Court of Appeal declares that India is not immune from the Devas investors' enforcement efforts and reinstates IATA seizure

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The evolving landscape of state immunity in award-enforcement proceedings in Canada

The rise of investor-state disputes, which has taken place globally over the last two decades, has led to a growing number of recognition and enforcement proceedings of foreign arbitral awards before Canadian courts by award creditors seeking to execute against the Canadian assets of delinquent sovereign debtors in the recent years.

Against this backdrop, the proceedings initiated by the Devas investors to recognize and enforce two investor-state arbitral awards (Treaty Awards) condemning the Republic of India (India) to pay over US$111 million before the Superior Court of Québec in late 2021 have been closely followed as a test case for how sovereign immunity comes into play in the context of award-enforcement proceedings in Canada. BLG represented the Devas investors in this matter.

On **December 4, 2024,** the Court of Appeal of Québec, in *Republic of India c. CCDM Holdings*, 2024 QCCA 1620, issued a landmark decision on sovereign immunity, ruling on **three appeals** that were joined and heard together. In essence, the Québec appellate court ruled that India was not immune from the jurisdiction of Québec courts in the enforcement proceedings, reinstated a seizure before judgment (a pre-judgment attachment) that had been quashed by the lower court, and confirmed that legislative changes adopted by the Québec legislature months after the seizure was authorized did not impact the money that had accrued before the new legislation's entry into force.

What you need to know

- The *State Immunity Act*, R.S.C., 1985, c. S-18 (SIA) grants foreign states a presumption of immunity from suit (s. 3 SIA) and execution (s. 12 SIA) in all proceedings, including recognition and enforcement of foreign arbitral awards before Canadian courts.
- The SIA grants immunity to inseparable organs of the foreign state, such as its political subdivision and any of its departments, and to agencies of the foreign

state, defined as “a legal entity that is an organ of the foreign state but that is separate from the foreign state” (s. 2 SIA).

- The SIA provides for a number of exceptions to a sovereign’s jurisdictional and execution immunities. Among those exceptions, a sovereign waives jurisdictional immunity where it “explicitly submits” to the jurisdiction of Canadian courts “by written agreement or otherwise” before or after the commencement of proceedings (ss. 4(2)(a) SIA) (the Waiver Exception).
- A foreign state is also not immune from the jurisdiction of Canadian courts in any proceeding that relate to its commercial activity (s. 5 SIA) (the Commercial Activity Exception).
- In *Republic of India c. CCDM Holdings,* the Court of Appeal interpreted the Waiver Exception, and more precisely the requirement that a sovereign’s waiver of jurisdictional immunity be *explicit*. The Court also considered whether immunity from suit, which shall be invoked by Canadian courts on their own motion, prevent them from authorizing *ex parte* seizures before judgment against sovereign assets. Finally, the Court hinted on the legal test to distinguish between a foreign state and its agencies pursuant to s. 2 SIA, thereby opening the door to the possibility of executing a state debt against the assets of an *alter ego* of the foreign state in Canada.

Background: The Treaty Awards and the Devas investors ’ enforcement efforts worldwide

In 2005, Devas Multimedia Private Ltd. (Devas) and Antrix Corporation Ltd. (Antrix), a corporation wholly owned by India, entered into an agreement (Devas Agreement) by which Antrix would lease S-Band spectrum capacity to Devas for broadcasting services within India, using satellites to be built by the Indian Space Research Organization (ISRO). After payment of an upfront fee of US$40 million to Antrix and multiple rounds of capital injected into Devas, India decided to annul the Antrix-Devas deal, citing increased demand for S-Band spectrum. In 2011, on the instructions of the Department of Space, Antrix terminated the Devas Agreement on the basis of *force majeure*.

India and Antrix’s annulment / termination of the Devas Agreement namely led Devas and some of its investors to respectively initiate arbitration proceedings before the International Chamber of Commerce (ICC Arbitration) and before the Permanent Court of Arbitration (PCA) which culminated in (i) the ICC Award, which condemned Antrix to pay Devas US$562.5 million for having wrongfully repudiated the Devas Agreement; and in (ii) the Treaty Awards, which condemned India to pay the Devas investors US$111 million for breaching its obligations under the *Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments* (India-Mauritius BIT), by unlawfully expropriating their investments in Devas and by failing to give them fair and equitable treatment.

To date, India has refused to honour its obligations under the ICC Award and Treaty Awards and has deployed unprecedented efforts to thwart enforcement efforts in multiple jurisdictions worldwide, including the Netherlands, the United States, Australia, France, Belgium, Luxembourg and the United Kingdom.

Background: The Canadian enforcement proceedings

In November 2021, the Devas investors initiated recognition and enforcement proceedings of the Treaty Awards against India before the Superior Court of Québec and successfully seized before judgment US$37.5 million belonging to Airport Authority of India (AAI) in the hands of the International Air Transport Association (IATA) in Montréal, Québec (the AAI Seizure).

In January 2022, the Superior Court quashed the AAI Seizure on the basis that AAI was a distinct legal entity who was not a party to the underlying arbitration and who, as an agency of the foreign state, was presumptively immune from the jurisdiction of Québec courts pursuant to s. 3 of the SIA. Without ruling on AAI's claim of state immunity, the Superior Court determined that the attachment could not have been authorized without a prior *inter partes* determination on AAI's jurisdictional immunity. The Devas investors appealed from this decision.

In June 2022, the National Assembly of Québec passed *An Act Respecting the International Air Transport Association* (IATA Act), which essentially provides that money held by the IATA outside of Québec on behalf of third parties to which it provides financial services may not be the object of a seizure. Shortly thereafter, AAI filed a new application to vacate the AAI Seizure, in which it argued that the effect of the IATA Act was to **retroactively** exempt from seizure any money held by the IATA in respect of a participant in its financial services, including monies seized since November 2021 by the Devas investors.

In September 2022, the Superior Court, refusing to rule on the effect of the IATA Act on the AAI Seizure for sums that had accrued before its entry into force (as the Court of Appeal was already seized with the Devas investors' appeal from its decision to quash the AAI Seizure), declared that the IATA Act rendered the AAI Seizure inoperative for any AAI money collected by the IATA after the IATA Act's entry into force. The Devas investors appealed from this decision.

In December 2022, the Superior Court ruled that India was not immune from the jurisdiction of Québec as both the Waiver Exception and the Commercial Activity Exception applied to the Devas investors' recognition and enforcement proceedings. You can find our BLG insight on this decision here. India appealed from this decision.

On Appeal: India is not immune from the jurisdiction of Canadian courts

In its recent decision, the Court of Appeal dismissed India's appeal from the Superior Court decision dismissing India's claim of state immunity and upheld the first instance ruling that India had *expressly* waived its jurisdictional immunity before the commencement of the enforcement proceedings. The Court held that India's agreement to international arbitration under the India-Mauritius BIT and ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), amounted, by necessary implication, to an *express* waiver under ss. 4(2)(a) of the SIA. India's assertion that the "explicit submission" requirement was a distinguishing feature of Canadian law requiring that the sovereign plainly stipulates either orally or in writing that it is waiving its immunity was thus dismissed by the appellate court.

The Court of Appeal also dismissed India's argument that the Mauritius shareholders' investments in Devas were fraudulent and were not protected under the India-Mauritius BIT, thereby preventing the application of the Waiver Exception. India contended that the Supreme Court of India's decision – which was rendered in the context of Antrix's application to liquidate and wind up Devas – stating that the Devas Agreement was fraudulent and violated India's public policy, was binding on the Québec courts. The Court of Appeal resoundingly rejected India's attempt to circumvent the Treaty Awards enforcement on that basis given that the PCA tribunal had already dismissed India's fraud allegations in the course of the arbitration. The Court of Appeal stated that since the Treaty Awards are final and presumed to be valid and enforceable, India cannot raise the fraud argument again based on a subsequent foreign decision, especially as India did not invoke any of the grounds under Article 653(2) of the *Civil Code of Procedure* (which incorporates Article V of the New York Convention into Québec law) to challenge the Treaty Awards.

Since the Court of Appeal's ruling on the applicability of the Waiver Exception was dispositive of India's claim of jurisdictional immunity, it did not consider the Superior Court's finding that the Commercial Activity exception also applied to the case at bar. It is however noteworthy that in *CC/Devas (Mauritius) Ltd. c. Republic of India*, 2022 QCCS 4785, the Superior Court had ruled that India's activity at stake in the enforcement proceedings was predominantly commercial within the meaning of s. 5 SIA as "[India] breached a commercial treaty by annulling a commercial contract without offering a *fair and equitable compensation* to the [Devas] investors".

On Appeal: The AAI Seizure is reinstated

Second, the Court of Appeal allowed the Devas investors' appeal from the Superior Court decision quashing the AAI Seizure, overturned the trial judge's ruling and reinstated the US$37.5 million AAI Seizure. The Court of Appeal ruled that whereas the Devas investors fulfilled the criteria for a seizure before judgment, nothing in the SIA prevented Québec courts from authorizing *ex parte* pre-judgment attachments against sovereign assets. In its analysis, the Court of Appeal held that forcing the parties to hold a lengthy *inter-partes* debate on state immunity *before* a seizure can be authorized would defeat the conservatory purpose of pre-judgment attachments and allow the sovereign to move its assets out of the jurisdiction pending a determination on its sovereign immunity claim.

The Court of Appeal also found that the authorizing judge in this case was right to determine, on a *prima facie* basis, that AAI was an inseparable organ of India despite AAI being constituted as a corporate entity under its constitutive act, the *Airports Authority of India Act* (AAI Act). The Court held that the evidence of AAI's sovereign functions and of India's extensive control over all aspects of AAI adduced before the authorizing judge was sufficient to conclude, on a *prima facie* basis, that AAI was an inseparable organ of India with the consequence that the money seized at the IATA could serve to satisfy India's debt and that AAI did not enjoy a presumption of sovereign immunity distinct from that of India. In doing so, the Court of Appeal unequivocally acknowledges that the juridical status accorded to an organ of the foreign state under the foreign law is not conclusive of its status under the SIA and before Canadian courts.

On Appeal: The AAI Seizure is unaffected by the IATA Act

Third, the Court of Appeal allowed in part the Devas investors' appeal from the Superior Court decision ruling on the effect of the new IATA Act on the AAI Seizure, which dealt with the temporal application of new legislation on conservatory measures in Québec. The appellate court ruled that the IATA Act, which came into force 6 months after the AAI Seizure was authorized, did not affect the sums collected by IATA on behalf of AAI before its entry into force. As a result, the US$37.5 million AAI Seizure is unaffected by the enactment of the IATA Act.

Key takeaways & legal implications

The Québec Court of Appeal's decision is precedent-setting as it is the first time an appellate court in Canada considers the issue of waiver of state immunity in the enforcement of foreign arbitral awards context. The Court of Appeal of Québec's findings align with international case law which stands for the proposition that a state's agreement to arbitrate amounts to a waiver of immunity in enforcement proceedings even in the absence of an arbitration exception in the SIA. This holding further confirms Canada's long-standing commitment under the New York Convention and reinforces its position as an enforcement-friendly jurisdiction.

This is also the first time a Canadian appellate court considers the novel issue of *ex parte* seizures before judgment against foreign states. By holding that the issue of state immunity does not need to be ruled on with finality before issuing conservatory measures, the Court confirms that the SIA should be interpreted harmoniously with the legal framework of seizures before judgment.

Finally, this decision represents a favourable development for award-creditors seeking to execute against uncooperative foreign states in Canada as the Canadian appellate court expressly opens the door to the possibility of executing a state debt against the assets of an *alter ego* of the foreign state.

The BLG team

The BLG team representing the Devas investors includes Karine Fahmy, Ira Nishisato, Amanda Afeich, Dayeon Min, Van Khai Luong and, up until his judicial appointment, Mathieu Piché-Messier.

By

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