitive damages in the Italian legal order.

1.11 The English proceedings

In line with the common law practice concerning the recognition and enforcement of foreign judgments, the claimants in *Havlish* are currently seeking to register the US judgment as a judgment of an English court and to have it enforced on assets of the defendants within the English jurisdiction.¹⁷²

The English strand of the *Havlish* saga has been characterised by serious difficulties in instituting the exequatur proceedings, due to the Iranian Ministry of Foreign Affairs’ systematic refusal to accept service of process (section 3.2.1). As for the potential future unfolding of these proceedings, a recent

¹⁶⁸ The case concerned a US judgment relating to a settlement between the producer of defective helmets and the victim of a sport motorcycle accident, awarding 1 million euros damages to the victim. According to the respondent, that amount was excessive and abnormal, and clearly punitive in nature.

¹⁶⁹ Court of Cassation, Judgment No 16601 of 2017, § 7.

¹⁷⁰ See E Perot Bissell V and J R Schottenfeld, ‘Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act’ (2018) 127 *Yale Law Journal* 1890.

¹⁷¹ Court of Appeal of Rome, Order No 8714/17 of 14 June 2018 §4.

¹⁷² Cfr Fiona Havlish Et Al. v Islamic Republic of Iran Et Al. [2018] EWHC 1478 (Comm) (08 June 2018), §4.

judgment of the High Court¹⁷³ might shed some light on several aspects of the assessment required from an English court when dealing with a request for registration of a foreign judgment rendered against a sovereign State. (section 3.2.2)

1.11.1 The state of the proceedings as of December 2019

As of December 2019, the English procedure has resulted solely in an order pursuant to CPR 6.16(1), which vests the court with the power to dispense with the service of a claim form in proven exceptional circumstances. In *Havlish*, these exceptional circumstances consisted of, according to the High Court, the absolute inability of the Foreign & Commonwealth Office (FCO) to serve the appropriate documents on the defendants in Iran in the normal way, as well as the lack of any future realistic prospect of successful service in such a way.

Having regard to the file of the case and of previous experience in similar cases,¹⁷⁴ the High Court was persuaded of the existence of an established practice of the Iranian Government not to allow foreign embassies to have contact with government departments or authorities in Iran, except as arranged by the Ministry of Foreign Affairs (MFA). This, in turn, seems to adhere to “a policy of resisting service in cases which it believes to be against the interests of the Islamic Republic of Iran” and to be determined to obstruct service of such papers, notably in respect to cases which appear “politically motivated”.¹⁷⁵ On this basis, the High Court deemed the “exceptional circumstances required under CPR 6.16(1) fulfilled.

This finding did not however entail, *per se*, any obligation for the court to dispense with service.¹⁷⁶ To the contrary, the High Court considered that it retained considerable discretion on this point, which it exercised having regard to two different circumstances.

¹⁷³ Estate of Michael Heiser Et. Al v Islamic Republic of Iran Et Al. [2019] EWHC 2074 (QB)

¹⁷⁴ Similar problems arose, *inter alia*, in the case Estate of Michael Heiser Et. Al v Islamic Republic of Iran Et Al. [2019] EWHC 2074 (QB) § 16 ff. Here, service was finally effectively accomplished through a non-resident UK Chargé d'affaires during a visit of a UK delegation to the Iranian MFA in Tehran. The documents were handed over to the Iranian MFA by delivery in person to the Iranian non-resident Chargé d'affaires at the end of a very short meeting in a rather informal way. This person accepted the bundle of documents and put it into his vehicle. A certificate of service was consequently delivered by the FCO. Later on in the procedure, however, this service was rejected by the MFA, on the basis that staff are not generally permitted to receive legal documents and that the only person authorized to do so was the Head of the MFA's Legal department. The Certificate of Service previously delivered was consequently nullified. Despite these difficulties, in that case the High Court established that the documents were “transmitted” within the MFA compound, through the FCO and “received” by the Iranian Ministry as required by section 12 of the Sovereign Immunity Act 1978 (§218). Consequently, the High Court found that there was good service of proceedings.

¹⁷⁵ Cfr Fiona Havlish Et Al. v Islamic Republic of Iran Et Al. [2018] EWHC 1478 (Comm) (08 June 2018), § 6-13

¹⁷⁶ It is worth noting that, until recent times, there was considerable disagreement in the first instance authorities as to whether the court does have power to dispense with service of a claim form on a foreign State, as it would be contrary to the mandatory terms of section 12 SIA. While *Certain Underwriters at Lloyd's of London v Syrian Arab Republic* [2018] EWHC 385 (Comm), *Havlish v Islamic Republic of Iran* [2018] EWHC 1478 and J Teare in *General Dynamics United Kingdom Limited v State of Libya* [2018] EWHC 1912 (Comm) (“General Dynamics WN”) admit the possible use of this power vis-à-vis a foreign State, the opposite conclusion was reached in *General Dynamics United Kingdom Ltd v Libya* [2019] EWHC 64 (Comm) (18 January 2019) by LJ Males. More recently, the High Court confirmed, in *Qatar National Bank (QPSC) v Government of Eritrea & Anor* [2019] EWHC 1601 (Ch) (27 June 2019), that the Court does have power to dispense with service of the claim form in a case against a foreign State. But see *infra* as concerns the recent overruling of these authorities by the Court of Appeal.

On the one hand, it remarked that a refusal to grant the relief sought by the claimants would have “deprive[d] the claimants of any recourse in the proceedings and allow the defendants to avoid the proceedings without any substantive basis for doing so, *de facto* granting them absolute immunity from suit.”¹⁷⁷

On the other hand, the Court stressed that there was reason to believe that the defendants were in any case aware of the US judgment, given that there were press reports indicating that an Iranian Foreign Ministry spokesman had publicly commented on the U.S. *Havlish* judgment, calling it “clumsy scenario-making” by the United States. Moreover, the defendants should also have been aware of the ongoing efforts of the claimants to recover amounts due under that judgment in countries where they believe they may find seizable assets, in light of the formal appearances made on 3 March 2016 and 26 June 2017 in proceedings before the Luxembourg courts. Furthermore, the central bank of Iran, and a judgment debtor of the US *Havlish* judgment, had been served with proceedings before the Italian courts in which the claimants were also seeking to enforce the US judgment. Since these circumstances alone did not suggest that the defendant was specifically aware of the English proceedings, the Court granted the order dispensing from service under the condition that the claimants took certain further steps to bring these proceedings to the attention of the defendants.¹⁷⁸

However, in July 2019 the Court of Appeal’s ruling in *General Dynamics* invalidated the High Court’s reasoning in *Havlish*.¹⁷⁹ In an obiter, it clarified that, where a document is required to be served for instituting proceedings against a State under section 12 of the State Immunity Act 1978, there is neither power nor discretion to dispense with service of that document on the State. The requirements of section 12 of the SIA are consequently to be regarded as mandatory. The Court of Appeal also specified that the (obiter) decision to the contrary in *Certain Underwriters at Lloyd’s of London v Syrian Arab Republic*¹⁸⁰ cannot be considered good law. Even though *Havlish* is not specifically mentioned in this decision, it must now be equally considered bad law.

1.11.2 The possible unfolding of the English *Havlish* proceedings: lessons to be learnt from *Estate of Michael Heiser Et. Al v Islamic Republic of Iran*¹⁸¹

¹⁷⁷ *Ibid*, § 28

¹⁷⁸ Notably, they should email the claim form and any other necessary documents to the Iranian Ministry of Foreign Affairs in Iran at the email address publicly available on the ministry’s website; instruct a courier to deliver the necessary documents to the Iranian Ministry of Foreign Affairs at its stated address on its website in Tehran; and finally, effect personal service and transmission by email to the Luxembourg lawyers who were representing the defendants in the Luxembourg proceedings.

¹⁷⁹ *General Dynamics United Kingdom Ltd v The State of Libya*[2019] EWCA Civ 1110 § 63.

¹⁸⁰ [2018] EWHC 385 (Comm)

¹⁸¹ *Estate of Michael Heiser Et. Al v Islamic Republic of Iran Et Al*. [2019] EWHC 2074 (QB). In this case, after having successfully effected the service of process (see note 174), to which the Iranian defendants never reacted, the claimants obtained, on 23 July 2014, permission to enter default judgment in the sum of \$664,112,636.54 (including interest to date) and to serve it out of the jurisdiction. This default judgment would have become effective and enforceable against the assets of Iran in England and Wales after the expiry of two months from the date of service upon the defendants, who had liberty to apply to set aside or vary that order by no later than two months after the date of service of the documents. Iran alleged having become aware of the judgment only because the claimants’ leading counsel had published some details of the case on his website. Iran consequently issued the set aside application in October 2014. In *Estate of Michael Heiser Et. Al*, Iran is therefore asking not only that the default judgment issued against it to be set aside, but also for the claims in the proceedings to be dismissed, as well as a decision on costs.

While the *exequatur* proceedings concerning the US *Havlish* judgment are still ongoing, in July 2019 the English High Court rendered a judgment on the registration of 12 judgments of the US District Court of Columbia, concerning several terrorist incidents in which US citizens were killed or seriously injured. The Government of Iran was found to have knowingly provided assistance by way of resources to the terrorist organisations which perpetrated the attacks.

This case presents evident similarities to the *Havlish* case (notably that the US court equally exercised jurisdiction against Iran and its emanations on the basis of Section 1605A FSIA) and one main difference: while the terrorist attack at issue in *Havlish* occurred in the US, 11 of the 12 judgments at issue in *Estate of Michael Heiser Et. Al* concern terrorist incidents which occurred in a number of countries in the Middle East. One of those US judgments, *Acosta*,¹⁸² concerned however a shooting incident in New York carried out by an individual who was allegedly acting in conspiracy with the Iranian State.

Because of these similarities, and despite this partial difference concerning the *locus commissi delicti*, the reasoning developed in *Estate of Michael Heiser Et. Al* may assist in formulating some cautious speculations concerning the future developments of the English *Havlish* procedure. There are, in particular five different propositions that could be drawn from that case.

i. Section 31 of the Civil Jurisdiction and Judgments Act 1982 and Section 5 of the State Immunity Act 1978 will provide the relevant legal framework

Estate of Michael Heiser Et Al confirms, at the outset, that the registration, in England and Wales, of US judgments rendered against a foreign State depends on the fulfilment of the *cumulative* requirements set out by section 31 of the Civil Jurisdiction and Judgments Act 1982. This provision reads as follows:

(1) A judgement given by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognised and enforced in the United Kingdom if, and only if—

a) it would be so recognised and enforced if it had not been given against a state; **and**

b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978.

The requirement set out under letter a) shall be assessed according to English common law principles of private international law, and notably of rule 43 of Dicey, Morris & Collins.¹⁸³ This rule requires either that the person against whom the judgment was given was, at the time the proceedings were instituted, “present” in the foreign country having delivered that judgment or that said person has submitted to the jurisdiction of that court or voluntarily appeared in the proceedings before that court.¹⁸⁴

Estate of Michael Heiser Et. Al clarifies, for the first time,¹⁸⁵ that this general principle requiring the presence of the defendant in the State of origin of the judgment applies also in relation to judgments

¹⁸² *Acosta Et Al v The Islamic Republic of Iran Et Al*, Civil Action No. 06-745 (RCL)

¹⁸³ 15th edition (2012)

¹⁸⁴ Cfr *Estate of Michael Heiser Et. Al v Islamic Republic of Iran Et Al*. [2019] EWHC 2074 (QB). §60

¹⁸⁵ There was no previous authority on the application of the requirement of presence in relation to States: *Ibid*, § 67

rendered against a foreign State, thus discarding the claimant's argument whereby it would be practically impossible, for a State, to be legally present in another State.¹⁸⁶ According to the High Court, conversely, there is no good reason to expand rule 43 of Dicey, Morris & Collins so as not to require presence at all. The requirement set out under letter (a) requires proving that Iran had established and maintained a fixed physical presence for the purposes of carrying on State business in the US (e.g. an embassy).

Concerning the requirement under section 31(1) (b), *Estate of Michael Heiser* confirmed that the relevant exception to State immunity shall be found in section 5 of the State Immunity Act 1978. This provides that a State is not immune in regards to proceedings concerning, inter alia, death or personal injury caused by an act or omission of that State in the United Kingdom. For the purposes of its application in proceedings relating to the recognition and enforcement of foreign judgments, the expression "United Kingdom" shall be substituted by a reference to the State of origin, in this case the US. Read in this way, letter b) of section 31(1) (b) expresses the basic principle of reciprocity whereby the English court should recognise the jurisdiction of the foreign court if the situation is such that, mutatis mutandi, it would have set aside the immunity and exercised jurisdiction over a similar case. The recognition, in England, of a US judgment against Iran requires therefore a death or personal injury caused by an act or omission of Iran in the United States.¹⁸⁷

ii. Neither Article 6 ECHR nor the fact that the judgment concerns "terrorist acts" impact on the interpretation of section 31 (1) (b) of the 1982 Act and of section 5 of the 1978 State Immunity Act.

Since 11 of the 12 US judgments at stake in *Estate of Michael Heiser* concerned deaths or personal injuries that occurred outside the territory of the US, the claimants were advocating that section 31 (1) (b) of the 1982 Act and section 5 of the 1978 Act should be interpreted in such an (extensive) way as to comply with article 6 ECHR. The argument was that the UK would be in breach of the ECHR if the court granted immunity to the defendant in circumstances where that is not required by international law. *Estate of Michael Heiser* notes, in this respect, that section 5 already reduces the immunity for an inherently sovereign or governmental act provided by customary international law. "It therefore increases¹⁸⁸ the right of access to the court beyond that mandated by international law". The Court concluded that, while article 6 ECHR is engaged for the purpose of examining whether the conditions for enforcing a judgment in the UK are met, it does not require them to be construed more broadly than might otherwise be the case.

Moreover, the High Court clarified that the nature of the tort allegedly committed by the foreign State, a terrorist act, does not warrant a broader interpretation of the State immunity exception under section 5 of the 1978 Act.¹⁸⁹

iii. In the English Havlish proceedings, the existence of an act or omission of the defendant in the US should be rather straightforward

As mentioned above, the main interpretive difficulty, in *Estate of Michael Heiser*, was to consider whether a terrorist act that occurred in the Middle East could give rise to "death or personal injury" on

¹⁸⁶ Ibid, § 70

¹⁸⁷ Ibid, §104

¹⁸⁸ Underlined in the text of the judgment.

¹⁸⁹ *Estate of Michael Heiser Et. Al v Islamic Republic of Iran Et Al.* [2019] EWHC 2074 (QB). §156-160. For a different approach under Italian law, see section

US territory for the purpose of section 31 (1) (b) of the 1982 Act and of section 5 of the 1978 Act. None of the theories advanced by the claimants – relying on the qualification of acts of terrorists as composite acts, continuing offences or acts against a US target¹⁹⁰ – were accepted by the Court. However, in relation to the one US judgment concerning a terrorist act that occurred in New York¹⁹¹ the High Court had no problems in deeming the requirements set forth by section 31 (1) (b) of the 1982 Act and section 5 of the 1978 Act satisfied.¹⁹²

Insofar as they concern the terrorist attacks of 11th of September 2001, the *Havlish* judgments should not be particularly problematic as concerns the requirement of a death or an injury in the US. It is worth stressing, however, that the English court must also be satisfied that the acts in question are “acts of the defendants”, *i.e.* of the State of Iran, its emanations and the other parties to those judgments.

If the (factual) findings of the US court will be of fundamental importance for this purpose, the fact remains that the benchmark used by the English court in assessing the necessary and sufficient involvement of the defendants in said attacks will be set out by English law. The principles of joint tortfeasance elaborated by Lord Neuberger¹⁹³ will likely guide the English court’s assessment on this point, as they did in *Estate of Michael Heiser Et Al*.¹⁹⁴

iv. In the English Havlish proceedings, the requirement of presence of the defendants in the US will be of fundamental importance

In *Havlish*, as in *Estate of Michael Heiser Et Al*, (one of) the deal breaker(s) for the registration of the US judgment in England will likely be the requirement of presence under section 31 (1) (a), read in conjunction with rule 43 of Dicey, Morris & Collins.

To substantiate the jurisdiction of the US over Iran, the claimants in *Estate of Michael Heiser Et Al* argued that Iran was “present” in the US through two legal entities incorporated in New York, the Alavi Foundation (a charitable association with religious, scientific, literary and educational purposes), and the company “650 Fifth Avenue”. A prior judgment of the Southern District Court of New York had found, in fact, that these entities were agents or instrumentalities of Iran under the US Terrorism Risk Insurance Act 2002.¹⁹⁵ According to the claimants, these findings were admissible evidence¹⁹⁶ before the English courts.

According to the High Court, however, the findings of another court can be admissible evidence solely at an interlocutory stage, for the purpose of assessing whether there is a serious issue to be tried. Noting that *Estate of Michael Heiser Et Al* had already progressed well past that interlocutory stage, the

¹⁹⁰ Ibid, § 140.

¹⁹¹ *Acosta Et Al v The Islamic Republic of Iran Et Al*, Civil Action No. 06-745 (RCL).

¹⁹² *Estate of Michael Heiser Et Al v Islamic Republic of Iran Et Al*. [2019] EWHC 2074 (QB). §167: “It is agreed that there was an act in U.S. for the purpose of section 5”. Having additionally established that the act in question was to be considered as act of the defendants, the Court concludes that the requirements of section 31(1)(b) are satisfied in the *Acosta* case (§174).

¹⁹³ *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, § 55-60

¹⁹⁴ §167-172

¹⁹⁵ *Kirschenbaum et Al v 650 Fifth Avenue*, 257 F.Supp.3d 463 (S.D.N.Y 2017)

¹⁹⁶ Relying on *Sabbagh v Khoury & ors* [2014] EWHC 3233 (Comm)§ 202-207

High Court could not rely on said US judgment and lacked, consequently, sufficient evidence to displace the strong presumption of the separate corporate status of the two aforementioned entities.

Another line of argument set forth by the claimants aimed at establishing Iran's presence in the US by virtue of its permanent mission to the UN's headquarters in New York. These submissions, which raise many questions of facts and law,¹⁹⁷ were never properly assessed by the High Court as to the substance, given that they were dismissed on the basis of tardiness.¹⁹⁸

In *Havlish*, these questions, together with the factual difficulties of proving Iran's presence in the US, will likely resurface. It is worth stressing, however, that – as recognised by Mr Justice Steward himself in *Estate of Michael Heiser Et Al* – there is no prior authority relating to the assessment of the requirement of presence vis-à-vis a State, and that the High Court deciding on *Havlish* will not be technically bound to follow *Estate of Michael Heiser Et Al* on this point.

v. Beware of service by e-mail within the framework of the 1978 State Immunity Act.

One final lesson which can be drawn from *Estate of Michael Heiser Et Al* concerns the service of process. It clarified that e-mails are not a valid form of service under section 12 (1) of the State Immunity Act 1978, concerning service of process and judgments in default of appearance.

This provision requires in fact that any writ or other document instituting proceedings against a State shall be *transmitted* through the Foreign and Commonwealth Office and *received* by the Ministry of Foreign Affairs of the other State concerned. "Receiving" implies, according to the High Court, some act of volition which is absent in the case of e-mails, insofar as they allow for no possibility of refusing to receive documents.

1.11.3 The defence based on a violation of the rights of the defence before English courts

Even where all the requirements under section 31 of the Civil Jurisdiction and Judgments Act 1982 are satisfied, common law recognizes a limited number of defences against the recognition and enforcement of a foreign judgment in England. The problem ascertained by the Luxembourgish Court, concerning the service of the Third Amended Complaint upon the Defendant, could still be raised before the English High Court under the defence of contrariety to natural justice.¹⁹⁹

Cheshire, North & Fawcett recognise that it is difficult to trace delicate gradations of injustice so as to reach a definite point at which it deserves to be called a negation of natural justice. They also acknowledge, however, that concerns over due notice have arisen in situations where jurisdiction has been exercised over absent defendants, as happened in *Havlish*. In this respect, they clarify that

the English courts are reluctant to criticize the procedural rules of foreign courts on this matter and will not measure their fairness by reference to the English equivalents, but, if the mode of citation has been manifestly insufficient as judged by any civilized standard, they will not hesitate

¹⁹⁷ See the considerations developed by Mr Justice Steward in *Michael, Estate of & Ors v The Islamic Republic of Iran & Anor* [2019] EWHC 2073 (QB) (31 July 2019) § 52

¹⁹⁸ *Estate of Michael Heiser Et Al v Islamic Republic of Iran Et Al*. [2019] EWHC 2074 (QB). §89-90

¹⁹⁹ Cheshire, North & Fawcett, *Private International Law*, 14th ed, (Oxford 2008), 563.

to stigmatise the judgment as repugnant to natural justice and for that reason to treat it as nullity.²⁰⁰

It is further specified that due notice is concerned with notice of the proceedings, not of the steps necessary to defend those proceedings, and that if the defendant had knowledge of the foreign proceedings, the lack of due notice defence cannot be used. The question remains as to whether the same conclusion could be reached in relation to defendants who were certainly aware of the proceedings, having been previously served with a Complaint, but were unaware of subsequent major changes in the legal basis of the claim.

1.12 Concluding remarks: an emerging comity between the courts of European Union Countries?

The several European judgments which have dealt, up to the present, with the recognition and enforcement of the US *Havlish* judgments evidence that European courts are generally well aware of each other's decisions on the matter. Particularly revealing are, in this sense, the judgments rendered by the English High Court. *Havlish*²⁰¹ explicitly refers to both the Italian and the Luxembourgish procedures, whereas *Estate of Michael Heiser Et Al* mentions a number of decisions of EU Member States where US judgments arising from Iranian State sponsored terrorism have not been enforced. The High Court notes that the outcome of the cases brought to its attention has been a consistent refusal to enforce, a circumstance which "gives some support to Iran's submissions of comity between the courts of European Union countries".²⁰²

The High Court itself recognises, however, that the reasons for refusing recognition and enforcement have differed in the several countries. As it is, the judgment refers both to the Luxembourgish judgment on *Havlish* (§164), where recognition and enforcement was refused due to the interpretation of the scope of the available exception to the custom of State immunity, and some Italian cases (among which *Flatow*) where the refusal was not determined by the law of State immunity but by the ordinary indirect jurisdiction test. A veritable "comity" between European courts seems therefore difficult to detect, at least as concerns the interpretation of the authorised exceptions to State immunity.

However, these cases serve to confirm, on the one hand, that the wide breadth of the US STT exception tends to create problems for those States (e.g. Italy and Luxembourg) which abide to strict bilateralisation of domestic rules of jurisdiction to assess the indirect jurisdiction of the court of origin. On the other hand, they also confirm that the Member States' courts often face similar problems, e.g. as concerns the difficulties in performing service, and take stock of the solutions devised by their European counterparts to address the issue.

²⁰⁰ Ibid, 564.

²⁰¹ Fiona Havlish Et Al. v Islamic Republic of Iran Et Al. [2018] EWHC 1478 (Comm) (08 June 2018), § 24 and 25

²⁰² Estate of Michael Heiser Et. Al v Islamic Republic of Iran Et Al. [2019] EWHC 2074 (QB) § 161 ff.



Max Planck Institute
LUXEMBOURG
for Procedural Law

4, rue Alphonse Weicker
L-2721 Luxembourg
www.mpi.lu