

SINGAPORE

A Vanishing Silhouette: Acts of State Doctrine(s) and Interim Relief In Singapore

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1. Introduction

This digest examines the intersection between the act of State doctrine, and the power of Singapore courts under Singapore's International Arbitration Act ("IAA") to grant interim relief. It is well settled that this private international law doctrine can be applied by courts at common law when they examine purported sovereign acts of a foreign government to decide on whether they ought to assume or decline jurisdiction.

Put differently, the act of State doctrine limits, for prudential reasons, the forum court from inquiring into the validity of a recognised foreign government's public acts committed within the latter's own territory.¹ Whether or not the act of State doctrine applies is typically considered at the outset of judicial or arbitral proceedings as it is question of jurisdiction that the court or tribunal ought to answer first, before determining the substantive merits of the application. However, in *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* (hereinafter *Maldives Airports*),² principles relevant to the doctrine seem to have been applied in the Singapore Court of Appeal's ("CA") analysis as to whether or not an injunction should be granted under the SIIA, even though the CA expressly held that the doctrine did not apply to preclude its competence because the dispute was a

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¹ *WestLB AG* [2012] 4 SLR 894, at ¶ 39.

² [2013] 2 SLR 449.

private one, with each party seeking private law remedies.³

Significantly, the CA's eventual refusal to grant the injunction was in part based on the practical problems it had perceived in enforcing and policing the injunction, particularly where third parties were involved.⁴ The author asks if the CA's decision effectively re-introduced elements of the act of State doctrine under a different guise. It posits that interim relief in support of arbitration should acknowledge that disputes, and thus the evidence and assets underlying them, can have both private and public dimensions. [Emphasis added]

After all, the complexity of this doctrine has prompted the Court of Appeal of England and Wales to refer to it not as one doctrine, but several rolled into one. In *Yukos Capital SARL v OJSC Rosneft Oil Coy*⁵ (hereinafter *Yukos Capital*), Rix LJ held the act of State doctrine(s) should not be defined purely by their pre-conditions (to which there can exist exceptions), but perhaps by their limitations.⁶

We think that on the whole we prefer to speak of "limitations" rather than "exceptions".

The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed.⁷

His Honour added as follows:

In our judgment, the act of state doctrines cannot be reduced to a single formula such as the judge adopted (distinguishing validity from all other forms of lawful conduct) or such as Mr Pollock has sought to reformulate on this appeal. Such formulae accord with neither the English nor the US jurisprudence. On the contrary, we consider that the act of state doctrines ultimately reflect more complex considerations, and would refer to the analysis in this court in *Kuwait Airways v. Iraqi Airways* concluding in its [317]-[323].⁸

³ *Maldives Airports* [2013] 2 SLR 449, at ¶¶ 32-52.

⁴ *Id.*, at ¶¶ 66-71.

⁵ [2013] 3 WLR 1329.

⁶ The English Court of Appeal in *Yukos Capital* identified five exceptions to the act of State doctrine: 1. The act of state must, generally speaking, take place within the territory of the foreign State itself; 2. The doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is grave infringement of human rights; 3. Judicial acts will not be regarded as acts of State for the purposes of the act of state doctrine; 4. As a matter of general international law, there is no immunity for the state's commercial activities; 5. The act of State doctrine was not involved where the only issue was whether certain acts had occurred, not whether they were invalid or wrongful.

⁷ *Yukos Capital* [2013] 3 WLR 1329, at ¶ 115. [Emphasis added]

⁸ *Kuwait Airways Corporation v Iraqi Airways (Nos. 4 and 5)* [2002] AC 883. [Emphasis added]