SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-17-119144-213

DATE: January 8, 2022

BY THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

CC/DEVAS (MAURITIUS) LTD.
and
DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED
and
TELCOM DEVAS MAURITIUS LIMITED
Plaintiffs

CCDM HOLDINGS, LLC
and
DEVAS EMPLOYEES FUND US, LLC
and
TELCOM DEVAS, LLC
Plaintiffs in continuance of proceedings
v.

REPUBLIC OF INDIA
Defendant

AIRPORT AUTHORITY OF INDIA
and
AIR INDIA, LTD.
Mis-en-cause
INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

Third-Party Garnishee

JUDGMENT

OVERVIEW

[1] Pending the homologation of two foreign arbitral awards rendered against the Republic of India in favour of Plaintiffs, this case involves two seizures before judgment by garnishment effected in the hands of IATA, that were authorized *ex parte* at the behest of Plaintiffs who are seeking to execute their arbitral awards in excess of USD 111M due by the Republic of India but against the assets of two of its state-owned agencies, namely the Airport Authority of India and Air India, Ltd.

[2] Despite the fact that they are distinct legal entities who were not parties nor involved in the arbitration process nor were they condemned to pay any amount of money to Plaintiffs, the latter obtained two authorizations to seize before judgment by garnishment the assets of the Airport Authority of India and of Air India, Ltd. in the hands of IATA on the basis that they are the *alter egos* of the Republic of India and as such, their assets are subject to seizure just as if they belonged to the Republic of India.

[3] Moreover, since the Republic of India cannot allegedly invoke State Immunity pursuant to the *State Immunity Act*[1] (the "**SIA**"), Plaintiffs argue that Airport Authority of India and Air India either waived *de facto* said State Immunity or that their situation falls within one of the statutory exceptions.

[4] Claiming that it enjoys a strong presumption of State Immunity, Airport Authority of India has invoked State Immunity of jurisdiction and of attachment arguing that the seizure against its assets in Québec could not be authorized *ex parte* without the Court determining beforehand on its merits whether it is subject to the jurisdiction of the courts in Québec with respect to Plaintiffs' seizure before judgment of its assets.

[5] Finally, the Court shall determine whether the allegations in the various sworn declarations filed by Plaintiffs in support of their two Applications for seizure before judgment by garnishment meet the requirements to authorize such seizures on the basis of their sufficiency only.

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[1] R.S.C., 1985, c. S-18.

CONTEXT

[6] The Court is seized with four Applications relating to seizures before judgment by garnishment authorized *ex parte* on November 24, 2021, and on December 21, 2021:

- Application of the Airport Authority of India (the "**AAI**") to Dismiss and to Stay the first Seizure Before Judgment by Garnishment authorized on November 24, 2021; (the "**AAI Application to dismiss and stay**")

- Application of Air India, Ltd. ("**Air India**") to Quash the second Seizure Before Judgment by Garnishment authorized on December 21, 2021; (the "**Air India Application to quash**")

- *De bene esse* Application of Air India to Stay the second Seizure Before Judgment by Garnishment authorized on December 21, 2021[2]; (the "**Air India Application to stay**")

- Application of International Air Transport Association ("**IATA**"), the Third-Party Garnishee to Quash the two Seizures Before Judgment by Garnishment of Plaintiffs; (the "**IATA Application to quash**")

[7] The two seizures before judgment were authorized at the behest of Plaintiffs, CC/Devas (Mauritius) Ltd ("**CC/Devas**"), Devas Employees Mauritius Private Limited ("**DEMPL**"), and Telcom Devas Mauritius Limited ("**Telcom Devas**") (collectively, the "**Plaintiffs**") against Defendant, the Republic of India ("**India**" or the "**Republic of India**").

[8] Plaintiffs are shareholders of Devas Multimedia Services Ltd. ("**Devas**") who on January 28, 2005, entered into a contract with Antrix Corporation Limited ("**Antrix**") an Indian corporation wholly owned by the Republic of India and under the administrative control of the Indian Department of Space ("**DOS**"), by which Antrix leased spectrum capacity in the "S-band" (2500–2690 MHz) to Devas and agreed to provide two satellites to broadcast in that spectrum, to be built, operated, and launched by the Indian Space Research Organization ("**ISRO**") (the "**Agreement**")[3].

[9] These satellites were to form an integral part of a hybrid satellite/terrestrial system through which Devas would provide broadband wireless access and audio-video services cost-effectively within India. Under the Agreement, Devas was required to pay Antrix upfront fees of approximately USD$40 million to reserve transponder capacity on the two satellites, followed by an annual lease fee after the satellites were launched.[4]

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[2] At the end of the hearing, the Court advised the parties that it would not rule on the *de bene esse* Air India Application to stay, preferring to rule shortly on the other Applications instead.

[3] Sworn declaration of Lawrence T. Babbio Jr. ("**Babbio**") dated November 12, 2021, par. 13.

[4] *Ibid.*, par. 14–15.

[10] Following the execution of the Agreement, Plaintiffs injected multiple rounds of capital into Devas to enable it to make the required payments under the Agreement and trigger Antrix's obligation to launch the two satellites and lease spectrum to Devas.[5]

[11] In July 2010, the Indian Space Commission adopted a resolution favouring the termination of the Agreement. 20. On February 17, 2011, the Cabinet Committee on Security of India purported to terminate the Agreement. Then, on February 25, 2011, Antrix notified Devas that the Agreement was terminated by reason of "force majeure".[6]

[12] The termination of the Agreement triggered the arbitration process that led to the Treaty Awards[7] in favour of Plaintiffs against the Republic of India.

[13] Incidentally, following Antrix's repudiation of the Agreement, Devas also pursued relief from Antrix pursuant to the Agreement, and commenced an arbitration under the auspices of the International Chamber of Commerce ("**ICC**") on July 1, 2011 (the "**ICC Arbitration**"). The ICC Arbitration was seated in New Delhi, India.[8]

[14] On September 14, 2015, the tribunal, composed of three arbitrators (the "**ICC Tribunal**"), unanimously rejected Antrix's defence of force majeure, held that Antrix had wrongfully repudiated the Agreement and awarded Devas USD$562.5 million in damages plus 18% interest per annum (the "**ICC Award**")[9].[10]

[15] Back to Plaintiffs, on January 3, 2022, three Notices of continuance of proceedings were filed by Plaintiffs in continuance of proceedings, CCDM Holdings, LLC ("**CCDM**"), Devas Employees Fund US, LLC ("**DEFU**") and Telcom Devas, LLC ("**Telcom**") (collectively the "**Plaintiffs in continuance**").

[16] The fact that the Court shall refer in the present judgment to the Plaintiffs in continuance, does not deprive in any manner whatsoever the rights of the other parties to contest their legal standing and their capacity to act instead of Plaintiffs in the present instance.

[17] A first *Application for a Seizure Before Judgment by Garnishment* on November 15, 2021 (the "**First Application**"), filed by Plaintiffs filed was granted and a first seizure before judgment was authorized *ex parte* by Justice Lukasz Granosik on November 24, 2021, over funds held by IATA on behalf of India and of AAI (the Airport Authority of India) (the "**First Seizure**") with the following provisions:

> **A.** […];

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[5] *Ibid*., par. 16.
[6] *Ibid*., par. 19–21.
[7] As defined hereafter.
[8] Sworn declaration of Babbio, par. 26.
[9] **P-13**.
[10] *Ibid*., par. 27.

> **B. AUTHORIZE** the Seizure Before Judgment by Garnishment of all sums or moveable property of Defendant Republic of India **and/or the Mis-en-Cause Airports** (*sic*) **Authority of India**, including all air navigation charges and aerodrome charges invoiced and/or collected and/or accrued and/or otherwise being held by the Third-Party Garnishee, the International Air Transport Association, either at its head office in Montreal or at any of its worldwide branches, on behalf of Defendant Republic of India **and/or the Mis-en-Cause Airports** (*sic*) **Authority of India**;
>
> **C. DECLARE** effective the Seizure Before Judgment by Garnishment in the hands of the Third-Party Garnishee, the International Air Transport Association, for all future sums to be remitted to the Defendant Republic of India **and/or the Mis-en-Cause Airports** (*sic*) **Authority of India**;
>
> **D. DESIGNATE** the Third-Party Garnishee, the International Air Transport Association, as the custodian of the property seized;
>
> [Emphasis added]

[18] Following the First Seizure, on December 7, 2021, IATA filed a *Declaration by the Garnishee*, confirming that as of December 6, 2021, IATA had "in its hands" the sum of USD 722,483.17 owing to AAI and no sums owing to the Republic of India[11].

[19] On December 16, 2021, IATA filed an *Amended Declaration by the Garnishee*, confirming that as of December 16, 2021, IATA had "in its hands" the sum of USD 6,819,163.00 owing to AAI and no sums owing to the Republic of India[12]:

[20] Subsequently, a *Second Application for a Seizure Before Judgment by Garnishment*, dated December 17, 2021 (the "**Second Application**"), aimed this time to seize the funds belonging to Air India held by IATA was authorized once again *ex parte* on December 21, 2021, by Justice Patrick Buchholz (the "**Second Seizure[13]**") with the following provisions:

> **A.** […];
>
> **B. AUTHORIZE** the Seizure Before Judgment by Garnishment of **all moveable property of Air India Limited ("Air India")** in the hands of the Third-Party Garnishee, the International Air Transport Authority (the "IATA"), including all sums of money invoiced and/or collected and/or accrued and/or otherwise being held by the IATA, either at its head office in Montreal or at any of its worldwide branches, **on behalf of Air India**;
>
> **C. DECLARE** effective the Seizure Before Judgment by Garnishment on all sums of money that become owing or **payable by the IATA to Air India** from time to

[11] **R-1**.
[12] **R-2**.
[13] The First Seizure and the Second Seizure are referred to collectively as the "**Seizures**").

> time after service of the Notice of Execution upon the IATA for as long as the Seizure Before Judgment by Garnishment remains in force;
>
> **D. DESIGNATE** the Third-Party Garnishee, the International Air Transport Association, as the custodian of the property seized;
>
> [Emphasis added]

[21] Following the Second Seizure, IATA filed two additional affirmative declarations on January 3, 2022, confirming holding USD 17,306,658.70 on behalf of Air India as of December 31, 2021, and USD 12,767,745.25 on behalf of AAI as of December 31, 2021.

[22] The Seizures were obtained in the context of an *Application for recognition and enforcement of arbitral awards rendered outside of Québec* (the "**Originating Application**") filed by Plaintiffs seeking to enforce in Québec two arbitration awards issued by a three-member tribunal under the auspices of the Permanent Court of Arbitration ("**PCA**") pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (1976) ("**UNCITRAL Rules**") and seated in The Hague, Netherlands (the "**PCA Tribunal**"):

> i. An award on jurisdiction and merits issued on July 25, 2016[14] (the "**Merits Award**"), finding India liable for breaches of the *Agreement Between the Republic of India and the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments*[15] (the "**Treaty**"); and
>
> ii. An award on quantum issued on October 13, 2020[16] (the "**Quantum Award**"), ordering India to pay Plaintiffs USD$111 million plus interest and costs;
>
> (The Merits Award and the Quantum Award, collectively referred to as the "**Treaty Awards**").

[23] Although two notices of execution were served on IATA on November 24 and December 21, 2021, in connection with the Seizures, the Court was only remitted a vague email confirmation from the bailiffs Paquette dated January 5, 2022,[17] that "*l'envoi*" presumably referring to documents related to the First Seizure destined for Defendant

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[14] **P-6**.
[15] **LB-1**.
[16] **P-7**.
[17] **P-20** :
« Bonjour,
Pour ce dossier, pour l'envoi effectué le 26 novembre, cela a été livré à l'autorité le 10 décembre 2021.
C'était l'envoi pour la défenderesse [India].
Pour l'envoi du 1er mis en cause [AAI], effectué le 30 novembre, ce n'est pas encore arrivé, pareil pour l'envoi du 22 décembre dernier.
Je vous joins les "tracking fedex".
Quelle est l'issue de la demande de cassation ?
Dans l'attente de vos nouvelles. »

India would have been delivered to the *Central Authority at the Ministry of law and justice in New Delhi, India* on December 10, 2021[18].

[24] Until now, the Republic of India has not filed an Answer to the summons nor was it represented in the context of the present hearing. In fact, the Court does not even know with any certainty whether Defendant India was duly served with the Originating Application and the First and Second Applications for seizure before judgment by garnishment.

[25] With respect to the Mis-en-cause, other than the two Notices of execution served upon IATA, the attorneys for AIA and Air India have complained that their clients were never served until now with any of the legal proceedings that gave rise to the judgments authorizing the Seizures. No evidence of proper service was ever produced before the Court.

[26] Counsel for Plaintiffs in continuance argued that it should not become a significant issue since AAI and Air India have nevertheless answered the summons. However, counsel is somehow dodging the real issue regarding the lack of proper service until now, as AAI and Air India were forced to react given that their discovery that their assets were held by IATA pursuant to the Seizures. The Court understands that they were made aware of the situation by IATA not by Plaintiffs.

[27] With all due respect, the Court cannot conclude, as suggested by counsel for Plaintiffs in continuance, that the absence of Defendant India is a further evidence of the latter's bad faith towards his clients.

[28] At this juncture, the Court cannot simply infer that the absence of Defendant India is the result of a malevolent and obstructive strategy to impede on the judicial process initiated by Plaintiffs in Québec.

[29] Without expressing any opinion whatsoever on the merits of the Originating Application, based on the written proceedings, the Court takes notice that India is still actively contesting the Treaty Awards through juridical processes before legitimate courts and tribunals worldwide.

[30] Be that as it may, under normal circumstances, a seizure before (or after) judgment by garnishment entitles the plaintiff to seize assets owned by the defendant that are held by the garnishee or sums of money due to the defendant by the garnishee.

[31] At first glance, what seems to be odd herein is that with their Seizures, Plaintiffs in continuance are not seeking to enforce in Québec the Treaty Awards rendered outside of Québec against the sole named defendant in those awards namely, the Republic of India, but they managed to obtain on two occasions and on an *ex parte* basis that their Seizures

[18] **P-20**.

before judgment by garnishment affect the assets of third parties namely, AAI and Air India, held by IATA in Montréal and even at any of its worldwide branches.

[32] Both AAI and Air India were never—nor were ever alleged to have been—parties to the arbitration proceedings that gave rise to the Treaty Awards[19] nor were they personally condemned to pay any sums of money to Plaintiffs in connection therewith.

[33] Moreover, there are no allegations that AAI and Air India have acted in any manner whatsoever that could give rise in the minds of Plaintiffs to a serious and objective fear or apprehension that without the Seizures, the recovery of their claim pursuant to the Treaty Awards would be seriously jeopardized.

1. THE POSITION OF PLAINTIFFS JUSTIFYING THE AUTHORIZATION OF THE SEIZURES

[34] For the essential, Plaintiffs satisfied Justices Granosik and Buchholtz (the "**Authorization Judges**") to authorize the Seizures on the basis that:

- AAI and Air India being the *alter egos* of the Republic of India, their assets can serve to satisfy the execution of their claim against India pursuant to the Treaty Awards;

- The Republic of India having been involved in the arbitration process that led to the Treaty Awards, it waived, to all intents and purposes, the State Immunity provided by the *State Immunity Act*;

- Moreover, as the arbitration process related to commercial matters, therefore, it constituted an exception to India's State Immunity[20];

- Although AAI and Air India are *agencies of a foreign state*[21], as they are allegedly *alter egos* of the Republic of India who waived its right to invoke State Immunity by participating in the commercial arbitration that led to the Treaty Awards, they cannot claim as well State Immunity against Plaintiffs' proceedings;

- In any event, should AAI and/or Air India raise the issue of State Immunity, the same should be dealt with later at the hearing on the merits of the Originating Application without affecting the Seizures;

- With respect to AAI, India's wrongful and abusive conduct towards Plaintiffs, for the past ten years, gave the latter every reason to fear that without the requested seizure before judgment, India's assets in Québec (being the AAI

[19] **P-6** and **P-7**.
[20] Section 5 of the *SIA*.
[21] Section 2 of the *SIA*.

assets) *will be diverted before the issuance of a final judgment on their Originating Application*;

- With respect to Air India, firstly, Plaintiffs believed that IATA holds and receives on a regular basis, significant sums of money that are owed or will become owing or payable to Air India as a result of the various financial solutions offered by the IATA to Air India;

- Secondly, given the imminent sale to the Tata Group of India's shares[22] held in Air India, it was urgent for Plaintiffs to obtain the requested second seizure before judgment by garnishment to seize Air India's assets in Québec before the consummation of the acquisition of Air India by the Tata Group and protect their claim against India arising from the Treaty Awards;

- Finally, India's same wrongful and abusive conduct towards Plaintiffs for the past ten years, further gave them every reason to fear that without the requested second seizure before judgment by garnishment, Air India's assets in Québec will be *diverted* before the issuance of a final judgment on Plaintiffs' Modified Originating Application.

[35] Concurrently to seeking the Second Seizure and undoubtedly in order to justify the same, Plaintiffs filed a Modified Originating Application seeking essentially judicial declarations on the merits that AAI and Air India are *alter egos* of Defendant India.

[36] As a preliminary comment, if it was really contemplated and feared by Plaintiffs, the Court fails to see how the present seizure by garnishment against IATA would enable them to seize either the shares held by India or the sale proceeds of India's shares in Air India to the Tata Group, especially since there are no allegations whatsoever indicating or suggesting IATA's possible involvement in the share purchase transaction.

[37] On a different note, AAI and Air India are seeking an order quashing of the Seizures insofar as they are concerned but based on different grounds.

2. THE POSITION OF AIR INDIA IN SUPPORT OF THE AIR INDIA APPLICATION TO QUASH

[38] With respect to Air India, without prejudice to its right to raise subsequently any argument relating to the veracity of the allegations in the sworn declarations filed in support of the Second Application to authorize the Second Seizure, Air India disputes, with the support of IATA, the sufficiency of those allegations to warrant the judicial authorization obtained *ex parte* against Air India's assets held by IATA.

[39] It is important to mention that Air India is not asserting State Immunity under the SIA.

[22] The Republic of India holds 100% of the shares issued by Air India.

[40] Air India's position can be summarized as follows:

- While Plaintiffs' Second Application for Seizure attempts to try and justify the seizure by invoking several elements which Air India considers irrelevant, these allegations are insufficient to demonstrate that:
  (i) Air India is an *alter ego* of India that will be used to jeopardize the recovery of Plaintiffs' claim against India;
  (ii) Air India has done anything that would justify a seizure before judgment against it; or
  (iii) the lifting of the corporate veil is justified;
- even though Air India is not involved in any of the proceedings, including the arbitration process between Plaintiffs and India, it is not in any way indebted to Plaintiffs pursuant to the Treaty Awards or otherwise; yet very substantial of its assets held by IATA have been frozen through this *ex parte* process;
- the funds seized with IATA represent about 65% to 75% of its revenues which effectively requires Air India to carry out flights all over the world with barely 25% to 35% of its usual passenger sales revenues;
- the continued operation of the airline is therefore put in jeopardy pursuant to these *ex parte* proceedings against it, the whole at a particularly delicate time given global interruptions to the airline industry due to the COVID-19 pandemic;
- In addition, the seizure was authorized shortly before the closing of the well-known public process of privatization of Air India that has been going on for many months; Air India's shares are currently owned by India;
- Moreover, nothing in these allegations can ground an objective fear that Air India will be used to jeopardize the recovery of a claim; Air India has had absolutely no involvement in the dispute between Plaintiffs and India, and has done nothing to Plaintiffs, or in respect of any claim they have;
- All these allegations can only establish is that India has been the shareholder of Air India for an extensive period of time and has acted as any shareholder would have done in the best interest of the corporation.

3. THE POSITION OF AIRPORT AUTHORITY OF INDIA IN SUPPORT OF THE AAI APPLICATION TO DISMISS AND STAY

[41] Without prejudice to any argument relating to the sufficiency or veracity of the allegations in the sworn declarations in support of Plaintiffs' First Seizure, the latter should be dismissed on the basis that AAI enjoys State Immunity provided for in the *State Immunity Act*, including in respect of execution against its property, and that AAI has not waived and is not waiving its State Immunity in any way.

[42] This would explain why AAI has not engaged actively until now on the front of the insufficiency or veracity of Plaintiffs' allegations in order to avoid jeopardizing its State Immunity claim and standing.

4. THE POSITION OF IATA IN SUPPORT OF THE IATA APPLICATION TO QUASH

[43] While reserving its right to oppose the two Seizures on the basis of the veracity of Plaintiffs' allegations, the Third-Party Garnishee, IATA, is also seeking an order to quash the Seizures based on:

- The insufficiency of the allegations for this Court to consider that the recovery of Plaintiffs' claim might be jeopardized but for the Seizures;
- The fact that the garnishment proceedings are abusive in that the Seizures target assets that do not belong to the Republic of India but belong to Air India and AAI who are both distinct legal entities from the Republic of India;
- Moreover, those assets are covered by State Immunity, and thus exempt from seizure or execution pursuant to the SIA;
- Finally, the Superior Court exceeded its territorial jurisdiction in respect of authorizing the seizure of assets located in foreign countries, in breach of the fundamental principle of state sovereignty.

[44] With all due respect, the Court has serious doubts that IATA can claim the status of State Immunity on behalf of AAI and Air India.

[45] Be that as it may, the Court would add that at the hearing, counsel for IATA informed the Court that the Seizures against the assets of an airport authority and against a major airline who avail themselves of the many services offered by IATA[23] around the world, have had a "*chilling effect*" on its other clients who may no longer consider the services offered by IATA as secured, thus inciting them to seek alternate arrangements, and thus causing great prejudice to IATA and to its mission.

[46] Again, with all due respect, while the Court is sensitive to IATA's legitimate preoccupations, such practical and serious concerns cannot impact directly on the determination of the validity of the Seizures.

[23] Whose head office is located in Montréal.

ANALYSIS

4.1 The criteria applicable to a seizure before judgment

[47] A seizure before judgment is an exceptional measure, intended to safeguard a creditor's rights by placing property of its debtor in the hands of justice while a legal proceeding is pending.[24]

[48] A seizure before judgment may be authorized only if the court is satisfied that a plaintiff has established that "*there is reason to fear that recovery of the claim might be jeopardized without the seizure*"[25].

[49] The Court of Appeal recently summarized the criteria for the issuance of a seizure before judgment as follows:

> **La saisie avant jugement**
>
> **[**33] L'article 518 du *Code de procédure civile* prévoit que le demandeur peut faire saisir avant jugement les biens du défendeur « s'il est à craindre que sans cette mesure le recouvrement de sa créance ne soit mis en péril ».
>
> [34] L'article 520 du *Code de procédure civile* indique que « [l]a saisie avant jugement se fait au moyen d'un avis d'exécution sur la base des instructions du saisissant appuyées de sa déclaration sous serment dans laquelle il affirme l'existence de la créance et les faits qui donnent ouverture à la saisie ».
>
> [35] Sur une demande de saisie avant jugement, le demandeur doit donc d'abord démontrer, *prima facie*, l'existence de sa créance. **Par la suite, il doit présenter la preuve d'une crainte objective que le recouvrement de cette créance est en péril.**
>
> [36] En principe, **une simple allégation de fraude ne suffit pas pour justifier une saisie avant jugement. Le demandeur doit en effet alléguer des faits précis qui laissent croire que le débiteur se livre à des manœuvres ayant pour but de soustraire la créance de l'exécution d'un jugement.**
>
> **[37] Cependant, « en face d'une conduite malhonnête persistante et caractérisée » de la partie visée, la jurisprudence « se montre plus généreuse** en ce qu'elle ne se veut pas exigeante au point que le recours à la saisie avant jugement soit en quelque sorte stérilisé ».
>
> [38] Bref, dans de telles circonstances, **les faits contenus dans les allégations de la déclaration du saisissant « doivent démontrer que le débiteur se comporte d'une manière reprochable, louche ou suffisamment troublante**

[24] Article 516 of the *Code of civil procedure* ("***CCP***").
[25] Article 518 *CCP*.

> **pour conclure qu'il y a à craindre que, sans la saisie, le recouvrement de la créance soit en péril ».**
>
> [39] L'article 522 du *Code de procédure civile* spécifie que le défendeur peut demander l'annulation de cette saisie « en raison de l'insuffisance ou de la fausseté des allégations de la déclaration du saisissant ». Si une telle insuffisance ou fausseté est avérée, le tribunal annule la saisie. Dans le cas contraire, il la confirme et peut en réviser la portée.
>
> **[40] Le juge saisi d'une demande d'annulation de saisie avant jugement pour cause d'insuffisance des allégations du saisissant doit tenir ces dernières pour avérées et en décider uniquement à la lumière des faits tels qu'allégués et de leur rapport logique avec le droit à la saisie avant jugement.**
>
> **[41] En outre, le juge qui doit statuer sur une telle demande d'annulation bénéficie de l'éclairage supplémentaire qu'apporte la partie saisie, contrairement au juge ayant premièrement autorisé la saisie avant jugement lors d'une audition ex parte.[26]**

[50] At the outset, the Court cannot help but notice that the Authorization Judges were submitted voluminous documentation in support of the First and Second Applications before granting the same:

With respect to the First Application:

- the Originating Application of some 82 paragraphs (17 pages) with 19 exhibits (P-1 to P-19 (1,378 pages);
- the First Application with some 132 paragraphs (20 pages) and three sworn declarations in support thereof:
- Sworn Declaration of Anne Champion, a lawyer from New York City, dated November 11, 2021 (50 paragraphs (11 pages)) with 24 exhibits in support thereof (878 pages);
- Sworn Declaration of Anurhada Dutt, a lawyer from New Delhi, India, dated November 11, 2021 (51 paragraphs (9 pages)) with 27 exhibits in support thereof (1,361 pages); and
- Sworn Declaration of Lawrence T. Babbio Jr., then director of Original Plaintiff DEMPL and former Chairman of Devas Multimedia Services Ltd., dated November 12, 2021 (73 paragraphs (11 pages)) with 29 exhibits in support thereof (581 pages);

[26] *Desjardins Assurances générales inc. v. 9330-8898 Québec inc.*, 2019 QCCA 523.

- *Plan d'argumentation des demanderesses* dated November 24, 2021 (21 pages) and 26 authorities.

With respect to the Second Application:

- The Second Application dated December 17, 2021, with some 143 paragraphs (23 pages) and 5 new exhibits (26 pages) in addition to the three original sworn declarations mentioned previously;

- An additional Sworn Declaration of Anne Champion dated December 17, 2021 (93 new paragraphs (18 pages)) with 24 new exhibits in support thereof (1,752 pages);

- The authorization granted on November 24, 2021, by Justice Granosik as it appears on the minutes of that hearing:

> CONSIDÉRANT la preuve au soutien de la demande de saisie ;
>
> CONSIDÉRANT les trois (3) déclarations sous serment ;
>
> CONSIDÉRANT que le Tribunal est convaincu à la fois tant de l'existence de la créance que de la crainte objective que celle-ci soit en péril, tenant compte surtout des démarches de la défenderesse visant à se soustraire ä l'exécution des sentences arbitrales P-6 et P-7 ;
>
> CONSIDÉRANT que le Tribunal fait siens les commentaires ainsi que le résumé des arguments et de la preuve contenus dans le Plan d'argumentation des demanderesses du 24 novembre 2021.
>
> PAR CES MOTIFS, LE TRIBUNAL :
>
> AUTORISE la saisie selon ses conclusions.

- *Plan d'argumentation des demanderesses* dated December 20, 2021 (21 pages) and 30 authorities.

[51] On December 21, 2021, Justice Buchholz authorized the Second Seizure as follows:

> The seizure before judgment by garnishment requested by the second application darted December 17, 2021, is authorized in light of the two affidavits of Ms. Champion, and of the affidavits of Mr. Babbio and [Ms.] Dutt.

[52] With all due respect, the relatively short hearings held on November 24 and on December 21, 2021, do not necessarily do justice to the time actually spent in chambers by both Authorization Judges to consider those Applications and satisfy themselves that the criteria to authorize such seizures were met on a *prima facie* basis after considering

as truthful the allegations of the proceedings, affidavits supported with a multitude of exhibits.

[53] Again, with all due respect, its own perusal of the same proceedings, affidavits and exhibits has satisfied the Court that from a strict sufficiency standpoint and on a *prima facie* basis, the Authorization Judges were right to consider and conclude that there were objective and serious reasons to fear that recovery of Plaintiffs' claim against the Republic of India might be jeopardized without the Seizures regardless of the behaviour of AAI and Air India.

[54] Without going into detail into the extensive factual allegations aiming to establish India's wrongful and abusive conduct towards Plaintiffs, the many actions, direct or indirect, of India within its country's boundaries to attack, *inter alia*, the Treaty Awards and to prevent their execution by Plaintiffs is simply mind-boggling to say the very least on a *prima facie* basis and leaves very little doubt in the mind of the Court that it would be next to impossible to execute the Treaty Awards within India leaving Plaintiffs with the sole realistic alternative but to execute the same on assets located outside that country.

[55] The Court understands that even though the Treaty Awards have been homologated so far in five other countries, Plaintiffs have yet to collect a single penny from the Republic of India on account of the Treaty Awards.

[56] These actions made and the measures adopted by India within its jurisdiction, directly or indirectly via its wholly state-owned corporation Antrix as detailed in the sworn declarations go way beyond a legitimate contestation of the validity of the Treaty Awards before international courts and tribunals.

[57] In short, the highly detailed and compelling allegations contained in the sworn declarations in support of the two Seizures taken, at this juncture, as truthful overwhelmingly satisfy the criterion of the objective fear that the recovery of the amounts due under the Treaty Awards to Plaintiffs would be seriously in peril and jeopardy if the Seizures were denied.

[58] The other criterion of the existence of a valid claim against the Republic of India has also been satisfied on a *prima facie* basis. At this stage, the fact that the Republic of India is still contesting the Treaty Awards and their enforcement by Plaintiffs in other jurisdictions does not impede the legal process initiated by Plaintiffs in the present instance insofar as the Applications for seizure before judgment by garnishment are concerned.

4.2 The issue of AAI and Air India being the *alter egos* of the Republic of India

[59] What about the crucial issue of AAI and Air India being the *alter egos* of the Republic of India for the purpose of execution and enforcement of the Treaty Awards against their own assets?

[60] It is important to bear in mind that the Court is only called upon the verify the sufficiency of the allegations not their veracity.

[61] The allegations of the sworn declarations highlight not only the serious difficulties experienced so far by Plaintiffs to collect the amounts due to it pursuant to the Treaty Awards, be it inside India and outside in the other jurisdictions where the Treaty Awards have already been homologated, but they also also highlight the need to attempt to execute the same against assets belonging to AAI and Air India with seizures before judgment by garnishment in the hands of IATA, based on the theory that they are the *alter ego* of the Republic of India.

[62] The basis invoked by Plaintiffs to justify their Applications for seizure before judgment by garnishment against the assets of AAI and Air India derives essentially from the unique and extensive link between them and the Republic of India who exercises an exceptionally high degree of control over those state-owned entities, their assets and their activities which, according to the allegations of the sworn declarations, goes way beyond the involvement and control normally exercised by a shareholder over its wholly owned corporation.

[63] That somewhat unique and exceptional situation identified and alleged in painstakingly details in the sworn declarations satisfied the Authorization Judges that, on a *prima facie* basis, AAI and Air India are the *alter egos* of the Republic of India for the purpose of attachment of their respective assets to eventually serve to satisfy the amounts due pursuant to the Treaty Awards, should the Superior Court homologate the same as requested.

[64] Although deemed to be sufficient to warrant the Seizures, the foregoing does not necessarily mean that Plaintiffs will subsequently manage to prove such a position on the merits or at the veracity challenge should there be one.

[65] But it is not up to this Court at this stage of the proceedings, to rule on the validity of the legal issue of the *alter ego* without further evidence being formally adduced.

[66] Be that as it may, the Court also wishes to point out that arguing that various erroneous allegations were made in the sworn declarations in connection with the issue of *alter ego* in particular, does not fall within the realm of insufficiency but rather on the veracity of such allegations. That includes the capacity of the affiants to make the allegations they made.

[67] Finally, the Court shares the opinion of counsel for Plaintiffs that in view of the very special circumstances of this case as it appears from the nature and the extent of the allegations made in the sworn declarations to support the *alter ego* argument, Plaintiffs did not have to establish at this juncture that AAI and Air India were behaving in such a manner as to jeopardize the recovery of India's debt pursuant to the Treaty Awards.

[68] The Seizures authorized by the Authorization Judges based on the detailed allegations of the sworn declarations, implied sufficiently that on a *prima facie* basis while taking those various allegations as truthful, Justices Granosik and Buchholz were satisfied of the existence of an *alter ego* situation that allowed for the seizure before judgment by garnishment of the assets of AAI and Air India held by IATA for the debts of the Republic of India.

[69] At the level of contestation of the sufficiency of the allegations regarding the issue of *alter ego*, the Court respectfully does not find any grounds to intervene at this juncture.

[70] Therefore, the Court shall dismiss in part Air India's Application to quash on the basis of insufficiency.

[71] However, at the hearing, counsel for Plaintiffs in continuance reminded the Court that article 522[27] *CCP* confers upon the judge confirming a seizure the discretion to revise its scope.

[72] Given the foregoing reminder by Plaintiffs' counsel and the special and exceptional circumstances surrounding the seizure by garnishment against the assets of Air India and the proof already adduced on the extraordinary and drastic impact of the Second Seizure upon Air India and its ongoing operations[28], the Court has sufficient elements justifying the exercise of its judicial discretion to revise immediately the scope of the Second Seizure against the assets of Air India held by IATA (the "**Air India Seizure**").

[73] Subject to the right of Air India, IATA and Plaintiffs to seek an additional revision of the scope of the Air India Seizure should additional facts and circumstances warrant it, the Court finds that it is in the interest of justice to limit the scope of the Air India Seizure to 50% of the Air India funds presently held by IATA, the whole retroactively to December 21, 2021, and that henceforth and until further order from the Court, the Air India Seizure shall be limited to 50% of the funds received and held from time to time by IATA.

[74] On a different note, the AAI Application to dismiss and stay is a totally different story.

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[27] **522.** Within five days after service of the notice of execution, the defendant may ask that the seizure be quashed on the grounds that the allegations in the seizor's affidavit are insufficient or false. If this proves to be true, the court quashes the seizure; if not, it confirms the seizure and may revise its scope. [Emphasis added]

[28] Sworn declaration of Ajit Udhav Karmarkar dated December 31, 2021. Mr. Karmarkar is the Deputy General Manager-Finance for Air India.

4.3 **The AAI Application to dismiss and stay**

[75] With respect to AAI, the latter seeks the dismissal of the First Seizure insofar as it is concerned on the basis that:

- AAI enjoys a strong presumption of State Immunity provided for in the *State Immunity Act*, including in respect of execution against its property, and that AAI has not waived and is not waiving its immunity in any way vis-à-vis Plaintiffs;

- As an *ex parte* hearing was inappropriate under the circumstances, there has been no determination on the merits of the issue of AAI's claim to State Immunity; such a determination was a necessary prerequisite to seek the involvement of AAI in the present proceedings, and it could not simply be made on a *prima facie* basis; the failure to determine on the merits beforehand the State Immunity applicable to AAI is fatal to the First Seizure insofar as AAI is concerned;

- AAI is an agency of a foreign state, a legal entity distinct of the Republic of India and its assets are also distinct from those of the Republic of India;

- Moreover, by Plaintiffs' own admission, the amounts seized with IATA, including aviation charges, are related to its sovereign functions not commercial functions:

  > (a) "AAI is namely tasked with collecting air navigation charges, incurred during flights through India's airspace, and aerodrome charges, which relate to the use of airport and other ground or navigation facilities, including airport maintenance fees and route maintenance fees ('**Aviation Charges**')";
  >
  > (b) "Aviation Charges are payable by airlines and countries to AAI in order to be granted permission to fly over the Indian airspace and to use its airports and other ground or navigation facilities."
  >
  > (c) "AAI entrusted the collection and remittance of Aviation Charges from airlines and countries to the International Air Transport Authority."[29]
  >
  > (d) "AAI describes its role as an air navigation service provider as a 'sovereign function', as appears from the January 2021 report of the Ministry of Civil Aviation [...]"[30]

[76] Counsel for AAI argued that his client is an *agency of a foreign state* being the Republic of India, as defined in Section 2[31] of the SIA.

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[29] Sworn declaration of Anne Champion dated November 11, 2021, par. 49.
[30] Sworn declaration of Anuradha Dutt dated November 11, 2021, par. 48.
[31] 2 In this Act,
agency of a foreign state means any legal entity that is an organ of the foreign state but that is separate from the foreign state; (*organisme d'un État étranger*)

[77] As such, AAI benefits from a strong presumption of State Immunity pursuant to the SIA.

[78] Counsel for AAI also contended that given the strong presumption of State Immunity of AAI, pursuant to the provisions of section 3[32] of the SIA, upon being informed of the remedy sought by Plaintiffs against AAI who was described in their own proceedings as a statutory organization constituted under the *Airports Authority of India Act, 1994* and whose primary purpose is to manage airports, civil enclaves and the aeronautical communications efficiently in India[33], the Authorization Judge had the obligation to determine immediately—on the merits and not on a *prima facie* basis *ex parte*—AAI's entitlement to claim State Immunity from the jurisdiction of Canadian courts before dealing with any other issues in these proceedings including authorizing the First seizure against AAI's assets.

[79] AAI had the right to be heard by the Authorization Judge on such a fundamental determination, i.e., the determination whether the Superior Court had jurisdiction or not over AAI and its assets for the purpose of authorizing the First Seizure against the assets of an agency of a foreign state.

[80] Plaintiffs have not argued, let alone adduced—based on the provision of the SIA—the requisite evidence to establish that an *ex parte* hearing was nevertheless required, particularly on the vital issue of State Immunity, and have not shown that notice to AAI of those proceedings could not have been given.

[81] The immediate dismissal or stay of the First Seizure is a necessary measure to safeguard AAI's rights, to preserve the integrity of the vital principle of State Immunity, to remedy an abuse of process and to provide urgent relief to immediately end the irreparable harm caused to AAI by the continuing violation of its right to immunity.

[82] In other words, there must be a complete reset in connection with any legal proceedings involving AAI and its assets in Québec.

[83] Although a notice of execution was served on IATA on November 24, 2021, no proceeding, affidavit or notice of execution has to date been served on AAI in connection with the judgment rendered by Justice Granosik. This remains the case notwithstanding the fact that valuable assets that have been frozen through this *ex parte* process belong to AAI and continue to accrue on a daily basis.

[84] The importance of AAI's presence and involvement from the outset at any hearing on the First Seizure is underscored by the fact that it appears that the Authorizing Judge

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[32] 3 (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
3 (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.
[33] Sworn declaration of Anuradha Dutt dated November 11, 2021, par. 44.

did not have before him highly relevant case law on the issue of State Immunity at the time he heard the First Application for Seizure.

[85] The only other known decision ever rendered in this province involving a seizure by garnishment for a foreign state debt in the hands of IATA that seems to have been submitted by Plaintiffs, *International Air Transport Association v Instrubel N. V.*[34] ("***Instrubel***") did not address in any way the present State Immunity issue at any point in time. Neither did the Court of Appeal.[35]

[86] Counsel for AAI concluded that notwithstanding that this Court (i) has never decided the issue of State Immunity on the merits; (ii) that AAI is presumptively immune from the jurisdiction of this Court; (iii) that Plaintiffs have not—and cannot—adduce any evidence undermining that immunity or establishing that AAI has waived its immunity; and (iv) that AAI has never even been served with process, millions of dollars belonging to AAI have been frozen since November 24, 2021, and the amounts frozen continue to accrue on a daily basis, the First Seizure should never have been granted insofar as AAI is concerned and should be immediately quashed and vacated.

[87] For the reasons to follow, the Court agrees with counsel for AAI.

[88] The relevant factual background reveals that the First Application was filed in this Court in connection with proceedings seeking the recognition and enforcement of two foreign arbitral awards issued against India on July 25, 2016, and October 13, 2020, being the Treaty Awards.

[89] AAI was not a party to the underlying arbitration and no award was made against it.[36] In fact, Plaintiffs' alleged claim against the Republic of India is entirely unrelated to AAI's activities, actions, and conduct.

[90] Objectively, from the standpoint of AAI, the Treaty Awards are still being challenged by India at the seat of arbitration (The Hague). An appeal of India's challenge to the 2016 Merits Award is pending before the Dutch Supreme Court and a challenge to the Quantum Award is pending before the Dutch court of first instance (the District Court of The Hague). India is also presently resisting enforcement of the Treaty Awards in several jurisdictions.

[91] On a legal standpoint, the Court finds that, in this instance, State Immunity invoked by AAI had to be decided on the merits before any order was entered including authorizing the First Seizure against AAI.

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[34] 2019 CSC 61.
[35] 2019 QCCA 78.
[36] Sworn Declaration of Lawrence T. Babbio Jr. dated November 12, 2021, par. 22–27.

[92] In light of the foregoing, the Court had no reason to proceed on an *ex parte* basis against AAI, and by accepting to rely exclusively on the allegations and representations of Plaintiffs in the absence and without the knowledge of AAI.

[93] Given the critical importance and gatekeeping function of the principle of State Immunity, absent exceptional circumstances, a Court should not decide the issue on an *ex parte* basis.

[94] In the present instance, no exceptional circumstances were pointed out to the Court in that precise context. There were no allegations that AAI was "running away" and would stop its sovereign operations in India, no allegations that AAI was going to stop using the services offered by IATA. Aircraft are going to continue to fly over the airspace of India without forgetting landing and taking off from Indian airports, all of which will generate more funds to transit regularly via IATA.

[95] Section 9(3) of the SIA provides for the service of an originating document on an agency of a foreign state.

[96] In 2015, in the case of *Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anomic Sirketi v. Kyrgyz Republic*[37], the Ontario Court of Appeal held that:

- before even addressing the issue of State Immunity, a court must determine whether service was properly made; and

- an application judge could not make an order declarative of the republic's interest in the shares and then deprive the republic of that interest:

> [52] In none of the previous proceedings has the court directly considered and ruled on the issue of whether service on the Republic's Washington embassy was in accordance with s. 9(1)(a) of the SIA. To the extent that in other decisions involving these parties, courts may have declined to address that issue based on Kyrgyzaltyn's lack of standing, that position was taken per incuriam. As a preliminary matter, a court must always determine whether service was properly made on an absent named party whose interests will be affected by the order sought. The question of standing is irrelevant to this issue, as it is the court's role to ensure that the procedural rights of a party that does not appear are protected.
>
> [53] As noted above, s. 3(2) of the SIA specifically requires a court to "give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings", and the Supreme Court of Canada in Kuwait Airways reinforced that meant a court must give effect to the immunity "of its own volition." A Canadian court must also give effect to the procedural provisions of the SIA on its own volition when faced with a case involving an action against a state, as these provisions are an integral part of the scheme designed to respect state immunity.

[37] 2015 ONCA 447.

> [54] The respondent argues that s. 3 of the SIA, which provides for substantive state immunity from the jurisdiction of any court in Canada, is distinct from the procedural provisions of the SIA. It submits that a court is therefore not obliged to consider the procedural issue of validity of service on its own volition. **However, this argument ignores the fact that the only logical way to proceed requires a court to address any issue regarding service before it engages with the merits of a proceeding, including the underlying question of substantive immunity.**
>
> [Emphasis added and references omitted]

[97] The Court believes that the foregoing principles and obligations apply as well to an agency of a foreign state under the SIA and that a waiver or an exception affecting the State Immunity of a foreign state does not automatically impact in the same manner the State Immunity that may enjoy an agency of that foreign state pursuant to the provisions of the SIA.

[98] In the present instance, in the absence of prior service upon AAI, Plaintiffs have not argued before the Authorizing Judge, let alone adduced evidence to prove that an *ex parte* hearing prior to service on AAI was appropriate or justified despite of the provisions of the SIA. Also, they have not shown that service could not have been effected upon AAI.

[99] In fact, it appears that the Authorization Judge was informed that the *Instrubel* case served as a guiding precedent with respect to the authorization of a seizure by garnishment of the assets of the Iraqi Civil Aviation Authority ("**ICAA**") in the hands of IATA for the debts of the Republic of Iraq ("**Iraq**").

[100] Yet, several distinctions needed to be made with respect to the case at hand.

[101] More importantly, State Immunity was not an issue dealt with at any level up to the Supreme Court of Canada. Justice Stephen W. Hamilton, a Justice of the Superior Court at the time, noted in his judgment that the parties had agreed on an amicable basis before the hearing to plead at a later date the issue of State Immunity raised by Iraq[38]. The Court was never asked to address that issue at the outset of the proceedings contesting the seizure by garnishment that had been authorized in the hands of IATA.

[102] The Court also shares the view of counsel for AAI that State Immunity is a threshold issue.

[103] Therefore, AAI's entitlement to claim State Immunity from the jurisdiction of Canadian courts had to be decided on a merits basis before any other issues in the present proceedings.

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[38] *Instrubel, n.v. c. Ministry of Industry of The Republic of Iraq*, 2016 QCCS 1184, par. 5 and 10.

[104] Indeed, Section 3(2) of the SIA requires the Court "*to give effect to the immunity conferred on a foreign state* [. . .] *notwithstanding that the State has failed to take any step in the proceedings.*"

[105] It is up to the moving party (i.e., the Plaintiffs) to establish that an exception to the State Immunity applies in its case, but again not on an *ex parte* context.

[106] These principles were confirmed by the Supreme Court of Canada in *Kuwait Airways Corp. v. Iraq*[39]:

> [15] The SIA first establishes a principle of immunity from jurisdiction in favour of foreign states. This immunity applies generally, and the court must give effect to the immunity **on its own initiative** if applicable:
>
> > 3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
> >
> > (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.
>
> [. . .]
>
> [22] Since the SIA applies, it must be determined whether its provisions preclude recognition of the English judgment. The parties disagree on this issue, regarding the burden of proof in particular. In my opinion, the issue is resolved by the very wording of the SIA. As I mentioned above, s. 3 establishes a presumption of immunity from jurisdiction in legal proceedings against sovereign states. Since the subject of the application, Iraq, is a state, it is entitled to this immunity. **It is up to KAC to establish that it may rely on an exception to this immunity** (J. Walker, Castel & Walker: Canadian Conflict of Laws (6th ed. (loose-leaf)), vol. 1, at p. 10–15).
> [Emphasis added]

[107] In *New Jersey (Department of the Treasury of the State of), Division of Investment c. Trudel*[40], the Court of Appeal determined that the issue of State Immunity was a question of public order that must, in the absence of exceptional circumstances, be decided immediately, prior to anything else, in the same way that a court must consider its *ratione materiae* jurisdiction at the very outset.

[108] The Court of Appeal further held that Québec courts must rule on state immunity as soon as the status of the foreign state (or of the agency of a foreign state) has been recognized or identified:

> [22] Même si la prudence est de mise en matière de requête en irrecevabilité, celle-ci était, dans les circonstances, mal avisée. Dans *Gillet c. Arthur*, la Cour rappelle que « *le juge saisi d'une requête en irrecevabilité portant sur un point de droit précis doit trancher quelles que puissent être soit la difficulté, soit la complexité de*

[39] 2010 SCC 40.
[40] 2009 QCCA 86.

> *la question* ». La question de l'immunité de juridiction d'un État étranger est une question d'ordre public qui, sauf circonstances exceptionnelles, doit être tranchée **immédiatement**, dès le stade de la requête en irrecevabilité, au même titre, par exemple, que celle de la compétence *ratione materiae* du tribunal.
>
> [23] L'immunité d'un État par rapport aux tribunaux d'un autre État est un élément essentiel des relations entre États souverains et de l'ordre juridique international. L'importance du principe est telle que le tribunal canadien est tenu de reconnaître d'office l'immunité de juridiction de l'État étranger, et ce, même si celui-ci s'est abstenu d'agir dans l'instance.
>
> [24] Selon moi, il serait contraire à l'objectif visé par la *Loi sur l'immunité des États* de retarder la décision judiciaire concernant l'immunité de juridiction invoquée puisque cela aurait pour effet d'obliger l'État étranger à se soumettre à la juridiction du tribunal canadien, alors qu'en principe il bénéficie d'une immunité de juridiction reconnue, de façon générale, par la communauté internationale et, de façon particulière, par le Canada dans la *Loi sur l'immunité des États*.
>
> […]
>
> [27] Je souscris à ces propos qui, après les avoir adaptés à la procédure civile québécoise, s'appliquent parfaitement ici. La revendication d'immunité de juridiction d'un État étranger est une question d'ordre public qui, tout comme la compétence *ratione materiae* du tribunal, doit être décidée immédiatement. Avec égards pour la juge de première instance, rien ne justifiait ici de déférer la question au juge du fond.
>
> [Emphasis added and references omitted]

[109] The Court noted that generally the issue of State Immunity is raised in the context of an application to dismiss the proceedings served against a foreign state who invokes the same. Under such circumstances, the foreign state or agency was necessarily served with the legal proceedings to warrant the application for dismissal.

[110] With all due respect, Plaintiffs could not circumvent this fundamental determination to the prejudice of AAI by simply arguing on an *ex parte* basis that as the Republic of India did not allegedly benefit from the State Immunity of jurisdiction nor of the State Immunity of execution pursuant to the SIA by renunciation or otherwise, AAI would have automatically lost any such benefit.

[111] In other words, under the alleged application of the principle of the *alter ego* of India, AAI was somewhat found "*guilty by association*" and would have automatically lost the benefits of State Immunity under the SIA, especially the State Immunity from attachment and execution of its property located in Canada flowing from Section 12 of the SIA.

[112] Counsel for Plaintiffs proposed to the Court that in any event, the First Seizure should nevertheless remain in place pending the determination of AAI's State Immunity.

[113] Respectfully, given the omission of Plaintiffs to respect and abide by the provisions of the SIA insofar as AAI was concerned and to point out to the Authorization Judge the relevant and compelling jurisprudence on that very issue, counsel's proposal is not an acceptable and appropriate outcome.

[114] There was no urgency to proceed *ex parte* as AAI and IATA were not going anywhere. At that time, Plaintiffs had no reasons to believe—nor did they make such allegations—that India would cause AAI to withdraw completely from IATA to avoid any execution against the assets of AAI in satisfaction of the Treaty Awards.

[115] Moreover, counsel's proposal to leave the First Seizure untouched pending the determination of AAI's State Immunity status would compound the serious prejudice already caused to AAI who was deprived of its right to assert beforehand its State Immunity in the present instance, which implied the prior proper service of the relevant legal proceedings and who since November 24, 2021, has been deprived of millions of dollars belonging to it that have been frozen in the hands of IATA as a result of the First Seizure having been authorized irregularly under the present circumstances insofar as AAI was concerned.

[116] Finally, accepting counsel for Plaintiffs proposition that the State Immunity issue could be dealt with later, would clearly go against the following reasoning of the Ontario Court of Appeal in *Schreiber v. Federal Republic of Germany*[41] that a State Immunity claim must be decided immediately on the merits before any further steps are taken in the legal proceedings:

> [16] The "plain and obvious" approach cannot be applied to a motion to dismiss founded on a claim of sovereign immunity. That claim challenges the obligation of the foreign state to submit to the court's jurisdiction. Until that challenge is decided, the action cannot proceed. Unlike a court faced with an allegation that a claim does not disclose a cause of action, **a court faced with an immunity claim cannot withhold its decision until the end of the trial**. **There can be no trial until the court decides whether the foreign state is subject to the court's jurisdiction**.
>
> [17] The *State Immunity Act* clearly contemplates that any claim of sovereign immunity will be decided on its merits before the action proceeds any further. Section 4(2)(c) provides that a state submits to the jurisdiction of a court where it "takes any step in the proceedings before the court". Section 4(3)(b), however, permits the foreign state to appear in the proceedings strictly for the purpose of asserting sovereign immunity without thereby submitting to the court's jurisdiction. Participation beyond a claim of immunity may, however, result in the loss of any immunity to which the foreign state might otherwise have been entitled.
>
> [18] If, on a motion to dismiss based on a sovereign immunity claim, a court was to conclude that it was not "plain and obvious" that the claim should succeed and direct that the matter proceed to trial, the foreign state would be in the untenable

[41] 2001 CanLII 23999 (ON CA).

> position of either not participating in the trial and risking an adverse result or participating in the trial and thereby losing its immunity claim. **The scheme set out in the *State Immunity Act* is workable only if immunity claims are decided on their merits before any further step is taken in the action**.
>
> [19] Although the sovereign immunity cases from this court have not specifically addressed the test to be applied on a motion to dismiss based on a sovereign immunity claim, all have proceeded on the premise that the motions judge was obligated to determine that claim on its merits and all have applied a correctness standard in reviewing the decision of the motions judge: Jaffe v. Miller (1993), 1993 CanLII 8468 (ON CA), 13 O.R. (3d) 745, 103 D.L.R. (4th) 315 (C.A.), affg (1990), 1990 CanLII 6828 (ON SC), 75 O.R. (2d) 133, 73 D.L.R. (4th) 420 (H.C.J.), leave to appeal to S.C.C. refused, [1994] 1 S.C.R. viii; Walker v. Bank of New York Inc. (1994), 1994 CanLII 8712 (ON CA), 16 O.R. (3d) 504, 111 D.L.R. (4th) 186 (C.A.), revg (1993), 1993 CanLII 5467 (ON SC), 15 O.R. (3d) 596, 20 C.P.C. (3d) 210 (Gen. Div.), leave to appeal to S.C.C. refused, [1994] 2 S.C.R. x; United States of America v. Friedland (1999), 1999 CanLII 2432 (ON CA), 46 O.R. (3d) 321, 182 D.L.R. (4th) 614 (C.A.), revg (1998), 1998 CanLII 14864 (ON SC), 40 O.R. (3d) 747, 21 C.P.C. (4th) 89 (Gen. Div.), leave to appeal to S.C.C. granted, [2000] S.C.C.A. No. 91.[42]

[117] The foregoing is also consistent with the Supreme Court of Canada's recent confirmation that, in the context of the recognition of foreign judgments between private parties, jurisdictional issues should always be dealt with first.[43]

[118] It is also consistent with the logic and structure of the SIA.

[119] Pursuant to Section 4(2)(c) and 4(3)(a) of the SIA, "*a foreign state submits to the jurisdiction of the court where it . . . intervenes or takes any step in the proceedings before the court*" except where such intervention or step is taken "*for the purpose of claiming immunity from the jurisdiction of the court*."

[120] If the issue of State Immunity were to be left unresolved, a foreign state would be forced to choose between defending the merits of a progressing action against it and preserving its immunity from the court's jurisdiction.

[121] In closing, the Court emphatically agrees with counsel for AAI that the First Seizure insofar as AAI was concerned perfectly exemplifies the very real harm that can flow from impermissibly leapfrogging the threshold question of State Immunity, particularly by means of an *ex parte* proceeding: AAI has had millions of dollars seized by a court that presumptively lacks jurisdiction over it, further to an *ex parte* application with which AAI has yet to be served, and on the basis of a meaningfully deficient set of case law and other authorities.

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[42] Incidentally, the Court of Appeal in the case of *New Jersey* mentioned above (*Supra*, note 40, par. 25, 26 and 27) cited with approval the Ontario Court of Appeal in *Schreiber*.
[43] *Barer v. Knight Brothers LLC*, 2019 SCC 13, par. 80.

[122] As a final comment, the Court wishes to strongly emphasize that the foregoing analysis and comments should not be interpreted or construed as reflecting in any manner whatsoever the Court's opinion on the merits of the issue of State Immunity raised by AAI.

[123] The present judgment only deals with and affects the legality of the authorization of the First Seizure insofar as AAI is concerned in light of the provisions of the SIA.

[124] Consequently, the Court shall grant the AAI Application to dismiss and shall declare that the First Seizure should not have been heard and granted on an *ex parte* basis, without first disposing of AAI's claim to State Immunity pursuant to the SIA.

[125] With respect to AAI's request that Plaintiffs First Seizure be declared abusive vis-à-vis AAI, it is too early in the process to make such a declaration.

4.4 **The IATA Application to quash**

[126] The outcome of the IATA Application to quash is directly linked to the outcome of the similar Applications filed by Air India and AAI.

[127] The Court shall grant IATA, as Third-Party Garnishee, a *mainlevée* and release of the First Seizure regarding the assets of AAI.

[128] With respect to the Second Seizure affecting the assets of Air India, as previously mentioned, the scope of the seizure shall be reduced by 50% retroactively which will enable IATA to remit to Air India 50% of the funds already seized from the outset on December 21, 2021, and thereafter, until further order from this Court.

[129] Should there remain any issue with IATA concerning seized funds located outside of Canada, the Court shall entertain an Application of IATA on such an issue, if any.

[130] With respect to the request made by IATA that Plaintiffs Seizures be declared abusive, such a declaration is not warranted, for the time being, in the case of the Second Seizure. In any event, it is too early in the process to make such a declaration against Plaintiffs.

4.5 **The provisional execution notwithstanding appeal**

[131] Finally, the Court shall order the provisional execution of the present judgment for the following reasons.

[132] Notwithstanding the alleged behaviour of the Republic of India, the special circumstances surrounding the authorization of the Seizures, the lack of prior service of the proceedings on foreign entities pursuant to the SIA, the fact that regardless of their alleged status as *alter egos* of the Republic of India, the Seizures affect the assets of third parties being nevertheless legal entities distinct of the actual debtor of Plaintiffs under the Treaty Awards, the fact that AAI and Air India are totally foreign to the circumstances that

gave rise to the Treaty Awards and most importantly, in light of the major and drastic effects and consequences of the Seizures on the ongoing operations of AAI and especially those of Air India who claims to be in the incapacity of meeting its ongoing obligations to maintain its normal operations, justify amply the need for the Court to make such an order.

[133] Given the urgency of the situation insofar as AAI and mainly Air India are concerned, there is no doubt in the mind of the Court that the balance of inconvenience overwhelmingly favours AAI and Air India as they stand to suffer far greater prejudice compared to Plaintiffs' prejudice, should the provisional execution not be ordered.

FOR THOSE REASONS, THE COURT:

[134] **DISMISSES** in part the Application of Air India, Ltd. to quash the Second Seizure before judgment by garnishment authorized on December 21, 2021 (the "**Second Seizure**");

[135] Subject to the right of the Mis-en-cause Air India, Ltd., the Third-Party Garnishee, International Air Transport Association (IATA), and the Plaintiffs to seek an additional revision of the scope of the Second Seizure against the assets of Air India, Ltd. should additional facts and circumstances warrant it, **REDUCES** and **LIMITS** henceforth the scope of the Second Seizure against the assets of the Mis-en-cause Air India, Ltd. to **fifty percent (50%)** of all the funds belonging to Air India, Ltd. presently held by IATA pursuant to the Second Seizure (the "**Limited Scope**"), the whole retroactively to December 21, 2021, the date of service of the Notice of execution;

[136] **PERMITS AND AUTHORIZES** the Third-Party Garnishee, International Air Transport Association (IATA), to forthwith release and remit to the Mis-en-cause Air India, Ltd., **fifty percent (50%)** of all the funds due to or belonging to Air India, Ltd. presently held by the International Air Transport Association IATA pursuant to the Second Seizure, the whole retroactively to December 21, 2021, the date of service of the Notice of execution;

[137] For greater certainty, **DECLARES** that henceforth and until further order of this Court, the Limited Scope of the Second Seizure shall continue to affect only **fifty percent (50%)** of all funds due to or belonging to the Mis-en-cause Air India, Ltd. that are received, collected and/or held from time to time on its behalf or for its benefit by the Third-Party Garnishee, International Air Transport Association (IATA);

[138] **DISMISSES** the Application of International Air Transport Association (IATA), the Third-Party Garnishee, to quash the Second Seizure before judgment by garnishment authorized on December 21, 2021;

[139] **TAKES NOTICE** that the Mis-en-cause, Airport Authority of India, is asserting in the present instance State Immunity of jurisdiction and of execution pursuant to the *State Immunity Act*, RCS 1985 c S-18;

[140] **DECLARES** that, in light of the provisions of the *State Immunity Act*, the first *Application for a Seizure Before Judgment by Garnishment* of November 15, 2021, involving the Mis-en-cause, Airport Authority of India, and its assets, should not have been heard on an *ex parte* basis without prior notice being properly served upon the Mis-en-cause and without determining beforehand on the merits the State Immunity status claimed by the Mis-en-cause, Airport Authority of India;

[141] Therefore, **GRANTS** the Application of the Mis-en-cause, Airport Authority of India, to dismiss the First Seizure before judgment by garnishment authorized on November 24, 2021;

[142] **TAKES NOTICE** that the Third-Party Garnishee, International Air Transport Association (IATA), filed negative declarations on December 6, 2021 (**R-2**), on December 16, 2021 (**R-3**) and on January 3, 2022, with respect to the Defendant, Republic of India;

[143] **DISMISSES** the Plaintiffs' Application for a First Seizure before judgment by garnishment of November 24, 2021;

[144] **QUASHES** and **VACATES** the First Seizure before judgment by garnishment authorized and executed on November 24, 2021;

[145] **GRANTS** to the Third-Party Garnishee, International Air Transport Association (IATA), **A FULL and UNCONDITIONAL MAINLEVÉE** and **A FULL RELEASE** from the First Seizure before judgment by garnishment executed by Plaintiffs on November 24, 2021;

[146] **PERMITS AND AUTHORIZES** the Third-Party Garnishee, International Air Transport Association (IATA), to forthwith release and remit to the Mis-en-cause, Airport Authority of India, all assets, funds and money held by the International Air Transport Association (IATA) for the benefit of or belonging to the Mis-en-cause, Airport Authority of India;

[147] **ORDERS** Plaintiffs to effect proper service upon the Mis-en-cause, Airport Authority of India, in accordance with the *State Immunity Act*;

[148] **STAYS** all proceedings against the Mis-en-cause, Airport Authority of India, including, without limitation, any delay applicable to the Notice of Continuance of Proceeding, until proper service;

[149] **DECLARES** that the Application of International Air Transport Association (IATA), the Third-Party Garnishee, to quash the First Seizure before judgment by garnishment authorized on November 24, 2021, becomes moot given the nature of the present judgment rendered in favour of the Mis-en-cause, Airport Authority of India;

[150] **ORDERS** the provisional execution of the present judgment notwithstanding appeal;

[151] **THE WHOLE** with judicial costs to follow suit.

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MICHEL A PINSONNAULT, J.S.C.

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Hearing dates: January 4 and January 5, 2022