

CASE LAW UPDATE

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Kuwait Airways Corp. v. Iraq

2010 SCC 40, Released 21 October 2010

Recognition and Enforcement of Foreign Judgments – Sovereign Immunity

At the time of Iraq's invasion of Kuwait in 1990 and subsequent occupation, the Iraqi government ordered its national airline, the Iraqi Airways Company ("IAC"), to appropriate the aircraft, equipment and parts inventory of the Kuwait Airways Corporation ("KAC"). KAC brought an action against IAC in the U.K. for damages as a result of the appropriation of its property. After lengthy proceedings, the U.K. courts awarded judgment against IAC for over \$1 billion Canadian. KAC then had the Republic of Iraq joined as a second defendant in order to claim costs of the actions in the U.K. The U.K. High Court of Justice made a further order requiring Iraq to pay \$84 million Canadian in costs.

KAC sought to have the costs order recognized in Quebec. At issue was whether the *Sovereign Immunity Act* applied, and if it did, whether or not the actions by Iraq fell into the "commercial activity" exception in that Act. The Court held that all actions by a foreign state are prima facie entitled to protection under the Act, and that the onus was on KAC in this case to show that the actions of Iraq fell within one of the Act's exceptions. The only exception argued in this case was the "commercial activity" exception.

The Court held that it was not enough to determine whether the acts complained of were authorized or desired by Iraq, but rather that the nature of the acts must be examined to carefully ensure a proper legal characterization. To do so, it is necessary that the findings of fact made by the British judge be accepted. In this case, the U.K. court found that Iraq, the sole proprietor of IAC, controlled and funded IAC's defence throughout the proceedings and participated in the commercial litigation in the hope of protecting its interest in IAC. In doing so, it was responsible for numerous acts of forgery, concealing evidence, and lies. While the initial seizure of the aircraft was a sovereign act, the U.K. litigation in which Iraq intervened concerned

the retention of the aircraft, which was unconnected to the seizure of the aircraft. Therefore, the actions fell within the exception, and Iraq could not rely on the protection of the SIA

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