

Enforceability of foreign judgments: State immunity from jurisdiction and jus cogens (Ruling n° 443 – 21-19.766)

28/06/2023



Ruling No. 443

Dismissal

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE FIRST CIVIL CHAMBER OF THE COUR DE CASSATION (COURT OF CASSATION) OF 28 JUNE 2023

Mr [P] [X], of address at [Address 1] (USA), acting both in a personal capacity and as administrator of the estate of [D] [X] and on behalf of the heirs of [D] [X], lodged appeal No. U 21-19.766 against the ruling delivered on 16 March 2021 by the *cour d'appel* (Court of Appeal) of Paris (Section 3, Chamber 5) in the dispute between him and the Islamic Republic of Iran, represented by its Minister for Foreign Affairs, whose head office is the Ministry of Foreign Affairs [Address 2], [Locality 3] (Islamic Republic of Iran), respondent in the quashing.

The Islamic Republic of Iran lodged a possible cross-appeal against the same ruling.

In support of his main appeal action, the appellant relies on one single ground of quashing.

The case file was sent to the Prosecutor-General.

On the report of Mr Ancel, judge, the written and oral observations of SCP Spinosi, lawyer of Mr [X], and SCP Foussard and Froger, lawyers of the Islamic Republic of Iran, and the advisory opinion of Mr Poirret, first advocate-general, following debate in the public hearing of 23 May 2023 in the presence of Mr Chauvin, President, Mr Ancel, reporting judge, Ms Guihal, elder judge, Messrs Hascher, Bruyère, judges, Ms Kloda, Ms Dumas, Ms Champ, Ms Robin-Raschel, judge-referees, Mr Poirret, first advocate-general, and Ms Vignes, Chamber Registrar,

the First Civil Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after debate in accordance with the law, has delivered the present ruling.

Account of the dispute

Facts and procedure

1. According to the ruling under appeal (Paris, 16 March 2021), by judgment of 11 March 1998, the United States Federal Court for the District of Columbia ordered the Islamic Republic of Iran, the Iranian Ministry of Information and Security, the Ayatollah [C] [S], Mr [T] [U] and Mr [Y] to pay Mr [P] [X], acting in a personal capacity and on behalf of the estate, various sums as compensation for damages resulting from the death in Israel of his daughter [D] following an attack with a vehicle loaded with explosives claimed by a faction of the Palestinian Islamic Jihad. 2. Mr [X] sued the Islamic Republic of Iran to obtain an exequatur for this decision in France.

Reviewing pleas

Examination of the pleas Concerning the plea in the main appeal Statement of plea

3. Mr [X] objects to the ruling that declares the Islamic Republic of Iran's plea for immunity from jurisdiction admissible and well founded, and that declares his request for an exequatur consequently inadmissible, whereas:

"(1) in the first place, the exequatur judge, who merely introduces a foreign decision into the French legal order, cannot make a substantive review of a foreign decision; unless he disregards the scope of his power, said judge must limit himself to verifying the jurisdiction of the court that issued the decision, the compliance of that decision with international public order and the absence of fraud, and he cannot overstep that function to reassess the admissibility or merits of the applicant's action that have been upheld by the foreign judge; in this case, by holding—in order to judge the Islamic Republic of Iran's plea for immunity from jurisdiction admissible and well founded—that "the fact that the American judge himself set aside Iran's immunity from jurisdiction—under his own law—in the decision for which an exequatur is being sought cannot prevent the French judge from exercising his judicial power to assess whether the plea for immunity from jurisdiction lodged with him by the Islamic Republic of Iran is admissible and well founded, the *cour d'appel* (Court of Appeal), which reassessed the admissibility and merits of said immunity, the judgment for which an exequatur was being sought having specifically ruled that it could not be invoked against the applicant, disregarded the principle of prohibition of review of the merits of foreign decisions and, consequently, exceeded its judicial power and infringed Article 509 of the Code of Civil Procedure;

(2) in second place, and in any event, foreign States benefit from immunity from jurisdiction only insofar as the act giving rise to the dispute contributes, by its very nature or purpose, to the exercise of the sovereignty of the State.; the participation of a State in the preparation and execution of acts of terrorism cannot be characterised as an act of sovereignty; in this case, by holding the Islamic Republic of Iran's plea for immunity from jurisdiction admissible and well founded when it had previously found that the judgment for which an exequatur was sought had "condemned the Islamic Republic of Iran and other defendants jointly and severally to pay damages to Mr [X] on the grounds that they provided material resources and assistance to a terrorist group that murdered [D] [X]", the *cour d'appel* (Court of Appeal) failed to apply the legal consequences of its own findings and infringed the principles governing the immunity from jurisdiction of foreign States;

(3) in third place, and in any event, the prohibition of acts of terrorism constitutes a peremptory rule of international law whose very nature must absolutely preclude the plea for immunity from jurisdiction by a recognised State liable to have actively participated in such acts; in this case, by holding the Islamic Republic of Iran's plea for immunity from jurisdiction admissible and well founded when it had previously found that the judgment for which an exequatur was sought had "condemned the Islamic Republic of Iran and other defendants jointly and severally to pay damages to Mr [X] on the grounds that they provided material resources and assistance to a terrorist group that murdered [D] [X]", the *cour d'appel* (Court of Appeal) failed to draw the conclusions from its own findings and infringed the principles governing the immunity from jurisdiction of foreign States;

(4) in fourth place, the right of access to a court provided in Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms may be restricted by the principle of the immunity of foreign States from jurisdiction only if said limitation is strictly proportionate to the objective pursued; the impossibility for a party that has obtained the final and irrevocable conviction of a foreign State for its direct involvement in a terrorist attack to obtain recognition of such conviction in France constitutes a manifestly disproportionate infringement of the right of access to a court; in this case, by holding the Islamic Republic of Iran's plea for immunity from jurisdiction admissible when it had found that the judgement for which an exequatur was sought had "condemned the Islamic Republic of Iran and other defendants jointly and severally to pay damages to Mr [X] on the grounds that they provided material resources and assistance to a terrorist group that murdered [D] [X]", the *cour d'appel* (Court of Appeal) failed to apply the legal consequences of its own findings and infringed Article 6(1) of the European Convention;

(5) in fifth place, the judge has the obligation not to alter the nature of the documents in the proceedings; in this case, by holding—in order to judge the Islamic Republic of Iran's plea for immunity from jurisdiction admissible and well founded—that "the circumstances of the case do not allow for an exception to this immunity, whereas the order for the State of Iran to pay damages delivered by the American court is not based either on a declaration of criminal liability of the Iranian State [], or even on proof of the direct involvement of the Iranian State or its agents in the suicide bomb attack of which [D] [X] was a victim", when the judgement of 11 March 1998 for which an exequatur was sought expressly provided that "the explosion was caused by a bomb that was driven deliberately on a bus by a member of the faction of

[G] of the Palestinian Islamic Jihad acting under instructions given by the defendants, *[inter alia]* the Islamic Republic of Iran" (Exhibit 5(22)), the *cour d'appel* (Court of Appeal) altered the nature of the terms of the judgment of 11 March 1998 in violation of the principle whereby the judge has the obligation not to alter the nature of the documents in the proceedings."

Statement of reasons

Court's response

4. First of all, it follows from Article 509 of the Code of Civil Procedure that, in order to grant an exequatur in the absence of an international agreement, the French judge must verify the admissibility of the action and then ensure fulfilment of three conditions: indirect jurisdiction of the foreign judge based on the connection of the dispute to the court receiving the referral; compliance of substance and procedure with international public order; and the absence of fraud.⁵ The *cour d'appel* (Court of Appeal) rightly stated that, in an exequatur proceeding, the French judge must refrain from reviewing the merits of the judgment delivered by the foreign court, whose international legality he is assessing, and that, when immunity from jurisdiction is claimed by a foreign State, it is up to the French judge to rule beforehand on the dismissal.

6. Indeed, the Court held that the fact that the American judge had himself set aside such immunity from jurisdiction, under his own law, in the decision for which an exequatur was being sought, did not relieve the French judge of the need to exercise his judicial power to assess whether the Islamic Republic of Iran's plea was admissible and well founded to invoke immunity before him.

7. Secondly, foreign States benefit from immunity from jurisdiction when the act giving rise to the dispute is, by its very nature or purpose, an exercise of their sovereignty and therefore not an act of administration.

8. The European Court of Human Rights (ECHR, Grand Chamber, 21 November 2001, *Al-Adsani v. United Kingdom*, petition No. 35763/97) has ruled that "The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.", that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.", that "The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.", and that "It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity." (similarly, ECHR, 12 October 2021, *J.C. and Others v. Belgium*, petition No. 11625/17).⁹ It follows that the right of access to a court, as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, where the enforcement of a court decision is a necessary extension thereof, does not preclude a limitation on said right of access, resulting from the immunity of foreign States, insofar as the limitation is provided in international law and does not exceed the generally recognised rules on State immunity.

10. The International Court of Justice has ruled that "in the current state of customary international law, a State is not deprived of immunity solely for the reason that it is accused of serious violations of international human rights law or the international law of armed conflict", that there is no conflict between a "rule—or rules—of *jus cogens* and the rule of customary law that requires one State to grant immunity to another", that "assuming [...] that the rules of the law of

armed conflict which prohibit the killing of civilians in occupied territory or the deportation of civilians or prisoners of war for the purpose of forced labour are rules of *jus cogens*, said rules do not conflict with those governing State immunity. These two categories of rules apply to different matters. The rules governing State immunity are procedural in nature and limited to determining whether the courts of one State are entitled to exercise jurisdiction over another. They have no bearing on the question of whether the act in respect of which the proceedings were initiated was lawful or unlawful [...]”, that a “rule of *jus cogens* is a rule which does not allow for exemptions, but the rules which determine the scope and extent of the jurisdiction, as well as the conditions under which said jurisdiction may be exercised, do not detract from material rules that have the value of *jus cogens* and there is nothing intrinsic to the concept of *jus cogens* that would require them to be amended or set aside”, and that “even if the actions brought before the Italian courts called into question infringements of rules of *jus cogens*, the application of customary international law relating to State immunity was not affected” (ICJ, 3 February 2012, Jurisdictional immunities of the State, Germany v. Italy; Greece (intervening), ICJ Reports 2012, p. 99).

11. The *Cour de cassation* (Court of cassation) ruled that “supposing that the prohibition of acts of terrorism can be considered a rule of *jus cogens* of international law, which takes precedence over other rules of international law and may constitute a legitimate restriction on immunity from jurisdiction, such a restriction would in this case be disproportionate to the aim pursued, since the accusation against the foreign State is not based on the commission of acts of terrorism but rather on its moral liability” (1st Civ., 9 March 2011, appeal No. 09-14.743, Bull. 2011, I, No. 49).

12. The *cour d’appel* (Court of Appeal) rightly held that the acts which gave rise to the dispute between Mr [X] and the Islamic Republic of Iran, insofar as they had consisted of financial support provided to a terrorist group that had committed a suicide attack in which Mr [X]’s daughter had been killed, did not fall within the scope of acts of administration of said State.

13. It noted that the immunity from jurisdiction of the Iranian State had been set aside by the American judge pursuant to the Foreign Sovereign Immunities Act, which provides a specific exception for legal proceedings relating to personal injury or death resulting from terrorist acts supported by a foreign State and thus made it possible to ascertain the civil liability of that State.

14. It rightly held that, even supposing that the prohibition of acts of terrorism could constitute a rule of *jus cogens* in international law such as to constitute a legitimate restriction on immunity from jurisdiction, which is not apparent from the present state of international law, the circumstances in the case did not allow for an exception to said immunity, since the order for the Iranian State to pay damages delivered by the US court was not based on the demonstration of the direct involvement of the Islamic Republic of Iran and its agents in the attack, but solely on the basis of the civil liability that should be awarded to said State in respect of the material resources or assistance provided to the group claiming responsibility for the attack.

15. It could only deduce, without altering the nature of the matter, that the Islamic Republic of Iran could assert its immunity from jurisdiction.

16. The plea is therefore unfounded.

Operative part of the ruling

FOR THESE REASONS, and without having to rule on the cross-appeal, which is of contingent interest only, the Court:

DISMISSES the appeal;

Orders Mr [X] to pay the costs;

Pursuant to Article 700 of the Code of Civil Procedure, dismisses the claims;

Thus decided by the first civil chamber of the *Cour de cassation* (Court of Cassation) and pronounced by the president in public hearing on the thirteenth day of the month of April of the year two thousand and twenty-three.

President : Mr Chauvin

First advocate-general referee : Mr Poirret

Reporting Judge : Mr Ancel

Lawyer(s) : SCP Spinosi – SCP Foussard and Froger

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Institution judiciaire

Translated rulings