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# THE ACT OF STATE DOCTRINE AND THE DIFC'S TURN TOWARD TRANSNATIONAL COMMON LAW

expert talk

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## I. INTRODUCTION

1. Last year, Singularity wrote on enforcing against sovereigns in the DIFC, where we examined the contours of sovereign immunity as applied by the DIFC Courts, analysing the seminal decisions in *Pearl Petroleum v KRG* and *Fal Oil v SEWA*.[i] That paper explored how the DIFC's hybrid legal framework, a fusion of statutory provisions and common law principles, accommodates common law doctrines such as sovereign immunity. We also discussed the possibility of importing principles from other common law jurisdictions, particularly the United States, to address challenges in enforcing against indirectly held sovereign assets and state-owned entities.

2. In a landmark decision in *Korek Telecom Company LLC v Iraq Telecom Limited ("Korek Telecom")* [ii] this year, the DIFC Court of Appeal ("CA") revisited the DIFC Application Law,[iii] the statute that determines what body of law applies in the DIFC, while assessing whether the Act of State ("AOS") doctrine forms part of DIFC law, and if so, in what manner. While sovereign immunity shields foreign states from being sued in foreign courts without their consent, the AOS doctrine raises a distinct question: how far domestic courts can inquire into the validity of a foreign state's acts within its own territory. The doctrine has long occupied an uneasy space between judicial comity, public policy, and separation of powers, and its contours (like those of sovereign immunity) vary across common law jurisdictions.

3. In *Korek Telecom*, the CA confirmed that the AOS doctrine forms part of DIFC law while upholding a US$ 1.6 billion ICC arbitral award in favour of Iraq Telecom Limited. The Court held that the doctrine did not prevent the recognition or enforcement of arbitral awards in the absence of a direct challenge to the sovereign acts of foreign state regulators themselves. Importantly, although the 2024 amendment to the DIFC Application Law (broadening the applicable sources of law from the laws of England and Wales to common law in general) did not apply retrospectively, the Court acknowledged its prospective significance. Read together, the judgment and the amendment mark a turning point in the DIFC's jurisprudential evolution toward a transnational common law framework, within which doctrines such as the AOS doctrine will continue to develop.

## II. THE *KOREK TELECOM* CASE

4. The dispute arose between Korek Telecom Company LLC ("Korek") and Iraq Telecom Limited ("Iraq Telecom") over Iraq Telecom's investment in Korek and the regulatory decisions of the Iraqi Communications and Media Commission ("CMC") that affected that investment. It stemmed from a joint venture between Iraq Telecom and Korek, established to operate one of Iraq's national telecom licences. In 2014, the CMC issued a decision reversing an earlier approval of Iraq Telecom's investment, effectively transferring control of Korek back to its local shareholders. Iraq Telecom alleged that this outcome had been engineered through corrupt and unlawful conduct by Korek and its principals, aimed at inducing the CMC to revoke its prior approval. The dispute was submitted to arbitration under the ICC Rules, seated in the DIFC, with the governing law being Iraqi law.

5. During the arbitration, Korek invoked the AOS doctrine, arguing that the tribunal could not inquire into the validity of the CMC's sovereign decision without violating that doctrine. The tribunal rejected this argument, relying on the U.S. law derived *Kirkpatrick* exception, which limits the doctrine's reach where the tribunal can determine liability by examining the facts of a foreign state's act without ruling on the validity of such act.[iv]

6. In its Award dated 20 March 2023, the tribunal found Korek liable for participating in an unlawful means conspiracy to corruptly procure the CMC's decision, concluding that the actions of Korek's principals caused Iraq Telecom substantial loss. The tribunal awarded damages exceeding US$ 1.6 billion in favour of Iraq Telecom.

7. Following the Award, Korek applied to the DIFC Court of First Instance ("CFI") to **s**et aside the Award. On 29 August 2024, the CFI dismissed the set aside application, confirming that the AOS doctrine forms part of DIFC law, and that the U.S. law derived *Kirkpatrick* exception applies in the DIFC. The CFI observed that the tribunal had not pronounced on the validity of the CMC's decision itself but had confined its findings to Korek's conduct leading up to it. Accordingly, the CFI held that the tribunal had neither breached the AOS doctrine nor violated UAE public policy in issuing its Award.

8. On appeal, the CA was invited to consider the issue more fundamentally. Korek argued that the CFI misapplied the AOS doctrine by relying on the U.S. law derived *Kirkpatrick* exception, which, they contended, had no footing in English common law – the applicable source of law under the pre-amendment DIFC Application Law. This required the Court to determine:

(a) the source of law from which the AOS doctrine is drawn in the DIFC; and (b) whether, and to what extent, DIFC Courts may draw on comparative common law principles, such as the *Kirkpatrick* exception, when interpreting and applying that doctrine.

## A. SOURCE OF LAW IN THE DIFC

9. In addressing this issue, the CA turned to Article 8(2) of the pre-amendment DIFC Application Law, which established a hierarchy for identifying the applicable law in matters not expressly provided for by DIFC legislations. Under the pre-amendment version of Article 8(2), the DIFC Courts were directed to apply, in order of priority: DIFC laws; laws expressly chosen by DIFC laws; laws chosen by the parties; the law most closely connected to the matter; and failing all else, the laws of England and Wales. Last year, we discussed this "waterfall" provision and its treatment in *Pearl Petroleum v KRG* and *Fal Oil v SEWA*, where the Courts construed the doctrine of sovereign immunity through English common law principles in the absence of express DIFC statutory foundations.[v]

10. In November 2024, the DIFC enacted a significant amendment repealing and replacing Article 8 of the DIFC Application Law, introducing new Articles 8 ("Application of DIFC Law"), 8A ("Content of DIFC Law") and 8B ("Interpretation of DIFC Statutes").[vi] These provisions expanded the scope of what constitutes DIFC law and clarified how it should be interpreted. The amendment preserves the "waterfall" or "cascade" structure for identifying the applicable law but redefines its final tier. Whereas the pre-amendment version directed the Courts, "failing all else," to apply the laws of England and Wales, the amended

provision now provides that the final resort is DIFC law. Under Article 8A, in addition to DIFC statutes, DIFC law expressly includes principles of the common law (including the principles and rules of equity) as they are applied in England and Wales and other common law jurisdictions, insofar as not inconsistent with DIFC legislation. Article 8B further directs that the interpretation of all DIFC statutes may be guided by jurisprudence from common law jurisdictions on analogous laws, as well as the rules and principles of statutory interpretation from common law jurisdictions.

11. The 2024 amendment thus marked a jurisprudential evolution in the DIFC's legal architecture. It transforms the relationship between the DIFC and the common law from one of derivative application to one of direct incorporation. The common law (no longer confined to that of England and Wales) now forms an intrinsic part of DIFC law itself, allowing the Courts to engage with principles from other mature common law jurisdictions where appropriate.

12. However, in *Korek Telecom*, the underlying CFI proceedings commenced before the amendment. The CA therefore had to consider whether the new Articles 8A and 8B applied retrospectively. Korek invoked the amended law to argue that the DIFC could now develop its own common law by reference to other common law jurisdictions, but the Court accepted Iraq Telecom's submission that the amendment could not apply retrospectively. Relying on DIFC authority,[vii] the Court reaffirmed the common law presumption against retroactivity, save for procedural provisions. It reaffirmed the default position under the pre-amendment DIFC Application Law that the laws of

England and Wales (particularly the common law) will apply to supplement the provisions of the DIFC Statutes.[viii]

13. Under this framework, the Court observed that English case law on the foreign AOS doctrine was relevant. It however added that, under the amended Article 8A, the applicable common law would be that of the DIFC, capable of drawing for its content upon all common law jurisdictions. While the Court ultimately accepted the *Kirkpatrick* exception (notwithstanding its arguable departure from English common law), it noted that, if anything, the amended DIFC Application Law would strengthen this position by expressly permitting reliance on comparative common law principles when delineating the limits of doctrines such as AOS.

## B. SCOPE AND APPLICATION OF THE AOS DOCTRINE

14. The AOS doctrine had previously surfaced before the DIFC Courts in *Muzama v Mihanti*, where a claimant sought to set aside an arbitral award on that basis.[ix] However, the Court there did not address the applicability of the doctrine as the arbitral tribunal had not considered any sovereign acts. In *Korek Telecom,* the CA took a definitive step, affirming for the first time that the doctrine forms part of DIFC law, and clarifying both its scope and its limits. Understanding the Court's reasoning is key to assessing how future disputes involving sovereign acts will be treated before the DIFC Courts.

15. Korek argued that the AOS doctrine (long recognised in English common law) was incorporated into DIFC law through Article 8(2) of the pre-amendment DIFC Application Law. Relying on *Fal Oil v SEWA*, where the DIFC Court confirmed that sovereign immunity (a doctrine conceptually related to AOS) forms

part of DIFC law through the operation of English law, Korek submitted that the AOS doctrine must likewise be treated as a rule of English common law applicable in the DIFC. It further contended that the *Kirkpatrick* exception, being a feature of U.S. law, had no footing in English jurisprudence and could not be adopted by the DIFC Courts without legislative sanction – the AOS doctrine is one of judicial abstention, and once engaged, it should preclude any inquiry (even indirect) into the validity or motives underlying a foreign sovereign act. On this basis, Korek relied on three set-aside grounds: Article 41(2)(a) *(that the tribunal exceeded its jurisdiction)*, Article 41(2)(b)(i) *(that the subject matter was not capable of settlement by arbitration)*, and Article 41(2)(b)(iii) *(that the award was contrary to public policy)*.

16. Iraq Telecom, conversely, advanced a more fundamental argument on the source of law and the characterisation of the AOS doctrine. It contended that the AOS doctrine was not automatically part of DIFC law, independent of UAE public policy, merely because it exists in English law. The doctrine, it argued, is not a substantive rule but a policy-based restraint on jurisdiction. For the doctrine to be relevant in a set-aside application, it would need to operate as a bar on arbitrability under the DIFC Arbitration Law, or as a matter of UAE public policy – neither of which, Iraq Telecom maintained, was the case. In the absence of any statutory or policy foundation, the DIFC Courts were neither bound to recognise the doctrine nor constrained by its contours as developed in English common law. Iraq Telecom further submitted that, even if the doctrine were to be recognised within the DIFC framework, it had not been infringed in this case, relying on the U.S. derived *Kirkpatrick* exception and on UAE public policy against corruption and bribery, which is against shielding wrongful conduct.

17. The CA accepted Iraq Telecom's premise that the AOS doctrine could not be applied automatically in the DIFC simply because it exists in English law. Its relevance and content depended on how far it aligned with the DIFC's legal framework and the grounds for setting aside an award under Article 41(2) of the DIFC Arbitration Law. On Article 41(2)(a), the Court found no jurisdictional excess since the tribunal had decided matters plainly within the scope of the parties' submission to arbitration. It observed that an objection based on a preclusive rule of law such as AOS (if it were to arise) would engage issues of arbitrability or public policy, not jurisdiction.

18. On non-arbitrability, the Court accepted that the AOS doctrine could, in theory, be relevant if it rendered a subject matter "incapable of settlement by arbitration" under Article 41(2)(b)(i). While Iraq Telecom argued that arbitrability must have a statutory foundation, limited to the express categories in Article 12(2) of the Arbitration Law, the Court held that Article 12(2) was not exhaustive of non-arbitrable matters. It identified two broad categories where non-arbitrability may arise: first, where the law of the State expressly reserves certain matters to its courts; and second, where the subject matter involves elements of public interest, making resolution by private arbitration inappropriate.[x] The Court acknowledged that defining this boundary is inherently uncertain and that English law has never arrived at a general theory for arbitrability.[xi] The question therefore became whether any provision of DIFC law (under the pre-amendment Application Law) incorporated a version of the AOS doctrine that would render the dispute before the Court incapable of settlement by arbitration.

19. The Court found no such rule. The common law of England and Wales showed no clear principle with well-defined content. From its review of English case law, the Court distilled only the general proposition that the AOS doctrine prevents a court from adjudicating upon the lawfulness of a sovereign act performed within its own territory, but even that is qualified by a public-policy limitation.[xii] It was therefore unnecessary to define the doctrine exhaustively for DIFC purposes. It sufficed to conclude that, as applicable in the DIFC at the time of the arbitration and CFI decision, the doctrine did not preclude arbitration between private parties over whether one had, through bribery of a foreign public authority, caused actionable loss to the other. Such a claim did not involve an inquiry into the validity of the CMC's decision, which was taken as effective but merely formed part of the causal chain of Korek's conduct. The Court illustrated that the legal analysis would be no different in a hypothetical case where a party's contractual breach induced an honest regulatory decision that caused loss, the regulator's act would still be treated as valid, and the doctrine would have no application.

20. While not a direct application, the Court acknowledged that its reasoning may be perceived as more closely aligned with the U.S. derived *Kirkpatrick* exception and thus some sort of departure from English common law. In such a case, the Court explained it was further supported by UAE public policy, which stands firmly against bribery of foreign officials, reflecting the UAE's commitments under international conventions and the provisions of its Penal Code. As part of an international commercial court system, the DIFC Courts serve to uphold the rule of law in transnational commerce; their founding public policy, the Court stated, *"will not allow the use of the foreign act of state doctrine*

*to blindfold the Courts or DIFC-seated arbitrators"* where the dispute arises from corrupt conduct. The Court further noted that this approach is reinforced under the amended Application Law, which now expressly empowers the DIFC Courts to draw upon the jurisprudence of other common law jurisdictions in delineating the limits of such doctrines – leaving little doubt that, today, the *Kirkpatrick* exception would apply.

## III. THE COMMON LAW OF THE DIFC

21. The significance of *Korek Telecom* lies not merely in its treatment of the AOS doctrine, but in its broader affirmation of the plural sources from which the DIFC may now derive its common law. With the 2024 amendment to the Application Law, the DIFC's judicial reference point is no longer confined to England and Wales. The amendment thus institutionalises what had already been emerging in practice – a comparative and adaptive method that allows the DIFC Courts to calibrate their jurisprudence and develop their own body of common law through selective incorporation and comparative reasoning, guided not by hierarchy but by persuasiveness, coherence, and suitability to the DIFC's institutional framework.

22. This evolution gives the DIFC a flexibility unmatched by most commercial courts. By authorising reference to this wider corpus, the amended Application Law enables the DIFC to interpret doctrines contextually, selecting from comparative sources according to their conceptual fit and policy resonance rather than their origin. For instance, the pragmatic and context-specific treatment of AOS principles in Australia,[xiii] and Canada,[xiv] or the minimalist and arbitration-compatible version adopted in Singapore,[xv] may at times offer more relevant guidance than the

fragmented English approach.[xvi] Equally, U.S. formulations like *Kirkpatrick*[xvii] may inform the DIFC's understanding of judicial restraint in corruption-linked disputes – precisely the kind of cross-pollination the Court envisaged in *Korek Telecom.*

23. DIFC Courts can now harmonise multiple legal traditions while maintaining consistency with UAE public policy and the DIFC's commercial purpose. Future cases – whether involving doctrines of state conduct, sovereign immunity, or public policy – are likely to continue this trajectory, drawing upon the collective experience of common law reasoning to refine a distinct DIFC jurisprudence attuned to international commerce, especially for fields like arbitration, state conduct, and transnational enforcement.

## IV. CONCLUSION

24. The *Korek Telecom* decision marks a critical juncture in the DIFC's jurisprudence. While the Court's holding was, at one level, confined to whether the AOS doctrine precluded the enforcement of an arbitral award, its reasoning reached much further. The Court affirmed that the doctrine forms part of DIFC law, yet applied it in a manner consistent with international public policy and the pro-enforcement ethos of the DIFC Arbitration Law. In doing so, the Court not only aligned with modern anti-corruption norms but also signalled that the DIFC's legal order is capable of developing an autonomous and principled approach to doctrines that historically drew from public law and comity.

25. Equally significant was the Court's recognition that the DIFC's legal identity is no longer confined to the jurisprudence of England and Wales. The 2024 amendment to the Application Law codified this shift, affirming that the DIFC's common law may

evolve by reference to all common law jurisdictions. *Korek Telecom* exemplifies how this transnational method operates in practice: the Court accepted the *Kirkpatrick* exception, a U.S. refinement of the AOS doctrine, not because of its origin but because of its conceptual coherence and normative fit with UAE public policy and the DIFC's institutional role.

26. This positions the DIFC as a new kind of common law jurisdiction: transnational rather than territorial, integrative rather than derivative. In such a framework, doctrines like AOS and sovereign immunity will no longer be imported wholesale but translated and re-contextualised to reflect the DIFC's status as an international commercial court embedded within a civil law federation. The likely trajectory is one of continued convergence between arbitral enforceability, anti-corruption policy, and the adaptive use of comparative common law.

***References:***

[i] Please see our previous paper from DAW 2024 titled, "Enforcing against sovereigns in the DIFC - Navigating Immunity and Sanctions" (see here)

[ii] *Korek Telecom Company LLC & Another v Iraq Telecom Limited* [2024] DIFC CA 016 (16 June 2025)

[iii] DIFC Law No. 3 of 2004 on the Application of Civil and Commercial Laws in the DIFC

[iv] *Novak & Ors v Norwood & Anr* [2023] DIFC ARB 012 (29 August 2024)

[v] Please see [5]-[10] of our previous paper from DAW 2024 titled, "Enforcing against sovereigns in the DIFC- Navigating Immunity and Sanctions" (see here)

[vi] We have discussed this amendment in detail in our alert, published last year (see here)

[vii] *Abdelsalam v Expresso Telecom Group* [2021] DIFC CA 011 (20 December 2021)

[viii] [88], *Dutch Equity Partners Ltd v Daman Real Estate Capital Partners* [2006] DIFC CFI 001 (25 July 2007)

[ix] [57], *Muzama v Mihanti* [2022] DIFC ARB 004 (8 February 2023)

[x] Relying on *Born*, International Arbitration Law and Practice; Allsop J in the Full Court of the Federal Court of Australia in *Comandate Marine Corp v Pan Australia Shipping.*

[xi] Relying on *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333

[xii] Relying on Lord Neuberger in *Belhaj v Straw* [2017] AC 964; Rix LJ in *Yukos Capital v Rosneft* [2014] QB 458 and endorsed by Lord Lloyd-Jones in *Maduro v Venezuela* [2023] AC 156; [2021] UKSC 57

[xiii] [57]-[59], *Nevsun Resources Ltd v Araya* [2020] 1 SCR 166

[xiv] *A-G (UK) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25; *Potter v The Broken Hill Proprietary Company Ltd* [1906] HCA 88; (1906) 3 CLR 479; *Habib v Commonwealth* [2010] FCAFC 12.

[xv] *Maldive Airports Co Ltd v GMR Malê International Airport Pte Ltd* [2013] SGCA 16; *Republic of the Philippines v Maler Foundation* [2013] SGCA 66

[xvi] *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Exparte Pinochet Ugarte* [2000] 1 A.C. 61; *Belhaj v Straw* [2017] AC 964; *Maduro v Venezuela* [2023] AC 156; [2021] UKSC 57; *Reliance Industries Ltd v Union of India* [2018] EWHC 822 (Comm); *Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5)* [2002] 2 AC 883; *Crane Bank Ltd v DFCU Bank Ltd* [2023] EWCA Civ 886

[xvii] *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964); *W.S. Kirkpatrick & Co. Inc. v Environmental Tectonics Corporation International* 493 U.S. 400 (1990); *Alfred Dunhill of London Inc v Republic of Cuba* 425 U.S. 682 (1976)

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(d) Legal 500 (Asia Pacific) - Recognised for Dispute Resolution practise in Arbitration (2025)
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Our partner, Prateek Bagaria, has also been registered as a Part II lawyer with full rights of audience before the DIFC Courts and will be heading the firm's Middle East practice.

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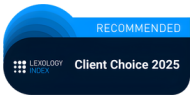

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*India*

1809-1810, One Lodha Place,
Senapati Bapat Marg,
Lower Parel,
Mumbai - 400013

*United Arab Emirates*

Level 41, Emirates Towers,
Sheikh Zayed Road,
Dubai, UAE
PO Box 31303

*Singapore*

138 Market Street,
#24-01 CapitaGreen,
Singapore 048946

e: singularity@singularitylegal.com
w: www.singularitylegal.com


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