THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL
BEFORE H.E. DEPUTY CHIEF JUSTICE ALI AL MADHANI, H.E. JUSTICE ROBERT FRENCH AND H.E. JUSTICE MICHAEL BLACK KC

BETWEEN

(1) KOREK TELECOM COMPANY LLC

First Claimant/Appellant

(2) KOREK INTERNATIONAL (MANAGEMENT) LIMITED

Second Claimant

(3) SIRWAN SABER MUSTAFA

Third Claimant/Appellant

and

(1) IRAQ TELECOM LIMITED
FOR ITSELF AND IN THE NAME AND ON BEHALF OF INTERNATIONAL HOLDINGS LIMITED

(2) INTERNATIONAL HOLDINGS LIMITED

Defendants/Respondents

Hearing :	1 May 2025
Counsel :	Ms Zoe O'Sullivan KC for the First and Third Claimants/Appellants Mr Tom Montagu-Smith KC and Ms Miriam Schmelzer for the Defendants/Respondents
Submissions	Appellants' Skeleton Argument dated 19 September 2024. Appellants' Supplementary Skeleton Argument dated 24 March 2025 Respondents' Skeleton Argument dated 18 December 2024 Respondents' Supplementary Skeleton Argument dated 23 April 2025
Judgment	16 June 2025

JUDGMENT OF THE COURT OF APPEAL

UPON the issue of the final award in ICC Case No. 25194/AYZ/ELU dated 20 March 2023 (the "Award")

AND UPON the Order of H.E. Justice Shamlan Al Sawalehi dated 14 April 2023 recognising the Final Award issued in case number ARB-009-2023

AND UPON the Claimants' set aside application dated 20 June 2023 (the "Set Aside Application")

AND UPON the Order of H.E. Justice Shamlan Al Sawalehi dated 29 August 2024 dismissing the Set Aside Application (the "Order")

AND UPON the First and Third Claimant's application seeking permission to appeal the Order (the "PTA Application")

AND UPON the Order of H.E. Justice Shamlan Al Sawalehi dated 27 November 2024 granting the PTA Application on all grounds

AND UPON hearing counsel for the Appellants and counsel for the Respondents at the Appeal Hearing before H.E. Deputy Chief Justice Ali Al Madhani, H.E. Justice Robert French and H.E. Justice Michael Black KC on 1 May 2025

IT IS HEREBY ORDERED THAT:

1. The Appeal is dismissed.

2. The Appellants will pay the Respondents' costs of the Appeal to be assessed by the Registrar if not able to be agreed.

Issued by
Delvin Sumo
Assistant Registrar
Date of Issue: 16 June 2025
At: 9am

SCHEDULE OF REASONS

Introduction

1. In an arbitration, which is the subject of this Appeal, the Respondents to the Appeal raised a tortious conspiracy claim against the Appellants. They alleged that the Appellants had corruptly procured a decision of the Communications and Media Commission of the Republic of Iraq ("CMC") adverse to the Respondents and had caused them to suffer loss and damage. The Tribunal found the claim made out. The Appellants contend that the Tribunal was precluded from making such a finding because it involved canvassing the decision of a foreign state authority contrary to the act of state doctrine and to the public policy of the UAE. The Appeal raises the question of the existence, scope and application of the act of state doctrine in the DIFC and its interaction with the public policy of the UAE.

2. An ancillary question involved the tender to the Tribunal of investigative materials allegedly unlawfully obtained.

The Parties

3. The Appellants are Korek Telecom Company LLC ("Korek"), a company incorporated under the laws of Iraq and Sirwan Saber Mustafa, who resides in Iraq. They were the respondents in the Arbitration, along with Korek International (Management) Ltd ("KI"), a company incorporated under the laws of the Cayman Islands. The Respondents to the Appeal are Iraq Telecom Ltd ("IT") and International Holdings Ltd ("IH"). They were the claimants in the Arbitration.

Procedural history

4. On 20 March 2023, an ICC Arbitral Tribunal (the "Tribunal") issued a Final Award (the "Final Award")[1] in the Arbitration. The seat and place of the Arbitration was the Dubai International Financial Centre (`DIFC"). The claims were brought pursuant to a Shareholders' Agreement of 10 March 2011 ("SHA"), an Amended and Restated Subscription Agreement dated 27 July 2011 ("Subscription Agreement") and a Letter Agreement entered into on or around 27 July 2011. The Tribunal made a number of orders in favour of the Respondents to the Appeal, including awards of damages, interest, declaratory relief, specific performance, the costs of the Arbitration and legal costs.

5. A Recognition and Enforcement Order was made on 14 April 2023 in the DIFC Court of First Instance ("DIFC CFI") in case number ARB-009-2023. On 24 May 2023, the Appellants issued an Application to Set Aside the Recognition and Enforcement Order. On 12 May 2023, H.E. Justice Sir Jeremy Cooke granted a Worldwide Freezing Order against the Appellant, Mr Mustafa in respect of the entirety of the sums due under the Final Award and granted the Respondents permission to enforce the Recognition and Enforcement Order and the underlying Final Award.

6. On 20 June 2023, the Appellants filed an Application to Set Aside the Award. The Application was heard by His Excellency Justice Shamlan Al Sawalehi on 19 February 2024. On 29 August 2024, His Excellency ordered that the Set Aside Application be rejected. The Recognition and Enforcement Order and a Worldwide Freezing Order issued by Justice Sir Jeremy Cooke on 12 May 2023 in claim number ARB-009-2023 were upheld.[2]

7. On 19 September 2024, the Appellants filed an Appeal Notice seeking permission to appeal His Excellency's Order. On 27 November 2024, His Excellency ordered that the Permission to Appeal Application be granted on all grounds and the matter be referred to the Court of Appeal for determination.

The Arbitration provisions of the relevant agreements

The Shareholders' Agreement

8. Clause 47 of the SHA provided for the governing law under the Agreement as follows:

> "47. **Governing Law**
>
> This Agreement, including any non contractual obligations arising out of or in connection with this Agreement, shall be governed by and construed in accordance with English law."

Clauses 48.1 and 48.2 provided for non-adversarial dispute resolution mechanisms under the Agreement, in circumstances in which:

> ". any dispute, controversy or claim of whatever nature arises under, out of, or in connection with this Agreement, including any question regarding its existence, validity or termination or any non contractual obligations arising out of or in connection with this Agreement (a **Dispute**) ."

9. Clause 48.3 provided for arbitration of disputes not resolved under clauses 48.1 and 48.2:

> "48.3 If the parties fail to resolve the Dispute in accordance with clauses 48.1 and 48.2, such Dispute shall be referred to and finally resolved by arbitration under the Arbitration Rules of the ICC (Rules), which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be three (3)."

10. Clause 48.6 provided:

". The seat, or legal place, of arbitration shall be Dubai International Financial Centre. The language to be used in the arbitration shall be English."

Subscription Agreement

11. The Subscription Agreement contained similar provisions in clauses 33 and 34.

12. It does not appear from the terms of clause 47 of the SHA and clause 33 of the Subscription Agreement that English law was to apply to the arbitral process. The application of the act of state doctrine for which the Appellants contended depended upon its application as a matter of DIFC Law.

Factual Background

13. The factual history was set out in the Final Award. That history is outlined in the paragraphs that follow.

14. Korek was established by Mr Mustafa and two partners in 2000 in the Erbil Province of Iraq to provide mobile telephone services initially in that region and later across Iraq.[3]

15. In 2007, the CMC issued a national license to Korek. The CMC is the official body responsible for the regulation of media and telecommunication interests in Iraq.

16. Under the terms of the license Korek was to pay the CMC a license fee of USD 1.25 billion. A first instalment of USD 375 million was paid in or around August 2007. A further instalment of USD 250 million was due on 11 September 2007. Korek approached Agility Public Warehousing K.S.C.P. ("Agility") for financing to make the payment. The funds were advanced to Korek on 11 September 2007 by a subsidiary of Agility, Alcazar Capital Partners.[4]

17. Korek required further financial and technical support in 2010. Agility then partnered with Orange S.A., formerly France Telecom S.A. ("Orange") to provide the funds and expertise required. This involved Orange and Agility acquiring an interest in Korek. The license required CMC's approval for any direct or indirect change in the control of 10% or more of the issued shares of Korek or total voting rights in Korek. Korek applied to the CMC for its consent to the proposed transaction with Agility and Orange. The consent was granted subject to conditions on 29 May 2011.[5]

18. Orange and Agility established IT to hold their interest. IH was established as a new holding company. Korek issued all of its existing and newly capitalised shares to IH in July 2011. Mr Mustafa and his fellow investors and another acquired 56% of IH shares, held through KI. IT acquired 44% of IH shares. IT had a Call Option to acquire a further 7% shareholding in IH, which would have given it majority control.[6]

19. Orange and Agility's total investment was USD 810 million. The investment was governed by two principal agreements, the SHA and the Subscription Agreement. The parties to the SHA were Korek, Mr Mustafa, KI and IT. The Subscription Agreement was made between IH, Korek, Mr Mustafa and his two partners. At the same time, IT entered into a Shareholder Loan Agreement with IH under which it advanced to IH the sum of USD 285 million. Clause 23 of the SHA contained a Call Option, exercisable by IT giving it the right to call for the transfer of 7% of the fully paid shares in IH sufficient to give it 51% of those shares ("Call Option"). [7]

20. The relevant shareholding structures were as follows:

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21. Korek was managed by Mr Mustafa as a statutory manager and not by a board of directors. A Korek Supervisory Committee ("KSC") was established to provide, pursuant to clause 7.1 of the SHA "the overall direction and management of Korek." It mirrored the composition of the IH board of directors, comprising three directors nominated by KI, three directors nominated by IT and an independent director also nominated by KI. [8]

22. On 31 October 2011, the Federal Supreme Court of Iraq accelerated the payment of the fourth instalment of Korek's license fee in the amount of USD 110 million so that it was due on 18 November 2011 and not in April 2012 as previously advised. Korek then had only USD 15 million at its disposal and would have to raise USD 150 million through loans or capital injections. [9]

23. Mr Mustafa advised Korek's Financing Proposal Committee ("FPC") on 21 November 2011 that he had obtained a commitment from the IBL Bank ("IBL") in Lebanon to cover Korek's payment obligations to the CMC. IT's representatives were concerned about the duration of the loan and various of its terms. In the event, it was accepted that the IT Shareholder Loan should be subordinated to the IBL Loan pursuant to a separate agreement.[10]

24. On 10 December 2013, the CMC wrote to Korek alleging that Korek, Agility and Orange had failed to fulfil conditions on which the CMC had approved the 2011 transaction.[11]

25. The CMC gave Korek one week to provide it with reasons that prevented fulfilment of the conditions and warned that "in light thereof, the actions necessary to protect the telecommunications sector in Iraq shall be taken." The letter from CMC was signed by Dr Safa Rabih, who was then its Deputy General Director.[12]

26. On 22 December 2013, Mr Charaf of Korek reported to the KSC that he had been advised by management that Korek was not in a position to reply to the CMC letter as it was not privy to the negotiations that led to the condition or acceptance by the CMC of the Korek transaction, including the partnership with FT-Orange. Nor was management aware of the contents of the SHA. Korek does not appear to have sent any response to the CMC. A final notice was sent by the CMC to Korek in January 2014 requiring a response within a week. A response was

provided on 22 January 2014 albeit it was said by IT, from the date stamp on the original, that it was not submitted until after the deadline imposed by the CMC. [13]

27. On 29 May 2014, Orange issued a statement to the effect that it was anticipating obtaining majority control of Korek. [14]

28. On 10 June 2014, the CMC wrote a letter to Korek stating, in error, that "final benefit from your company does not belong to Iraqi partners who own a stake of over 51% of your company's capital ., your company's management has been assigned to the foreign partner, which cannot . be considered anything other than a controlling or major shareholder." It asserted that Korek must pay a regulatory fee of 18% of its revenues as well as a differential in the regulatory fee. The letter was signed by Dr Rabee as "Chairman of the Executive Body". [15]

29. On 2 July 2014, the CMC issued a "Decision to revoke partnership between Korek Ltd and France Telecom / Agility". Its decision stated:

> "We inform you that, after long and deep study of the subject of partnership between your company and the foreign French company France Telecom/Agility, studying its different legal and realistic aspects, and in application of the authorities granted to our company by virtue of the terms of the meeting which was held on 21/4/2011 between our company and yours, and based upon the controlling role exercised by our company within the framework of verifying that the suspension conditions have been met, upon which the partnership was based to incur the appropriate legal results thereto, including the revocation of the mentioned partnership in light of the fact that the suspension conditions have not been collectively met, the Council of Trustees decided, in its session held on 24/6/2014, in report No. 19/2014, to consider the approval of our company based upon the principle of partnership dated 29/5/2011 as void and null as the suspension conditions, for which you were committed to fully carry out, have not been met by virtue of the report of the meeting dated 21/4/2011 and by virtue of your repetitive letters.
>
> Thus, we inform you by virtue of this letter the final decision of our company by considering the partnership, desired between you and the foreign French company France Telecom/Agility, as void, null and invalid as the related suspension conditions have not been met, and for lack of evidence thereto without any legal or material effects of any part whatsoever. And we warn you in this respect to immediately proceed, within a period of no later than 15 days from the date of this letter, to reinstate the status as it was on 13/3/2011, take the procedures to revoke and terminate any contracts assigning shares in your company's capital that were concluded after 13/3/2011, prove this revocation in the legal entries with the companies registrar and provide our company with a new statement proving return of shares to their main owners. Otherwise, your company shall bear all the legal consequences and necessary procedures will be taken against your company to compel you to obey and execute the content of the decision mentioned above." [16]

30. This document, referred to by the parties as the "CMC Decision", was signed by Dr Rabee.

31. An appeal was filed with the CMC Appeals Board on 17 July 2014. On 18 August 2014, that Board affirmed the CMC Decision and rejected the appeal. On 16 October 2014, Korek filed a claim in the Iraqi High Administrative Court challenging the CMC Decision.[17]

32. On 12 November 2014, the CMC wrote again to Korek reminding it of the decision to invalidate the partnership with Orange and Agility and requiring it to submit evidence within 15 days proving that "the shares have been returned to their original owners".[18]

33. 14 June 2015 was the due date for repayment of the principal of the IT Shareholder Loan. Neither Korek nor IH had paid back that principal by the due date nor any of the interest accrued under that loan and the IH Shareholder Loan from 2 September 2014.[19]

34. IBL issued a Notice of Default under the IBL Loan on 9 July 2015 and called on Korek and IH to refrain from making any payments under the IT Shareholder Loan, the IH Shareholder Loan or the Korek Guarantee. No repayment was made. IBL took no further action until 30 August 2017 when it sent a letter to Korek demanding payment and requesting that Korek provide additional security. In the event, IT investigated with IBL what collateral had been provided for the IBL Loan. IT then commenced arbitration proceedings against IBL in which IBL admitted that it had requested that the loan be secured with collateral and that such collateral had been provided in the form of cash. Discovery proceedings yielded bank records showing that on the eve of the execution of the IBL Loan, Mr Mustafa had transferred USD 150 million from an account held by him in HSBC in Dubai to an account with IBL in Beirut.[20]

35. On 25 January 2016, the Iraqi High Administrative Court dismissed Korek's challenge to the CMC Decision for want of jurisdiction. Korek filed an appeal to the Iraqi Supreme Administrative Court on 21 February 2016. That Court convened on 18 January 2018 and rejected Korek's challenge on that day.[21]

36. On 4 June 2018, IT commenced what was designated as "The First Shareholder Arbitration". On 16 March 2020, IH made a request for arbitration leading to the arbitral proceedings the subject of this Appeal. After an unsuccessful attempt to consolidate that arbitration with its First Shareholder Arbitration, IT agreed to terminate the First Shareholder Arbitration without prejudice on 9 July 2020.

37. The Arbitration hearing, the subject of this Appeal, was conducted between 8 and 14 May 2022 and oral closing arguments made on 1 and 2 August 2022. The Final Award was issued on 20 March 2023.

The claims relating to the CMC Decision

38. There were a number of claims raised in the Arbitration. Relevant to this Appeal were claims relating to the CMC Decision. These included allegations of unlawful means conspiracy and breach of contractual and statutory obligations on the part of the Appellants.

39. By the unlawful means conspiracy claim, the Respondent IT, alleged that there was a corrupt scheme to procure the CMC Decision requiring IH and IT to exit from Korek and preventing the valid or effective exercise of the IT Call Option. Mr Mustafa and his associates were said to have procured the CMC Decision through cash payments, gifts, bribes and real estate transactions for the benefit of high-ranking CMC officials. These activities were said to have been carried out for the ultimate benefit of Mr Mustafa with the complicity of the Appellants who knowingly concealed the fraud and corruption from the Respondents. Their activities were said to have led to the letter from CMC of 10 December 2013 and the CMC

Decision of 2 July 2014 declaring its approval of the 2011 transaction "void, null and invalid". Those events were said to have given rise to two claims based in the tort of unlawful means conspiracy:

> "(a) a derivative claim, brought on behalf of IH Ltd., against Mr Mustafa and CS Ltd for the destruction of the value of its shareholding in Korek; and
>
> (b) a direct claim by IT Ltd against each of the Respondents for the destruction in value of the Call Option." [22]

40. IT further asserted that the procurement by the Appellants of the CMC Decision through bribery and corruption put them in breach of their contractual obligations under the SHA and the Subscription Agreement. They were also alleged to have breached statutory duties under Articles 120 and 124 of the Iraq Companies Law, Article 53 of the DIFC Companies Law 2009 and Article 1 of the DIFC Law of Obligations 2005. Further, KI was said to have been in breach of provisions of the SHA by allowing its appointed directors to the IH Board and the KSC to engage in bribery and corruption and, in breach of the Subscription Agreement, by failing to ensure that Mr Mustafa complied with all obligations under those Agreements. He was also said to have been in breach of the SHA by allowing Korek's accounts to be used to make corrupt payments to CMC officials.[23]

41. Korek was also said to have been in breach of various provisions of the SHA and the Subscription Agreement in facilitating the bribery and corruption of CMC officials and in failing properly to contest the CMC Decision.

Invocation of the act of state doctrine in the Arbitration

42. The Appellants asserted in the Arbitration that the Tribunal had no jurisdiction to hear the claim that the CMC Decision was improperly procured through bribery and corruption because it would require the Tribunal to find that the CMC had been complicit in and issued the CMC Decision as a result of bribery and corruption. That, it was said, would require the Arbitral Tribunal to question the lawfulness of the CMC Decision and would offend against the foreign act of state doctrine. The Appellants contended in the Tribunal that the doctrine was applicable in the case before the Tribunal.[24]

43. In its Statement of Claim, IT rejected the argument submitting that the Appellants had not demonstrated that the foreign act of state doctrine should be applied by a DIFC-seated tribunal and had not cited any DIFC authority relating to the doctrine.

44. Further, IT said the doctrine was not engaged by its claims. It relied upon Belhaj v Straw [2017] AC 964 ("*Belhaj"*) in which the Supreme Court of the UK identified and discussed three rules within the foreign act of state doctrine. Its claims did not fall within the scope of any of those rules. They did not go to the validity or effect of foreign legislation and foreign governmental acts in respect of property within the State in question. Nor were they matters that were non-justiciable. None of its causes of action required the Tribunal to rule upon the validity or legal effectiveness of the CMC Decision.

45. IT also argued that it would be contrary to public policy, as well as to international public policy, to shield the acts in question from adjudication. [25]

46. In response, the Appellants contended that the public policy exception was concerned only with the question whether the thing being done by the foreign state was, in its nature, so egregious that English law could not be seen to be deferential to that foreign state in breach of a peremptory norm. They made reference to *Kuwait Airways Corporation v Iraq Airways Co*. [2002] UKHL 19; [2002] 2 AC 883. The authorities showed that the focus would be on the act and its effect not on antecedent circumstances of the act or whether it could be impugned as a matter of irrelevant local law. [26]

47. In its Reply in the Arbitral Proceedings, the Respondent IT rejected the argument that the foreign act of state doctrine was imported into DIFC Law. The absence of any recognition of the doctrine by the DIFC Court showed that the Tribunal should be slow to recognise that DIFC Law would automatically subscribe to the policy-driven considerations underpinning the English law development of the doctrine.

The Tribunal findings on the act of state defence

48. The Tribunal said it had not been provided with sufficient material on which it could make a finding that the foreign act of state doctrine would be applied in the courts of the DIFC as it had been applied in the English courts. The same applied to questions of public policy. That alone was said to be sufficient to dismiss the Appellants' objection.[27] Despite that, the Tribunal heard full argument on the applicability of the doctrine under English law.[28] As the matter was said to go to jurisdiction it was no doubt prudent for the Tribunal to follow the course that it did.

49. The Tribunal held that the foreign act of state doctrine, whether or not recognised by the DIFC Courts in the same manner as in the English Courts, had no application to IT's claims. IT was not challenging the legality or validity of the CMC Decision or that of the CMC Appeals Board. The claim had been advanced on the basis that the CMC's Decision stood. It was as a result of the Appellants' conduct that IT had suffered the loss of the value of its shareholding in Korek. The loss which IT had sustained was the result of the Appellants' collusive conduct and their procurement of the CMC Decision.[29]

50. The Tribunal held that the act of state doctrine would not prevent inquiry as to the involvement of the Appellants in procuring a decree from the CMC in breach of the Appellants' contract or as part of an unlawful act of conspiracy by the Appellants. The subject of the inquiry was the conduct of the Appellants and not the validity of the CMC's decree under Iraqi law.

51. The Tribunal analysed the issues it had to determine to resolve the conspiracy, contractual and statutory claims connected with the CMC Decision.

52. In relation to the conspiracy claim, the relevant issues were said to be:

"(i) Whether the [Appellants] conspired amongst themselves to procure the CMC Decision and related actions;

(ii) Whether the [Appellants] had the requisite intention to injure IT Ltd and IH Ltd;

(iii) Whether the [Appellants] acted on this conspiracy by unlawful means; and

(iv) Whether, as a result, [the Respondents] suffered loss." [30]

53. As to the contractual and statutory claims, the Tribunal was to determine:

"(i) Whether the [Appellants] engaged in conduct to procure the CMC Decision to further their own private interests;

(ii) Whether the [Appellants] engaged in bribery and corruption;

(iii) Whether these actions breached the [Appellants'] contractual and statutory duties; and

(iv) Whether, as a result [the Respondents] suffered loss".[31]

54. The Tribunal further held that even if the Respondents' claims required findings of the invalidity or illegality of a governmental act, it was not satisfied that the doctrine of act of state could be invoked under DIFC Law to prevent examination of questions of bribery. Bribery of officials was a very serious matter and contrary to the statutory provision and public policy of countries right around the world.[32]

55. In dealing with the merits of the unlawful means conspiracy claim arising out of the CMC Decision, the Tribunal observed that there was no dispute between the parties that it should apply principles of English common law to the determination of the claim.[33] The Respondents had pleaded that English law governed "all matters relating to the interpretation and application of the SHA, the Subscription Agreement, and the IraqCell Agreement. English law likewise governed any non-contractual obligations arising out of or in connection with the SHA, the Subscription Agreement, and the IraqCell Agreement, including obligations in tort."[34]

56. The Appellants did not take issue with that assertion. They relied upon the English common law act of state doctrine on the basis that, absent any other provision, the default position was that the laws of England applied in the DIFC.

The Tribunal's findings on unlawful conspiracy

57. On the basis of the evidence before it and the submissions of the parties, the Tribunal found on the balance of probabilities that there was an unlawful means conspiracy under which Mr Mustafa and his associates procured the CMC Decision with a view to using that Decision to force the Respondents out of Korek, to interfere with IT's Call Option rights and so cause harm to the Respondents. This conspiracy was said to have been in place at the latest in December 2013 and was advanced through cash payments and real estate transactions for the benefit of high-ranking CMC officials. The activities were said to have been carried out with the complicity of the Appellants who knowingly concealed the fraud and corruption from the Respondents. The Tribunal acknowledged that the findings of fact were of a very serious nature. Nevertheless, the evidence when taken together overwhelmingly pointed to that conclusion. The Tribunal also made it clear that it reached that conclusion without reference to or reliance in any way upon anonymous hearsay statements made by the Respondents' investigator, Mr Nicholas Bortman.[35] The Tribunal went on to say:

"In reaching this decision, the Arbitral Tribunal has had regard to a number of factors. The effect of the evidence was cumulative such that taken together it had even greater force. Having said that some parts of the evidence were sufficiently striking by themselves as to point forcefully in one direction and one direction only. The absence of Mr. Mustafa at the hearing itself to answer questions and give oral evidence or indeed any witness from the [Appellants] was of further significance. The [Appellants] throughout their submissions tried to suggest that none of this evidence permitted any adverse conclusion regarding the CMC Decision or its procurement. The Arbitral Tribunal states clearly that it does not agree. Singly and collectively the evidence was both striking and damning."[36]

58. There followed a detailed analysis by the Tribunal of the evidence going to the merits of the conspiracy claim. As the merits of its findings of fact are not in issue before this Court it is not necessary to canvass them in any detail.

59. The conclusion reached by the Tribunal was in the following terms:

"The Arbitral Tribunal therefore finds that:

(a) There was an agreement between, inter alios, (sic) Mr. Mustafa, CS Ltd, and Korek to procure the CMC Decision and the related actions of the CMC (including the amendment of the National License by way of the 3G Annex);

(b) The conspiracy had been formed and acted upon by the latest in December 2013;

(c) Each of the [Appellants] intended to injure IH Ltd, and IT Ltd;

(d) The acts performed to carry out the conspiracy were unlawful; and

(e) In consequence, IH Ltd, and IT Ltd each suffered a separate and distinct loss, as set out in Chapter R."[37]

Allegedly hearsay and illegally obtained evidence referred to by the Tribunal

60. In its treatment of the unlawful means conspiracy claim, the Tribunal referred to the Appellants' Rejoinder in relation to the evidence of Mr Bortman, who was the principal of Raedas Consulting Ltd ("Raedas"), a company based in London and specialising in investigations. Mr Bortman and his colleagues had interviewed a number of individuals said to be employed or to have been employed at Korek and at the CMC. None had

produced a witness statement and none had appeared to testify before the Tribunal. Their evidence was given indirectly by way of witness statements from Mr Bortman. None of the sources was identified by name and their identities had been protected pursuant to a confidentiality regime.[38]

61. The Appellants argued that Mr Bortman's evidence was central to IT's case. Various propositions advanced by IT were said to "rest entirely" on Mr Bortman's evidence.[39] Mr Bortman's evidence and the product of the Raedas evidence were said to be inadmissible. To the extent that they were admissible, the manner in which they had been gathered, collected and reported, meant that very little, if any, weight could be given to them.[40]

62. The grounds of inadmissibility advanced by the Appellants before the Tribunal and referred to in the Final Award were in summary:

(i) Raedas engaged in widespread and pervasive unlawful and criminal conduct in obtaining the evidence on which IT sought to rely.

(ii) Mr Bortman's witness testimony was a tendentious reportage of things said to have been told to his employees by unknown interlocutors.

(iii) The Appellants were prohibited, under a restricted access regime, from being told what documents procured by Raedas by its sources were and what they contained. The Appellants could not address the authenticity of those documents, their context and the circumstances in which they were created.[41]

63. The Appellants also submitted that no weight could be given to the allegations given that none of the sources had provided witness evidence in support of them. IT's refusal to disclose their identity had prevented the Appellants from making any submissions regarding their credibility and reliability. The Appellants also contended that Raedas had made large cash payments and other inducements to its sources in return for information, which would have had an impact on the reliability and credibility of their allegations.[42]

64. The Appellants also argued before the Tribunal that no weight could be given to Mr Bortman's own evidence purporting to summarise information given to him and his team by the sources that they interviewed.[43]

65. In a section of its Award dealing with the evidence of Mr Bortman and Raedas, the Tribunal acknowledged that very significant criticisms had been levelled by the Appellants at every stage of the proceedings against that evidence and against the testimony before the Tribunal and in other proceedings. The points taken before the Tribunal by the Appellants in relation to the evidence were summarised as follows:

(a) Raedas gathered evidence unlawfully by systematically making payments to public officials and Korek employees in return for confidential information obtained in the course of their employment and thereby committed offences in the UAE, in Iraq and in Turkey.

(b) Mr Bortman relied upon anonymised hearsay (and multiple hearsay) evidence. The DIFC Arbitration Law, UAE public policy, the IBA Rules and the principles of common law do not permit the use of anonymised evidence.

(c) The payment of witnesses undermined the weight that could be given to the evidence obtained.

(d) The investigative reports and memoranda produced by Raedas were not supported by the interview transcripts and ignored information relating to counterveiling case theories.

(e) The restricted access regime was falsely based on concerns for the safety of sources; and

(f) IT defied its obligation to produce the full universe of Raedas documents and shielded Mr Bortman through a persistent refusal to provide proper disclosure including "all contextual documents obtained by Raedas through its unnamed subcontracted investigators.[44]

66. Clarification was sought and provided on Days 1 and 3 of the evidentiary hearing as to the purpose for which IT sought to adduce Mr Bortman's evidence.[45] The Tribunal found that the sole statement upon which IT placed specific reliance was contained in paragraph 108 of Mr Bortman's first witness statement concerning the interest of a Mr Rahmeh in an entity called Ersal. Mr Bortman had said that "witnesses, including former Korek employees, have identified Ms Haddad as a nominee shareholder for Mr Rahmeh".[46] The Arbitral Tribunal said it placed no weight on that statement and was not persuaded, in any event, that Ersal was used as a conduit for bribing members of the CMC.[47]

67. The Tribunal went on to say:

"More generally the Arbitral Tribunal recognises the concerns expressed by the [Appellants] regarding the hearsay nature of the statements attributed to Mr Bortman's sources. It also has concerns about the statements that are attributed to the source identified as KE1. It appears to the Arbitral Tribunal that the evidence as summarised by Mr Bortman is not borne out by the transcripts of Ms Burton's meetings and calls with that source."[48]

In reaching its conclusions and making findings of fact, the Tribunal had placed no reliance whatsoever on any of the statements made by Mr Bortman's sources. It had reached its conclusions on the basis of the documentary record, the testimony of the Orange and Agility witnesses and on other relevant matters which it had identified, such as Mr Mustafa's failure to attend to give evidence, his behaviour in relation to the Arbitral Tribunal's order, that he failed to provide evidence of sums deposited with IBL, and the Appellants' failures in document disclosure. It mattered not whether the Raedas witness evidence was anonymised, hearsay, was paid for or was obtained in breach of some local legal requirement.[49]

68. The Tribunal also referred to arguments by the Appellants that it should afford no weight to a number of documents which had been obtained by Raedas. These were said to have been obtained by Mr Bortman from a subcontractor and that IT chose to withhold information or document production in respect of those documents with the result that the Arbitral Tribunal did not have any evidence on the record regarding their origin, context or veracity.[50]

69. The Tribunal said the fact that Mr Bortman obtained those particular documents or any other documents through a subcontractor was quite separate from the issues affecting the hearsay evidence of his sources. The Appellants had failed to challenge the authenticity of those documents within the time required by the Tribunal's Procedural Order No 1 and did not do so before the Tribunal at that time. The obvious inference was that there was no basis for any challenge to be made. The Tribunal referred to conclusions which it had reached on the face of the documents without reliance on Mr Bortman's assessment of their authenticity or otherwise.[51]

70. The Tribunal also rejected the Appellants' submissions in closing that without the statements of Mr Bortman or his sources, IT's case was irredeemably weakened. The Tribunal repeated its position in dealing with a list of matters set out by the Appellants and said:

> "Insofar as that list contains hearsay statements from Mr Bortman's sources, the Arbitral Tribunal has made clear above that it places no reliance upon those statements. It does not follow, however, that IT Ltd cannot rely upon Mr Bortman's evidence that the Rabee family lived at the Higher Drive property - a statement supported by documentary evidence."[52]

71. The Tribunal considered and found that without reliance upon or reference to the hearsay statements of Mr Bortman's sources, the evidence firmly established on the balance of probabilities that the Appellants bribed the CMC through the purchase of properties in London in order to procure the CMC Decision and that they paid bribes to the CMC disguised as legal and consulting fees in order to procure the CMC Decision.[53]

72. In reaching that conclusion the Tribunal relied upon the observation of Romer LJ in Hovenden & Sons v Millhoff [1900] All ER Rep 848:

> "If a bribe be once established to the court's satisfaction, then certain rules apply. Among them the following are now established and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable."[54]

73. The Tribunal said that, in any event, it was satisfied that the evidence justified the inference that the CMC would not have issued the CMC Decision had the Appellants not bribed it.[55]

74. The Tribunal made specific reference to the letter of 22 January 2014 from Korek to the CMC. The Tribunal said:

> "In fact it appears that the CMC received this letter on 26 January 2014, well after the deadline set by the CMC had passed. A copy of this letter was produced by Mr Bortman which appeared to have Dr Rabee's handwriting and signature on it suggesting that an appointment should be scheduled with "senior management of the company".[56]

75. Further on in the Final Award the Tribunal quoted submissions for the Respondents that there was overwhelming evidence that the CMC Decision was simply a pretext. It appeared to accept those submissions, one of which was that:

> "The CMC hid Korek's 22 January 2014 letter (a copy of which had Dr Rabee's handwriting on it confirming receipt) and then later used the absence as a purported justification for the CMC Decision.[57]

In a footnote to this paragraph of the Final Award, the Tribunal said:

> "This allegation is said by Mr. Hooker to be mere hearsay on the part of Mr. Bortman. What is clear, however, is that the letter from Korek does have manuscript writing on it which would appear to have been placed there by someone within the CMC, suggesting that the later statement that the letter had not been received was untrue. The Arbitral Tribunal does not understand the Respondents to have challenged the authenticity of either B2/1 or the marginal note, by whomever it was made.[58]

76. Later in the Final Award the Tribunal referred to arguments by the Appellants that it should afford no weight to a number of documents obtained by Raedas. These included an invoice referred to as the IC4LC Invoice of 25 April 2016, a Korek accounting spreadsheet and a ZR Group Aging Report. The Tribunal observed:

> "The Respondents failed to challenge the authenticity of these documents within the time required by Procedural Order No. 1 and indeed do not do so now ."[59]

77. The same point is made by the Respondents in relation to the Korek letter of 22 January 2014.

The Application to Set Aside the Tribunal's Award

78. On 20 June 2023, the Appellants filed a Claim seeking to set aside the Final Award pursuant to Article 41 of the Arbitration Law, DIFC Law No 1 of 2008 on bases set out in Particulars of Claim as follows:

> "6. .
>
> (a) pursuant to Articles 41(2)(a)(iii), 41(2)(b)(i) and 41(2)(b)(iii) of the Arbitration Law, that in failing to properly engage with and/or dismissing the [Appellants'] jurisdictional objections on the basis of the act of state principle and thereafter proceeding to consider evidence and rule on IT Ltd's allegations in relation to the decision of the Iraqi Communications and Media Commission dated 2 July 2014 (the "**CMC Decision**") the Tribunal exceeded its jurisdiction, rendered a decision on matters that are not arbitral and/or violated the public policy of the United Arab Emirates;
>
> (b) further or in the alternative, pursuant to Article 41(2)(b)(iii) of the Arbitration Law, that in failing to rule upon the admissibility of hearsay evidence and maintaining the same on the evidential record the Tribunal created a serious doubt and perception that the same was relied upon implicitly and/or expressly or otherwise improperly impacted upon the consideration of the allegations made by IT Ltd;

(c) further or in the alternative, pursuant to Article 41(2)(b)(iii) of the Arbitration Law, that in relying, implicitly and/or expressly, upon evidence and documents procured through the investigation by Mr Nicholas Bortman and Raedas Consulting Ltd, the Tribunal:

(i) failed to deal with an issue in dispute between the parties; and

(ii) rendered an award that is in conflict with the public policy of the United Arab Emirates; and

(d) further or in the alternative pursuant to Article 41(2)(b)(iii) of the Arbitration Law, that the Tribunal relied upon a decision of a Tribunal constituted under the Rules of the Lebanese Arbitration and Mediation Centre, seated in Beirut, Lebanon, that has subsequently been set aside by the Beirut Civil Court of Appeal."[60]

The reasons for the decision under appeal

79. In dismissing the Application to Set Aside the Award, which he did on 29 August 2024, the Primary Judge began by referring to the Tribunal's conclusions that:

"(a) The Communications and Media Commission (CMC) Decision had been procured by corruption; unlawful means conspiracy, involving bribery and corruption of Iraqi state officials.

(b) A related award in an arbitration conducted under the Lebanese Arbitration and Mediation Centre (the LAMC Award) did not give rise to an issue estoppel in the Arbitration Proceedings.

(c) The Appellants did conspire by unlawful means to injure the Respondents in these proceedings."[61]

80. On the first ground concerning the act of state doctrine which is central to this Appeal, His Excellency accepted that the doctrine is part of DIFC Law. He held that by the Appellants own admission the Tribunal had made no determination as to the validity of the CMC Decision, but instead had considered the acts of the Appellants in isolation in relation to the arbitrable matters at hand. The Tribunal's findings did not affect or comment on the validity of the decision made within Iraqi jurisdiction. The Tribunal had kept its decision within the boundaries of its jurisdiction by making determinations on the Appellants' acts leading up to the decision of the CMC.[62] His Excellency held, for those reasons, that the Tribunal's decision was lawful.

81. As to the public policy question, His Excellency held that, for there to be a violation of UAE public policy, a crime (within the context or procedure of the Arbitration) would have to have been committed on UAE soil. It was not enough to allege a misdemeanour to satisfy the public policy argument.[63]

82. A separate issue concerned the use by the Respondents of the evidence gathered by Mr Bortman and Raedas to show that the Appellants had colluded with former Iraq officials and CMC officials. It was contended that the methods used to gather that evidence rendered it inadmissible. The methods used included the gathering of intelligence from former Iraqi government officials, former and current Korek employees and former CMC officials.

83. The Tribunal had asserted that their determination was made without reference to or reliance on Mr Bortman's anonymous hearsay evidence. However, the Appellants referred to extracts from the Final Award that quoted evidence drawn from Mr Bortman's testimony and cross-examination. They argued that the Tribunal had consciously relied upon hearsay and double hearsay evidence in their determination.[64]

84. His Excellency said he did not find that the Tribunal had relied on Mr Bortman's evidence to reach its conclusion. Its explicit statements excluded the evidence and even if the evidence had been relied upon, no breach of public policy could be found.[65]

85. The Tribunal was at liberty to use its discretion to determine the weight, if any, to be given to Mr Bortman's evidence, which it decided was practically nil. In any event, the Respondents had shown through extracts from the Final Award, that the determination would have been the same irrespective of the weight given to that evidence. The threshold for setting aside the Award on procedural errors had not been met.[66]

86. His Excellency observed that hearsay evidence is permitted in the DIFC under the DIFC RDC. Irrespective of that fact, the rules of evidence did not engage UAE public policy. Public policy was engaged where criminal activity had occurred. No such activity had been shown to have occurred in the UAE.[67]

87. Evidence gathered by Raedas was not a "secret" pursuant to Article 432 of the UAE Criminal Code as CMC shareholders and third parties were involved in the sharing of the relevant information. There was no employee confidentiality obligation to breach. His Excellency reserved comment on whether there was criminal activity in Iraq. That was irrelevant to his determination as he was concerned with UAE public policy which would be engaged if criminal acts occurred in the UAE, which the Appellants failed to prove happened.[68]

88. His Excellency concluded that the Appellants had not proven that the Tribunal acted beyond its jurisdiction. It had not breached the act of state doctrine or UAE public policy when making the Award. The alternative submissions failed on a similar basis. No substantial proof was given to show that UAE public policy had been affected let alone breached by the Award or the subsequent enforcement of it in the DIFC.[69]

The grounds of appeal

89. The Appeal Notice in support of the Application for Permission to Appeal, was issued on 19 September 2024. The Skeleton Argument of that date filed on behalf of the Appellants, identified the following grounds of appeal:

"(1) The decision erred in its consideration and determination of the existence, scope and/or application of the doctrine of Foreign Act of State in the UAE;

(2) The decision erred in failing to engage properly or at all with considerations of public policy as they apply in the context of court or arbitral proceedings in or seated in the UAE with reference to evidence obtained illegally abroad and deployed in those proceedings."

UAE international commitments on bribery of foreign officials

90. In 2006, the UAE ratified the United Nations Convention against Corruption ("UNCAC") by Federal Decree No 8 of 2006. It also signed the Regional Arab Anti-corruption Convention made by the Arab League on 21 December 2010.

91. The Preamble to UNCAC included the following statement of concern by the State Parties:

". that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential."

92. Article 4 of the UNCAC is entitled *`Protection of sovereignty'* and provides:

"1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

93. The preceding provision must be read in conjunction with Article 16(1) which provides:

"Article 16. Bribery of foreign public officials and officials of public international organizations

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business."

94. Article 35 of the UNCAC provides:

"Article 35 Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."

95. The UNCAC entered into force on 14 December 2005.

96. The Regional Arab Anti-corruption Convention includes a Protection of Sovereignty provision, in Article 3, which mirrors that contained in the UNCAC. Article 4, according to its domestic legislation, shall adopt the necessary legal and other measures to criminalise listed acts when committed intentionally. These include:

"4 -Bribery of foreign public officials and officials of public international organizations in connection with international trade with a State Party."

97. Against the background of the UAE's international legal commitments it is apparent that at the time of the alleged bribery, its public policy stood firmly against the bribery of foreign officials. That has been reinforced by the new Penal Code, referred to below, which expressly criminalises bribery of foreign public officials or employees of international organisations.

98. It should also be noted that international conventions achieved the force of law in the UAE by ratification and become part of the applicable domestic laws of the State to be given effect to by UAE judges. In *Pearl Petroleum Company Ltd v The Kurdistan Regional Government of Iraq* [2017] DIFC ARB 003, (20 August 2017) ("**Pearl Petroleum**"), Justice Sir Jeremy Cooke, citing Dubai Court of Cassation Case 87/2009 observed:

"By virtue of the terms of Article 5 of Federal Law No 8 of 2004 . although the civil and commercial laws of the UAE are not applicable in DIFC, the DIFC remains bound by the terms of the Treaties which form part of the law of the UAE."

Statutory framework

UAE - Federal Law No. (8) of 2004 on Financial Free Zones

99. Article 5 of the above Law provides:

"Financial Free Zones must not perform any activity that results in the breach of an international treaty to which the State has adhered or will adhere."

UAE - Penal Code

100. The Penal Code of the UAE, as it stood in 2013 - Federal Law No. 3 of 1987, when the alleged bribery took place, criminalised the bribery of domestic public officials. The Penal Code was replaced by Federal Law No. 31 of 2021 which was later amended by Federal Decree No. 36

of 2022. The Penal Code now criminalises bribery, inter alia, of foreign public officials or employees of international organisations.[70]

UAE Civil Code - Federal Law No. (5) of 1985

101. Chapter 1 of the UAE Civil Code contains provisions relating to the application and effect of the "Civil Transactions Law" of the UAE. Part 1 of Chapter 1 deals with the law and its application and in Article 1 sets out a default provision allowing a judge to render judgment in accordance with custom "but provided that the custom is not in conflict with public order or morals ."

102. The term "public order" appearing in Article 1 was defined non-exhaustively in Article 3 of the UAE Civil Code. This was invoked by an expert witness called by the Appellants in their Application to Set Aside the Final Award. The witness was Dr Habib Mohammad Sharif Al Mulla. The English translation, as appears from a UAE legislation site, is as follows:

"Article 3

Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'a."

103. The version offered by Dr Al Mulla in his statement read as follows:

". Shall be considered of public policy, provisions relating to personal status such as marriage, inheritance, lineage, provisions relating to systems of governance, freedom of trade, circulation of wealth, private ownership and other such rules and foundations on which the society is based provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Shari'a." (emphasis added by Dr Habib)

104. According to Dr Al Mulla, Article 3 provides guidance on rules considered to be public policy provisions in the UAE. Given the non-exhaustive character of the list of matters falling into the category of "public order" in Article 3, it does not seem that it can be read as a provision which limits the concept of public policy in the UAE. In any event, it also picks up "other rules and foundations upon which society is based".

Dubai Law - The Judicial Authority Law No 12 of 2004

105. The Judicial Authority Law No 12 of 2004, a law made by the Ruler of Dubai, provides for the jurisdiction of the CFI in Article 5A. The Court has exclusive jurisdiction to hear and determine, inter alia, under Article 5A(1)(e):

"any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations."

Article 6 provides for the governing law in the following terms:

"The Courts shall apply the Centre's Laws and Regulations, except where parties to the dispute have explicitly agreed that another law shall govern such dispute, provided that such law does not conflict with the public policy and public morals."

106. Article 7(4) makes provision for judgments, decisions and orders rendered by the Dubai courts or arbitral awards ratified by the Dubai courts to be executed by the Execution Judge of the Courts.

Dubai Law - DIFC Court Law No. 10 of 2004

107. The DIFC Court Law, a law made by the Ruler of Dubai, states its purpose in Article 6 thus:

"6. Purpose of the Law

The purpose of this Law is to provide for the independent administration of justice in the DIFC in accordance with Dubai Law No. 9 of 2004 and the Judicial Authority Law."

108. The jurisdiction of the DIFC CFI relevant to this Appeal is set out in Article 19(1)(a):

"19. Jurisdiction

(1) The DIFC Court of First Instance has original jurisdiction pursuant to Article 5(A) of the Juidicial Authority Law to hear any of the following:

.

(a) any application over which the DIFC Court has jurisdiction in accordance with DIFC Laws and Regulations;"

109. Article 30 of the DIFC Court Law deals with the governing law of the DIFC Courts as follows:

"30. Governing Law

(1) In exercising its powers and functions, the DIFC Court shall apply:

(a) the Judicial Authority Law;

(b) DIFC Law or any legislation made under it;

(c) the Rules of Court; or

(d) such law as is agreed by the parties.

(2) The DIFC Court may, in determining a matter or proceeding, consider decisions made in other jurisdictions for the purpose of making its decision."

Dubai Law - DIFC Court Law (No 2) of 2025

110. This is a Law recently made by the Ruler of Dubai. It postdated the decision under appeal. In Article 14A it sets out the jurisdiction of the DIFC Courts, which includes:

"5. Claims and applications for the ratification or recognition of Arbitral Awards, in accordance with the Arbitration Law in force within the DIFC.

6. Claims and applications arising from or related to any arbitration procedures where:

i. the seat or legal place of arbitration is the DIFC;

ii. arbitral proceedings take place within the DIFC, and the parties have not agreed on the seat or legal place of arbitration; or

iii. the parties agree to the DIFC Courts' jurisdiction for disputes arising out of arbitration proceedings."

Dubai Law - The Law on the Application of Civil and Commercial Laws in the DIFC - DIFC Law No. 3 of 2004

111. The Law on the Application of Civil and Commercial Laws in the DIFC, Law No. 3 of 2004 was the Law as it stood at the time of the Arbitration and the Final Award and at the time of the Application to Set Aside the Award. Relevant provisions of the Law are set out below.

"3. Application of the Law

This Law applies in the jurisdiction of the Dubai International Financial Centre.

....

7. The objectives of this Law

The objectives of this Law are to:

(a) provide certainty as to the rights, liabilities and obligations of persons in relation to civil and commercial matters arising in the DIFC; and

(b) allow persons to adopt the laws of another jurisdiction in relation to civil and commercial matters arising within the DIFC."

112. Articles 8 and 9 of the Law provided:

"Application

(1) Since by virtue of Article 3 of Federal Law No. 8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).

(2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:

(a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,

(b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,

(c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,

(d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,

(e) the laws of England and Wales.

9. Submission to jurisdiction

(1) The Court shall determine any matter before it in accordance with the laws that may apply by virtue of Article 8.

(2) An Arbitrator shall determine any matter before him in accordance with the laws that may apply by virtue of Article 8."

113. The term "Jurisdiction" is defined in Schedule 1 of the Law in the following terms:

"Jurisdiction any jurisdiction in any country for the time being recognised by the UAE."

These provisions appeared in the DIFC Law No 3 of 2004 in a Consolidated Version dated March 2022 and reflect amendments by the DIFC

Laws Amendment Law, DIFC Law No 2 of 2022.

114. In *Pearl Petroleum* Justice Sir Jeremy Cooke referred to Article 8 as incorporating "waterfall" or "cascade" provisions as it provides for a hierarchy for determining the applicable law.[71] He described the jurisdiction as "founded on statutory provision which requires the law of the DIFC to be first applied and only in absentia to move on to the cascading subparagraphs' provisions, of which the last is the law of England and Wales, ."[72] As appears below, since the 2024 amendment to the Law the DIFC Courts have been empowered to determine the common law for the DIFC having regard to the common law of England and Wales and other common law jurisdictions.

Dubai Law - Law on the Application of Civil and Commercial Laws in the DIFC as amended by DIFC Law No. 8 of 2024

115. This Law post-dated the Arbitration, the Final Award and the decision under appeal. Article 8 of the Law as amended in November 2024 provides:

"8. Choice of applicable law

(1) Since by virtue of Article 3 of Federal Law No 8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).

(2) The relevant Jurisdiction is to be the one first ascertained under the following paragraphs:

(a) so far as there is a regulatory content, any applicable DIFC Statute; failing which,

(b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Statute; failing which,

(c) the laws of the Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,

(d) the laws of a Jurisdiction which appears to the DIFC Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,

(e) DIFC Law."

116. A new Article 8A. entitled "Content of DIFC law" provides as follows:

"8A. Content of DIFC Law

(1) The following provisions apply where DIFC Law is the law applicable to a civil or commercial matter pursuant to Article 8 above.

(2) The content of DIFC Law shall be determined by any applicable DIFC Statute, and any DIFC Court judgments interpreting and applying the applicable DIFC Statute in a manner consistent with this Law.

(3) The common law (including the principles and rules of equity) supplements DIFC Statute except to the extent modified by this Law or any other DIFC Law. The DIFC Courts in determining the common law for the DIFC in any case may have regard to the common law of England and Wales and other common law jurisdictions.

(4) The common law of the DIFC (including the principles and rules of equity) as determined by the DIFC Courts, must not be inconsistent with DIFC Statute.

8B. Interpretation of DIFC Statutes

(1) The interpretation of DIFC Statutes may be guided by:

(a) jurisprudence from common law jurisdictions regarding the interpretation and application of analogous laws; and

(b) the rules and principles of statutory interpretation from common law jurisdictions.

(2) Article 8 B(1) applies to all DIFC Statutes, regardless of whether the relevant DIFC Statute is based on an international model law or another non-common law source.

(3) If a DIFC Statute is based on an international model law, its interpretation may also be guided by international jurisprudence interpreting and applying the international model law, as well as interpretive aids and commentary published by international bodies regarding the international model law."

DIFC Law - Arbitration Law - DIFC Law No 1 of 2008 as Amended by DIFC Amendment Law No 1 of 2013

117. The DIFC Arbitration Law applies in the jurisdiction of the DIFC (Article 3). The law applies where the seat of the arbitration is the DIFC (Article 7(1)). Article 10 provides:

"10. Extent of court intervention

In matters governed by this Law, no DIFC Court shall intervene except to the extent so provided in this Law."

118. Article 12 of the Arbitration Law provides for the definition and form of arbitration agreements. Article 12(2) provides that certain classes of arbitration agreement cannot be enforced unless certain conditions are met. These are arbitration agreements relating to contracts of employment

within the meaning of the Employment Law 2005 and contracts for the supply of goods or services to a consumer by a supplier who is a natural or legal person acting for purposes relating to his trade, business or profession whether publicly owned or privately owned.

119. The jurisdiction of arbitral tribunals is dealt with in Chapter 4, and the conduct of arbitral tribunals in chapter 5. Chapter 7 deals with recourse against awards. It comprises Article 41, relevant parts of which provide:

> **"41. Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a Court against an arbitral award made in the Seat of the DIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) Such application may only be made to the DIFC Court. An arbitral award may be set aside by the DIFC Court only if:
>
> (a) the party making the application furnishes proof that:
>
> ....
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to Arbitration, or contains decisions on matters beyond the scope of the submission to Arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to Arbitration may be set aside; or
>
> ...
>
> (b) the DIFC Court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under DIFC Law;
>
> (ii) the dispute is expressly referred to a different body or tribunal for resolution under this Law or any mandatory provision of DIFC Law; or
>
> (iii) the award is in conflict with the public policy of the UAE.".

Articles 41(3) and 41(4) are not material for present purposes.

120. Articles 42, 43 and 44 of the Law deal with recognition and enforcement of awards. Article 44 includes grounds for refusing recognition and enforcement which reflect the grounds for setting aside an award in Article 41.

Whether the Application Law amendment was retrospective

121. It is appropriate at this point to deal with a submission by the Appellants made in reliance upon the recent amendments to the Application Law. They relied upon Article 7(e) and the new Article 8A for the proposition that the DIFC Court can now develop its own common law by reference to the jurisprudence of common law jurisdictions other than England and Wales provided that the development is not inconsistent with the DIFC Statutes.

122. In a footnote to their written submissions, the Appellants acknowledged that the amendment was not in force at the time that the Tribunal delivered its Final Award and held that the Appellants had not demonstrated that the act of state doctrine should be applied by a DIFC-seated tribunal.[73]

123. The Respondents submitted that the amended Application Law and the development of DIFC Law based on it do not have retrospective effect. They cited *Abdelsalam v Expresso Telecom Group* [2021] DIFC CA-011 (20 December 2021) in which the Court of Appeal had said:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events."[74]

This was subject to an exception for procedural laws regulating the manner in which rights and liabilities fixed by reference to past facts, matters or events were to be enforced. That approach was followed in a decision of this Court in TIG v EL Fadie Hamid [2022] DIFC CA-005/006 (20 September 2022) at paragraph 62.

124. The Court accepts the Respondents' submissions.

125. To the extent that the Application Law was relevant in the Appeal, it was the Application Law as it stood prior to the amendment. However, as appears from the reasons below, even on the assumption that it was the amended Application Law that applied, the outcome would be the same.

Expert testimony

126. Two expert witnesses were called in the Set Aside Application on the question of UAE public policy so far as it relates to scrutiny by UAE courts and tribunals of the acts or omissions of foreign states. They gave their own statements and a Joint Report setting out points of agreement and disagreement. There was no expert testimony before the Tribunal on the act of state doctrine as an aspect of UAE public policy. That testimony was only brought in the Set Aside Application.

127. Although the testimony appears to have been treated as evidence in the Set Aside Application, there is a question whether it was. Consistently with the approach adopted by this Court in the past, it would be appropriate to treat expert testimony on UAE law as a species of submission. In *Fidel v Felecia* [2015] DIFC CA 002 (23 November 2015), the Court referred to expert testimony on a question of UAE public policy. It held that DIFC Courts could treat such testimony on UAE law as legal submissions consistent with the practice of international arbitration. Chief Justice Michael Hwang said:

> "The presumptive rule should be that legal experts are to write briefs with their analysis of the relevant legal principles of the applicable or relevant law, and to make further submissions applying the legal principles to the facts as alleged by the respective parties, or to argue for a particular decision to be delivered by the Court."[75]

128. The Chief Justice made clear that the above was only a presumptive rule and the trial judge should always have the discretion to proceed in the manner which was considered most beneficial to the judge's education.

129. In that case, as in this, the Court was dealing with a question of UAE law. Indeed the "international approach" is applicable to questions of foreign law generally. In *Nest Investments Holding Lebanon SAL v Deloitte & Touche (M.E.)* [2021] DIFC CA 014 (8 December 2021), a case involving a question of Lebanese law, the Court held that the "international approach" enunciated by the former Chief Justice to be clearly appropriate.

130. The parties' experts in this case gave testimony on two disparate issues. One was whether the public policy of the UAE accommodates the act of state doctrine. The other related to the question whether the gathering of evidence by the Respondents' investigators involved unlawful acts such that use of the evidence would be contrary to UAE public policy.

131. The Primary Judge did not canvass the expert testimony on the first question at any length holding that:

> "It is clear that the act of state doctrine exists in DIFC law simply on the concept that the DIFC, has its own jurisdiction, is still bound by the public policy of the UAE and of international legal matters as a part of the UAE."[76] .

It is nevertheless appropriate to review the expert testimony.

Expert Testimony - Dr Habib Mohammad Shariff Al Mulla

132. The expert witness called by the Appellants, Dr Habib Mohammad Shariff Al Mulla, opined that:

> ". the public policy of the UAE precludes courts and tribunals based in the UAE from considering the acts or omissions of foreign states. Therefore, courts in the UAE or an arbitral tribunal seated in the UAE may not consider the acts or omissions of a foreign state, as any such consideration violates the laws and public policies of the UAE."[77]

133. He cited Article 3 of Federal Law No (5) of 1985, the UAE Civil Code, albeit in a translation that differed in its wording from that provided on the UAE government legislative website. He rightly footnoted that citation with a reference to the undefinable and elusive character of public policy.

134. The application of the public policy of the UAE in the DIFC was said to be confirmed by Article 41(2)(b)(iii) of the Arbitration Law. In *Loralia Group LLC v Landen Saudi Company* [2018] DIFC ARB 04 (23 April 2020) *("Loralia Group"),* His Excellency Justice Shamlan Al Sawalehi referred to Articles 41(2)(b)(iii) and 44(1)(b)(7) of the DIFC Arbitration Law and observed:

> "It is important to note that the wording here is specific and refers to the public policy of the "UAE" (and is not a reference to the public policy of "Dubai" or the "DIFC"). This is because federal public policy applies throughout the UAE in a unitary and indivisible nature."[78]

135. In relation to the act of state doctrine, Dr Al Mulla contended that "as a matter of principle courts in the UAE may not adjudicate on the acts of a foreign administrative or state agency".[79] In support of that proposition, he cited a judgment of the Federal Supreme Court in 714/2018 in which it was said:

> "It is resolved in jurisprudence and administrative law, and as accustomed by judicial practice, that the conditions of a challenge against an administrative resolution include that it shall be issued by a national administrative authority. So, a resolution issued by a foreign administrative authority may not be argued with before the administrative judiciary of another country, which is a material condition that is consistent with the concept of the sovereignty of the State, whereby public entities or authorities in the country extract the competencies and authorities thereof from the sovereignty of the State as an expresser thereof. Such sovereignty does not take effect versus other states and the subsidiary authorities thereof in general. Therefore, a resolution issued by an administrative authority of another country may not be argued with, even if such authority is a regulatory authority between the members thereof, represented by other states, as long as the rules of the law in force in the territory governing the same is the law applicable and these rules are associated with the public order." (emphasis added by Dr Al Mulla)

136. The reference to administrative courts did not mean that non-administrative courts could entertain such a claim. Dr Al Mulla formulated the principle he took from the decision of the Federal Supreme Court as follows:

> "A decision issued by a foreign administrative body may not be litigated before *any* courts of the UAE or a UAE seated tribunal."[80]

137. With respect the "principle" thus stated begs the question - what does it mean to litigate a decision issued by a foreign administrative body?

138. The act of state doctrine was said to constitute "an absolute rule relating to the public policy of the UAE". There were "no exceptions that would allow a UAE court or tribunal seated in the UAE to examine the acts or omissions of a foreign state."[81]

139. An allegation that the act of state in question was the result of corruption was said to have no bearing on the application of the public policy

rule which prohibits the review of foreign acts of state in its entirety.[82]

140. As appears later in these reasons the formulation by the Federal Supreme Court in 714/218, as reflected in the translated reasons, conveys a rather narrow concept of a foreign state principle. Moreover, it does not appear to have been a case in which a foreign act of state was involved.

Expert Testimony - Mr Ali Al Hashimi

141. A different view was offered by Mr Ali Al Hashimi,[83] a legal practitioner licensed to practice throughout the UAE who has 23 years of experience as a litigation practitioner in that jurisdiction. He has previously been called on as an expert witness on UAE Law in arbitration proceedings and before DIFC and foreign courts.

142. He observed that Article 3 of the Civil Code of the UAE does not provide an exhaustive list of matters covered by public policy. There is no express reference to the act of state doctrine in UAE legislation. The closest concept is that of the sovereign acts of a foreign state. The scarcity of judgments on the doctrine suggested that its scope and potential exceptions remain to be articulated by the local courts.

143. Mr Al Hashimi considered that the decision of the Federal Supreme Court 714/2018, invoked by Dr Al Mulla, precluded hearing a challenge to or appeal from the administrative decision of a foreign state - a preclusion based on the principle of state sovereignty. An award which did not directly challenge the legality of the acts of a foreign government that had taken place within the territory of the foreign state, would not be considered to have infringed the act of state doctrine to the extent it existed under UAE law.

144. Mr Al Hashimi suggested that Dr Al Mulla's report had mistranslated the passage of the Federal Supreme Court decision which it cited. The correct translation of the relevant part of the passage was that a resolution issued by a foreign administrative authority "may not be challenged before the administrative judiciary of another country". This difference was said to be crucial to the analysis. While foreign administrative decisions may not be the subject of judicial review by the UAE courts, nothing precludes UAE courts from discussing those decisions, nor adjudicating upon their consequences which was exactly what the Federal Supreme Court had done in the case cited in Dr Al Mulla's report. The Court in that case further ruled that the first instance court had failed to deal with a damages claim (possibly arising from the contended decision by the foreign court) before remitting the case to the Court of First Instance to adjudicate that claim.[84]

145. Mr Al Hashimi observed that the scarcity of judgments on the act of state doctrine in the UAE suggested that its scope and potential exceptions remained to be articulated. The Federal Supreme Court decision precluded a direct challenge to or appeal against the administrative decisions of foreign states, a proposition based on the principle of state sovereignty.[85]

146. To the extent that the act of state doctrine does exist in the UAE as a matter of UAE Law and may be inferred from the judgment of the Federal Supreme Court, an award which did not directly challenge the legality of the acts of a foreign government would not be considered to have infringed the act of state doctrine. So long as it did not seek to overturn the government decision or treat it as invalid, it would be permissible for an arbitral tribunal to consider the facts of the matter before it. It would also be permissible for the tribunal to award damages based on those facts, whether involving bribery and corruption or otherwise. This approach would not be a violation of the act of state doctrine if it exists under UAE Law.[86]

147. The Federal Supreme Court decision 714/2018 as Mr Al Hashimi viewed it, was limited in its application to the question of challenges to the validity of foreign government decisions. It had not considered exceptions to the application of the doctrine. Mr Al Hashimi's characterisation of the law of the UAE as not covering cases in which the validity of the foreign government decision was not in issue, does not appear to be based on any other UAE decision.

Expert Testimony Joint Report - Dr Al Mulla and Mr Al Hashimi

148. Dr Al Mulla and Mr Al Hashimi prepared a Joint Expert Report dated 15 December 2023 ("Joint Report"). In that Report they agreed that Article 3 of the Civil Code "provides guidance" or a "non-exhaustive" list of what is considered public policy in the UAE. They agreed also that there is no reference to the Act of State doctrine in UAE legislation. It was "an established principle in common law jurisdiction".[87] To the extent it existed in UAE courts it was likely to be a matter of public policy as it relates to the international competence of UAE courts and the principle of state sovereignty.

Federal Supreme Court Decision 714/2018

149. The Federal Supreme Court Decision 714/2018 relied upon by the Appellants, concerned a challenge by the International Automobile Touring Club to a decision of the International Road Transport Union ("IRU") changing its membership status from `active' to `affiliate'. It had been the sole member and sole local representative of the IRU in the UAE. It was replaced by the Automobile and Tourism Club of the UAE. It sought reinstatement by the IRU and compensation from the IRU and the club which replaced it.

150. As appears from its Constitution, the IRU is a not-for-profit association established under Swiss law. Its members are national non-profit organisations representative of various sectors of the road transport industry. It does not appear that the IRU is an agency of any foreign state.

151. The Federal Supreme Court appears to have treated it as a "foreign administrative authority". The way it was put in the judgment was:

> "Therefore, a resolution issued by an administrative authority of another country may not be argued with, even if such authority is a regulatory authority between the members thereof, represented by other states, as long as the rules of the law in force in the territory governing the same is the law applicable, and these rules are associated with the public order."[88]

152. The Respondents in their First Skeleton Argument claimed that the decision was proof that the act of state doctrine does not exist in UAE law as the matter was remitted for determination of the petitioner's compensation claim. While the Court appears to have made a statement about decisions of foreign administrative bodies, including membership bodies exercising regulatory powers conferred by law, the case does not appear

to have involved an act of state. The IRU was not a state actor. Nor is it apparent from the decision that it was exercising statutory powers.

153. The decision may preclude challenges to the validity or merits of the decisions of governmental executive bodies in other countries. It does not preclude the existence of a foreign act of state doctrine at common law in the DIFC. Nor does the Federal Supreme Court decision preclude a claim that one party, either tortiously or in breach of a contract has caused loss and damage to another party by corruptly procuring a decision of a foreign executive authority that is adverse to the other party. The question whether such a case is caught by the doctrine at common law is considered in the reasons that follow.

The act of state doctrine

154. Before turning to the submissions of the Parties, it is useful to review the origins and evolution of the act of state doctrine, particularly in the United States and the United Kingdom. However, seeking a definitive statement of its content is a task analogous to that of Menelaus seeking to extract the truth from the shape-shifting sea god Proteus. F.A. Mann described the doctrine as displaying "in every respect such uncertainty and confusion and [resting] on so slippery a basis that its application becomes a matter of speculation."[89]

Origins

155. The juridical basis of what has been called an act of state doctrine appears to differ between jurisdictions and to have evolved over time. It has been described as involving three distinct but related doctrines:

- foreign sovereign immunity (US) or state immunity (UK);
- royal prerogative (UK);
- a judicial rule barring domestic courts from reviewing the validity of acts taken by a foreigner referred to as "an act of State in the English sense.[90]

A precursor or early example of the doctrine from England is Blads Case reported in 1674.[91] It concerned an action by an English citizen trading with residents of Iceland, a Danish territory whose goods were seized by a Danish national purporting to act under Letters Patent from the King of Denmark. The Englishman sued the Dane for trespass against his goods, alleging that he had a right to trade under the Peace Treaty between England and Denmark and that the Letters Patent were illegal. The Dane sought an antisuit injunction in Chancery which was granted. In the course of judgment, the Chancellor observed:

> ". to send [the action] to a trial at law, where either the Court must pretend to judge of the validity of the king's letter patent in Denmark, or of the exposition and meaning of the articles of peace, or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd."

This old case has been characterised as raising all the arguments that have come subsequently to be involved in almost every act of state case over the following 200 years.[92]

156. The terminology of `Act of State Doctrine' has been traced back to the *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1; 2 ER 993. The case concerned a Bill in Chancery in England against King William IV of Hanover brought by the Duke of Brunswick who had been deposed and his property seized. King William demurred, asserting want of jurisdiction. In affirming a dismissal of the action by the Rolls Court, the House of Lords observed:

> "A foreign sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country whether it be an act right or wrong whether according to the Constitution of that country or not. The courts of this country cannot sit in judgment upon the act of a sovereign effected by virtue of his sovereign authority ."[93]

157. Professor Michael Zander, writing in 1959, observed of the Duke of Brunswick decision that, whatever its true meaning, it was undoubted that it exercised a great influence upon the minds of judges in a number of classical American decisions.[94]

158. There is an historical connection between state immunity and the act of state doctrine and a distinction to be drawn between them. State immunity is the immunity of foreign states and their agents from the processes of domestic courts. A classic formulation was that of Marshall CJ in 1812 in *The Schooner Exchange v McFaddon* 11 U.S. (7 Cranch) 116 (1812). He explained the nature of the immunity in terms of a qualification on sovereignty in relation to acts of a representative of a foreign state outside its territory. Its rationale was:

> "Mutual benefit - provided by intercourse [of sovereignty] with each other and by an interchange of those good offices which humanity dictates and its wants require."

The doctrine was stated for the UK by Lord Atkin in 1938 in The Cristina.[95] That case concerned the requisition by the Spanish government of ships registered in Bilboa, a decree which was applied to support the seizure of a vessel at Cardiff. A writ claiming sole ownership was set aside. Lord Atkin declared, as a principle of international law incorporated in domestic law, the proposition that:

> ". the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."

159. Both the foreign state immunity and the act of state doctrines have been characterised as components of the traditional approach of Anglo-Commonwealth law that served to exclude foreign relations from municipal legal control.[96] This reflected the concentration, in the executive, of power with respect to foreign relations:

"Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another."[97]

Within that general framework "immunity from jurisdiction was reinforced by the foreign act of state doctrine which precluded the acts of foreign states within their own territory from being called into question in the courts of another."[98]

U.S. Cases

160. The origin of the doctrine in the United States is said to have been Underhill v Fernandez 168 U.S. 250 (1897). In that case, the Supreme Court held that a military commander carrying on operations under the authority of a revolutionary government in Venezuela, later recognised by the United States as the legitimate government, was not liable in a US Court for wrongs inflicted on a citizen of the US. Fuller CJ formulated the principle thus:

"Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

It has been pointed out that Underhill was not really an act of state case. As appears from the facts, it was a case about the immunity from the jurisdiction of US Courts of a foreign official for their official acts.[99] That said, the formulation by Fuller CJ was so broadly stated as to provide a foundation for the development of the act of state doctrine in the United States.

161. The statement in its terms was applicable to the courts of any country and so formulated bore the character of a rule of international law. There was no elaboration of it in the opinion. However, it was characterised as a "settled principle" of municipal law by the Supreme Court in *Oedjen v Central Leather Co* 246 U.S. 297 (1918), along with two other principles which were that:

(1) The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - "the political"- departments of the government, and . what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

(2) Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political, question.

162. In *Ricaud v American Metal Co. Ltd*. 246 US 304 (1918) ("Ricaud") the doctrine was expressed thus:

"[T]he courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory. This last rule, however, does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action or the merits of the result cannot be questioned, but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction, but is an exercise of it."

It is of some importance that the doctrine was there characterised as a "rule for decision" and not as a bar to jurisdiction. The Appellants in their defence in the arbitration and in the set aside proceedings sought to characterise the doctrine as going to jurisdiction. Professor Zander in his 1959 paper noted that:

"It is a common error to assume that the act of state doctrine deprives the courts of jurisdiction over the issue. Its alleged effect is rather to deprive the court of the possibility of inquiring into the validity of the act; the merits of the case must be decided as if the act were valid."

163. In this connection there is a distinction between the effects of the doctrines of sovereign immunity and act of state in the US. In *International Association of Machinists and Aerospace Workers v Organisation of Petroleum Exporting Countries* 649 F.2d 1354, the Ninth Circuit Court of Appeals at 1359 observed:

"The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional. Rather it is a procedural doctrine designed to avoid action in sensitive areas."

164. A number of cases in which the acts of foreign states were in issue followed *Underhill*. *American Banana Co. v United Fruit Co*. 213 U.S. 347 (1909) involved an action against a New Jersey corporation for injury occurred by acts of the government of Costo Rica allegedly instigated by the defendant. The plaintiff failed on jurisdictional grounds but in dicta the court said it would not have considered the merits because it would have to canvass the allegedly corrupt motives of the government. That approach was not followed in *United States v Sisal Sales Corp*. 274 U.S. 268 (1927) (*"Sisal"*) where an action was allowed for alleged violation of US competition laws. The plaintiff alleged that the defendant had procured anti-competitive legislation from the Mexican government. The court held that it was the actions of the defendant which were in issue and not those of the Mexican government.[100] A similar approach was adopted in *Continental Ore Co. v Union Consolidated Carbon Corp*. 370 U.S. 690 (1962). There the plaintiff alleged that the defendant had influenced the Canadian government to direct the elimination of Continental from a Canadian market. The court declined to follow *American Banana* and followed *Sisal*.

165. Although the statements in *Underhill*, *Oejden* and *Ricaud* seem to have had the character of statements of international law, given their general application as between states, they were statements of domestic law given their application to the judicial process and their linkage to separation of legislative and executive from judicial powers.

166. Some decades later in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) (*"Sabbatino"*), the Supreme Court was concerned with an action by the Cuban government against a commodities broker for conversion of bills of lading. The defendants counterclaimed that sugar belonging to a Cuban company owned by US residents was invalidly expropriated by the Cuban government. Harlan J, delivering the opinion of the Court, called the dictum of Fuller CJ in Underhill "the classic American statement of the act of state doctrine, which appears to have taken root

in England as early as 1674,[101] and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries.". None of the court's subsequent cases in which the act of state doctrine was directly or peripherally involved had manifested any retreat from *Underhill*.[102]

167. *Sabbatino* held that the doctrine did not derive from the inherent nature of sovereign authority nor from some principle of international law. It was said to have "constitutional" underpinnings arising out of the basic relationships between branches of government in a system of separation of powers. As formulated in past decisions, the doctrine expressed "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder, rather than further, this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[103]

168. The Court in *Sabbatino* reasoned that the act of state doctrine required sovereign acts to be treated as legally operative and to be given effect in the courts of other sovereigns whether or not the act in question violated duties imposed by international law. As Professor John Harrison observed in a helpful article on the American doctrine in 2016:

> "In the context of the act of state doctrine, `invalid' and `illegal' thus are not synonyms. A government act can be illegal in the sense of inconsistent with the government's obligations under international law, and nevertheless are not invalid and hence legally effective."[104]

169. *Sabbatino* has been characterised as transforming the act of state doctrine in the US from one of external deference to one of internal deference.[105] The distinction between the acts of the defendants and those of the relevant government made in *Sisal* and *Continental Ore* was not apparent in cases following the decision of the Supreme Court in *Sabbatino*.

170. Following *Sabbatino* Congress enacted a law, referred to as the Hickenlooper Amendment. It provided that US courts should not decline, on the basis of the act of state doctrine, to give effect to the principles of international law except in cases in which the President decided that application of the doctrine was required by the interests of the United States.

171. *Alfred Dunhill of London Inc v Republic of Cuba* 425 U.S. 682 (1976) concerned, as did Sabbatino, expropriation by the Cuban government. It involved an action against Cuban beneficiaries of the expropriation of cigar manufacturing plants. The beneficiaries had been paid by importers of pre-expropriation shipments, in the mistaken belief that they were entitled to receive the payments. In an action for recovery of money paid under mistake, the Cuban beneficiaries claimed that their refusal to repay the money was an act of state.

172. The Supreme Court held that there was no act of state involved. White J, delivering the opinion of the Court, observed:

> "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Brench of our Government in the conduct of our foreign relations ."[106]

173. The Court was not compelled to recognise as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. This view aligned the act of state doctrine with the restrictive doctrine of sovereign immunity of foreign states which did not extend to cases arising out of their commercial or proprietary actions.

174. The question whether the act of state doctrine precludes inquiry into the motives of a foreign government as distinct from the validity of its acts, was considered by the Supreme Court of the United States in *W.S. Kirkpatrick & Co. Inc. v Environmental Tectonics Corporation International* 493 U.S. 400 (1990) ("Kirkpatrick"). The case concerned a civil action by Environmental Tectonics under the RICO Act alleging that its competitor, Kirkpatrick, had succeeded in procuring a contract from the Nigerian government by bribery.

175. The Court of Appeal for the Third Circuit had reversed a District Court finding that the case was covered by the act of state doctrine. The Supreme Court of the United States affirmed the decision of the Court of Appeal. The question for the Court was framed by Scalia J, delivering the opinion of the Court, thus:

> "In this case, we must decide whether the act of state doctrine bars a court in the United States 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."

176. Justice Scalia described the evolution of the jurisprudential foundation for the doctrine, from an expression of international law (citing *Oetjen*) to a consequence of domestic separation of powers (citing *Sabbatino*).

177. The Court was not concerned in *Kirkpatrick* with the commercial or proprietary action limitations referred to in *Dunhill*, nor was this a case in which the Executive had informed the Court that it had no objection to denying the validity of a foreign sovereign act.

178. The Court found that it was unnecessary to explore those possible limitations as the factual predicate for the application of the act of state doctrine did not exist:

> "Nothing in the present suit requires the court to declare invalid, and thus ineffective as "a rule for decision for the courts of this country" [citing Ricaud], the official act of a foreign sovereign."

179. The Court rejected an argument that the facts necessary to establish the claim would also establish that the contract entered into by the Nigerian government was unlawful. That did not suffice to attract the application of the doctrine:

> "Act of state issues only arise when a court must decide - that is, when the outcome of the case turns upon - the effect of official action by a foreign sovereign ...Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires."[107]

180. In conclusion, the Court stated:

> "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case, because the validity of no foreign sovereign act is at issue."[108]

181. There is continuing debate and room for debate about the application of the doctrine in the United States especially when it is invoked as an answer to claims arising out of human rights violations.[109]

182. It is sufficient for present purposes to observe that *Kirkpatrick* established an important distinction between inquiries into the validity of the act of a foreign state which are precluded by the doctrine and the conduct of private parties to proceedings which have induced or given rise to such acts.

183. The American Law Institute's Restatement of the Law Fourth, The Foreign Relations Law described the act of state doctrine after Kirkpatrick as "a special choice-of-law rule" that overrides public policy exceptions.[110]

184. In reviewing the US cases it is useful to bear in mind that they arose out of diverse geopolitical circumstances. As Scrutton J observed in Princess Paley Olga v Weisz [1929] 1 KB 718 at 724, the original development of the act of state doctrine arose out of South American revolutions. Later cases involved a pattern of attempted expropriation in Europe of assets located in or near the USA.[111]

185. The evolution of the doctrine from a foundation in international comity - with a connection to sovereign immunity, to a foundation in the separation of judicial non-executive powers in the field of foreign relations, reflects its responsiveness to the particular constitutional and legal settings in which it has been invoked.

186. The history of the doctrine in the US does not disclose a golden rule stretching bright and clear from *Blad's* case to *Kirkpatrick*. Nor is it treated as a matter going to the jurisdiction of the courts or tribunals so much as a choice of law rule - or perhaps more appropriately as a rule of law governing the decision of the court on the merits of the case before it - the character applied to the doctrine in *Ricaud*.

187. Characterisation of the doctrine as a rule of law for decision would have an impact on a challenge to an arbitration award on the question of its application. Mere error of law is not a ground for setting aside an award. However, when the error leads the tribunal to issue an award which is in conflict with the public policy of the UAE, then the award might be set aside. Alternatively, if an error of law as to the application of the doctrine leads the tribunal into making a decision "not capable of settlement in arbitrations under DIFC law", again the award would be amenable to setting aside.

188. That reflection leads on to a consideration of UK cases beginning with Luther v Sagor [1921] 3 KB 545.

UK Cases

189. An early twentieth century English decision was *Luther v Sagor*. The case concerned seizure of wood products by the Russian Socialist Federal Society Republic in 1919. The plaintiffs sought a declaration that they were the owners of the products which had been sold by the government to the defendant. The claim was dismissed on the basis that the Soviet government had been recognised as the de facto government of Russia and that the validity of the seizure decision and the sale of the wood to the defendant could not be impugned.

190. Bankes LJ saw the case as one of private international law. The applicable law was that of Russia. Warrington LJ stated:

> "It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country."[112]

He referred to *Oetjen*. Clearly enough, the act of state doctrine was here applied as a choice of law rule and not as a matter going to jurisdiction.

191. The decision has been criticised as failing to clarify the influence of the public policy of the forum on the recognition of foreign laws.[113] Oppenheim characterised it as standing for the proposition that "the courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign or officially avowed acts of its agents, at any rate in so far as they purpose to have taken effect within the sphere of the latter states own jurisdiction."[114]

192. *Princess Paley Olga v Weisz* involved a seizure of the plaintiff's properties, subsequently adopted by the Soviet government. Again, the Court of Appeal held that it could not inquire into the validity of the acts of a foreign sovereign. It approved *Oetjen* in so doing.

193. *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 ("Oppenheimer") at 282 reflected Underhill. Lord Salmon in a judgment concurring with Lord Cross of Chelsea, described the principle normally applied by the UK Courts:

> "The comity of nations normally requires our courts to recognise the jurisdiction of a foreign state over all its own nationals and all assets situated within its own territories. Ordinarily, if our courts were to refuse to recognise legislation by a foreign state relating to assets situated within its own territories or to the status of its own nationals on the ground that the legislation was utterly immoral and unjust, this could obviously embarrass the Crown in its relations with a sovereign state whose independence it recognised and with whom it had and hoped to maintain normal friendly relations."

Luther v Sagor was referred to.

194. *Buttes Gas & Oil Co v Hammer* (No 3) [1982] AC 888 ("Buttes Gas") has some factual analogy with the present case. Buttes sued Dr Hammer, the Chairman of Occidental Petroleum, for defamation. He had accused Buttes of colluding with the Ruler of Sharjah to backdate a

decree extending the territorial waters of Sharjah so that Buttes might obtain the benefit of an oil bearing deposit for which Occidental had a concession. Occidental brought a counterclaim for conspiracy between the plaintiffs and the Ruler of Sharjah to defraud them and to procure the UK government and others to act unlawfully to the injury of the defendants. The matters relied upon in the counterclaim were the same as the particulars of justification in the defence to the defamation action.

195. The case was procedurally and factually complex. It is not necessary to refer to that complexity.

196. Lord Wilberforce referred to the act of state doctrine as "a generally confused topic" (930- F). The term "act of state" had been used to cover situations distinct and different in law (930 - G). The question was whether there existed in English law a general principle that the courts will not adjudicate upon the transactions of foreign states. This was not an act of state principle but one for judicial restraint or abstention (931-GH). Lord Wilberforce concluded:

> "In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English law. This principle is not one of discretion, but is inherent in the very nature of the judicial process. (932 - A).

197. He referred to *Blad* and the *Duke of Brunswick*. He found the principle clearly stated there that the courts of England will not adjudicate upon acts done abroad by virtue of sovereign authority. It was support for a principle of non-justiciability in the English courts of certain kinds of foreign acts. (933) *Underhill, Oetjens and Sabbatino* were all referred to. The latter was seen as holding that international law does not require an application of the act of state doctrine. The US courts had moved to a flexible use of the doctrine, but there was room for a principle of judicial restraint in suitable cases. (934- B and C).

198. Occidental's case necessarily required an examination of the motives of Sharjah in taking the action it did. It also required establishing that the action, at least of Sharjah, was unlawful. These were not issues upon which a municipal court could pass. (938-A). There were no judicial or manageable standards by which to judge the issues (938-B). The other Law Lords on the appeal agreed with Lord Wilberforce.

199. *Williams and Humbert v W.H. Trademark* [1986] 1 AC 368 arose out of expropriatory decrees passed by Spain in 1983. It is unnecessary to review the complex facts of the case. Lord Templeman, with whom the other Law Lords agreed, referred to Luther v *Sagor* and *Princess Paley Olga v Weisz*. He described them as illustrating the principle that an English court will recognise the compulsory acquisition law of a foreign state, the consequential change in title to property and its consequences. The appellants in that case had attacked the motives of the Spanish legislature and the good faith of the Spanish administration as to which Lord Templeman said:

> "No English judge could properly entertain such an attack launched on a friendly state which will shortly become a fellow member of the European Economic Community."[115]

The case was, however, one which Lord Templeman described as "a simple case of compulsory acquisition".[116]

200. In *R v Bow Street Stipendiary Magistrates*,[117] the House of Lords by majority (Lord Nicholls, Lord Steyn and Lord Hoffmann) held that General Pinochet, former Head of State in Chile, was not immune from arrest under a provisional warrant for extradition to Spain. The warrant was based upon the alleged murder by Pinochet of Spanish citizens in Chile. The case turned upon the application of foreign state immunity under the *State Immunity Act 1978* (UK). However, the act of state doctrine was discussed briefly in the judgments.

201. Lord Nicholls described the doctrine as "a common law principle of uncertain application which prevents the English court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country or, occasionally, outside it.[118]

202. His Lordship observed that the 19th century version of the doctrine (citing *Brunswick* and *Underhill*) suggested that it reflected a rule of international law, however:

> "The modern view is that the principle is one of domestic law which reflects a recognition by the courts that certain questions of foreign affairs are not justiciable (citing Buttes) . and, particularly in the United States, that judicial intervention in foreign relations may trespass upon the province of the other two branches of government [citing Sabbatino]."[119]

He characterised *Kirkpatrick* as a more recent development of the doctrine in the US to instances where the outcomes of the case require the court to decide the legality of the sovereign act of foreign states.

203. It was not necessary to discuss the doctrine further because it yielded to a contrary intention of the UK Parliament. This was evidenced in statutes including the *Criminal Justice Act 1988* in relation to torture by foreign officials and the *Taking of Hostages Act 1982*.

204. Lord Slynn saw the act of state doctrine in England as similar to its earlier formulations in the US courts. He cited *Oppenheim's International Law* 9th edition, describing the effect of the doctrine thus:

> "the courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign state or the official or officially avowed acts of its agents, at any rate in so far as those acts involve the exercise of the state's public authority, purport to take effect within the sphere of the latter's own jurisdiction and are not in themselves contrary to international law."[120]

He referred to Lord Wilberforce in the *Buttes Gas* case.

205. *Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5)* [2002] 2 AC 883 arose out of the seizure by Iraq of aircraft belonging to the claimant. By a resolution, Resolution 369, the Iraqi Government transferred the aircraft to Iraqi Airways. Kuwait Airlines obtained judgment on liability from Mance J in the Commercial Court in an action for delivery up of the aircraft and damages for Iraqi Airways unlawful interference with them.

206. The House of Lords held that as a matter of public policy an English court ought to decline to recognise Resolution 369 and that Iraqi Airways action in treating the aircraft as its own amounted to tortious conversion for the purposes of English law. Recognition of Resolution 369 would be contrary to the UK's obligations under the UN Charter and manifestly contrary to the public policy of English law

207. Lord Nicholls, speaking generally of the attitude of English courts to actions taken under sovereign laws, referred to Buttes Gas and the observations of Lord Wilberforce. He also cited Lord Wilberforce's statement in another context that "conceptions of public policy should move with the times."[121] Lord Nicholls continued:

> "As nations become evermore interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important."[122]

It may be observed that the international standards today, reflected in international anti- corruption conventions to which the UAE is a party, are relevant to the content of public policy considerations which may limit the scope of the act of state doctrine in the UAE and in the DIFC.

208. Enforcement or recognition of Resolution 369 would have been manifestly contrary to the public policy of English law. Lord Steyn rejected as "too austere" and unworkable the interpretation of *Buttes Gas* case that it laid down an absolute rule that courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority. [113] Lord Steyn also held that while any breach of international law would not trigger the public policy exception to the doctrine, the case before the court was a paradigm of the example. Lord Hoffman agreed.

209. Lord Hope characterised an "act of state rule" as applicable to the legislative or governmental acts of a recognised foreign state or government within the limits of its own territory. English courts would not "adjudicate upon, or call into question, any such acts".[123] They could be pleaded and relied upon without being subject to that kind of scrutiny. The rule gave effect to a policy of "judicial restraint or abstention".[124]

210. Lord Hope said "very narrow limits must be placed on any exception to the act of state rule".[125] The comity of nations normally requires English courts to recognise the jurisdiction of foreign states over all assets situated within its territories. The judges should be slow to depart from those principles. Refusal to recognise legislation might be based on an inadequate understanding and be embarrassing to the Executive.[126] That said, the public policy exception was not limited to cases of grave infringement of human rights. Oppenheimer was cited. It was the public policy of the UK that its courts should give effect to clearly established principles of international law.[127] Restraint, not abstention, was required.[128] There was no need for restraint where it was plain beyond dispute that a clearly established norm of international law had been violated.

211. In *Yukos Capital SOR v OJSC Rosneft Oil Company (No 2)* [2014] QB 458 ("Yukos") an arbitration award adverse to a Russian company was annulled and set aside by a Russian court. A Dutch court gave the claimant leave to enforce the award on the basis that the Russian courts were not impartial and independent. Enforcement proceedings were instituted in England. The Court of Appeal held that the act of state doctrine did not preclude investigation of or adjudication upon the conduct of the judiciary of a foreign state.

212. Rix LJ, delivering the judgment of the Court, referred to the origin and evolution of the act of state doctrine from *Blad to Brunswick to Underhill, Oetjen, Ricaud, Buttes Gas, Williams and Humbert Ltd, R v Bow Street Metropolitan Stipendiary Magistrates* and others. He observed:

> "The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity ratione materiae, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations." [129]

Having said that, Rix LJ went on to consider the limitations of the doctrine. He observed of *Kirkpatrick*:

> "What the Kirkpatrick case is ultimately about . is the distinction between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to inquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it was unfair or expropriatory or discriminatory. As to the last possibilities, there can be a still further distinction to be made between the act of state which cannot be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore can be challenged."[130] (emphasis in original)

And further:

> "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."[131]

213. *Belhaj* concerned claims involving allegations of detention, rendition and torture in two cases, one involving a Libyan dissident and the other a Pakistani citizen suspected of being a member of an organisation with links to Al Qaeda. Various states were said to be complicit in the alleged unlawful activities.

214. State immunity and the act of state doctrine were in play. The primary judge in the first case struck out the claims on the basis of the act of state doctrine. The Court of Appeal held that the doctrine was limited to acts within the jurisdiction of the foreign state and subject to a public policy exception for grave human rights violations. In the second case the trial judge rejected the act of state defence. The second case was appealed directly to the Supreme Court.[132]

215. In the Supreme Court, Lord Mance undertook an extensive exposition of the US and UK case law. He described Sabbatino and the Hickenlooper Amendment as a point at which United States law departed significantly from any principle in English common law.[133] Kirkpatrick was seen to reflect, in the words of Lord Wilberforce in Buttes Gas a move by US courts "towards a `flexible' use of the doctrine [of act of state] on a case by case basis."[134] The reasoning and nuances of US law were not constant and not necessarily transposable to English law.

216. In the event, Lord Mance said:

> "Sovereign states who without justification and without permitting access to justice detain or mistreat individuals in the course or in relation to their conduct of foreign relations or affairs have sovereign immunity in foreign domestic courts. But I see no reason why English law should refrain from scrutinising their conduct in the course of adjudicating upon claims against other parties involved who enjoy no such immunity here, where the alleged conduct involves almost indefinite detention, combined with deprivation of any form of access to justice and, for good measure, torture or persistent ill-treatment of an individual."[135]

217. The passage is apposite to the question in this case. Should the DIFC-seated arbitral tribunal and its supervising court refrain from scrutinising the conduct of an authority or official of a foreign state when adjudicating claims against non-state parties where the alleged conduct involves decisions of the foreign state authority or official adverse to the claimant and procured by the corrupt conduct of the non-state parties.

218. Lord Neuberger wrote a separate judgment, with which Lord Wilson JSC, Baroness Hale and Lord Clarke agreed. Describing the nature of the doctrine, His Lordship observed:

> "In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully. In so far as it is relied on in these proceedings, the Doctrine is purely one of domestic common law, and it has all the advantages and disadvantages of a principle that has been developed on a case by case basis by judges over the centuries."[136]

219. He observed that many of the judgments cited to the court did not distinguish between what are now treated as three separate doctrines, namely crown act of state, foreign act of state and state immunity.

220. Lord Neuberger set out four "possible" rules which had been treated as aspects of the doctrine in domestic cases. They were as follows:

> (1) That the courts of the UK will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.[137]
>
> (2) That the courts of the UK will recognise and will not question the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.[138]
>
> (3) The courts will not interpret or question dealings between foreign states.[139]
>
> (4) The courts will not investigate acts of a foreign state where such an investigation would embarrass the government of the UK, but that this doctrine only arises as a result of a communication from the Foreign Office.[140]

221. He concluded that the first rule exists and is good law in relation to property, albeit it only applies to acts which take effect within the territory of the state concerned.[141] The second rule was valid and established in so far as the executive act of a state confiscating or transferring property or property rights within its territory is lawful or not unlawful according to the law of that territory. However, if unlawful according to the law of the territory, he was not convinced in principle, why it should not be treated as unlawful by a court in the United Kingdom.[142] It did not appear to Lord Neuberger that the common law regarded it as inappropriate for an English court to decide whether a foreign state's executive action infringed the law of that state at least where that is not the purpose of the proceedings. The third rule existed in relation to property and property rights and, where the doctrine applied, it would defeat what would otherwise be a perfectly valid private law claim. Where it did not apply the court was not required to make any finding binding on the foreign state

222. The fourth rule had no clear basis in any judicial decisions in the UK.

223. Lord Neuberger agreed with Lord Mance JSC that the first rule was a general principle of private international law.[143] The second rule was close to being a general principle of private international law.[144] The third rule was based on judicial self-restraint, applying to issues which judges decide that they should abstain from resolving and purely based on common law without any international law basis.[145] He considered the public policy limits and exceptions to the doctrine, including fundamental breaches of international law. The exception to the doctrine based on public policy had only been considered by courts in relation to the first of the four rules. He could not see grounds for saying that it did not apply similarly to the second rule relating to executive acts within the territory of the state concerned.[146]

224. As to the third and fourth rules, the exception might be applicable but in some it might not.[147]

225. Lord Sumption also held that on the facts pleaded, the claims were not barred by the foreign act of state doctrine so far as they were based on allegations of complicity or participation in torture or in detention or rendition otherwise than by legal authority. He characterised the foreign act of state doctrine as not an immunity but a rule of substantive law, operating as a limitation on the subject matter jurisdiction of the English court.[148]

226. In *Deutsche Bank AG London Branch v Receivers Appointed by the Court* and *Central Bank of Venezuela v Governor and Company of the Bank of England* [2023] AC 156; [2021] UKSC 57 (*"Maduro"*), a question arose out of competing claims by two presidential candidates, Messrs. Maduro and Guaido, to have been elected as President of Venezuela. That question was related to the issue in the cases as to which persons or bodies were entitled to give instructions to banks on behalf of the Central Bank of Venezuela. Mr Maduro claimed to have won

the 2018 election. Mr Guaido claimed that it was flawed. His claim to be Interim President pending fresh elections had been confirmed by a transition statute passed by the National Assembly. There were two boards of the Central Bank appointed by, respectively, Mr Maduro and Mr Guaido, referred to as the Maduro Board and the Guaido Board.

227. The act of state doctrine was raised in the appeal. The Supreme Court held that the courts of England and Wales would recognise and would not question the effect of a foreign state's legislation or other laws in relation to acts which took place or took effect within the territory of that state. They would also recognise and not question the effect of an act of a foreign state's executive in relation to any acts which took effect within the territory of that state. The existence of that second rule should now be acknowledged. There was no basis for limiting it to cases of unlawful executive acts concerning property.

228. Lord Lloyd-Jones JSC observed that a substantial body of authority lent powerful support for the existence of a rule that courts in the UK would not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state performed within the territory of that state. The rule was founded on the respect due to the sovereignty and independence of foreign states and was intended to promote comity in inter-state relations. While the same rationale underpinned state immunity the rule was distinct from state immunity and was not required by international law. It was not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings. It was an exclusionary rule limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. There was no good reason to distinguish in that regard between legislative acts in respect of which such a rule was clearly established and executive acts.[149]

229. Lord Lloyd-Jones went on to refer to the limitations on the doctrine considered in detail by Rix LJ in Yukos. These were summarised as follows:

> "(1) [T]he act of state must, generally speaking, take place within the territory of the foreign state itself.
>
> (2) [T]he 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 a 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) The doctrine does not apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character.
>
> (5) The doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to inquire into them for the purpose of adjudicating on their legal effectiveness.
>
> (6) For the doctrine to apply, challenges to foreign acts of state must arise directly "and not be a matter of merely ancillary or collateral aspersion".
>
> (7) The act of state doctrine should not be an impediment to an action for infringement of foreign intellectual property rights, even if validity of a grant is in issue, simply because the action calls into question the decision of a foreign official."[150]

230. In *Crane Bank Ltd v DFCU Bank Ltd* [2023] EWCA Civ 886 ("Crane Bank") the Court of Appeal considered a claim for damages for conspiracy brought by Crane Bank and a number of its shareholders. They alleged that from about Spring 2016, senior Ugandan officials and officials of the Bank of Uganda ("BOU") had engaged in a corrupt scheme to take control of Crane Bank making improper use of statutory and regulatory powers and to sell its assets for the benefit of parties to the scheme. They alleged that another Ugandan commercial bank, the DFCU Bank, had joined the corrupt scheme as purchaser of Crane Bank from the BOU. The DFCU Bank's holding company and current and former executives and directors of that bank, were also alleged to have joined the scheme. The judge at first instance held, on a jurisdictional challenge, that the claims would require the court to adjudicate on the lawfulness of executive acts of a foreign state under the laws of that state and performed within its territory. As the claims fell within the foreign act of state rule, the court had no jurisdiction to try them. The judge rejected arguments that the claims at least arguably fell within one or more exceptions to the foreign act of state rule.

231. In the Court of Appeal, Lord Justice Philips held that the primary judge was wrong to exclude as a realistic possibility, that the sale of CBL's assets was commercial rather than governmental activity.[151] In so concluding, he found no merit in the appellant's argument based on the Kirkpatrick exceptions. The principal cause of action was that DFCU Bank had joined in a conspiracy with the BOU to dispossess CPL of its assets by misuse of the BOU's statutory and regulatory powers. That was a claim which required proof that the BOU was party to and continued to be party to an unlawful means conspiracy. It required proof that the means used were unlawful. Phillips LJ could see no part of claim which did not require the court to adjudicate on the validity and lawfulness in Uganda and under Ugandan law of the actions of the BOU and its officials.[152]

232. As to the public policy argument, and after reference to *Belhaj* and international anti- corruption treaties, Lord Justice Phillips concluded that it was at least arguable, not least from the criminal law as framed in the *Bribery Act 2010* (UK), that corruption of foreign public officials was contrary to English public policy or that such a policy was developing. These questions and the precise formulation of the policy were matters for trial rather than determination on a summary basis. Lord Justice Popplewell and Sir Julian Flaux, Chancellor of the High Court, agreed.

233. The application of *Crane Bank* is limited by the fact that it was concerned with an application for summary disposition of proceedings. As appears from the above, the public policy question was left open but not answered. The Respondents made the point that in Crane Bank the lawfulness of the acts procured by bribery was a necessary part of the claim. In the present case there was no need, for the purpose of the tortious conspiracy claim, to show that the CMC's acts were unlawful - only that they had been procured by bribery. To some that might seem a fine distinction - an official decision procured by bribery is likely ipso facto to be unlawful in the country in which it is made. It is nevertheless true to say that the legal character of the CMC's decision in this case was not in issue in the Arbitration, only the fact that it was made and had consequences for the Respondents to this Appeal

234. The application of the doctrine to arbitration was considered in *Reliance Industries Ltd v Union of India* [2018] 1 CLC 648; [2018]

EWHC 822 (Comm) by Popplewell J. The parties' dispute arose out of production sharing contracts relating to Indian oil and gas fields. A challenge to a final partial award concerned two instances of a withholding by government nominees of the price of oil and gas pursuant to notices to do so issued under an office memorandum from the Ministry of Petroleum and Natural Gas. The tribunal had concluded (by majority) that it did not have jurisdiction to determine the question whether the government was entitled to withhold any part of the sale price. The claimant's challenge to the tribunal's holding on its jurisdiction failed.

235. Popplewell J characterised the case as concerned with legislative or executive acts in relation to expropriation of property within the jurisdiction of the foreign state in question, India. In that context, the English court would recognise and not question the validity or effect of the foreign state's legislative acts. The first rule articulated by Lord Neuberger in Belhaj was cited.[153]

236. His Lordship was also bound to hold that the doctrine included the principle that the English court would not question the effect of the foreign state's executive acts in relation to property situated within its territory and would not adjudicate upon whether such acts were lawful. That was Lord Neuberger's second possible rule. The claimant's argument was a head-on challenge to the validity of a sovereign legislative act of a foreign state in relation to property within its own territory. The withholding claim could only be resolved in the claimant's favour by resolving issues which would not be justiciable in an English court under the foreign act of state doctrine.[154]

237. The judge also rejected the submission that even if non-justiciable in an English court, the withholding claim was arbitrable. The claimant's argument was that the doctrine of foreign act of state relied upon the proposition that one sovereign state should not sit in judgment on the acts of another. An arbitral tribunal was not an organ of a sovereign state. *Belhaj* was cited. While Lord Sumption had treated comity as an underlying rationale for all aspects of the doctrine, the other judgments had suggested that while some aspects of the doctrine had as their basis the exercise of "judicial self-restraint", they were not the only aspects of the doctrine relevant to the current issue:

> "Here I am concerned with the principle that the validity and effectiveness of legislative and executive acts of a foreign state in relation to property within its jurisdiction is not justiciable. The majority of the judgments in Belhaj v Straw suggest that that is a hard edged principle of English private international law and that its rationale derives from the very concept of sovereignty which recognises the power and right of a state to determine the property rights of those whose property is situate within its territory."[155]

238. In a passage quoted by the Appellants, Popplewell J said that there was no reason why the principle should be any less applicable in arbitration than in litigation before an English court. The principle did not depend upon the tribunal itself being an organ of a sovereign state or exercising sovereign functions:

> "it depends upon a general principle of English private international law which recognises the sovereignty of nations within recognised spheres, a principle to which arbitration tribunals, no less than courts, are required to give effect when applying English private international law principles."[156]

Other jurisdictions

239. The position in other jurisdictions was covered in the Parties' submissions. The doctrine was recognised early in Australian case law in *Potter v Broken Hill Proprietary Company Ltd* (1906) 3 CLR 474. There the Court held that the grant of letters patent for an invention by a State of the Commonwealth of Australia was a grant of a right to exclude manufacture or use of the invention within the territory of the granting state. The validity of the grant was not examinable in the courts of another state, save where the question was merely incidental in an action otherwise cognisable by the courts of that other state. Thus, a grant in New South Wales was not justiciable in Victoria. The decision of course preceded the enactment of national legislation for the grant of patents of inventions.

240. Griffith CJ quoted Fuller CJ in *Underhill* and described his formulation as "a correct statement of English law".[157] Barton J accepted *Underhill* as a correct statement of the law but observed, as noted earlier in these Reasons, that the decision concerned the immunity of individuals from suits brought in foreign tribunals for acts done by them in their own states in the exercise of governmental authority.[158] O'Connor J also endorsed the statement in *Underhill*, although he criticised the term "act of state" as "at best a vague and unsatisfying term".[159]

241. In *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (the *"Spycatcher Case"*), six Justices of the High Court referred to the rule denying jurisdiction to courts to entertain actions for the enforcement of penal, revenue or other public laws of foreign states. They noted that it was sometimes described as a rule of public international law and sometimes as one of private international law. They described it as connected with "a related principle of international law, which has been recognised namely that in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign state within that sovereign's own territory." They cited *Underhill, Buttes Gas and Sabbatino* and observed "[t]he principle rests party on international comity and expediency."

242. The Justices referred to *Oetjen's* and adopted Lord Wilberforce's observation in *Buttes Gas* that the principle is one of "judicial restraint or abstention" and is "inherent in the very nature of the judicial process."[160]

243. The Full Court of the Federal Court of Australia exercising original jurisdiction, considered the doctrine in 2003 in *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 197 ALR 461; [2003] FCAFC 3.

244. A question in the case was whether the court could consider the validity of a concession granted to the applicant by the Portuguese government in the course of determining a claim of allegedly unlawful expropriation, by the Commonwealth Executive Government, of rights derived from the concession.

245. The claim was dismissed summarily. Black CJ and Hill J referred to Potter and Underhill. They pointed to exceptions to "the Potter principle". One was that it was "not applicable to a case where the act of state arises collaterally or more accurately is only incidental".[161] It was an essential part of the claim that the applicants did hold a valuable concession.

246. The judgment considered *Buttes Gas* as a manifestation of the principle in *Potter*. They referred to Lord Wilberforce's invocation on "judicial restraint or abstention" and observed that:

> "This is not surprising given that international relations can be controversial and the outcome of a court's adjudication might well create embarrassment for the government."[162]

Black CJ and Hill J also referred to *Kuwait Airways*. The facts in the case before the Federal Court were closer to *Buttes Gas* than *Kuwait Airways*. In the event, their Honours held the view that the claim was non-justiciable which meant that the court could have no jurisdiction to adjudicate upon the law of Portugal in granting the applicants the concessions.

247. The concept of justiciability was considered by Beaumont J in a separate judgment. He quoted from a paper in the *Melbourne University Law Review* by Sir Anthony Mason, which observed that the term was commonly used in a number of senses. It had been used to designate an issue "not appropriate or fit" for judicial determination. In its administrative law sense, it signified that a matter was not capable of or susceptible to judicial review as well as signifying a want of jurisdiction to entertain an issue than grant appropriate relief.

248. *Habib v Commonwealth* [2010] FCAFC 12; 183 FCR 62 was another decision of the Full Court of the Federal Court of Australia on proceedings commenced in the original jurisdiction of the High Court of Australia and remitted to the Federal Court. The plaintiff's claim alleged misfeasance in public office against officers of the Commonwealth. The Commonwealth officers were alleged to have aided, abetted and counselled his torture and inhumane treatment by foreign officials while he was detained in Pakistan, Egypt, Afghanistan and at Guantanamo Bay. The reserved question was whether the application should be dismissed because the determination of the claims would require a determination of the unlawfulness of acts of foreign states within their territory, rendering those claims not justiciable and not giving rise to a matter within the jurisdiction of the Court. The Court answered the question in the negative.

249. Although it was a dispute about the scope of the act of state doctrine, it was not in contention that it formed part of the common law of Australia. Black CJ agreed with Jagot J that the common law has evolved so that the authorities did not support the application of the act of state doctrine in that case. He observed:

> "If, however, the choice were finely balanced, the same conclusion should be reached. When the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another.[163]

250. Jagot J referred to Underhill and Sabbatino, noting that the latter decision represented a development of the doctrine by requiring consideration of the factors informing its existence on a case-by-case basis.[164]

251. Her Honour referred to the development of US and UK jurisprudence after 1897 in tandem with international law, particularly following the exposure of the horrors of the Nazi regime in Europe at the end of the Second World War.[165]

252. It could not be said that the recognition of limits on the doctrine was inconsistent with Australian authority. She described the allegations founding the claim as involving grave breaches of international law and contraventions of Australian law. As in *Kuwait Airways*, those legal parameters provided the standards necessary for judicial determination and placed the case in a category different from the "judicial no-man's land" apparent in Buttes Gas.[166]

253. The claim was by an Australian citizen against the Commonwealth of Australia. Findings would be necessary as facts along the way but no declaration with respect to the conduct of foreign officials was required. They would not be subject to the jurisdiction of an Australian court by reason of the proceeding. In terms of the jurisprudence of the United Kingdom, there was no reason why an Australian court also "should not give effect to clearly established principles of international law" - citing Kuwait Airways at [139] - particularly where those principles involve protection against the infliction of torture which the Commonwealth Parliament has prohibited. Prohibition on torture was an absolute requirement of customary international law.[167]

254. The *Habib* case involved alleged torture by officials of foreign states, allegedly procured by the Commonwealth, which was the defendant in the proceedings brought by Mr Habib. The present case involves another subject of international concern reflected in international conventions and municipal law - the bribery and corruption of public officials.

255. The doctrine received some consideration in *Moti v The Queen* (2011) 245 CLR 456 ("Moti"). The question on the appeal was whether prosecution of charges laid in an indictment against Mr Moti should be stayed as an abuse of process. The Court said it should on the basis that the appellant was brought to Australia from the Solomon Islands without his consent and that officials of the Solomon Islands government had deported him by putting him on an aircraft bound for Australia without power to do so. Having regard to the role that Australian officials had played in connection with the appellant's removal to Australia, the further prosecution of the charges would be an abuse of process. Six Justices of the Court in a joint judgment held that consideration of questions of act of state and *Underhill* were better conducted by reference to more recent examination of those questions. What had been said in *Underhill* and what had been said in *Spycatcher* did not establish as a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law.[168] The joint judgment pointed to the absolute and universal terms of the dictum of Fuller J, but observed that neither the dictum nor the phrase "act of state" should be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than could be achieved by applying a single all-embracing formula. F.A. Mann was cited for the proposition that issues like those considered in *Buttes Gas* and *Sabbatino* were better approached at a more particular level of inquiry than the level of generality reflected in the dictum of Fuller CJ. F.A. Mann was quoted for the proposition that:

> "the courts are free to consider and pronounce an opinion upon the exercises of sovereign power by a foreign Government, if the consideration of those acts of a foreign Government only constitutes a preliminary to the decision of a question . which in itself is subject to the competency of the Court of law."[169]

256. In *Moti* the question of the lawfulness of the appellant's removal from the Solomon Islands, although effected by the Solomon Islands government was "a preliminary" to the decision whether a stay should be granted.

257. Turning to Hong Kong, the Appellants submitted that the act of state doctrine is enshrined in Article 19 of the Basic Law of Hong Kong which provides that:

> "The courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs."

258. That Article was the subject of a referral by the Hong Kong Court of Final Appeal for interpretation by the Standing Committee of the National Peoples' Congress under the provisions of the Basic Law. The reference was coupled with a provisional view expressed by the Court of Final Appeal. The effect was that the Article was concerned with absolute State immunity - Democratic Republic of Congo v F.G. Hemisphere Associates LLC (No 1) [2011] 14 HKCFA R 95.

259. The case concerned an application for recognition and enforcement of two ICC arbitral awards against the Democratic Republic of Congo which had pleaded sovereign immunity. It was not a case involving the act of foreign state doctrine at common law.[xxxxx]

260. Turning to Singapore, in *Maldive Airports Co Ltd v GMR Mal International Airport Pte Ltd* [2013] SGCA 16, the Court of Appeal of Singapore was concerned with an interim injunction restraining the appellants from interfering with the respondents' performance of their obligations under a concession agreement. One of the respondents was the Republic of the Maldives.

261. The Court held that a provision of the concession agreement constituted a written consent by the Republic to waive immunity under the *State Immunity Act of Singapore*.[171]

262. A jurisdictional objection was raised based on the act of state doctrine. The Chief Justice, delivering the judgment of the Court, referred to the origin and evolution of the doctrine. The doctrine did not have any purchase in that case, which was "in essence . a private law dispute between the parties".[172]

263. In the *Republic of the Philippines v Maler Foundation* [2013] SGCA 66, the Court of Appeal, after surveying the authorities concluded that:

> ". it does not appear that a coherent or unified principle has emerged in the English jurisprudence. The act of state doctrine in England is perhaps best characterised as a combination of judicial restraint, comity, and a territorial choice of law rule in relation to acts of a foreign sovereign that affect property within its jurisdiction."[173]

264. In Canada, the Supreme Court of Canada held in *Nevsun Resources Ltd v Araya* [2020] 1 SCR 166, that the act of state doctrine had played no role in Canadian law and was not part of Canadian common law. Abella J delivering the judgment of the majority in that case described the doctrine as a known (and heavily criticised) in England and Australia. There was "no single definition that captures the unwieldly collection of principles, limitations and exceptions that have been given the name "act of state" in English law."[174] A distinction was drawn between state immunity and the act of state doctrine. Reference was made to various of the English cases mentioned above and the Australian cases of *Habib and Moti*.

265. Canadian courts would not hesitate to make determinations about the validity of `foreign' laws where they were incidental to the resolution of legal controversies before the court.[175] Abella J said:

> "Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence."[176]

The act of state doctrine - The Appellants' submissions

266. The Appellants described the act of state doctrine as an exclusionary rule that the executive and legislative acts of foreign states are non-justiciable because of their sovereign character. They traced what was called the "modern doctrine" from the decision of the US Supreme Court in *Underhill*. In that case the court declined to examine the legality of the detention of the plaintiff in Venezuela. Fuller CJ said at 252:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."

267. The Appellants referred to authorities in the United States, the United Kingdom, Australia, Singapore, Canada and Hong Kong. They addressed the question whether the act of state doctrine forms part of DIFC Law. They acknowledged that there is no DIFC statute referring to the doctrine. Having regard to the character of the DIFC Courts as international courts, however this Court should find that the doctrine is recognised as DIFC Law and give content to it by reference to common law authorities from other jurisdictions. While the Application Law in force at the time of the Arbitration and the proceedings before the court below, the common law of England and Wales could be resorted to as a source of the relevant law. Wider authority to determine the common law of the DIFC by reference to other common law jurisdictions is conferred as a result of the new Application Law.

268. The Appellants also submitted that the doctrine, founded on considerations of deference to state sovereignty, is a matter of public policy in the UAE. It may be observed, of course, that public policy is often described in broader terms than the common law of England and Wales such as it is. The UAE law experts, Dr Al Mulla and Mr Al Hashimi, who gave evidence before the Primary Judge, were said to have agreed on this point. So, it was said, that where the jurisdiction of an arbitral tribunal is excluded by the operation of the doctrine, any award rendered by the tribunal ought to be set aside as contrary to UAE public policy.

269. The Appellants accepted that there is a public policy exception to the act of state doctrine. Again, the relevant public policy was that of the UAE. The starting point was said to be that the exception is a narrow one. Lord Hope's judgment in Kuwait Airways was cited. The question in the present case was whether public policy required that the act of state doctrine should be disapplied by way of exception to the general rule in cases where it was alleged that the act of state in question was procured by bribery and corruption. The Appellants submitted that it should not.[177] The cases were said to show that the exception would arise only in case of violation of peremptory norms which are so universally recognised that no derogation from them can be permitted: notably the right not to be tortured. There was only one reported case in which a common law court had expressly considered whether allegations that an act of state was procured by bribery was within the scope of the public policy exception. That was Crane Bank where the court held that it was arguable that the exception did extend to allegations that the act had been procured by bribery.

270. There were said to be powerful public policy considerations to support a rule that a DIFC court or a DIFC arbitration tribunal should not question the motives for the acts of officials of other states done within their own territories. To do so, could prove highly damaging to the international relations of the UAE. To widen the public policy exceptions to the act of state doctrine in order to allow allegations of bribery and corruption to oust the doctrine risk narrowing it into insignificance. To preserve comity, such matters ought to be reserved to the courts of the state where corruption is alleged to have occurred.

271. The Appellants referred to the *"Kirkpatrick"* exceptions and their consideration by Lord Justice Rix in Yukos. Of the `limitations' to the doctrine listed by Lord Justice Rix, two were said to arise for consideration in this Appeal:

> "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 a grave infringement of human rights.
>
> .
>
> 5. Challenges to foreign acts of state must lie "at the heart" of the case and not be a matter of merely ancillary or collateral aspersion, and a test of necessity to a decision may therefore be a useful test."[178]

272. The Appellants cited *Belhaj* and argued that the speech of Lord Neuberger, with whom three other Justices agreed, at least as to the reasoning, appeared to represent the ratio of the decision. They pointed to three rules, summarised in the 16th edition of *Dicey, Morris and Collins on The Conflict of Laws* as reflecting the overall effect of the speeches:

> "(1) First, the court will recognise, and will not question the effect of a foreign State's legislation or other laws in relation to any acts which take place or take effect within the territory of that State.
>
> (2) Second, the court will recognise, and will nor question, the effect of an act of a foreign State's executive in relation to acts which take place or take effect within the territory of that State if the acts relate to property (and not personal injuries or death) within that State and are lawful under the law of that State (it being unnecessary to decide whether the same result flows if the acts are unlawful).
>
> (3) Third, an English court will refrain from resolving issues which are inappropriate for the court to resolve because they involve a challenge to the lawfulness of the act of a foreign State which is of such a nature that a municipal court cannot or ought not to rule on them, such as dealings between sovereign States, including making war and peace, making treaties with foreign sovereigns, and annexation and cession."

273. The Appellants relied upon the second rule. It was not disputed that the CMC Decision of 2 July 2014 was an executive act of the State of Iraq. They contended that the second rule was supported by the *Maduro* decision. They relied upon the speech of Lord Lloyd Jones JSC to the effect that the rule extends to executive as well as legislative acts, is not limited to seizures of property and is founded on comity.

274. Against the application of the *Kirkpatrick* limitations, the Appellants submitted that the Tribunal could not resolve the claim before it without adjudicating on allegations that the CMC Decision was procured by bribery, which it did. The Respondents would have had no cause of action without calling into question whether the agents of the Iraqi government were acting wrongfully and unlawfully.

275. The Appellants also referred to the position in Australia, Singapore, Canada and Hong Kong, discussed earlier in these Reasons.

276. The Appellants supported the conclusion of the Primary Judge that the act of state doctrine forms part of DIFC Law. They acknowledged that there is no DIFC statute which refers to the doctrine of the act of state but relied upon new Article 8A of the Application Law to the effect that DIFC statutes are supplemented by the common law. They pointed to *FAL Oil v SEWA* [2019] DIFC CFI 221 (16 February 2021) in which Martin J held that principles of sovereign immunity - closely related to the act of state doctrine - form part of DIFC law, albeit individual Emirates were not entitled to assert sovereign immunity as against each other. It was said to be important that the UAE itself recognises a nascent doctrine of act of state. They contended that on any view the expert testimony acknowledged that the UAE Federal Supreme Court considered that the principle of state sovereignty precludes a direct challenge to the acts of foreign states. They submitted that this Court should find that the doctrine of act of state is recognised in DIFC law and give content to it by reliance on common law authorities from other jurisdictions.

277. The Appellants also submitted that the act of state doctrine is a matter of public policy in the UAE, a proposition on which the experts agreed. Accordingly, where the jurisdiction of an arbitral tribunal is excluded by the operation of the doctrine, any award rendered by the tribunal ought to be set aside as contrary to UAE public policy.[179]

278. The Appellants submitted that the onus is on the Respondents to establish that the alleged bribery and corruption are of the same order as torture, grave infringements of fundamental rights or clear and acknowledged breaches of international law which were the only instances in which public policy had been held to apply to date. They invoked Lord Hope's "golden rule" in *Kuwait Airways* to the effect that the benefit of any doubt must be resolved in favour of the application of the doctrine. They pointed to the fact that the UAE was not a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[180]

279. The balancing exercise tentatively suggested in some English cases would leave the law in a state of uncertainty.[181]

The act of state doctrine - The Respondents' submissions

280. The Respondents submitted that under English law the act of state doctrine would not have barred their claim.[182] And even if it did, there was no good reason for this Court to follow suit.[183] Private parties should not be allowed to avoid liability for large scale fraud simply because their fraud involved bribing the public officials of a foreign state.

281. The Respondents set out a number of questions for determination by the Court. The first question was whether the act of state doctrine forms part of DIFC Law independently of UAE public policy under Article 41(2)(b)(iii) of the DIFC Arbitration Law.

282. Article 8(2) of the Application Law No 3 of 2004 did not import English law on the act of state doctrine. That provision could not be relied upon to import an English law doctrine which did not otherwise exist under DIFC Law. Article 8(2) was a choice of law provision. A gap in the law of the chosen jurisdiction did not trigger a default selection of the next jurisdiction in line. *The Industrial Group Limited v El Fadil Hamid* [2022] DIFC CA-005/006 (20 September 2022); *Fal Oil Company v Sharjah Electricity and Water Authority* [2019] DIFC ENF 221/2019 (16 February 2021) and *Muzama v Mihanti* [2022] DIFC Arb 004 (8 February 2023), relied upon by the Appellants, were distinguished. In the latter case, His Excellency Justice Al Sawalehi had proceeded on the assumption that the doctrine applied but that assumption had not been argued.

283. The attempt to invoke the Amended Application Law was said to be misconceived. The Law was not in effect at the time of the Award nor the Set Aside Application. On common law principle it would not, absent clear language, have retrospective effect. It was not a procedural law.[184]

284. The Respondents pointed to the importance of the characterisation of the doctrine. Even if it existed, in order for the Court to be able to set aside the Award, the doctrine must operate as a restriction on the jurisdiction of the Tribunal, as a rule of arbitrability or as part of UAE public policy.[185] The doctrine could only be relevant if it formed part of DIFC Law in a way which permitted the Court to intervene in arbitration proceedings.[186]

285. There was no reference in the Arbitration Law, Article 12(2) to the act of state doctrine as going to arbitrability. Arbitrability under the New York Convention and the Arbitration Law concern whether the subject matter of a dispute could not be determined by an arbitral tribunal and must be determined by a court. Arbitrability did not go to whether a claim could succeed at all. The act of state doctrine, if applicable, would operate as a bar to success, whether in an arbitration or in judicial proceedings.[187]

286. The Respondents contended that the act of state doctrine is not part of UAE public policy within the meaning of Article 41(2)(b)(iii) of the Arbitration Law. The Appellants had relied upon UAE Federal Supreme Court Judgment No. 714. But that was authority only for the proposition that UAE law precludes claims seeking to overturn foreign administrative decisions in UAE administrative courts. The Respondents had never sought to do that in this Arbitration. The Federal Supreme Court of the UAE in Judgment No 714 had remitted the relevant compensation claim for decision, a step which was not consistent with that aspect of the claim being barred as a matter of UAE public policy.[188]

287. Expert testimony adduced for the Appellants on a UAE act of state doctrine was said to be unsupported by reasoning or by reference to any authority.[189] There was no trace of an act of state doctrine in UAE law. The Respondents submitted that in any event neither the relevant UAE Law Rule nor the act of state doctrine were within the international concept of public policy referred to in Article 41(2)(b)(iii) of the Arbitration Law.

288. The Respondents went on to submit that even if the act of state doctrine were applicable, the Tribunal had not infringed it.[190]

289. The Respondents relied upon *Kirkpatrick* and referred to *Maduro* and *Yukos*.

290. Recognition of the doctrine in Australia was noted albeit limited in its scope and application by Moti. The absence of the doctrine from Canadian law was pointed out by reference to *Nevsun Resources Ltd v Araya* [2020] 1 SCR 166, as was its different application in Hong Kong in *Democratic Republic of the Congo v F.G. Hemisphere Association LLC* (No 1) (2011) 14 HKCFAR 95 at [344]. Further, there were only two cases concerning the doctrine coming out of Singapore.

291. The Respondents also submitted that the act of state doctrine was subject to a public policy exception in respect of claims arising out of the bribery or corruption of the public officials of a foreign state. *Crane Bank and Federal Republic of Nigeria v J.P. Morgan Chase Bank N.A.* [2022] EWHC 1447 (Comm) were said to leave the exception open as arguable.

292. UAE public policy was said to be opposed to bribery and corruption. Public policy was also opposed to such conduct in the arbitration context.

Consideration - act of state doctrine

293. In order to succeed in an application to set aside an award for contravention of an act of foreign state principle, the Appellants must show that the principle, whatever its content and juridical basis, can be invoked in support of one or other of the grounds for setting aside an award in Article 41(2) of the DIFC Arbitration Law.

294. In their Supplementary Skeleton Argument, the Appellants contended that by reason of the act of state doctrine, the Tribunal lacked jurisdiction to investigate the Respondents' allegation that the CMC Decision of 2 July 2014 was procured by bribery and corruption. This contention was linked to the grounds for setting aside an award in Article 41(2)(a), 41(2)(b)(i) and 41(2)(b)(iii) of the Arbitration Law.

295. Article 41(2)(a) is not applicable. It cannot be said that in dealing with the claims of bribery of the CMC the Tribunal was dealing with "a dispute not contemplated by or not falling within the terms of the submission to arbitration". Nor can it be said that the Final Award contained

"decisions on matters beyond the scope of the submission to arbitration"

296. In this case the objection, as reflected in the Appellants' defence, was that the Tribunal was prevented from deciding the matter submitted to it by reason of a preclusive principle of law going to arbitrability and/or the public policy of the UAE.

297. If, as was said in *Ricaud*, the act of state doctrine is "a rule for decision", a proposition supported by Professor Zander, then it may be doubted that such a rule would go to jurisdiction. If, however, a rule for decision renders an issue before the tribunal non- arbitrable, the result may be the same. Alternatively, a rule for decision may embody a principle of public policy which, if not respected, could lead to the setting aside of the award. The Appellants framed their case alternatively on arbitrability and public policy although the two issues in this case are entangled.

298. Consideration of arbitrability directs attention to Article 41(2)(b)(i) of the Arbitration Law.

299. The wording of the Article is that of Article 34(2)(b)(i) to the UNCITRAL Model Law on International Commercial Arbitration and Article V(2)(a) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (1958). The circumstances in which non-arbitrability may be invoked are not defined in the Arbitration Law save for what is found in Article 12(2). Nor are they defined in its antecedents in the New York Convention and the Model Law.

300. The Respondents referred to *Gauge Investments Ltd v Ganelle Capital Ltd* [2016] DIFC ARB 003/2016 (8 June 2016) for the proposition that DIFC Courts will only find that a dispute is non-arbitrable "where this has been clearly and distinctly demonstrated". Justice Sir Richard Field referred to the judgment of V.K. Rajah in the Singapore Court of Appeal in *Larson Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21; [2011] 3 SLR 414, where it was said:

> "44. The concept of non-arbitrability is a corner stone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute."

As Justice Sir Richard Field pointed out those words were cited with approval by Patten LJ in *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333.

301. The Respondents referred to Arbitration Law Article 12(b)(2) as identifying matters which are not arbitrable, noting that there is no reference there or in any other DIFC Law to an act of state doctrine. While accepting that the courts of the DIFC, consistently with international practice, will take a restrictive approach to claims of non-arbitrability Article 12(b)(2) of the Arbitration Law is not exhaustive of the matters which are not arbitrable.

302. As is pointed out in Born, *International Arbitration Law and Practice*:

> "The types of disputes that are non-arbitrable differ from nation to nation. In general, disputes or claims are deemed "non-arbitrable" because of their public importance or a perceived need for judicial protections. Among other things, various nations refuse to permit arbitration of at least some disputes concerning criminal law, labour grievances, intellectual property, real estate, bankruptcy and domestic relations." [191]

Born observed that courts in most developed jurisdictions have narrowed the non- arbitrability doctrine typically applying it where statutory provisions expressly require. This has resulted in a limited set of "mandatory law" claims from which parties are not free to contract in advance and which clearly require resolution in judicial or other specialised forums.

303. Criminal conduct is regarded as non-arbitrable in the sense that arbitrators may not impose criminal sanctions, although in civil disputes they may consider allegations of conduct that would amount to a criminal offence.[192] Croft, Stamboulakis and Warren in *International and Australian Commercial Arbitration*[193] observed, after referring to some express statutory exclusions from arbitrability:

> "Despite these limited express exclusions from arbitrability, over time, there has been a removal on restrictions on matters that are non-arbitrable. This means that there are now only limited restrictions on the kinds of commercial disputes - particularly international ones - that can be arbitrated."

304. Case law and legislative developments in other model law jurisdictions were also said to demonstrate the expansion of arbitrability.

305. The text of the equivalent provisions of the New York Convention and the Model Law requires a finding that by the law of the State which governs the arbitration, the subject matter of the dispute is not capable of settlement by arbitration. That exclusion must be found in the law of the State, either the statute law or, in a common law jurisdiction, the common law where the statute law is silent. That requirement is applicable to Article 41(2)(b)(i) of the DIFC Arbitration Law.

306. There are two categories of case in which the non-arbitrability ground may be applicable. The first is the case in which the law of a State reserves certain matters to determination by the courts of the State. That might be done expressly. Alternatively, the law of the State may involve elements of public interest, reflected, for example, in a statutory scheme, such that disputes about rights and liabilities arising under the law are clearly intended to be reserved to the court system.

307. In the judgment of Allsop J in the Full Court of the Federal Court of Australia in *Comandate Marine Corp v Pan Australia Shipping*, his Honour traced the origins of the term "capable of settlement by arbitration". The types of disputes which national laws might see as non- arbitrable were the subject of discussion leading up to both the New York Convention and the Model Law. They were disputes such as those concerning intellectual property, anti- trust and competition disputes, securities transactions and insolvency. His Honour made three observations:

> (1) The common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject

matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate.

(2) The identification and control of these subjects was the legitimate domain of national legislatures and courts.

(3) In none of the *travaux preparatoirs* was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral tribunal applying the laws chosen by the parties to govern the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws.

308. The delineation of what is non-arbitrable is not clear. In *Fulham Football* Club, Patten LJ observed, quoting *Mustill and Boyd*[194] that English law had never arrived at a general theory for arbitrability. He made an important distinction between arbitrable subject matter and non-arbitrable remedies. The question before the Court was whether a member of a football club could bring oppression proceedings under the *Companies Act 2006* against the club chairman or was constrained to arbitration by an arbitration clause in the club rules. Patten LJ held that there were public policy limits on the remedies which an arbitrator could award. Members of a company could submit disputes to a process of arbitration but the question whether a company should be wound up was not arbitrable as within the exclusive jurisdiction of the courts. Longmore LJ reaffirmed the public policy purposes of the *Arbitration Act 1996* holding that public policy had a part to play only as "a safeguard . necessary in the public interest."[195] Rix LJ agreed with both Lord Justices Patten and Longmore. An application for permission to appeal against that decision was dismissed by the Supreme Court of the United Kingdom.

309. The history of the non-arbitrability provision marks it as identifying a demarcation line between what may be done through arbitral process and what is reserved to the courts of a state. If, however, by the law of a State some matter is non-justiciable in the courts of the State, the public policy underlying that limitation may also have the effect that the dispute is not capable of settlement by arbitration. So it is that the foreign act of state doctrine is invoked in this case as a matter going to both justiciability in the courts and arbitrability in arbitration tribunals for the same public policy reason.

310. The question becomes - is there a law of the DIFC which applies some version of the act of foreign state doctrine to render the subject matter of certain disputes not capable of settlement by arbitration. The term `DIFC Law' in Article 41(2)(b)(i) of the Arbitration Law encompasses DIFC Law made by the Ruler of Dubai. The law of the Application of Civil and Commercial laws - in Article 8 as it was until recently, applied "DIFC Law or any other law in force in the DIFC" and "the laws of England and Wales" to DIFC courts and arbitrators (Article 9).

311. In *Dutch Equity Partners Ltd v Daman Real Estate Capital Partners* [2006] DIFC CFI-001, Hwang J was concerned with a case involving the application of the DIFC Company Laws of 2004 and 2006. Neither provided an exclusive code of company law. Thus:

".the default position under Article 8(2)(e) of DIFC Law No. 3 is that the laws of England and Wales (particularly the common law) will apply to supplement the provisions of the DIFC Statutes.[196]

312. Thus, the case law on the foreign act of state doctrine in the courts of England and Wales is relevant in the present case. Under the new Application Law, Article 8A, the applicable common law will be the common law of the DIFC which may draw for its content on all common law jurisdictions.

313. The common law of England and Wales, as the cases show, has not yielded a clear principle with well defined content. The clearest exposition relevant to this case, albeit at a level of some generality, is the second rule expounded by Lord Neuberger in Belhaj. The rule may be seen as subject to the public policy limitation enunciated by Rix LJ in *Yukos* and summarised by Lord Lloyd-Jones in *Maduro*.

314. 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 CMC Decision. That Decision was taken to be effective and a link in the causal chain from the acts of the Appellants to the loss suffered by the Respondents.

315. The metaphorical question whether the allegations of the CMC's corruption were "at the heart of the case" is of little assistance here. The metaphor does not supply a legal standard. And even applying the anatomical metaphor, it would not be difficult to conclude that the heart of the case was the conduct of the Appellants.

316. The legal analysis of the Respondents' cause of action differs little from the analysis required in a hypothetical case, posited to counsel for the Appellants, in which one party in breach of contractual obligations did something which led the CMC to make an honest decision giving rise to the same loss. There might be an issue in such a case whether in the foreign state, i.e. Iraq, such a decision would be subject to judicial review, but it would be assumed to be valid for the purposes of the claim. No question of the foreign act of state doctrine would apply.

317. The preceding line of reasoning might be thought to reflect Kirkpatrick and thus some sort of departure from the English common law. However, if that be so, the case is answered by reference to the public policy of the UAE. That public policy, as already indicated, stands firmly against conduct involving the bribery of foreign officials. It derives from international conventions to which the UAE was a party at the time of the arbitration and the decision of the CFI rejecting the Application to Set Aside the Award. It is reinforced by the current provisions of the Penal Code of the UAE. The DIFC Courts serve as part of an international community of commercial courts and in that way contribute to the rule of law in transnational trade and commerce. The public policy which gave rise to their creation 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. If anything, the position is strengthened under the amended Application Law whereby the Court can draw upon all common law jurisdictions for the purpose of delineating the relevant limitations of the doctrine. The so-called *Kirkpatrick* exceptions would be applicable.

318. We should add that, in our opinion, the Appellants are not assisted by the decision of the Federal Supreme Court 714/218. As noted earlier,

the decision appears to preclude judicial review by courts and tribunals of the UAE of decisions taken by administrative authorities of a foreign country. To the extent that that decision reflects a UAE public policy applicable to arbitrations seated in the DIFC, it does not touch the current case which is concerned with the conduct of the non-State parties. It is the effect of the CMC Decision not its validity or lawfulness that was in issue in the Arbitration.

Illegally obtained evidence - the Appellants' submissions

319. The Appellants submitted that the Final Award was contrary to UAE public policy in that the Tribunal without ruling on the admissibility of evidence unlawfully obtained by the investigation firm, Raedas, nevertheless admitted and then relied upon such evidence in forming its conclusion that the CMC Decision was procured by bribery of CMC officials. Mr Bortman's evidence had included reports of statements of unidentified former CMC officials and a former Korek employee. The Appellants contended that he had obtained materials without consent in breach of obligations of confidentiality and legal provisions and in a manner that breached both UAE and Iraqi public policy.[197] The Appellants said they had objected to the unlawful methods used to obtain the evidence and its unreliability as hearsay and double hearsay. They referred to a submission by the Respondents' counsel that the CMC had hidden the letter from Korek of 22 January 2014, a copy of which had Dr Rabee's handwriting on it confirming its receipt. Its alleged absence had been used as a purported justification for the CMC Decision. While the Tribunal had stated in the Final Award that it had not relied upon hearsay statements of Mr Bortman it had referred to a copy of the letter of 22 January 2014 which he had produced.

320. In oral argument, counsel for the Appellants focussed their attack on the Tribunal's reliance on information and evidence allegedly obtained from past or present Iraqi public officials in violation of Iraqi criminal and civil law. UAE public policy was said to require the exclusion of such unlawfully obtained evidence. An award rendered in reliance on such evidence should be set aside on the public policy ground. The challenge seemed centred on the Korek letter. The Appellants relied upon inference to contend that the Korek letter must have been within the control of the CMC to whom it was addressed. The inference was that an employee of the CMC took the document and gave it to Raedas. It was also to be inferred that Raedas had bribed the person to hand over the document. The Tribunal ought to have followed UAE public policy and excluded the evidence. Instead, it had admitted it and relied upon it as a critical step in its conclusion on the CMC bribery allegations.

321. Further it was argued that the suggestion that the handwriting was that of Dr Rabee had come from the hearsay evidence of Mr Bortman, based on what he had been told by an anonymised source called `CO2'. The Tribunal's acceptance of the evidence was said to contradict its assertion in the Final Award that it placed no reliance on the hearsay testimony.

Respondents' submissions on illegally obtained evidence

322. The Respondents pointed to the Primary Judge's finding that certain of the evidence referred to was not relied upon by the Tribunal and even had it been there would have been no breach of public policy. Other evidence referred to was not secret within the meaning of UAE Criminal Law so there could be no UAE crime and no breach of employee confidentiality on the evidence. Nor was there any territorial link between the alleged crime and the UAE.

323. The Respondents contended that the Appellants had not at any stage in the proceedings presented a coherent case that evidence relied upon by the Tribunal was illegally obtained. They also maintained that the illegality alleged by the Appellants would, even if proven, not have rendered the Final Award in conflict with public policy within the meaning of Article 41(2)(b)(iii) of the DIFC Arbitration Law.

324. In relation to the Korek letter, the case that the handwriting on it was Dr Rabee had been advanced by comparison of the signature on the letter with other signatures.

325. Counsel for the Respondents pointed out that the contention relating to the letter had been raised for the first time in the Skeleton Argument produced on the Setting Aside Application. The Appellants had failed to challenge the authenticity of the Korek letter and other documents produced by Mr Bortman. They pointed to the terms of Procedural Order No. 1, which provided at paragraph 6.6 that "all documents submitted to the Tribunal are deemed authentic and admissible . unless the other party disputes their authenticity or admissibility within 28 days of receipt".

326. The Respondents also pointed to the opening slides at the Arbitration which showed the letter of 22 January 2014 and a letter signed by Dr Rabee dated 10 December 2013. The Tribunal was invited to compare the two signatures. The Respondents contended that it was therefore wrong to allege that the Tribunal relied on a second-hand report that Dr Rabee's handwriting appeared on the Korek letter of 22 January 2014.

327. In any event, the issue had not been raised in the Arbitration. Counsel referred to a passage in the Tribunal's Final Award in which it said that:

> "What is clear . is that the letter from Korek does have manuscript writing on it which would appear to have been placed there by someone within the CMC, suggesting that the later statement that the letter had not been received was untrue. The Arbitral Tribunal does not understand the Respondents to have challenged the authenticity of either B2/1 or the marginal note, by whomever it was made."

The question whether the handwriting and signature were Dr Rabee's was not critical to the Tribunal's findings. The letter had no impact on the central question which the Tribunal had to decide, which was whether bribes were paid. That was established by following the money and by evidence of property transactions in London.[198]

Consideration - hearsay and illegally obtained evidence

328. This ground of appeal may be dealt with very shortly. As to the hearsay allegation, it is quite clear from the terms of the Final Award that the Tribunal did not rely upon hearsay evidence. As to the allegations of criminality involving in the obtaining of documentary evidence, this is proffered as a matter of inference which is inadequately supported. In any event, the authenticity of the documents in question, particularly the Korek letter, was not challenged applying the procedures provided by the Tribunal for such challenges.

329. The question whether the resort to illegally obtained documents would be contrary to UAE public policy, as applied in the DIFC, would not

be resolved by simply asking whether illegally obtained evidence may be admitted in the discretion of the arbitral tribunal or a DIFC Court. The question posed by the application of the rule of evidence would not answer the public policy question. This Court would be hesitant to say that the public policy of the UAE, as applicable in the DIFC would preclude the use of evidence of corruption even if that evidence had been unlawfully obtained.

330. The second ground of appeal is not made out.

Conclusion

331. For the preceding reasons, the Appeal is dismissed and the Appellants will pay the Respondents' costs of the Appeal to be assessed by the Registrar if not able to be agreed.