Neutral Citation Number: [2018] EWHC 385 (Comm)

Case No: CL-2015-000667

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2018

Before :

MR ANDREW HENSHAW QC
(sitting as a Judge of the High Court)

- -

Between :

(1) CERTAIN UNDERWRITERS AT LLOYDS LONDON **(2) ALLIANZ CORNHILL INSURANCE PLC** **(3) AVIATION AND GENERAL INSURANCE COMPANY LTD** **(4) ENGLISH &AMERICAN INSURANCE COMPANY LTD** **(5) MARKEL INSURANCE COMPANY LTD** **(6) MINSTER INSURANCE COMPANY LTD** **(7) MMO/NEW YORK MARINE AND GENERAL** **(8) NIPPON INSURANCE COMPANY OF EUROPE LTD** **(9) RIVERSTONE INSURANCE (UK) LTD** **(10) SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LTD** **(11) SR INTERNATIONAL BUSINESS INSURANCE COMPANY LTD** **(12) TOWER INSURANCE LTD** **(13) LA REUNION AERIENNE**	**Claimants**
- and -	
(1) SYRIAN ARAB REPUBLIC **(2) SYRIAN AIR FORCE INTELLIGENCE** **(3) GENERAL MUHAMMED AL KHULI, CHIEF, SYRIAN AIR FORCE INTELLIGENCE**	**Defendants**

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Timothy Otty QC and Naina Patel (instructed by **Clyde & Co LLP**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing date: 5 February 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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ANDREW HENSHAW QC
(sitting as a Judge of the High Court)

Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. The Claimants have brought proceedings under CPR Part 8 on the basis of a final judgment rendered in their favour on 12 April 2012 and filed on 14 May 2012 by the United States District Court for the District of Columbia, in the sum of US$ 51,574,997.89 together with any post-judgment interest that may accrue. The United States not being a party to any relevant Convention with the UK for the mutual enforcement of judgments, the claim is brought at common law.

2. The final hearing of the Claimants' claim took place on 5 February 2018, and I received on 6 February 2018 the Claimants' supplementary note on certain matters on which I had invited written submissions.

3. None of the Defendants was present or represented at the hearing. I therefore considered at the hearing whether or not to proceed, taking account by analogy of the factors identified by the Court of Appeal in *R v Hayward, Jones and Purvis* [2001] EWCA Crim 168, [2001] 2 Cr. App. R. 11 at § 22.5. For the reasons I gave at the hearing, I concluded that it was right to proceed. Briefly, I was satisfied that:

   i) all reasonable steps had been taken to give the Defendants sufficient notice of the hearing (as well as of the proceedings), and the Defendants had been given ample opportunity to attend. I elaborate on these matters in section (C) below;

   ii) there was no reason to believe that an adjournment would be likely to result in the Defendants attending the hearing at a later date;

   iii) there was no reason to believe that any of the Defendants wished to be represented at the hearing; and

   iv) although the matters raised were serious, there was a public interest in the matter proceedings without further delay.

   In all the circumstances, the Defendants had in my judgment foregone their right to appear or be represented at the hearing, and were voluntarily absent.

4. I therefore indicated that I would proceed, and would assume that had they been present then the Defendants would have taken all available points. I am satisfied that the Claimants have done everything possible to assist me in identifying and considering the arguments available to the Defendants.

5. The key issues arising are:

   i) whether the present proceedings have been served on the Defendants in accordance with the requirements of the State Immunity Act 1978, alternatively whether service should be dispensed with; and

   ii) whether the Defendants submitted to the jurisdiction of the US courts.

6. The Claimants accept that even if judgment is given in their favour, separate issues may arise about immunity from enforcement pursuant to section 13 of the 1978 Act. Those are not issues for determination at this stage.

(B) BACKGROUND TO THE CLAIM

7. The Claimants' claim in the United States District Court arose from the 1985 hijacking of EgyptAir flight 648 and the loss to which that gave rise. The Claimants brought two sets of proceedings in the US District Court under action numbers 06-CV-731 (filed in April 2006) and 08-CV-504 (filed in March 2008) against the present Defendants and a number of Libyan defendants. The latter were dismissed from the actions following the enactment of the Libya Claims Resolution Act of 2008.

8. The US District Court's "*Findings and Fact and Conclusions of Law*" records that the claims against the present Defendants came before the court as the subject of an evidentiary hearing held from 3 to 7 May 2010 pursuant to which the court made its findings. The District Court's summary of findings includes the following points:

   i) The plaintiffs' claim was for damages for acts of state-sponsored terrorism that resulted in the hijacking of EgyptAir flight 648 on 23 November 1985 while bound from Athens to Cairo, resulting in the complete destruction of the aircraft, which was insured by the plaintiffs, and the terrorist shootings of the American victims of the hijacking.

   ii) Having heard and reviewed the evidence the District Court determined that the hijacking was an act of international terrorism committed by the Abu Nidal Organization ("***ANO***"), which caused the destruction of the aircraft, and that the shootings occurred during and as a result of the hijacking.

   iii) The court also determined that the ANO was sponsored and supported by Syria at the time of the hijacking, and that the present Defendants were liable by reason of having *"conspired with and provided substantial and material support to the ANO terrorist organization"* and *"provided material support and resources and conspired with the ANO in the planning, training, support for, and commission of the EgyptAir hijacking"*, because *"the lead ANO terrorist operative, Omar Ali Rezaq, was trained and supported by the Syrian defendants"*, and because *"the Syrian defendants intended that their support of the ANO would promote and cause extrajudicial killings of American citizens, as well as necessarily result in the property destruction of the EgyptAir airplane incidental to the goals and objectives of the Syrian defendants and the ANO terrorists."*

9. The "*Findings and Fact and Conclusions of Law*" also recorded that:

   i) the Syrian defendants were served with process on 28 June 2003 but neither answered nor appeared;

   ii) service had been perfected on each of the Syrian defendants, in accordance with US law, by delivery of the required documents (accompanied by Arabic translations) to the Head of the Ministry of Foreign Affairs via international courier service, including tracking information and a delivery record from the

international courier service indicating that the shipment (containing two copies of the summons and the complaint, a notice of suit, and a translation of each into the official language of the foreign state) was signed for at the Syrian Ministry of Foreign Affairs on 30 July 2006; and

iii) a five-day hearing on liability and damages was held, commencing on 3 May 2010, during which the court accepted evidence in the form of *inter alia* live testimony, live video-link testimony, affidavit, *de bene esse* deposition, original documentary evidence and expert evidence from eight well-qualified experts on various subjects related to the issues before the court.

(C) SERVICE OF THE PROCEEDINGS

10. It is necessary to decide whether the present proceedings have been validly served on the Defendants.

11. Section 12 of the State Immunity Act 1978 provides, so far as relevant, that:

> "12(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry."

12. Section 14 provides that references to a State are to include references to any Government department (such as the Second Defendant), and the Court of Appeal held in *Propend Finance Pty Ltd v Sing* (17.4.97, 1997 WL 1103759) that this extends to individual employees or officers of the State such as the Third Defendant:

> "The protection afforded by the Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, "functionaries") could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself."

13. The House of Lords held in *Kuwait Airways Corp v Iraqi Airways Co (No.2)* [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694 that (save where there is agreement to the contrary under s.12(6) of the Act) the requirements of section 12 are mandatory and good service cannot be made without adhering to them. As a result, service on a State's Embassy in the UK was insufficient. The House of Lords approved the statement by Evans J at first instance that:

> "In my judgment, the requirement of service at, not merely 'on,' the Foreign Ministry of the defendant state is no more and no less than the plain words of section 12(1) demands. Service is effected by transmission to the Ministry and takes effect when the document is received at the Ministry. In no sense is a

> diplomatic mission in a foreign state the same as the Ministry of Foreign Affairs of the sending state."

14. CPR 6.44 requires a party wishing to serve a claim form or other document on a State to file in the Central Office of the Royal Court of Justice a request for service to be arranged by the Foreign and Commonwealth Office ("***FCO***"), accompanied by specified documents. The Senior Master will then send the documents to the FCO with a request that it arrange for them to be served. CPR 6.44(5) states that:

> "An official certificate by the Foreign and Commonwealth Office stating that a claim form or other document has been duly served on a specified date in accordance with a request made under this rule is evidence of that fact."

15. The question of service has been the subject of certain previous orders in these proceedings:

    i) Knowles J's order of 8 August 2016 granted the Claimants permission to serve the proceedings on the Defendants out of the jurisdiction at the Syrian Ministry of Foreign Affairs ("***the Syrian MFA***") and extended time for service to 14 March 2017.

    ii) Teare J's order of 14 December 2016 provided that service on the First Defendant by transmission by the FCO by courier to the Syrian MFA "s*hall be deemed to be good and sufficient service*", and that transmission by the FCO by courier to the Syrian Ministry of Justice to the Second and Third Defendants would similarly be deemed good service on them.

    iii) Mrs Justice Carr's order of 8 February 2017 brought the position of the Second and Third Defendants into line with that of the First Defendant by providing for transmission to the Syrian MFA, in the light of indications from the FCO that their practice and understanding of the 1978 Act required this, and extended time for service to 14 September 2017.

16. The steps taken formally to serve the present proceedings on the Defendants are as follows:

    i) A request for service, accompanied by the requisite documents, was filed with the Foreign Process Section (part of the Central Office of the High Court) on 9 March 2017.

    ii) The documents for service were delivered by the court to the FCO on 22 March 2017 with a request that the FCO arrange for service.

    iii) The FCO arranged for service via the courier DHL at the Syrian MFA in Damascus.

    iv) The FCO (Service of Process Enquiries section) told the Claimants' solicitors in a telephone call on 19 April 2017 that DHL had informed the FCO that upon DHL attempting to deliver the documents to the Syrian MFA, the Syrian MFA had refused to accept the documents on the basis that they *"were not*

needed". The position was set out more fully in a letter from Mr Wickremasinghe, Legal Counsellor at the FCO, dated 2 August 2017 as follows:

> "I can confirm that in accordance with the Court Orders of 8th August 2016, 14th December 2016 and 27th February 2017, the Foreign and Commonwealth Office ("FCO") instructed the courier company DHL to deliver the Claim Forms and other accompanying documents in these proceedings, including sealed copies of the said Orders to the address of the Syrian Ministry of Foreign Affairs provided on the Claim forms. The documentation was sent under cover of a Diplomatic Note from the FCO to the Syrian Ministry of Foreign Affairs in both English and Arabic. In the case of the Second and Third Defendants, the Note Verbale requested the Syrian Ministry of Foreign Affairs to transmit the documentation to the Syrian Ministry of Justice for onward transmission to the Syrian Air Force Intelligence and General Muhammed Al Khuli, respectively.
>
> …
>
> I can confirm that DHL have informed the FCO that on 18th April 2017, representatives of their local office took the documents to the Syrian Ministry of Foreign Affairs, where they asked a reception consignee to take delivery of the documents. DHL have further informed FCO that the consignee was aware of the identity of the sender (i.e. FCO), however the consignee refused to accept the documents and insisted the couriers remove them from the premises. DHL have further explained that for staff welfare reasons, they would not be able to accept an instruction simply to leave documents on the street outside the Syrian Ministry of Foreign Affairs.
>
> …
>
> … whether, in the highly unusual circumstances of this case, the facts related above constitute service is a matter which the Court will have to determine. For that reason, the FCO is not in a position to provide either a certificate of service or a certificate of inability to effect service. The FCO is however content for you to place this letter before the Court."

17. In addition, the other steps including the following have been taken to bring the proceedings and various stages of them (including the final hearing on 5 February 2018) to the Defendants' attention:

    i) The claim form was sent by email to the Syrian MFA on 2 October 2015 using the email address provided on the Syrian MFA's website. No response was received.

ii) On 9 and 14 October 2015 the Defendants' former US attorneys, Ramsey Clark and Lawrence W. Schilling (together, "***LWS***"), were notified by courier of the proceedings and a proposed directions hearing. No response was received.

iii) On 11 October 2015 the claim form was sent, not by way of service, to the Syrian MFA by courier. No response was received.

iv) On 22 and 23 August 2017 DHL attempted to deliver the Claimants' application for a default judgment, a supporting affidavit and other documents, but the Syrian MFA on both days refused to accept delivery. (The default judgment application was later not pursued after the Claimants appreciated that a CPR Part 8 claimant cannot obtain default judgment.)

v) Notification of the listing appointment for the default judgment application was sent to the Syrian MFA by email and by courier on 25 August 2017. There was no response to the email. DHL later advised, by letter of 13 September 2017, that it was not able to deliver the shipment, and could not in future deliver a shipment, because the named consignee was subject to sanctions.

vi) The Claimants on 4 October 2017 applied for a declaration as to service and other relief. The application notice was sent by email to the Syrian MFA and by email and courier to LWS.

vii) On 13 October 2017 a witness statement in relation to interest and costs issues was sent by email to the Syrian MFA and by email and courier to LWS.

viii) On 18 October 2017 the Claimants' skeleton argument in relation to the Claimants' 4 October 2017 application, and related documents, were sent by email to the Syrian MFA and by email to LWS.

ix) On 2 and 4 November 2017 Knowles J's order and an invitation to attend the listing appointment for the final hearing were sent, respectively, to LWS by email and courier and to the Syrian MFA by email. No response was received.

x) On 8 January 2018 the Claimants' solicitors sent a letter giving notice of the date and place of the final hearing date on 5 February 2018, and attaching copies of a Civil Evidence Act Notice under CPR 33.7 and the decision in *Starlight International v AJ Bruce* [2002] IL Pr 35 to which the Notice referred, by email to the Syrian MFA and by email and courier to LWS. The Defendants did not respond. LWS responded by email on 8 January 2018 asking for the attachment to the email to be resent.

xi) On 12 January 2018 the Claimants' application to rely on the 9th witness statement of Ms Andrewartha, *Starlight International* and the expert report of Joy Langford was sent to the Syrian MFA by email and to LWS by email and courier. Automated emails responses were received from both indicating that the mailboxes were full.

xii) The hearing bundles were sent by email to the Syrian MFA and by email and courier to LWS. LWS did not respond. Automated responses were received from the Syrian MFA indicating that the mailbox was full.

Arabic translations were included as appropriate.

18. I consider first whether by reason of DHL's having taken the documents to the Syrian MFA in Damascus on 18 April 2017 (§ 16.iv) above) on behalf of the FCO, the present proceedings were *"transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs"* and *"received at the Ministry"* within section 12 of the 1978 Act.

19. The Act contains no definition of the words "*transmitted*" or "*received*" in section 12, and counsel informed me that they had found no authority on their meaning other than the cases cited below. It seems likely that the word *"received"* is intended, at least, to indicate that it is not sufficient merely for documents to be transmitted in the sense of being dispatched: they must actually reach the relevant Ministry. Conversely, section 12 does not in my view require the documents to be accepted upon delivery: otherwise the recipient could evade service simply by declining to accept delivery.

20. The Claimants cited *Pocket Kings v Safenames* [2009] EWHC 2529 (Ch), where a claim was served on the US State Department but several months later returned by the Department to the British Embassy. It was held that that rejection of service in no way impugned the validity of the service of the proceedings. The decision supports the view that a subsequent rejection of the documents does not prevent valid service from having taken place. It is not on all fours with the present case, where it appears that the Syrian reception consignee refused to take the documents in the first place.

21. The Claimants also provided a solicitor's note of a hearing before Teare J on 2 February 2018 in the proceedings *EIB v Syrian Arab Republic* (CL-2017-000508), according to which Teare J concluded that there was valid service under section 12 where an email had been sent to the Syrian MFA and no undeliverable notification received, indicating that the email had been received in the electronic repository or server – by contrast with the position in relation to a later email sent on 30 January 2018 for which a failure message had been received. Teare J is recorded as having accepted the submission that, following the Court of Appeal's decision in *Anson v Trump* [1998] 1 WLR 1404 that 'transmission' (in the context there of service by fax) was complete when the complete document had been received into the recipient's fax equipment, transmission by email was achieved when the email arrived in the electronic repository. That decision provides a helpful analogy for a case such as the present one where a document has physically arrived at the Ministry's premises, whether or not it has been accepted, opened or read.

22. The Claimants also referred to two of the numerous definitions of the word "*receive*" in the Oxford English Dictionary, which include at 16a and b:

> "To have (a thing) given or handed to oneself …"
>
> and

> "To get (a letter, etc.) brought to oneself or delivered into one's hands"

23. In the present case, the documents were not merely transmitted to the Syrian MFA but actually arrived within the Ministry's premises. Further, it appears from the FCO's letter quoted in § 16.iv) above that the consignee knew the identity of the sender, but refused to take the package and instead insisted on its removal from the premises. In these circumstances, there was no further step that could have been taken in order to effect service, and in my judgment no further step which needed to be taken. The documents had been transmitted to and received at the Syrian MFA, notwithstanding that the Ministry's representative insisted on their immediate removal. I do not consider that the reception consignee's refusal to take the package into his hands prevented it from having been received at the Ministry for the purposes of section 12, and I conclude that service under that section was complete when DHL proffered the package to the consignee.

24. In case I am wrong in that conclusion, I also consider the Claimants' fallback application for an order dispensing with service. CPR 6.16(1) permits service of a claim form to be dispensed with by the court where the circumstances are exceptional, and CPR 6.28(1) makes similar provision for any other document which is to be served in proceedings. Applications under both provisions may be made without notice (see CPR 6.16(2)(b) and 6.28(2)).

25. The House of Lords in *Kuwait Airways* was not asked to, and did not, consider the possibility that service might be dispensed with. If dispensing with service would be inconsistent with the mandatory nature of section 12 of the 1978 Act then the court would not have power to make such an order. However, I do not consider there to be an inconsistency. Section 12 applies to *"Any writ or other document required to be served for instituting proceedings against a State"*. If, exceptionally, the court has made an order dispensing with service of the claim form instituting the proceedings, then it is not a document *"required to be served"* within section 12.

26. I asked the Claimants whether it would be possible and legally coherent for the court to conclude both that service had been validly effected and that service should be dispensed with. The Claimants submitted that it was, provided the latter order were made in the alternative. I accept that submission. It is not logically inconsistent for the court to decide that (a) service has been validly effected but (b) (in case that conclusion were wrong) the need for service can properly be dispensed with.

27. The Court of Appeal in *Olafsson v Gissurarson (No.2)* [2008] EWCA Civ 152, [2008] 1 W.L.R. 2016 held that the court's power to dispense with service retrospectively under what is now CPR 6.16 should be limited to truly exceptional cases. I consider that the present case falls within that category given the withdrawal of UK diplomatic personnel from Syria (making more conventional means of service impossible), the Syrian MFA's refusal to accept delivery of the relevant documents (even in circumstances where it appears the Ministry's reception consignee knew or believed they had come from the FCO), and the fact that in all the circumstances there is no further step which the Claimants or the FCO could reasonably be expected to take in order to effect service.

28. The White Book commentary on CPR 6.16 refers to the Court of Appeal's statement in *Bethel Construction v Deloitte and Touche* [2011] EWCA Civ 1321 that if, as was the case there, the facts could not support a good reason for exercising the discretion under CPR 6.15 then they could not amount to exceptional circumstances under CPR 6.16. CPR 6.15 allows the court to order substituted service, and according to the Notes to it was designed to assist claimants where defendants deliberately evade service. An important objective in the context of CPR 6.15 is to seek to ensure a high likelihood that the document in question will come to the defendant's attention (see the discussion in Note 6.15.3 of *Abela v Baardarani* [2013] UKSC 44). I have therefore considered, as a factor relevant to the exercise of the CPR 6.16 power to dispense with service, whether the steps the Claimants have already taken are likely to have brought these proceedings to the Defendants' attention. It seems to me that the answer is yes, given the repeated communications referred to in §§ 16 and 17 above, to both the Defendants and their former US counsel LWS, the absence of message failure messages prior to 12 January 2018, and LWS's request on 8 January 2018 for the email attachment to be resent (which at least indicates a level of interest or concern over the contents of the Claimants' solicitors' communications in relation to this case).

29. Overall, I consider that this is a truly exceptional case in which it is right to make an order in the alternative dispensing with service of the proceedings and the other documents created in the course of the proceedings and which the Claimants have attempted to serve on the Defendants.

(D) SUBMISSION TO JURISDICTION OF THE U.S. COURT

30. In the absence of any Convention or other instrument for mutual recognition of judgments, a foreign judgment *in personam* can be recognised only if it was delivered by a court which had jurisdiction according to English private international law. That means that the defendant must either have (i) been present in the foreign jurisdiction when proceedings were commenced, (ii) claimed or counterclaimed in those proceedings, (iii) previously agreed to submit to the jurisdiction, or (iv) voluntarily have submitted himself to the overseas court's jurisdiction (see *Rubin and another v Eurofinance SA* [2013] 1 AC 236 § 7). In the present case (i)-(iii) do not apply, so the Claimants must show that the Defendants submitted to the US court's jurisdiction.

31. In addition, as regards judgments given by overseas courts against States, section 31(1) of the Civil Jurisdiction and Judgments Act 1982 ("***CJJA***") provides:

> "31(1) A judgment 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 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."

32. The Supreme Court in *NML Capital v Argentina* [2011] 2 AC 495 made clear that section 31 provides a separate gateway for the enforcement of judgments against States, over and above those provided for by the 1978 Act (see, in particular, §§ 44-51).

33. The requirement in CJJA section 31(1) subparagraph (a) that the judgment would be recognised and enforced if it had not been given against a State imports, among other things, the requirement referred to above that the overseas court had jurisdiction according to English private international law, and hence in the present case that the Defendants submitted to the US court's jurisdiction.

34. As to subparagraph (b), the only provision in sections 2 to 11 of the 1978 Act relevant to the present case is section 2:

> *"2. Submission to jurisdiction*
>
> (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> …..
>
> (3) A State is deemed to have submitted –
>
> ….
>
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of –
>
> (a) claiming immunity…."

35. As a result, in the present case <u>both</u> CJJA section 31(1)(a) and 31(1)(b) (via section 2 of the 1978 Act) mean the Claimants need to show that the Defendants submitted to the US court's jurisdiction.

(1) Principal facts relating to submission to US jurisdiction

36. The Defendants took no part in the US proceedings up to and including the evidential hearing and judgment at first instance referred to above. However, a number of steps were taken in relation to an appeal from that judgment, which the Claimants contend amounted to submission by the Defendants to the jurisdiction of the US court.

37. The original US judgment was entered in favour of the Claimants on 2 September 2011. The final judgment, being the judgment on which the present proceedings are founded, was entered on 12 April 2012 and filed on 14 May 2012 correcting a (significant) mathematical error in the original judgment. The key steps taken thereafter in the US proceedings were as follows.

i) On 3 October 2011 a Notice of Appeal was filed against the 2 September 2011 judgment, in the US Court of Appeals for the DC Circuit, by Ramsey Clark and Lawrence W Schilling as "*Attorneys for the Syrian Arab Republic*". The Notice of Appeal referred to the judgment as having been *"based on the sole judgment and at the sole direction of the Magistrate judge presiding to whom the actions had been assigned for all purposes by the Article III judge initially presiding and without any further consideration or intervention by any Article III judge"*. That was an objection to the judgment based on an issue of the allocation of responsibilities between judges within the US federal judicial system. It was later elaborated in the "*Statement of Issues to be Raised*" referred to below as raising among other things the issue:

> "Whether the assignment of a case against a foreign sovereign state under the FSIA [Foreign Sovereign Immunity Act] to a Magistrate Judge for all purposes without the expressed consent of the sovereign, excluding all participation thereafter by an Article III judge where the Magistrate Judge then presides over, holds evidentiary hearings and decides all issues of fact or law in the case against the sovereign and enters a final judgment without any participation or review by an Article III judge violates the Constitution or laws of the United States."

The Notice of Appeal did not, however, contain any objection to the jurisdiction of the US courts to assume jurisdiction over the Defendants, or any reservation of rights in that regard.

ii) On 8 May 2012 LWS filed an Amended Notice of Appeal. It made essentially the same point about the allocation of the case to a Magistrate Judge: *"said sums of $51,574,997.80 and $23,823,828.99 based on the sole judgment and were entered by the Clerk at the sole direction of the Magistrate judge presiding to whom the action had been assigned for all purposes by the Article III judge initially presiding over the consolidated actions and without any further consideration or intervention by any Article III judge"*. ($23,823,828.99 was the difference between the sums adjudged due in the original and amended judgments.) There was again no objection or reservation to the jurisdiction of the US courts in general based on state immunity.

iii) On 17 May 2012 LWS filed a further Amended Notice of Appeal in essentially similar terms following a further amendment to the judgment.

iv) On 30 May 2012 LWS filed a Motion for Extension of Time for Syria to file its preliminary papers on the appeal. The motion referred to a number of facts creating the need for an extension, including (1) the grounds for the increase in the judgment sum, (2) a contention that under an overall settlement between the US and Libya in August 2008 the actions against both Libya and Syria were required to be terminated and (3) that *"This is a case for property damage by insurers of an airplane for which there is little if any case law, not for the usual damages under the FSIA terrorism exception for personal injury or death."*

v) On 2 July 2012 a Statement of Issues to be raised on appeal was filed by LWS. This raised 12 issues, including (a) the matter of judicial allocation referred to in the Notices of Appeal (§§ 1 and 2) and (b) an issue reflecting the point quoted above from the extension of time application:

> "5. Whether losses from property damage to the hull of an airliner separately insured by plaintiffs from terrorist violence occurring on November 23, [1985] is recoverable against the Syrian Arab Republic as damages under the Foreign Sovereign Immunities Act by plaintiffs who are U.S. insurers and/or foreign insurers."

The other issues referred to included: (c) whether all claims against Syria were terminated under the US-Libyan Overall Settlement Agreement (§ 6); (d) whether the proceedings had involved various breaches of the US Foreign Sovereign Immunities Act ("***FSIA***") as regards service of process (§§ 7, 8 and 9); (e) whether Syria had been subjected to liability *"on the basis of judicially decided political questions not constitutionally determinable by U.S. Courts"* (§ 11); and (f) whether liability was being imposed on Syria as a result of *"a continuing course of action by the Executive and Legislative branches that consistently and predictably renders judgments of U.S. courts non final and subject to change"* (§ 12).

vi) On 2 July 2012 LWS filed a certificate describing all three Defendants as Appellants and parties to the appeal, adding that *"Syria submits that the Libyan defendants should be considered as appellants on this appeal because their dismissal below was erroneous."* The certificate stated that the Magistrate Judge's orders filed on 2 September 2011 were under review *"because the Magistrate Judge issued no decision or explanation of amount by which he increased the judgment he directed the Clerk to enter against Syria by minute order on April 12, 2012."* The certificate also indicated that there were many other cases against Syria in US courts which should be considered related cases because they *"raise common and fundamental issues as to Syria's right to equal sovereignty and the soundness of the extraterritorial jurisdiction U.S. courts are claiming in order to adjudicate the cases"*.

vii) On 2 July 2012 LWS filed an Entry of Appearance asking the Clerk to enter their appearance as counsel for the Syrian Arab Republic. It included no objection or reservation of rights based on sovereign immunity.

viii) Also on 2 July 2012, LWS filed a Civil Docketing Statement setting out basic details about the case and indicating that the case turned on the validity or interpretation of the FSIA.

ix) LWS filed a third document on 2 July 2012, headed "*Underlying Decision from Which Appeal Arises*", which referred to the original judgment entered in September 2011 replaced by the April 2012 judgment taking into account the increased amounts awarded by the Magistrate Judge in granting the plaintiffs' motion to alter judgment filed in September 2011. The document further states *"There is no underlying decision or explanation accompanying the increase. The Clerk was directed by the Magistrate Judge to enter a new*

judgment awarding the increased amounts in a Minute Order issued on April 12, 2012, which included no explanation of the figures. …"

x) On 19 September 2012 LWS filed a *"Statement of the Syrian Arab Republic regarding formats for the briefing of the appeal"*.

xi) On 20 November 2012 LWS filed a consent motion for voluntary dismissal of the appeal, stating *"Defendant-Appellant the Syrian Arab Republic, moves herewith for an order pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure voluntarily dismissing this appeal"*, indicating that the plaintiffs consented to this. The court on 27 November 2012 ordered *"that the motion be granted, and this case is hereby dismissed"*.

xii) Subsequently, the plaintiffs in December 2012 applied for an order authorising enforcement of the April 2012 judgment. The motion noted that counsel for the Syrian Defendants (defined to refer to all three of the present Defendants) had *"entered his appearance, in this Court and before the US Court of Appeals for the DC Circuit in the now dismissed appeal, on behalf of the Defendants."* It argued that Syrian must have known of the judgment prior to or on 3 October 2011 *"the day its long-time counsel entered an appearance and noticed an appeal of the District Court's September 2, 2011 judgment"*, and argued that the judgment should be enforced without any need for it to be further served on the defendants.

xiii) On 4 January 2013 LWS filed a Notice in response *"without prejudice to its voluntary dismissal of this appeal and without prejudice to its position that this Court lacks subject matter and personal jurisdiction over Syria in this case and that this case is barred by Syria's sovereign immunity and Syria's right to equal sovereignty."* The Notice went on to state that in another case, Chief Judge Lamberth had denied plaintiffs' request for such relief *"in circumstances indistinguishable from those in this case"*. The Notice attached the Chief Judge's ruling in that case (*Wultz v Islamic Republic of Iran*), which referred to the FSIA requirement that any FSIA default judgment be sent to the relevant state in the prescribed manner, and which stated: *"It is irrelevant under FSIA § 1608(e) that the Syrian defendants appeared by counsel for a portion of the proceedings in this case; the final judgment is still a default judgment".* Thus LWS's motion proceeded on the footing that they had appeared by counsel for a portion of the US proceedings in the present case, but that that fact did not prevent the judgment from being a default judgment which required formally to be served. This was the first filing in which the Defendants had included any express statement to the effect that the claim was barred by sovereign immunity.

38. The Defendants' approach to the US proceedings in the present case may be contrasted with the approach they took in a case the previous year, *Baker et al v Socialist People's Libyan Arab Jamahirya et al* (Civil Action No. 03-cv-0749). Each of the Defendants was a defendant to those proceedings, and represented by the same counsel (LWS) in the same court as the present case i.e. the US District Court for the District of Columbia. In *Baker*, LWS on behalf of the Defendants on 14 April 2011 filed a "*Notice of Limited Appearance*":

> "for the limited purpose of appealing the Clerk's Judgment entered in this action on March 31, 2011, for lack of personal and subject matter jurisdiction, applying for a stay of enforcement of the Judgment pending appeal, and asserting the entitlement of the Syrian Arab Republic as a sovereign nation to sovereign immunity and equal sovereignty in the Courts of the United States".

The Notice of Appeal and Application for a Stay Pending Appeal, filed on the same date, similarly began by stating that Syria *"a sovereign state and Member of the United Nations and entitled as such to equal sovereignty among nations, … holds firmly to the conclusion that the Courts of the United States lack personal and subject matter jurisdiction to adjudicate actions against it for damages based on death and injury occurring entirely outside the United States …".*

(2) Submission under English law

39. In *Rubin and another v Eurofinance SA* [2013] 1 AC 236 the Supreme Court stated:

> "159 The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have "taken some step which is only necessary or only useful if" an objection to jurisdiction "has been actually waived, or if the objection has never been entertained at all": Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA [1984] 1 WLR 438, 444 (HL) approving Rein v Stein (1892) 66 LT 469 , 471 (Cave J).
>
> …
>
> 161 The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that a foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by an English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts.
>
> 162 It is in that context that Scott J said at first instance in Adams v Cape Industries plc [1990] Ch 433, 461 (a case in which the submission issue was not before the Court of Appeal):

> "If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not … to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication of procedural steps taken in foreign proceedings must … be assessed in the context of the foreign proceedings."

> 163 I agree with the way it was put by Thomas J in Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90, 97:

> "The court must consider the matter objectively; it must have regard to the general framework of its own procedural rules, but also to the domestic law of the court where the steps were taken. This is because the significance of those steps can only be understood by reference to that law. If a step taken by a person in a foreign jurisdiction, such as making a counterclaim, might well be regarded by English law as amounting to a submission to the jurisdiction, but would not be regarded by that foreign court as a submission to its jurisdiction, an English court will take into account the position under foreign law.""

40. Green J in *Swiss Life AG v Moses Kraus* [2015] EWHC 2133 (QB) stated:

> "61 Case law provides illustrations of the sorts of acts of participation in foreign proceedings which amount to submission. These include: pursuing acts as a plaintiff; pleading to the merits of a claim qua defendant without contesting jurisdiction; contesting jurisdiction but nonetheless proceeding further to plead to the merits; agreeing to a consent order dismissing the claims and cross claims; failing to appear in proceedings at first instance but appealing on the merits; taking no part in proceedings and allowing judgment to go against him in default of appearance but later applying to set aside the default judgment on non-jurisdictional grounds. …"

41. An example of submission by bringing an appeal was *SA Consortium General Textiles v Sun & Sand Agencies* [1978] Q.B. 279, where the majority of the Court of Appeal held that the defendants had submitted to French jurisdiction for the purposes of the Foreign Judgments (Reciprocal Enforcement) Act 1933[1] by an application to appeal out of time from a first instance judgment and by their subsequent appeal from that judgment. Lord Denning MR stated:

> "The English company did not appear in the original court at Lille but it did appear in the Appeal Court at Douai. It made an

[1] Section 4(2) of the Act provides that "the courts of the country of the original court shall … be deemed to have had jurisdiction - (a) in the case of a judgment given in an action in personam (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court".

> application to the Appeal Court and lodged an appeal against the judgment of the original court. That application to the Appeal Court was in my view a submission to the jurisdiction of the original court - because it sought to upset it. By inviting the Appeal Court to decide in its favour on the merits, it must be taken to have submitted to the jurisdiction of the original court. If the Appeal Court decided in its favour, it would have accepted the decision. So also if it decided against it, thus upholding the original court, it must accept the decision. It cannot be allowed to say that it would accept the decision of the Appeal Court if in its favour, and reject it if it was against it. In my opinion, therefore, by appealing to the Appeal Court, the English company was submitting to the jurisdiction of the original court." (p299)

Shaw LJ stated:

> "… there is the further demonstration of unqualified submission to the jurisdiction of the court at Lille in the defendants' application to the appeal court at Douai for leave to appeal against the judgment of the Lille court, which judgment of course dealt with both transactions. The recitals in the notice of appeal make it abundantly clear that both constituents of that judgment are to be called in question. There is not the least hint that the Coframaille judgment is to be impugned on any ground different from that relating to Pigeon Voyageur. An unqualified notice of appeal which does not differentiate between one part of the judgment and another should be taken as asking the appellate court to regard itself as seised of all aspects of the prospective appeal including the merits." (p308)

Goff LJ dissented on the ground that, as to part of the claim, it was not established on the evidence (which included grounds of appeal not yet having been lodged) that the company had by appealing taken part in the proceedings for a purpose other than that of disputing the jurisdiction (see p305).

42. Older English cases, in particular *Henry v Geoprosco International* [1976] QB 726 (CA), held that a defendant submitted if he protested the foreign court's jurisdiction by entering a conditional appearance which was converted automatically into an unconditional appearance if the decision on jurisdiction went against him.

43. CJJA section 33 was enacted in order to reverse that case law, as noted in Dicey, Morris and Collins, "*The Conflict of Laws*", 15th ed, § 14-070 and Briggs *"Civil Jurisdiction and Judgments,* 6th ed., § 7.55. It provides:

> "**33. Certain steps not to amount to submission to jurisdiction of overseas court**
>
> (1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland the person

> against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any of the following purposes, namely -
>
> (a) to contest the jurisdiction of the court;
>
> (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the courts of another country;
>
> (c) to protect or obtain the release of property seized or threatened with seizure in the proceedings.
>
> (2) Nothing in this section shall affect the recognition or enforcement in England and Wales or Northern Ireland of a judgment which is required to be recognised or enforced there under the 1968 [Brussels] Convention or the Lugano Convention or the [Brussels I] Regulation …."

44. As section 33(2) makes clear, section 33 relates specifically to cases not covered by the Brussels Convention and its successors. For the reasons indicated below, it is necessary though to give some consideration to the test of submission as it has developed in that context.

45. The Brussels Convention and its successors provided and provide a comprehensive regime covering both jurisdiction and the recognition and enforcement of judgments. One of the grounds on which a court can assume jurisdiction under this regime is submission; by contrast, submission is not relevant to the recognition and enforcement of judgements, because a key feature of the regime is that the Member State in which recognition or enforcement is sought may not question the originating court's jurisdiction (see, e.g., Article 28 of the Brussels Convention, and, now, Article 45(3) of the Recast Brussels Regulation).

46. Article 18 of the Brussels Convention provided that:

> "'Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16".

47. The European Court of Justice held in Case C-150/80 *Elefanten Schuh* that:

> "[16] … it follows from the aim of Article 18 that if the challenge to jurisdiction is not preliminary to any defence as to the substance it may not in any event occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised.

and

> "[17] …Article 18 of the Convention must be interpreted as meaning that the rule on jurisdiction which that provision lays down does not apply where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised."

48. The issue that had arisen in *Elefanten Schuh* was whether in order to avoid submission a defendant had to confine himself to contesting jurisdiction, or could contest the jurisdiction as well as the substance of the claim, bearing in mind that in some Member States a defendant who raised the issue of jurisdiction alone might be barred from arguing the merits if his jurisdiction plea were rejected (§ 14).

49. Read literally, the ECJ's conclusion quoted above might be taken to mean that no step taken by a defendant to invoke the merits jurisdiction of the court *prior to* submission of his defence could amount to submission to the jurisdiction, so long as in due course the defence included a challenge to jurisdiction. If so, the test for submission under Article 18 might diverge from the existing common law test applied in the context of enforcement of judgments, summarised above, under which a pre-defence step might well constitute submission to the jurisdiction. It might also be unclear how the test should be applied in the context of an appeal.

50. Observations made in certain English cases have suggested that the common law concept of submission should be assimilated to the Article 18 test as determined in *Elefanten Schuh.*

51. In *Marc Rich & Co. A.G. v Società Italiana Impianti (The Atlantic Emperor) (No.2)* [1992] I.L.Pr. 544 the Court of Appeal applied Article 18, as interpreted in *Elefanten Schuh*, in a case about submission to the jurisdiction under the Brussels Convention. In setting out the applicable provisions, Neill LJ (with whose judgment the other members of the court agreed) stated:

> "[29] I should also read section 33 which reflects provisions which I have already read from Article 18. It is to be noted, however, that both section 32 and section 33 relate to judgments given by courts of overseas countries generally and are not restricted to judgments given in Convention countries. 'Judgment' is defined in section 50 as meaning (subject to exceptions which do not apply)
>
> 'any judgment or order (by whatever name called) given or made by a court, in any civil proceedings.'
>
> Section 33, to which I earlier referred, is in these terms, under the rubric 'Certain steps not to amount to submission to jurisdiction of overseas court' :

> 'For the purposes of determining …'
>
> I need not read subsection (2).” (emphasis added)

52. The Court of Appeal concluded that a defence submitted by Marc Rich in which “*they made it abundantly clear in the pleading that the primary purpose of the document was to challenge the jurisdiction of the Genoa court*” did not amount to a submission.

53. In *Harada Limited v Turner* [2003] EWCA Civ 1695 the Court of Appeal applied Article 18 in deciding whether there had been a submission to the jurisdiction of an employment tribunal. Simon Brown LJ referred to *Elefanten Schuh* and *Marc Rich*, and stated:

> “[29] … the court does not have jurisdiction even if the defendant makes submission on the merits provided only that the challenge to the jurisdiction is made either before or at the same time as (and not merely after) the argument on the merits. …”
>
> …
>
> “[32] … the whole rationale of [Article 18] is to allow the merits to be contested without prejudice to the question of jurisdiction provided only and always that the jurisdictional objection has not been delayed until after, under national procedural law, there has already been a submission to the jurisdiction.
>
> Mance LJ stated:
>
> “[50] … in countries whose procedure does not require any challenge to the jurisdiction to be made before any defence on the merits, a defendant’s right to challenge the jurisdiction is preserved as long as it has raised its challenge no later than the time of its first defence on the merits. The rationale being that any other result could be contrary to the defendant’s right to defend itself, it is absurd to suggest that the European or any other court would hold that a defendant was, after raising its initial challenge, unable to continue to defend itself to any extent necessary to avoid judgment being entered against it on the merits, pending final resolution of its challenge to the jurisdiction.”

54. The Court of Appeal concluded that there was no submission by a party who *“clearly has contested jurisdiction from the outset; it raised its jurisdictional objection in its very first appearance”* (§ 29) and, having tried unsuccessfully to have it adjourned, had participated in the merits hearing only under protest (§ 35).

55. In *AES Ust-Kamenogorsk Hydropower Plant* [2012] 1 WLR 920 the Court of Appeal held that a claimant in England relying on an arbitration clause, who had when sued in Kazakhstan done all it could to preserve its challenge to the jurisdiction there, had not

submitted to the jurisdiction of the Kazakh court. Having lost on jurisdiction it joined issue on the merits pending renewing its jurisdiction challenge on appeal. In the course of his reasoning Rix LJ at § 174 referred to Neill LJ's reliance on *Elefanten Schuh* when interpreting CJJA section 33, but did not regard it as determinative of the issues before the court in *AES* (§ 175). Stanley Burnton LJ agreed with the result, but also observed at § 201:

> "I add that in my judgment it would be unfortunate if the principles applied by our courts on the question whether a litigant has submitted to the jurisdiction of a foreign court in non-EU cases were to differ from the principles applied by the Court of Justice and therefore our courts in cases under the Brussels and Lugano Conventions and now the Judgments Regulation."

Wilson LJ agreed with both judgments.

56. Finally, in *Ecobank Transnational v Tanoh* [2016] 1 WLR 2231, the Court of Appeal refused an anti-suit injunction sought by a claimant in England who relied on an arbitration agreement and sought to restrain the enforcement of judgments the defendant had obtained in the Togolese Republic and the Republic of Cote d'Ivoire. One issue raised was whether the claimant had submitted to the jurisdiction of the court in Togo in circumstances where the court there had required jurisdiction and the merits to be dealt with together (§ 67). The Court of Appeal's discussion of the case law included the following observation *a propos* Stanley Burnton LJ's comment in *AES* quoted above:

> "66 In his judgment Stanley Burnton LJ said that it would be unfortunate if the principles applied by our courts on whether a litigant had submitted to the jurisdiction of a foreign court in non-EU cases were different from the principles applied by the Court of Justice, and therefore our courts, in cases under the Brussels and Lugano Conventions and now the Judgments Regulation (Council Regulation (EC) No 44/2001). I would go further. The decision of the court in Harada in relation to section 33 was heavily influenced by the decision of the European court in relation to article 18 of the Brussels Convention. But, now that section 33 has been interpreted in the way that it has, it cannot be right that it should bear a different meaning in cases outwith the European context."

57. I invited the Claimants to file a written submission addressing the implications (if any) for the present case of this line of cases, which was provided after the hearing. I have concluded that the *Elefanten Schuh* approach, even if adopted, would not alter the outcome of the present case, because:

i) it does not, properly analysed, support the view that a pre-defence step cannot amount to a submission if the defendant subsequently contests jurisdiction by the time of submitting his defence; and

ii) in any event, where as in the present case the question of submission arises in the context of an appeal, in so far as there is any analogous step to the filing of a defence at first instance it must here be the filing of the notice of appeal.

58. Neither *Elefanten Schuh* nor any of the English cases referred to above had to consider the situation where a defendant takes a step to invoke the merits jurisdiction of the court before having filed any defence, still less the situation of submission by commencing an appeal. A relevant pre-defence step might be, for example, an application for an injunction or other interim relief, an application for disclosure or for further information, or an acknowledgment of service indicating an intention to defend the claim and not indicating an intention to contest jurisdiction. Despite the construction which might literally be placed on the Court of Justice's formulation quoted in § 47 above, I do not consider that any of these cases holds that such a step may not amount to submission, and the formulation of Simon Brown LJ in *Harada* § 32 (quoted in § 53 above) is inconsistent with any such view. *A fortiori*, none of these cases supports the proposition that an appellate filing not reserving the appellant's position on jurisdiction cannot amount to a submission, and in my view the Court of Appeal's decision in *SA Consortium General Textiles* remains good authority for the proposition that it can.

59. If and in so far as (contrary to the points made above) the *Elefanten Schuh* approach could lead to a different outcome in the present case, I would conclude that it should not be applied in the context of the present case. That is because:

i) *Elefanten Schuh* concerned the interpretation of Article 18 of the Brussels Convention, which allows jurisdiction to be founded on submission as a part of a comprehensive scheme providing a range of bases of jurisdiction including domicile, "special" jurisdiction in contract, tort and other cases, and certain heads of exclusive jurisdiction. By contrast, the common law rule of private international law forms part of a long-established scheme under which foreign judgments *in personam* are treated as having been within the foreign court's jurisdiction only in a very limited set of circumstances, one of which is submission, as outlined in § 30 above. In these circumstances, it does not appear logical to deduce from the fact that the ECJ may have given a restricted approach to submission in the context of Article 18 that the established bases for recognition of non-EU judgments should as a result be narrowed down. As the Claimants say, it would be very odd in principle if CJJA section 33(1) were to be treated as inadvertently attenuating the circumstances in which recognition could be given to judgments of other leading common law jurisdictions such as the United States.

ii) Section 33 was introduced for the reason indicated in §§ 42-43 above, and not in order to reflect Article 18 of the Brussels Convention. On the contrary, section 33(2) explicitly provides that section 33 does *not* apply to cases within the Brussels regime. The position is thus not merely that section 33 is *"not restricted to judgments given in Convention countries"*, but that it expressly has no application in such circumstances.

iii) I agree with the Claimants that the reference in *Ecobank* § 66 to the decision of the court in *Harada* "*in relation to section 33 [being] heavily influenced by the decision of the European Court in relation to article 18*" is, with respect,

puzzling given that the *Harada* decision makes no express reference to CJJA section 33. Indeed, neither *Marc Rich* nor *Harada* concerned the common law rules on submission at all: *Marc Rich* involved a court of another EU Member State, so that Article 18 and not section 33 applied; *Harada* concerned submission to an English court.

iv) *AES* and *Ecobank* did involve submission to the jurisdiction of a non-EU foreign court. However, the comments in both cases were *obiter*. In *AES* that is clear from the observation itself. In relation to *Ecobank*, I agree with the Claimants that even as a matter of common law, unaffected by Article 18, the conduct said to have constituted submission in Togo would not have amounted to submission. The Defendants were ordered to plead to the merits despite their express challenge to the jurisdiction. That requirement was fatal to any suggestion of submission (see §§ 7-9 and 67). Even taking the conventional common law approach this conduct would not amount to submission having regard to the principles set out earlier.

(3) Submission under US federal law

60. The statements in *Rubin* quoted in § 39 above indicate that the way in which the foreign court would characterise the steps taken in that court is relevant to the English court's consideration of whether there has been submission, though it is not decisive.

61. The Claimants have adduced evidence of the relevant US law by two means:

i) They rely on findings as to US law made by Lawrence Collins J in *Starlight International Inc v AJ Bruce and Others* [2002] IL Pr 35 617, pursuant to section 4 of the Civil Evidence Act 1972, having given the Defendants 21 days' prior notice of such reliance pursuant to CPR 33.7. The Claimants are accordingly entitled to rely upon these findings or, in the alternative, seek permission to do so. To the extent that permission may be required, I grant such permission.

ii) They also seek the permission of the court to rely upon an expert report of Joy L Langford dated 5 January 2018, a copy of which was sent by email to the Syrian MFA, and to the Defendants' former attorneys, on 8 January 2018 without substantive response. Ms Langford is a partner in the Washington, DC office of Norton Rose Fulbright LLP. In all the circumstances, including the Defendants having failed to engage with any part of these proceedings and having offered no response to that report, which contains potentially relevant evidence, I grant permission to the Claimants to rely upon its contents[2].

[2] The Claimants also seek permission to make this application without service of the same pursuant to CPR PD23A paragraphs 2.10 and 3, having regard to the exceptional circumstances prevailing in Syria and the repeated and consistent efforts made to give the Defendants notice of these proceedings and of the application. The evidence before me indicates that (a) the UK has no diplomatic presence in Syria, the FCO advises against all travel to Syria and even DHL has now indicated that it cannot attempt deliveries to the Syrian MFA because of a perception that international sanctions prevent it from doing so; (b) the material documents have been sent by both courier and email to the Defendants' former US attorneys LWS, and attempts were also made to send the same by email to the Syrian MFA; (c) the sole response to date to the provision of the Civil Evidence Act Notice, *Starlight International* and expert report has been a request from LWS for an attachment to be re-sent, which was done; (d) subsequent emails sending the application notice and accompanying materials were met

62. The evidence indicates that there is no general requirement in US law for defendants to raise merits-based submissions as part of any challenge to jurisdiction. That is evident from findings as to US law made in *Starlight* at §§ 18 to 23 to the effect that:

    i) a defence based on lack of jurisdiction may be made either in a defence, or in a separate motion; and

    ii) whether particular conduct constitutes a submission will be a highly fact sensitive inquiry.

63. Ms Langford's report indicates that:

    i) in deciding whether a defendant has implicitly waived a jurisdiction defence by its appearance in proceedings, a court must determine whether any of the defendant's appearances and filings constituted "*legal submission to the jurisdiction of the court*" (§ 12);

    ii) US courts apply a "*reasonable expectation*" standard to make this determination, such that "*submissions, appearances and filings that give a plaintiff a reasonable expectation that the defendant will defend the suit on the merits or which cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking, result in a waiver of personal jurisdiction defense*" (§§ 7 & 12);

    iii) a determination of submission to jurisdiction is a fact sensitive enquiry which requires a consideration of all the relevant circumstances, including the specific actions taken by the defendant in the proceedings (§§ 7 & 12); and

    iv) in the present proceedings, as a matter of US law the Defendants would be held to have submitted to the jurisdiction of the US courts by taking the steps that they did and engaging with the merits in the way that they did. Ms Langford explains that constitutional objections are treated, as a matter of US law, as arguments on the merits; and refers to the contrast between the Defendants' conduct in the US proceedings in the present case with the stance they took (represented by the same US Attorneys) in *Baker* where they filed a limited notice of appearance as indicated in § 38 above.

64. Ms Langford states in her evidence that *"I have also inspected the full docket for the proceedings to ensure that I have a full understanding of the same"*, and sets out the events which occurred in the proceedings after the original judgment. Based on this evidence, I conclude that unlike in *Baker*, the Syrian defendants in the present case did not accompany their Notices of Appeal by a Notice of Limited Appearance denying jurisdiction and asserting sovereign immunity.

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with automated responses indicating that LWS's mailbox was full, albeit the courier delivery was successful; (e) emails sending the hearing bundles were met with no response; and (f) automated responses have also been received from the Syrian MFA email address indicating that delivery of the application notice and accompanying materials and the hearing bundles has not been possible because the mailbox is full. In these very unusual circumstances, I grant the permission sought.

(4) Conclusions as to submission by First Defendant

65. I consider first whether the First Defendant ("***Syria***") submitted to the jurisdiction of the US courts, because as indicated in section 5 below there is a separate issue as to which, if any, steps were also taken on behalf of the Second and Third Defendants.

66. In my judgment Syria did submit to the jurisdiction of the US courts, because:

i) The three Notices of Appeal filed in October 2011 and May 2012 directly invoked the jurisdiction of the US courts, without expressing any reservation as to the jurisdiction of the US courts and without any objection on sovereign immunity grounds.

ii) All three Notices of Appeal raised an issue relating to the powers of a Magistrate Judge relative to those of an Article III judge, which was said to concern the Constitution or laws of the US. Ms Langford's evidence is, as noted above, that constitutional objections are treated, as a matter of US law, as arguments on the merits. Viewing the matter from an English point of view too, raising an issue as to the allocation of powers between judges within a court system should be regarded invoking the court's merits jurisdiction or, at least, as indicating a submission to the jurisdiction of the relevant country's courts as a whole. I agree with the statement in Dicey, Morris & Collins § 14-072 that:

> "It is submitted that if the whole of the relief sought by the defendant from the foreign court is a decision by the court that it has no international jurisdiction, the appearance will be protected from being regarded as a submission by s.33(1)(a); but that a contention that a different court (but in the same country) has jurisdiction is not to be seen as contesting the jurisdiction within the meaning of s.33(1)(a), for it is implicit in the contention that the courts of the country do not lack jurisdiction."

iii) There was no need for Syria to litigate on the merits at the same time as challenging the jurisdiction of the US courts: it would have been entitled simply to challenge jurisdiction alone: see the *Starlight* finding referred to in § 62.i) above.

iv) Syria's filings in this case contrast with the Notice of Limited Appearance which it had, through the same counsel, filed in the same court the previous year in *Baker*. Its failure to file such a notice in the present case lends support to the view that it submitted to the jurisdiction.

v) The Motion for Extension of Time filed on 30 May 2012 raised issues as to the merits. Whilst it also referred to questions arising under the FSIA, it did not allege that the US courts lacked jurisdiction on sovereign or state immunity grounds.

vi) The same applies to the Statement of Issues filed in July 2012 and the certificate filed in July 2012.

vii) The "*Underlying Decision*" document filed in July 2012 referred only to a merits issue, namely the alleged lack of explanation for the increase in the judgment figure.

viii) Syria's Motion for voluntary dismissal of the appeal was itself an invocation of the US court's jurisdiction without any accompanying reservation as to jurisdiction or immunity. It was equivalent to agreeing to a consent order dismissing the claims and cross claims (see the quotation from *Swiss Life* in §40 above).

ix) None of the documents filed up to and including the Motion for voluntary dismissal of the appeal contained any clear or express reservation to the effect that Syria contended the US courts could not exercise jurisdiction over it by reason of sovereign or state immunity, against in contrast to its filing in *Baker*.

x) Each of those documents was taking a step which was only necessary or only useful if any objection to jurisdiction had been waiver or not taken.

xi) In contrast, Syria's January 2013 Notice in response to the plaintiffs' enforcement motion did contain an express statement that the court lacked jurisdiction over Syria and that the case was barred by sovereign immunity. By this stage, however, Syria had already submitted to the jurisdiction by filing and pursuing an appeal without any such reservation, up to and including the point of applying for its voluntary withdrawal. As noted in § 37.xiii) above, Syria's motion itself proceeded on the footing that it *had* previously appeared by counsel for a portion of the proceedings before the US courts.

67. Even to the extent that Syria in its Statement of Issues referred to an issue about the recoverability of particular property damages losses under the FSIA, that is more properly to be read as a substantive defence to a claimed loss, assuming jurisdiction to exist, than a challenge to jurisdiction. Ms Langford cites it as an example of Syria's intention to challenge the lower court's approach to the merits. In any event, Syria had by this stage already filed three Notices of Appeal, and a Motion for extension of time, in the terms I have already described.

68. The result is the same even if it is appropriate to apply the *Elefanten Schuh* approach. To the extent that it is possible to find an analogy in these appellate proceedings for the service of a defence, it was in my view the service of the Notices of Appeal, each of which included a merit-based objection to the judgment appealed from but contained no assertion that the US courts lacked jurisdiction by reason of, or that the claims were barred by, sovereign immunity. The simple fact is that Syria at no stage made any such challenge, save to the extent that its January 2013 response contained one: but that was too late to prevent Syria from having submitted by its filings in the appeal up to and including Syria's motion to withdraw the appeal.

69. Moreover, as the Claimants point out, the circumstances here were very different from those in *Ecobank* and *Harada* (and indeed *Elefanten Schuh* itself). Here it is not the case that Syria could have done nothing further to distance itself from the US courts' jurisdiction:

i) *Starlight* makes clear that a defendant may challenge jurisdiction in a separate motion.

ii) Ms Langford's report emphasises the absence in any of Syria's relevant steps of an assertion of immunity, a reservation of the right to challenge jurisdiction, or any actual challenge.

iii) As evidenced by the fact that the Notices of Appeal were first filed and then dismissed at Syria's own request, it was under no obligation to participate in the proceedings at all.

iv) As evidenced by the Defendants' conduct of the *Baker* litigation, Syria could easily have made it explicit that it was appearing only in order to challenge jurisdiction.

v) All of this is in stark contrast to the facts in issue in both *Ecobank* and *Harada* where the defendants were ordered to file submissions on the merits or directed that the hearing on the merits would proceed notwithstanding their objections (see e.g. *Ecobank* at §§ 8-9; *Harada* at §§ 9-11 and 35-36).

70. I therefore conclude that Syria submitted to the jurisdiction of the US courts for the purposes of English private international law. Accordingly, and for the same reasons, I conclude that:

i) the US judgment would be recognised and enforced against Syria if it had not been given against a State;

ii) Syria submitted to the jurisdiction of the US courts for the purposes of section 2 of the State Immunity Act 1978, having taken one or more steps in the proceedings other than for the purpose only of claiming immunity;

iii) the US court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the UK in accordance with sections 2 to 11 of the State Immunity Act 1978; and

iv) the US judgment therefore qualifies for recognition and enforcement in the UK against Syria pursuant to CJJA section 31(1).

(5) Conclusions as to submission by Second and Third Defendants

71. The Notices of Appeal and other filings in the US Court were made by LWS who, at the end of each document, referred to themselves as "*Attorneys for the Syrian Arab Republic*". The Notices began by stating that "*Notice is hereby given that the Syrian Arab Republic, named as a defendant in the above consolidated cases, hereby appeals …*"

72. The question therefore arises whether all three Defendants submitted to the US Court's jurisdiction, or only Syria itself.

73. The Claimants submit that all three Defendants submitted, relying on the following factors:

i) the US District Court's use of the shorthand of "*Syria*" to refer to all three Defendants in its Findings of Fact and Conclusions of Law, and in its Judgment and Amended Judgment filed on 2 September 2011 and 14 May 2012 respectively;

ii) the express statement by LWS in the Certificate filed on 2 July 2012 that *"The Syrian appellants on this appeal are the Syrian Arab Republic, Syrian Air Force Intelligence and General Muhammed Al Khuli"*;

iii) the reference in the Plaintiffs' Motion of December 2012 to the facts that on 2 September 2011 *"Magistrate Judge Facciola entered a judgment against the Syrian Defendants"*; on 3 October 2011 *"all Syrian Defendants entered an appearance and simultaneously noticed an appeal"*; on 8 May 2012 *"Counsel for the Syrian Defendants filed an Amended Notice of Appeal";* and on 27 November 2012 *"the Syrian Defendants filed an unopposed motion to voluntarily dismiss the appeal.* To these statements can be added the statement quoted in § 37.xii) above that counsel for the "*Syria Defendants*" (defined to refer to all three of the present Defendants) had *"entered his appearance, in this Court and before the US Court of Appeals for the DC Circuit in the now dismissed appeal, on behalf of the Defendants";*

iv) the absence of any express challenge by the Defendants to this treatment of all three Defendants as party to the appeal and as represented by the same Counsel, in the January 2013 filing by LWS; and

v) the evidence that at least in the related *Baker* litigation LWS were acting for all three Defendants despite at the same time and (it is to be inferred for shorthand) referring to themselves as *"Attorneys for the Syrian Arab Republic"*. The Court treated the Defendants as appearing together and as jointly represented in those proceedings too, noting for example in its Memorandum order of 1 September 2011 in *Baker* that *"the defendants noted an appearance"* and *"the defendants filed a notice of appeal"*.

74. The Claimants also relied on the reference in the Plaintiff's Motion to Confirm Final Judgment to the Magistrate Judge having "*ordered damages to be assessed against the Syria Defendants*" (emphasis added) and the statement in the US District Court's April 2014 Memorandum Order that "*Although the Syrian defendants never answered nor appeared before this Court they did file a Notice of Appeal*" (emphasis added). These documents post-dated LWS's January 2013 filing, so the point about LWS's failure to take exception to them in that filing does not arise.

75. The arguments here are in my view finely balanced. However, I have come to the conclusion that all of the Defendants submitted to the US courts' jurisdiction, because:

i) LWS in the Certificate filed on 2 July 2012 expressly stated all three to be appellants in the appeal.

ii) LWS nonetheless signed the Certificate using the words "*Attorneys for the Syrian Arab Republic*". There is, however, no sign in any of the documents that any other law firm was representing the Second and Third Defendants in

the appeal or any other part of the case. The only logical inference is therefore that, whilst they described themselves as attorneys for the First Defendant, LWS were in fact acting for all three Syrian defendants and representing them all as appellants. It also follows that LWS's execution of earlier and later filings in the same manner was not inconsistent with their acting for all three Defendants.

iii) The plaintiffs' December 2012 Motion, quoted above, stated four times that all three of the Defendants had participated in the appeal. LWS's January 2013 filing was a direct response to that Motion. Had LWS not been conducting the appeal on behalf of all three Defendants, it would have been very surprising for them not to have taken issue with those statements in their response.

iv) The US court itself subsequently, in its April 2014 Memorandum Order, took the view that all three defendants had filed a Notice of Appeal.

76. In these circumstances I conclude that the steps which LWS took in relation to the appeal in the US court were taken on behalf of all three of the Defendants, and all three thereby submitted to the US courts' jurisdiction. The conclusions I reach in relation to Syria in § 70 above therefore also apply to the Second and Third Defendants.

(6) Other requirements

77. As well as the requirement that the foreign court had jurisdiction according to English private international law, it is necessary to show in an action at common law on a foreign judgment that:

i) the foreign judgment is final and conclusive on the merits;

ii) it is for a debt or definite sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and

iii) not impeachable on the basis of fraud, contrary to public policy, or obtained in proceedings that were contrary to natural justice.

78. I am satisfied that these requirements are satisfied in the present case. As part of reaching that conclusion I have satisfied myself that the Defendants were given proper notice of the US proceedings (see, in particular, § 9.ii) above), and that the US court awarded damages on a compensatory basis without any element of multiple, penal or exemplary damages.

(E) INTEREST

79. The US court awarded the Claimants the sum of US$51,574,997.89 together with post-judgment interest. I have been provided with witness evidence from Ms Andrewartha, the solicitor acting for the Claimants (based on information from her firm's New York office), that under US law post-judgment interest would have accrued at 0.18% compounded annually, amounting to US$310,715.68 at the time of

commencement of these proceedings, and giving a primary sum sought as the debt then crystallised of US$51,885,713.57.

80. In addition, the Claimants seek interest on that judgment sum from the date of commencement of these proceedings and until payment. They do so on the basis of the average US Prime Rate applicable over the period from the date of issue to the present day. An up to date average rate and interest calculation to 5 February 2018 has been provided in Ms Andrewartha's ninth witness statement, and I give permission to rely upon that statement. This produces a final sum of post-judgment interest sought to 5 February 2018 of US$4,694,619.36.

81. Going forward, the Claimants seek interest on the judgment sum at a rate of 4.5% (reflecting the current US Prime Rate) and amounting to US$6,396.87 per day.

82. Ms Andrewartha explains in her eighth witness statement that:

    i) she considers the US Prime Rate to be appropriate because (a) though borrowing rates in the US vary depending on borrower type and characteristics, the Prime Rate is used as a benchmark in the market, (b) US cases have held it to be the most appropriate rate of pre-judgment interest as it best approximates the market rate of borrowing, and (c) it is generally considered the starting point for awards in US dollars in the English courts; and

    ii) whilst section 35A of the Senior Courts Act is wide enough to permit a claim based on the US Prime Rate as from the date of the US judgment, in circumstances where US law provides for the lower rate of 0.18% by way of post judgment interest the Claimants consider it appropriate to seek Prime Rate only as from the date of issue of the present proceedings (14 September 2015).

83. Whilst it might be argued that the US post judgment rate should continue to apply right up to the date on which judgment is given by this court, it is reasonable to apply the US Prime Rate at least from the date of commencement of these proceedings. That approach does no more than to compensate the Claimants, at a rate approximating to the real cost of borrowing, for being out of their money for that period.

84. The only aspect of the Claimants' approach to interest at which I would cavil is the calculation of interest under section 35A on the aggregate of the amount of the US judgment *plus* the US post judgment interest of approximately US$310,715. I would accept that under the Foreign Judgments (Reciprocal Enforcement) Act 1933, which may serve as an analogy, section 2(6) provides that *"[i]n addition to the sum of money payable under the judgment of the original court, including any interest which by the law of the country of the original court becomes due under the judgment up to the time of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original court"* (emphasis added); and section 2(2)(c) then provides that the sum for which a judgment is registered shall carry interest as if the judgment had been a judgment originally given in the registering court and entered on the date of registration. Thus the overseas judgment, including interest, is registered and then carries interest going forward.

85. However, the 1933 Act does not apply here, and the general position under section 35A noted in White Book note 9A-124 is that *"the award of interest under s.35A must be for "simple interest" which is perhaps similar to the prohibition contained in proviso (a) to s.3 of the Act of 1934 against "the giving of interest upon interest" (see Bushwall Properties Ltd v Vortex Properties Ltd [1975] 1 W.L.R. 1659; [1975] 2 All E.R. 214)." Bushwall* (which was reversed on other grounds at [1976] 1 W.L.R. 591) held that despite the former statutory proviso precluding an award of interest on interest, interest could be awarded on an amount of damages which had been calculated by reference to the interest cost of having to pay for a property immediately instead of in stages as had been agreed. In those particular circumstances the principal sum was held in reality not itself to constitute "interest" as such.

86. In the present case, I do not see a sufficient basis on which to award interest under section 35A on the post-judgment interest of US$310,715.68, and consider that that would represent an element of compounding whereas section 35A (as opposed to certain instances in equity and perhaps cases where interest can be claimed by way of damages) provides only for simple interest. I therefore consider that interest at Prime Rate (at the rates determined on the bases the Claimants have proposed) should be awarded under section 35A from 14 September 2015 on the US judgment sum of US$51,574,997.89 rather than upon US$51,885,713.57. This will necessitate a recalculation of the sums claimed by way of interest since 14 September 2015 and the daily rate going forward.

(F) COSTS

87. As the final hearing was listed for and took not more than 1 day, the Claimants seek a summary assessment of their costs pursuant to CPD 44PD.9. The costs claimed were addressed in Ms Andrewartha's Eighth and Ninth Witness Statements. Up to date statements of the costs claimed have been provided, detailing total costs of £545,153.89.

88. The Claimants invite the court to proceed with a summary assessment of costs on the grounds that:

    i) the general rule is that the court *should* make a summary assessment of costs where the hearing has lasted not more than one day unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily (CPR 44PD.9 at 9.2);

    ii) the Claimants wish to keep to a minimum any further delay in the crystallisation of the Defendants' liability so that they can proceed to attempt enforcement; and

    iii) the history of proceedings to date suggests that there is little or no prospect of the Defendants participating in any detailed assessment process or of their complying with an order to make an interim payment.

89. 44PD.9 § 9.2 does not in my view apply here, because the provision relied upon (subparagraph (b)) applies only at the conclusion of any "*other hearing*", in contradistinction to subparagraph (a) which applies "*at the conclusion of the trial of a*

case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim". § 9.2 does not cover the case of a trial in a non-fast track case. As the hearing in the present case was in substance the trial of the action, the situation does not in my view fall within § 9.2.

90. Nonetheless, § 9.1 provides that "*Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs*". Further, CPR 44.6(1) provides that "*Where the court orders a party to pay costs to another party (other than fixed costs) it may either (a) make a summary assessment of the costs; or (b) order detailed assessment of the costs by a costs officer, unless any rule, practice direction or other enactment provides otherwise*". The court therefore has the power to make a summary assessment in the present case.

91. In the circumstances indicated in §§ 88 (ii) and (iii) above I am willing to accede to the Claimants' request.

92. I have carefully considered the Claimants' two Statements of Costs, respectively covering the periods up to and as from 13 October 2017, in the sums of £341,435.47 and £203,718.42. The detailed evidence filed for the hearing has given me a good sense of the amount and complexity of work involved in the proceedings. I am satisfied that the hourly rates, the hours spent, the division of work between more and less senior staff, and the disbursements, are broadly reasonable. On the basis that there will be no detailed assessment, I do not think it would be right to assess the costs at 100% simply on the basis of a broad sense of the reasonableness of the bill. On the other hand, I do not see any good basis in the present case on which to make any very substantial percentage discount to the sum claimed in order to reflect the inevitable uncertainties involved. In the circumstances I summarily assess the Claimants' costs at £495,000.

93. In addition, I consider it appropriate in the present case, where the Claimants are likely to have been out of pocket for considerable periods of time as regards significant amounts of costs, to order interest on costs pursuant to CPR 44.2(6)(g) at the commercial rate of 2.5% per annum from the date the costs were incurred up to the date of my order. Interest thereafter should accrue at the judgment rate.

(G) CONCLUSIONS

94. For the reasons set out above I shall enter judgment for the Claimants and approve an order reflecting the relief granted in this judgment.

95. I am grateful to Claimants' counsel for their clear and helpful written and oral submissions.