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SINGAPORE

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

Mahdev Mohan*

1. Introduction

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

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

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

² [2013] 2 SLR 449.

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

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

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

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

His Honour added as follows:

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

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

⁴ *Id.*, at ¶¶ 66-71.

⁵ [2013] 3 WLR 1329.

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

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

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

In *Kuwait Airways Corporation v. Iraqi Airways (Nos. 4 and 5)*,⁹ the House of Lords articulated three ‘insights’ which are relevant to the act of State doctrine:

1. The doctrine is primarily founded on the comity of nations;
2. Regardless of whether the sovereign acts within its own territory or outside it, there is a certain class of sovereign act which calls for judicial restraint on the part of national courts; and
3. This is the principle of non-justiciability, which seeks to distinguish inter-State disputes involving sovereign authority from private disputes which can be resolved by national courts; and subject to certain exceptions, judicial restraint is only a *prima facie* rule.

This digest suggests that, regardless of that Court’s decision and perhaps intention, the CA in *Maldives Airports* is illustrative of the point made in *Yukos Capital* and *Kuwait Airways Corporation*: i.e. the act of State doctrine cannot, and indeed should not, be reduced into a singular conception. The doctrine, and the question of whether alleged conduct is non-justiciable, may be able to take various forms, including being part of an analysis of a seemingly disparate issue, such as the substantive considerations surrounding the granting of an interim injunction.

2. Facts

In a concession agreement, the appellants, Maldives Airports Company Limited (“MACL”) and the Republic of the Maldives (hereinafter Maldives Government), granted a consortium a 25 year concession to rehabilitate, expand, modernise and maintain the Malé International Airport (hereinafter the Airport).¹⁰

MACL is a company wholly owned by the Maldives Government.¹¹ The consortium subsequently incorporated the respondent, GMR Malé International Airport Private Limited (“GMIA”) and novated all its rights and obligations under the concession agreement to GMIA.¹² However, in an action commenced in Maldives Government, the Maldives civil court had issued a judgment declaring that clauses 2(a) and 2(b)

⁹ *Id.*

¹⁰ *Maldives Airports* [2013] 2 SLR 449, at ¶¶ 1 & 3.

¹¹ *Id.* at ¶ 1.

¹² *Id.* at ¶¶ 1 & 3.

of the concession agreement, which entitled GMIA to impose fees on departing passengers, were contrary to a piece of Maldivian legislation as such fees had not been approved by the Maldivian Parliament (hereinafter Maldivian Judgment).¹³

In order to ensure that the project could continue, the Maldives Government agreed to deduct the amount of concession fees that GMIA was supposed to pay MACL resulting in a dramatic fall in revenue that it was supposed to receive.¹⁴ Protests led to the resignation of former Maldivian President Mohamed Nasheed on February 7, 2012. Five days after the next administration came to power on April 14, 2012, it declared that the former government's agreement to deducting the concession fees payable by GMIA was issued without requisite authority, and sought to recover these fees. Notwithstanding these developments, GMIA continued to operate the agreement on the basis that it was entitled to take into account the loss of income arising from the Maldives Judgment in calculating fees payable to the Maldivian Government.

Two separate arbitrations were then commenced in an effort to resolve this dispute. The first arbitration was commenced on July 5, 2012 by GMIA against MACL and the Maldives Government seeking, among other things, a declaration that it was entitled to adjust the fees payable to MACL. Subsequently, on November 27, 2012, MACL and the Maldives Government each notified GMIA that following the Maldives Judgment, the concession agreement was void *ab initio* or, alternatively, had been frustrated. MACL and the Maldives Government gave GMIA only seven days to vacate the airport failing which they intimated they would take the airport over.

On November 29, 2012, MACL and the Maldives Government then commenced the second arbitration against GMIA seeking a declaration that the concession agreement was void and had no effect. To prevent the concession agreement from being prematurely terminated, GMIA filed and obtained an injunction from the Singapore High Court under Section 12A of the IAA¹⁵ restraining MACL, the Maldives Government, and their directors, officers, servants or agents from interfering either directly or indirectly with GMIA's performance of its obligations under the concession agreement.

On appeal by MACL and the Maldives Government, the main issue before the CA was whether a Singapore court should grant an interim injunction to restrain

¹³ *Id.* at ¶ 4.

¹⁴ *Id.* at ¶ 4.

¹⁵ Cap. 143A, 2002 Rev. Ed. Sing., Section 12A of International Arbitration Act, which relates to Court-ordered interim measures.

MACL and the Maldives Government from interfering with GMIA's operation of the airport pursuant to the Concession Agreement until the arbitration was determined.¹⁶ Two sub-issues that followed from this were: (1) whether a Singapore Court has the power to grant an injunction against the government of a foreign sovereign State; and (2) if it had such a power, whether the injunction should be granted or upheld given the circumstances.¹⁷ With regard to competence or jurisdictional challenges, the CA held that it was able to determine the injunction substantively no such barriers applied. In the Court's opinion, the jurisdictional barrier of State immunity did not apply as the dispute resolution clause in clause 23 of the concession agreement is sufficient to constitute written consent for the purposes of s 15(3) of the State Immunity Act ("SIA").¹⁸ Further, it held that the act of State doctrine did not apply as the acts were part of a dispute which was of an entirely private nature and MACL and the Maldives Government were seeking private law remedies.¹⁹

In setting aside the injunction, the CA held that the Singapore courts have the power to grant the injunction sought for under s 12A(4) of the IAA. In this regard, GMIA did not have any contractual rights that could be protected as their contractual rights were not those which, if lost, would not adequately be remediable by an award of damages.²⁰ However, it had an interest in the land on which the airport was situated conferred under a lease that was conferred by the concession agreement; and this interest was an asset capable of being preserved.²¹ In addition, the CA held that the balance of convenience ultimately lay in not granting the injunction.²²

3. Waiver of State Immunity

The doctrine of State immunity, which states that a foreign sovereign is immune to the jurisdiction of other national courts and may not be made a party to legal

¹⁶ *Maldives Airports* [2013] 2 SLR 449, at ¶ 11.

¹⁷ *Id.* at ¶ 12.

¹⁸ *Id.* at ¶¶ 17-22.

¹⁹ *Id.* at ¶¶ 23-31.

²⁰ *Id.* at ¶¶ 32-52.

²¹ *Id.*

²² *Id.* at ¶¶ 53-80.

proceedings against its will, is a principle enshrined in Singapore law.²³ This doctrine was first recognised as forming part of Singapore’s common law²⁴ and was subsequently codified under s 3 of the SIA.²⁵

In *Maldives Airports*, the CA held that s 15(2) of the SIA ordinarily prohibits the courts from granting injunctive relief against a state.²⁶ However, it opined that clause 23 of the concession agreement was sufficient to constitute waiver of State immunity under s 15(3) of the SIA.²⁷ Clause 23 states:

To the extent that any of the Parties may in any jurisdiction claim for itself ... immunity from service of process, suit, jurisdiction, arbitration ... or other legal or judicial process or other remedy ..., such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction. [Emphasis added]

In this regard, the Court of Appeal rejected the argument put forward by counsel for MACL and the Maldives Government given that it was their case that the whole concession agreement and accordingly clause 23 was void.²⁸ This was attributed to two reasons. First, it held that this argument required it to proceed on the basis that the concession agreement was void *ab inito*, which was the very issue which is being contested by the parties in the second arbitration.²⁹ Second, the CA was of the view

²³ *Republic of the Philippines v Maler Foundation and others (Philippines v. Maler)* [2008] 2 SLR(R) 857, at ¶ 33.

²⁴ *See, e.g., Philippines v Maler* [2008] 2 SLR(R) 857, at ¶ 33.

²⁵ Cap. 313, 1987 Rev. Ed. Sing., s. 3(1): ‘A State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part.’

²⁶ Cap. 313, 1987 Rev. Ed. Sing., s. 15(2) is as follows:

“Subject to subsections (3) and (4):

- (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
- (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.”

²⁷ Cap. 313, 1987 Rev. Ed. Sing., s. 15(2) and (3) are as follows:

(2) Subject to subsections (3) and (4):

- (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
- (b) the property of a State shall not be subject to any process for the enforcement of a judgment or an arbitration award or, in an action in rem, for its arrest, detention or sale.
- (3) “Subsection (2) does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.”

²⁸ *Maldives Airports* [2013] 2 SLR 449, at ¶¶ 19-21.

²⁹ *Id.* at ¶ 19.

that clause 23 was severable and parties intended it, as part of the dispute resolution mechanism, to be enforceable even in situations where the concession agreement was alleged to be void.³⁰ Notably, whilst the CA formed the view that MACL and the Maldives Government had waived immunity under s 15(3) of the SIA, in this author's opinion, it could have similarly reached this conclusion under s 11 of the SIA, which states:

Arbitrations

11. (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects **proceedings in the courts in Singapore which relate to the arbitration**. [Emphasis added]

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

Whilst s 11 of the SIA may similarly constitute a waiver, it operates differently from s 15(3) of the SIA. Unlike s 15(3) which constitutes a waiver specific to the court's power to grant injunctive relief under s 15(2) of the SIA, s 11 of the same constitutes a *general* waiver such that the Singapore Courts are conferred jurisdiction over the entire "proceedings in the courts in Singapore which relate to the arbitration," as mentioned therein. As such, s 11 of the SIA is broader than s 15(3) of the SIA.

Authority for the proposition that section 11 could have been considered in this instance can be found in the UK High Court decision in *London Steam-ship Owners' Mutual Insurance Association Ltd v Spain & Anor*,³¹ where the Plaintiffs, who were protection and indemnity insurers, applied to enforce two arbitral awards obtained pursuant to an arbitration clause in the contract of insurance. The arbitral awards limited the Plaintiffs' liability for an ecological disaster created when a storm caused a vessel to split in two and sink off the coast of Spain. The ship was carrying 70,000 tonnes of fuel oil and the effects of the pollution spread all the way along the coast to France. The Defendant States, France and Spain, had refused to participate in the arbitration proceedings and challenged the substantive jurisdiction of the arbitral tribunal.

The Defendant States relied on Section 9(1) of the UK's State Immunity Act 1978 (Cap. 33), which is *in pari materia* with Section 11 of the SIA. In finding that the Defendants had waived their immunity by agreeing in writing to arbitration, the UK High Court held that the purpose of Section 9 was "to ensure that where a State is

³⁰ *Id.* at ¶¶ 19-21.

³¹ [2013] EWHC 3188 (Comm).

bound to arbitrate it is also bound to submit to the supervisory jurisdiction of the courts, to ensure that the arbitration is effective."³²

4. Act of State Doctrine

A. General Approach

The judgment of *Maldives Airports* was the first time in which the Singapore Court of Appeal had occasion to consider the act of State doctrine, which has since been affirmed and further applied by the same court in *Maler Foundation*.³³ In *Maldives Airports*, the CA affirmed the formulation in the seminal decision of *Underhill v Hernandez*:³⁴

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.³⁵

The difference between the State immunity doctrine and the act of State doctrine as was usefully set out by Rix LJ in *Yukos Capital*:

As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.³⁶

In relation to the approach which the courts should take in relation to the act of State doctrine, the Singapore Court of Appeal followed the English House of Lords

³² *London Steam-ship* [2013] EWHC 3188 (Comm), at ¶ 140. [Emphasis added]

³³ *The Republic of Philippines v Maler* [2014] 1 SLR 1389, at ¶ 48.

³⁴ 168 US 250 (1897), at 252.

³⁵ *Maldives Airports* [2013] 2 SLR 449, at ¶ 24. [Emphasis added]

³⁶ *Yukos Capital* [2013] 3 WLR 1329, at ¶ 53.

decision of *Attorney-General v Nissan*:³⁷

An act of state is something not cognisable by the court: *if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim.* In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it. This is a very unusual situation and *strong evidence is required to prove that it exists in a particular case.*³⁸

A few points on the Court's approval of the extract of *Attorney-General v Nissan* bear mention. First, the concept of an act of State functions as a jurisdictional and not a substantive question. Second, the burden of proof for an act of state to be recognised is high – i.e. the Court must be presented with 'strong evidence,' although the CA provided no guidance on what constitutes 'strong evidence.' Third, once the Courts have been presented with a clear case that an act of State exists, it must refuse to adjudicate on the claim and does not have any residual discretion in this regard. Fourth, at its literal interpretation, the act of State doctrine aims to prevent courts from opining on "the legality or illegality, or the rightness or wrongness" of the act of another State. Put differently, courts should be mindful of passing judgment on the act only in so far as they relate to the 'propriety,'³⁹ the 'validity'⁴⁰ or the 'legitimacy'⁴¹ of the act in question. This purpose is therefore narrow and in the interests of international comity.⁴²

By extension, this narrow purpose does not prevent courts from adjudicating a claim where an act of State is an ancillary concern, and forms the mere background to the substantive claim to be adjudicated upon.⁴³

³⁷ [1970] AC 179, at 237, per Lord Pearson.

³⁸ *Maldives Airports* [2013] 2 SLR 449, at ¶ 27. [Emphasis added]

³⁹ *WestLB AG* [2012] 4 SLR 894, at ¶¶ 38 & 43.

⁴⁰ *Id.* at ¶ 39.

⁴¹ *Id.* at ¶ 43.

⁴² *Maldives Airports* [2013] 2 SLR 449, at ¶ 25, citing the passage of J Clarke, *Oetjen v Central Leather Company* 246 US 297 (1918), at 303–304: The principle that the conduct of one independent government cannot be successfully questioned in the courts of another ... rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

⁴³ *Maldives Airports* [2013] 2 SLR 449, at ¶ 13.

B. What is an Act of State?

In relation to the question of what amounts to an act of State, the CA affirmed the test laid down in *Salaman v Secretary of State in Council of India*:⁴⁴ i.e. an act “done in the exercise of the State’s supreme sovereign power”⁴⁵ Elaborating on this test, it cited the following extract from *Duke of Brunswick v Ernest Augustus, King of Hanover, Duke of Cumberland and Teviotdale, in Great Britain and Earl of Armagh, in Ireland* (hereinafter *Brunswick*):⁴⁶

If it were a private transaction ... then the law upon which the rights of individuals may depend, might have been a matter of fact to be inquired into ... But ... if it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong.
[Emphasis added]

Applying this test, the Singapore Court of Appeal was of the view that the facts of this case entailed that the dispute “in essence is a private law dispute between the parties.”⁴⁷ Moreover, given that MACL and the Maldives Government’s basis for taking over the airport was that the contract was void *ab initio* or frustrated, which was essentially a matter of contract law.⁴⁸ Accordingly, it held that the act of State doctrine did not apply.⁴⁹ In this regard, the CA’s analysis mirrors one of the limitations of the act of State doctrine articulated by the English Court of Appeal in *Yukos Capital* that “as a matter of general international law...there is no immunity for the state’s commercial activities.”⁵⁰ Whilst the case presents a clear example of a private dispute, this author questions the CA’s adoption of the *Brunswick* test as this test has been framed in somewhat didactic terms: i.e. an act is either an act of state or a private act.

Such dicta leave little room to consider whether or not elements of both sovereign and private actions can co-exist. *E.g.*, in another dispute concerning the construction of an airport terminal, *Philippine International Air Terminals Co., Inc. The Government of the Republic of the Philippines*, a tribunal constituted under the International Chamber of Commerce considered interim injunctions sought in aid of an arbitration

⁴⁴ [1906] 1 KB 613, at ¶¶ 21-22.

⁴⁵ *Maldives Airports* [2013] 2 SLR 449, at ¶ 28.

⁴⁶ (1848) 2 HLC 1; 9 ER 993, at 21-2.

⁴⁷ *Maldives Airports* [2013] 2 SLR 449, at ¶ 30.

⁴⁸ *Id.* at ¶ 30.

⁴⁹ *Id.* at ¶ 30.

⁵⁰ *Yukos Capital* [2012] EWCA Civ 855, at ¶ 92.

concerning the alleged expropriation of one of the terminals of the Philippine national airport by the Republic of Philippines.

That Tribunal, in dealing with an argument by the Republic of Philippines that the act of State doctrine applied, stated:

The Tribunal does not propose to pass judgment upon the validity or invalidity of the expropriation proceedings in the Philippines ... [t]he only matter which the Tribunal will determine is whether, in the context of a dispute concerning the validity and breach of a contract, permitting the Claimant to construct and operate Terminal 3, the Respondent should be ordered to give up possession to the Claimant.⁵¹

In *Maldives Airports*, GMIA could have raised a similar argument that MACL's demand for repossession of the airport was an act of expropriation and asked the court to accordingly assess its rights due to the unlawful breach of the concession agreement. However, the concession agreement in *Maldives Airports* expressly provided for the right of the Maldives Government to expropriate the property, setting out a specific amount of damages as compensation. This appears to be the reason why GMIA chose instead to insist that the act was not in fact proprietary expropriation *per se*, but rather "a gross breach of the Concession Agreement," seeking more extensive remedies.⁵²

C. A Mere Factor in Interim Curial Measures?

It therefore follows from the above, and the Court of Appeal's endorsement of *Attorney-General v Nissan*, that an act of State would only render a court wholly incompetent where this act is the precise act over which the Singapore courts are required to pass judgment. Thus far, this fact pattern has not arisen for consideration before the Singapore courts. In other words, the narrow application of the act of State doctrine indicates that it is the *limitations* of the doctrine that steer its application, rather than the doctrine itself. [Emphasis added] For this reason, the CA in *Maldives Airports*, as *obiter*, refrained from expressing a definite opinion as to where a possible future act of State forms the subject of an injunction, whether the wider principle of judicial abstention or restraint should apply and the court should refrain from adjudicating on the matter.⁵³

⁵¹ *Order concerning Application for Interim Measures to Maintain Status Quo Ante* (Aug. 23, 2006), at ¶¶ 42-43, ICC Case No 126/TE/MW.

⁵² *Maldives Airports* [2013] 2 SLR 449, at ¶ 60.

⁵³ *Id.* at ¶ 31.

The CA merely suggested that the act of state “would inevitably be a factor which a court will take into consideration when assessing whether an injunction should be granted in such circumstances.”⁵⁴ As recognised by the CA, the act of State doctrine is a narrow one as ‘strong evidence’ is required to prove its existence in a particular case.⁵⁵ Without elaborating on the weight to be given to an act of State and the requisite criteria of “strong evidence”, the comments provided by the Court of Appeal in *Maldives Airports* have limited instructive value to future applicants seeking interim measures which touch on a potential act of a foreign State.

5. Rights Which Are Capable of Being Protected

As a further liminal issue, the Court of Appeal considered the basis on which it had the power to grant an injunction. It agreed with both parties that such power was conferred by Section 12A(4) read with sections 12(1)(i) and 12A(2) of the IAA,⁵⁶ which state as follows:

12.(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, *an arbitral tribunal shall have powers to make orders or give directions to any party for:*

...

(i) *an interim injunction or any other interim measure.*

...

12A(1) This section shall apply in relation to an arbitration:

(a) to which this Part applies; and

(b) irrespective of whether the place of arbitration is in the territory of Singapore.

(2) *Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(c) to (i) as it has for the purpose of and in relation to an action or a matter in the court.*

...

(4) *If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders*

⁵⁴ *Id.* at ¶ 31.

⁵⁵ *Id.* at ¶ 27.

⁵⁶ Cap. 143A, 2002 Rev. Ed. Sing.: *Maldives Airports* [2013] 2 SLR 449, at ¶ 32.

under subsection (2) as the High Court or Judge thinks *necessary for the purpose of preserving evidence or assets*.

[Emphasis added]

On this basis, the CA concluded that it had the power to make any interim order, not merely those limited to Anton Piller orders or Mareva injunctions, as long as they consider the order sought as necessary for the preservation of evidence or assets.⁵⁷ In this regard, the CA had to determine whether the following were assets capable of being preserved under s 12A(4) of the IAA:

- (a) the right to be served the appropriate notice under the concession agreement before termination was effected,
- (b) the right under the concession agreement to have any dispute over the entitlements of the parties under the concession agreement resolved by an arbitral tribunal before those entitlements were destroyed; and
- (c) GMIA's asserted interest in the land on which the airport is situated.

With regards the first set of contractual rights, the CA concluded that contractual rights were, in theory, capable of being preserved under s 12A(4) of the IAA. The Court of Appeal was of the view that Parliament intended that the definition of assets in *Cetelem SA v. Roust Holdings Ltd* [2005] 1WLR 3555 (hereinafter *Cetelem*) would govern the interpretation of s 12A(4) of the IAA.⁵⁸ In *Cetelem*, Clarke LJ (as he then was) held that contractual rights could be assets within s 44(3) of the English Arbitration Act 1996.⁵⁹ However, His Honour maintained that not all contractual rights could be protected under s 12A(4) of the IAA, but merely those “which lend themselves to being preserved or, put another way, those which, if lost, would not adequately be remediable by an award of damages.”⁶⁰ These contractual rights were those which could be subject to an order of specific enforcement by the court, such as the right to purchase shares of what appears to have been an unlisted company, as a contractual right to purchase such shares would not be available in the open market.⁶¹

⁵⁷ *Maldives Airports* [2013] 2 SLR 449, at ¶ 32.

⁵⁸ *Id.* ¶¶ 36-39.

⁵⁹ *Id.* at ¶¶ 36-37. Section 44(3) of the English Arbitration Act 1996 (Cap. 23) is as follows:
44 Court powers exercisable in support of arbitral proceedings...

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

⁶⁰ *Maldives Airports* [2013] 2 SLR 449, at ¶¶ 40-43.

⁶¹ *Id.* at ¶ 41.

In the *Maldives Airports*, there was nothing to suggest that the concession agreement was one that was specifically enforceable, as the two contractual rights alleged by GMIA were not rights capable of being preserved under s 12A(4) of the IAA.⁶² Construing them as such would be tantamount to pre-judging GMIA's claim to carry out and perform the concession agreement, which was the very issue where the arbitral tribunal had to determine in the substantive arbitration.⁶³ Nevertheless, the CA was of the view that GMIA's interest in the land on which the airport was situated was capable of being preserved under s12A(4) of the IAA.⁶⁴ GMIA had a right as a lessee in the land by virtue of clause 2.3.1 of the concession agreement, in which GMIA was granted the "exclusive right to occupy, use and peacefully enjoy the Site" for a term of 25 years.⁶⁵ As will be discussed below, however, the Court of Appeal still had to consider whether, on a balance of probabilities, an injunction should be granted.

6. Scope of Interim Relief Sought

Although the Court of Appeal was of the view that it had the power to award an interim injunction, it did not grant the injunction after assessing where the balance of convenience lay.⁶⁶ It applied the well-known balance of convenience test laid down by Lord Diplock in *American Cyanamid Co v Ethicon Ltd*,⁶⁷ which is that the court should "take whichever course appears to carry the lower risk of injustice if that course should ultimately turn out to have been the 'wrong' course."⁶⁸

The CA opined that the balance of convenience lay in not granting the injunction, taking the following into account:

- (a) damages were an adequate remedy for GMIA in the event that the tribunal determined that the concession agreement was not void *ab initio* or frustrated;⁶⁹

⁶² *Id.* at ¶ 46.

⁶³ *Id.* at ¶¶ 46-49.

⁶⁴ *Id.* at ¶¶ 50-52.

⁶⁵ *Id.* at ¶¶ 50-51.

⁶⁶ *Maldives Airports* [2013] 2 SLR 449, at ¶ 53.

⁶⁷ [1975] 2 WLR 316, at 321-2.

⁶⁸ *Maldives Airports* [2013] 2 SLR 449, at ¶ 53; referring to *Regina v Secretary of State for Transport, Ex parte Factortame Ltd and Others (No 2)* [1991] 1 AC 603, at 683. [Emphasis added]

⁶⁹ *Maldives Airports* [2013] 2 SLR 449, at ¶¶ 55-62.

- (b) GMIA did not adduce sufficient evidence that MACL and/or the Maldives Government would be unable to pay it damages for any losses that the former might incur if the injunction were not granted;⁷⁰ and
- (c) the practical problems associated with the enforcement of the injunction.⁷¹

Focussing primarily on point (c), the CA considered the following to be practical problems. First, that courts will not ordinarily grant an injunction requiring parties to continue working together once it was shown that there was no longer any willingness to cooperate. Further, those courts will not grant injunctions, either, which would result in numerous follow-up applications raising issues of compliance or non-compliance with the injunctions granted.⁷² Second, the CA considered that the sheer breadth of the injunction, which would have made it difficult for both MACL and the Maldives Government (particularly the latter) to have any certainty of what was required of them in order to ensure that compliance with the terms of the injunction.⁷³ It bears repetition that the injunction sought to restrain MACL, the Maldives Government, *and their directors, officers, servants or agents from interfering either directly or indirectly* with GMIA’s performance of its obligations under the concession agreement.⁷⁴

The Court was rightly concerned that a myriad of potential disputes might arise about whether particular acts involving other agencies of the Maldives Government were in contravention of the injunction.⁷⁵ The CA held that: “An interim injunction must be certain and should not be granted in terms which leave it to be argued in contempt proceedings what it does and does not require of the party to whom it is directed.”⁷⁶

Third, the CA was mindful that the injunction would have affected third parties.⁷⁷ This was due to “the principle that third parties must not aid or abet a breach, or deliberately frustrate the purpose of an injunction.”⁷⁸ In this case, third parties comprised “domestic regulators whose regulatory functions encompass aspects related to the operation of the Airport,” such as the Maldives Civil Aviation Authority

⁷⁰ *Id.* at ¶¶ 63-65.

⁷¹ *Id.* at ¶¶ 66-71.

⁷² *Id.* at ¶ 66.

⁷³ *Id.* at ¶ 68.

⁷⁴ *Id.* at ¶ 8. [Emphasis added]

⁷⁵ *Id.* at ¶ 68.

⁷⁶ *Id.* at ¶ 68; referring to *Electronic Applications (Commercial) Ltd v Toubkin and Another* [1962] RPC 225, at 227.

⁷⁷ *Maldives Airports* [2013] 2 SLR 449, at ¶ 69.

⁷⁸ *Id.* at ¶ 68, recited from STEVEN GEE, *COMMERCIAL INJUNCTIONS* ¶ 4.001 (5th ed. 2004).

and the Maldivian Department of Immigration and Emigration,⁷⁹ as well as other Maldivian governmental bodies involved in the regulation of transportation, tourism and even defence.⁸⁰ Ultimately, given the potential far-reaching effects on other Maldivian governmental entities and agencies, the CA held that the uncertainties which arose was not purely a matter of the drafting of the injunction,⁸¹ and could not be addressed by rewording the injunction. To this end, the Court was convinced that such uncertainties were inherent to the very nature of the dispute, being the governance of relationships over the operation of the national airport of a sovereign State.⁸²

In refraining from issuing an injunction that would have had consequential effects on government entities and agencies concerned with the running of the Maldivian airport, the CA was effectively applying the doctrine of comity, which, as stated above, forms the basis of non-justiciability inherent to the act of State doctrine, despite the fact that the Court's finding that this doctrine did *not* apply in this case. [Emphasis added] According to the Court, the injunction would have entailed "an unacceptable degree of supervision in a foreign land," over which it had little power to enforce.⁸³

It may be argued that these so-called 'practical problems' are indeed invocations of the act of State doctrine. As it is evident from the analysis above, the CA based much of its perception of the injunction's potential impact on third parties, particularly the fact that it would be inevitable for third parties to be affected given that this concerned the operation of a national airport. Support for this view may be found in the ICC Case of *Philippine International Air Terminals*, which has been mentioned above. In that case, the Claimant, Philippine International Air Terminals Co., Inc, sought interim injunctions which, if granted, would have had the effect of reverting matters to the *status quo* before the expropriation.⁸⁴ To this end, it sought orders restraining the Republic of Philippines from altering, operating or removing the terminal; from assigning or bidding out the right to possess, lease, manage or operate the said terminal; from entering into any management contract, etc; from entering into sales contracts, lease contracts, etc; from interfering with and influencing the breach of the contractual relationship between the Claimant and a

⁷⁹ *Maldives Airports* [2013] 2 SLR 449, at ¶ 69.

⁸⁰ *Id.* at ¶ 70.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at ¶ 71.

⁸⁴ *Supra* note 51, at ¶¶ 3 & 62.

third party and from planning or performing any other acts aimed at dispossessing or requiring from the Claimant documents, plans and codes.⁸⁵

In dismissing most of the interim orders sought, the ICC Tribunal was of the view that such orders would have the effect of determining, at the interim stage, that the Claimant was entitled to specific performance of the contract which formed the subject matter of the dispute.⁸⁶

Such a finding would be premature if, at the end of the arbitration, the Claimant was only found to be entitled to damages.⁸⁷ This finding is similar to that of the Court of Appeal in *Maldives Airports*.⁸⁸ But there is one crucial difference. Unlike the CA, the ICC Tribunal was of the view that it was important for the Claimant to continue to have access to the airport terminal in order to present its case⁸⁹ and to have a legitimate interest in possessing and occupying the terminal in order to preserve necessary evidence for the arbitration, on the basis that “irreparable or substantial harm will be caused if the order is not made.”⁹⁰

As such, the Tribunal ordered the Philippines Government and “its officers and agents” to “cease occupation and give up possession of [the terminal] and not to obstruct the Claimant in entering into occupation and taking up possession of [the terminal].”⁹¹ It is clear from the reasoning of the ICC Tribunal in *Philippine International Air Terminals* that interim relief may be granted where the applicant is able to demonstrate a real need for interim relief, *e.g.*, regarding the preservation of evidence. Such a request for interim relief was worded in clear and unambiguous terms, *i.e.*, to cease occupation of the terminal and not obstruct the Claimant from entering into occupation and taking up possession of the terminal, as opposed to the wide-ranging order sought in *Maldives Airports*, which was that the MACL and the Maldives Government were to be restrained from interfering “*either directly or indirectly with the performance by the Respondent (GMIA) of its obligations under the Concession Agreement.*”⁹²

⁸⁵ *Id.* at ¶ 62.

⁸⁶ *Id.* at ¶ 63.

⁸⁷ *Id.*

⁸⁸ *Maldives Airports* [2013] 2 SLR 449, at ¶ 41.

⁸⁹ *Supra* note 51, at ¶ 59.

⁹⁰ *Id.* at ¶ 64.

⁹¹ *Id.*

⁹² *Id.* at ¶ 8. [Emphasis added]

7. Conclusion

The Court of Appeal's analysis in *Maldives Airports* has been brought into sharp focus by recent decisions of a Singapore-seated arbitral tribunal in favour of GMIA. Undoubtedly strengthened, in part, by the reasoning in *Maldives Airports*, the tribunal had issued its initial award in June 2014, concluding that the concession agreement was valid and binding, and that the Maldives Government and MACL had unlawfully repudiated the contract. The tribunal found that both were liable for damages to GMIA. In February 2016, the tribunal added this damages payable by to GMIAL will also include all the sums owed by GMIA to the Singapore-based project lenders Axis Bank Singapore Pte Ltd under the concession agreement.⁹³

The decision in *Maldives Airports* reaffirms that courts in Singapore have the power to assist with providing interim relief in support of arbitration, and that the mere presence of a State or State-linked party will not necessarily foreclose such relief. Although the CA made clear that it will not adjudicate upon matters that turn on the legality of a foreign sovereign act, Singapore courts will follow English case law and require that a high standard of proof be discharged to demonstrate that a purported act of State is evidenced. In this case, the CA considered that the dispute was a “*private law dispute*” involving “*private law remedies*.” [Emphasis added] Further, it considered that since MACL and the Maldivian Government were claiming that the concession agreement was void *ab initio* or frustrated, those were purely matters of contract law.

Yet the practical considerations that were ultimately taken into account by the CA are telling and appear to be an unspoken allusion to the doctrine. In due course, the act of State should be seen, as the English Court of Appeal has noted, as a collection of doctrines, rather than a simple dichotomy between public acts and private exceptions. Where sovereign States are concerned, the line separating both is thin. Courts should be guided by the general concept of judicial restraint within the plurality of the act of State doctrine(s). Decisions should turn on the context and effect of passing judgment on the alleged act in question instead of a seemingly binary classification, lest the ‘silhouette’ of the act of State vanishes.

⁹³ C. Simson, *India's GMR Handed Win in Maldives Airport Arbitration*, LAW 360, Feb. 24, 2016, available at <http://www.law360.com/articles/763023/india-s-gmr-handed-win-in-maldives-airport-arbitration> (last visited on May 18, 2016).

