

DIFC Court of Appeal confirms that Act of State Doctrine forms part of DIFC law

In *Korek Telecom Company LLC & ors v Iraq Telecom Ltd & anor* [2024] DIFC CA 016, the DIFC Court of Appeal issued its first ever judgment on the foreign act of state doctrine, confirming that the doctrine forms part of DIFC law.

The case arose from an application under Article 41(2) of the DIFC Arbitration Law to set aside a USD 1.6 billion arbitration award seated in the DIFC. The tribunal had found the award debtors liable for unlawful means conspiracy, as a result of their efforts to corruptly procure a regulatory decision in a third country, including by bribery of state officials (the “**Regulatory Decision**”), causing loss and damage to the award creditors.

The award debtors argued that the Tribunal had exceeded its jurisdiction by determining matters that were not arbitrable and/or violated UAE public policy by dismissing their objections under the act of state doctrine, and thereafter ruling on the award creditors’ allegations in relation to the Regulatory Decision.

The award creditors contended that the act of state doctrine did not form part of DIFC law and that, even if it did, the Tribunal had not offended against the doctrine as it had not been required to determine the validity or lawfulness of the Regulatory Decision. Instead, it was asked to determine whether there had been (i) a conspiracy amongst the award debtors to procure the Regulatory Decision; (ii) an intention to injure; (iii) unlawful means (i.e., the payment of bribes); and (iv) consequential loss. The award creditors submitted that the fact that the Tribunal’s findings may have incidentally disclosed offences by the bribed officials did not offend the act of state doctrine as such matters fell squarely within the so-called *Kirkpatrick limitation*, which provides that the act of state doctrine does not bar a court from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act.¹

At first instance, Justice Shamlan Al Sawalehi dismissed the set-aside application, finding that the act of state doctrine did apply in the DIFC but was not engaged on the facts. A copy of his judgment can be found at <https://www.difccourts.ae/rules-decisions/judgments-orders/arbitration/arb-0122023-1-novak-2-nola-3-nadim-v-1-norwood-2-numair>.

On appeal, the award debtor argued that the act of state doctrine could be imported into DIFC law via the amended Application Law (DIFC Law No. 3 of 2004), which allows DIFC

¹ The “*Kirkpatrick limitation*” is named after the US Supreme Court decision in *WS Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400) and has been endorsed, inter alia, by Rix LJ in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, at [95]-[102], Lord Sumption in *Belhaj v Straw* [2017] A.C. 964 at [240] and Lord Lloyd-Jones in *Maduro v Guaido* [2023] A.C. 156 at [136] and [151].

law to be supplemented by reference to the common law of England and Wales and other common law jurisdictions.

The Court of Appeal rejected the debtors' reliance on the amended Application Law, finding that the amendment (enacted after the award and first instance judgment) did not have retrospective effect.

Nonetheless, citing *Dutch Equity Partners Ltd v Daman Real Estate Capital Partners* [2006] DIFC CFI-001, and without reference to the subsequent developments in *TIG v El Fadil* [2022] DIFC CA 005/006, the Court of Appeal held that under the pre-amendment Application Law, English common law could still be used to supplement DIFC law, so that the English case law on the foreign act of state doctrine was relevant in the present case.

While the Court declined to fully adopt English law on the doctrine, noting its lack of “a clear principle with well-defined content”,² it held that whatever the precise contours of the doctrine under DIFC law, it did not preclude DIFC-seated arbitrations between private parties involving allegations that one party caused loss to another by bribing foreign officials:³

“It is not necessary for present purposes to provide a comprehensive definition of the act of foreign state doctrine applicable in the DIFC by reference to the common law of England and Wales. It is sufficient to say that the doctrine, as applicable in the DIFC as at the date of the arbitration and the setting aside decision, did not preclude arbitration as between private parties of the question whether one party, by bribery of a public authority of a foreign state had inflicted actionable loss and damage on the other. That question does not involve any investigation of the validity of the [Regulatory Decision]. That Decision was taken to be effective and a link in the causal chain from the acts of the [award debtors] to the loss suffered by the [award creditors].”

The DIFC Court of Appeal thereby effectively endorsed the Kirkpatrick limitation, drawing a line between assessing the validity of a sovereign act (which is precluded by the doctrine) and inquiring into the conduct of private parties which have induced that act.⁴

Further, the Court of Appeal explained that it would have reached the same decision based on the public policy of the UAE, which “stands firmly against conduct involving the bribery of foreign officials” and “will not allow the use of the foreign act of state doctrine to blindfold the Courts or DIFC-seated arbitrators in cases where the disputes before them have arisen out of the corrupt conduct of one of the parties.”⁵

² At [313].

³ At [314].

⁴ At [182] and [317].

⁵ At [317]

By confirming the doctrine's place in DIFC law - but restricting its reach - the Court of Appeal has adopted a firm anti-corruption stance. It also opens the door for future development: while the doctrine may now be invoked in DIFC litigation or arbitration, its precise scope remains unsettled, likely inviting further argument and clarification.

As in other common law jurisdictions, the foreign act of state doctrine in the DIFC is now established, but still evolving.

Tom Montagu-Smith KC and Miriam Schmelzer acted for the successful award creditor, instructed by Graham Lovett, Michael Stewart Emily Kemp and Hannah Braiding Watson of Akin Gump Strauss Hauer & Feld, and Bader El-Jeaan, John Reynolds, Tarek Badawy, Oliver Green and Ismail Lamie of Meysan, together with John Willems and Noor Davies of White & Case.

A link to the full Court of Appeal Judgment can be found at <https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/1-korek-telecom-company-llc-2-korek-international-management-limited-3-sirwan-saber-mustafa-v-1-iraq-telecom-limited-itself-and>