COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

Nos.: 500-09-030393-235, 500-09-029899-226, 500-09-700124-225
(500-11-060766-223, formerly 500-17-119144-213)

DATE: December 4, 2024

CORAM: THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.
BENOÎT MOORE, J.A.
SOPHIE LAVALLÉE, J.A.

No. 500-09-030393-235

THE REPUBLIC OF INDIA
APPELLANT – Defendant
v.

CCDM HOLDINGS, LLC
DEVAS EMPLOYEES FUND US, LLC
TELCOM DEVAS, LLC
RESPONDENTS – Plaintiffs in continuance of proceedings
and
AIRPORT AUTHORITY OF INDIA
AIR INDIA LIMITED
IMPLEADED PARTIES – Impleaded parties
and
INTERNATIONAL AIR TRANSPORT ASSOCIATION
IMPLEADED PARTY – Third-party garnishee

No. 500-09-029899-226

CCDM HOLDINGS, LLC

DEVAS EMPLOYEES FUND US, LLC
TELCOM DEVAS, LLC
APPELLANTS – Plaintiffs in continuance of proceedings
v.

AIRPORT AUTHORITY OF INDIA
RESPONDENTS – Impleaded party
and
INTERNATIONAL AIR TRANSPORT ASSOCIATION
IMPLEADED PARTY – Third-party garnishee
and
THE REPUBLIC OF INDIA
IMPLEADED PARTY – Defendant
and
AIR INDIA LIMITED
IMPLEADED PARTY – Impleaded party

No 500-09-700124-225

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

AIRPORT AUTHORITY OF INDIA
RESPONDENTS – Impleaded party
and
INTERNATIONAL AIR TRANSPORT ASSOCIATION
IMPLEADED PARTY – Third-party garnishee
and
THE REPUBLIC OF INDIA
IMPLEADED PARTY – Defendant
and
AIR INDIA LIMITED
IMPLEADED PARTY – Impleaded party

TABLE OF CONTENTS

JUDGMENT

[1] Three appeals were joined for a hearing on as many judgments rendered in 2022 by the Honourable Michel A. Pinsonnault of the Superior Court of Québec, District of Montreal, in connection with an application for recognition and enforcement of two foreign arbitral awards. These arbitral awards order the Republic of India ("**India**") to pay US$111 million to the investors and shareholders of Devas Multimedia Services ("**Devas**"), i.e., CC/DEVAS (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited, domiciled in the Republic of Mauritius (collectively, "**Devas Investors and Shareholders**"). The proceedings brought by the Devas Investors and Shareholders were continued by CCDM Holdings LLC, Devas Employees Fund US LLC and Telcom Devas LLC (collectively, "**CCDM/Devas**").

A. Common background

[2] These two arbitral awards, rendered by the Permanent Court of Arbitration sitting in The Hague ("**PCA**"), arose from a trade dispute between Devas and Antrix Corporation Limited ("**Antrix**"), a government corporation of India.

[3] The first award, made on July 25, 2016 ("**Award on the Merits**"),[1] found that India was responsible for expropriating Devas's investments, in contravention of the international commitments set out under the bilateral investment treaty concluded between India and the Republic of Mauritius aiming to protect and promote investments in their respective territories ("**Treaty**").[2]

[4] The second award, made on October 13, 2020, set the amount that India would have to pay at US$111 million ("**Award on the Quantum**").[3]

[5] As yet, India has not paid this amount and has put a great deal of effort into having these awards set aside or varied, thus leading the Devas Investors and Shareholders to resort to recognition and enforcement measures in several countries, including the Netherlands, France, Belgium, Luxembourg and the United Kingdom.

---

1 Permanent Court of Arbitration, case number 2013-09, Award on Jurisdiction and Merits, July 25, 2016.

2 *Agreement between the Republic of India and The Republic of Mauritius for the Promotion and Reciprocal Protection of Investments*, September 4, 1998 [Treaty].

3 Permanent Court of Arbitration, case number 2013-09, Award on the Quantum, October 13, 2020.

[6] It was in this context that in November 2021, the Devas Investors and Shareholders filed an application for recognition and enforcement of the two arbitral awards before the Superior Court of Québec and requested an initial notice of enforcement of a seizure before judgment by garnishment against the International Air Transport Association ("**IATA**"), the organization responsible for collecting airport fees and remitting them to the authorities or airlines. The Devas Investors and Shareholders thereby sought to seize all sums due or property belonging to the Airport Authority of India ("**AAI**"), the state agency responsible for managing Indian airports and airspace. They took the same steps the following month to seize from IATA the sums due or property belonging to the government corporation and official Indian airline, Air India.

[7] At this stage, it is appropriate to detail the origin of the dispute between Devas and Antrix, as well as the dispute between the Devas Investors and Shareholders and India. In the wake of the Treaty, on January 28, 2005, Devas entered into an agreement with Antrix, the "marketing arm" of the Indian Department of Space ("**DOS**") and the Indian Space Research Organisation ("**ISRO**"). This agreement provided that Antrix would lease part of the 2500-2690 Mhz S-band spectrum capacity to Devas and provide it with two satellites to be built, launched and operated by ISRO, while Devas would install antennas and transponders to provide wireless service across India, specifically wireless Internet service and audio and video services ("**Devas Agreement**").[4]

[8] The Devas Agreement, governed by the Treaty, required an initial payment by the Devas Investors and Shareholders of US$40 million.[5] To ensure the construction, launch and operation of the satellites, Antrix had to obtain a series of authorizations from the Government of India. On December 1, 2005, India authorized the manufacture and launch of satellites essential to the realization of the Devas Agreement. On February 2, 2006, Antrix confirmed in writing to Devas that it had obtained all the required authorizations, so that the Devas Agreement was now in effect.

[9] However, in September 2007, Indian military and paramilitary agencies questioned the accessibility of the spectrum for military needs, if the Government were to make it available for commercial purposes. Starting in 2009, India considered terminating the Devas Agreement, which led to the delivery of the first satellite, initially scheduled for June 2009, being postponed until late 2009 and then until September 2010. Meanwhile, the Devas Investors and Shareholders continued to pay the amounts required under the Devas Agreement, injecting over US$25 million into Devas through share purchases.

[10] On April 23, 2010, the Indian Ministry of Defence sent a letter to ISRO informing it that its spectrum capacity needs would nearly double between 2017 and 2022. As of May 2010, while rumours were circulating about the Devas Agreement and the media

---

4 *Agreement for the Lease of Space Segment Capacity on ISRO/ANTRIX S-Band Spacecraft by Devas Multimedia PVT. Ltd*, January 28, 2005 [Devas Agreement].

5 US$20 million for each of the two satellites.

were demanding that the Indian government cancel it, several meetings between the Devas Investors and Shareholders and various government entities took place. The viability of the Devas Agreement or the allocation of part of the spectrum to Devas were never called into question.

[11] On July 12, 2010, the Solicitor General of India prepared an internal memorandum of opinion confirming the lawfulness of the grounds for terminating the Devas Agreement, including applying the force majeure clause (11 b.). A few days later, the Space Commission of India passed a resolution to terminate the Devas Agreement.

[12] On January 9, 2011, the Secretary of the DOS, mandated by the Space Commission, submitted a report arguing that the spectrum capacity granted to Devas would prevent the needs of the DOS and ISRO from being met and that a consultation with the Indian Satellite Coordination Committee was necessary before the Devas Agreement came to an end.

[13] On February 8, 2011, the Space Commission of India announced in a press conference its decision to terminate the Devas Agreement. The following day, India set up a committee to conduct a technical, commercial, procedural and financial review, based on various reports that had already been published. On February 16, 2011, a memorandum was sent to the National Security Council of India, tasking it with prioritizing the country's strategic needs, including societal needs, highlighting requests from various government entities for a share of the spectrum. On February 17, 2011, the Council published a statement announcing its decision to terminate the Devas Agreement and on February 23, 2011, the DOS directed Antrix to immediately take the necessary steps to terminate it.

[14] On February 25, 2011, Antrix notified Devas of its decision to terminate the Devas Agreement on the grounds of force majeure, thus leading to the arbitration process provided for in the Devas Agreement between Devas and Antrix ("**Antrix Arbitration**"), as well as the arbitration process between the Devas Investors and Shareholders and India, as the entity responsible for the decision to terminate the agreement ("**India Arbitration**").

[15] On September 14, 2015, an arbitral tribunal constituted under the aegis of the International Chamber of Commerce's Court of Arbitration rejected the defence of force majeure raised in the Antrix Arbitration and ordered Antrix to pay Devas damages of US$562.5 million, with an annual interest rate of 18% ("**ICC Award**").[6]

[6] ICC International Court of Arbitration, *Devas Multimedia Private Limited (India) vs. Antrix Corporation Limited (India)*, Case No. 18051/CYK, September 14, 2015 [ICC Award].

[16] On July 25, 2016, as part of the India Arbitration, a tribunal constituted under the aegis of the PCA ("**PCA Arbitral Tribunal**") determined that India was liable for illegally expropriating Devas and violating its obligation of fair treatment.[7]

[17] As of that date, numerous claims were made on both sides before the courts of various jurisdictions to contest and/or have this award recognized and enforced. India also undertook criminal proceedings against some Indian government officials and Devas representatives, accusing them of violating some of the mandatory rules of the Devas Agreement.

[18] On October 27, 2016, India filed an application with The Hague District Court to have the Award on the Merits set aside on the grounds that the arbitral tribunal had no jurisdiction over it and that it had violated its right to be heard.

[19] On December 21, 2016, the PCA Arbitral Tribunal dismissed, on an interim basis, an application from India to suspend the quantum determination process in the India Arbitration because of allegations of fraud still to be decided by the Indian courts. It found that the allegations of fraud were directed at Devas and not its investors and that there was no evidence to support the idea of fraudulent behaviour on the part of the investors.[8]

[20] On December 13, 2017, as part of another arbitration, this time between India and Deutsche Telekom AG ("**Telekom Arbitration**") concerning an entirely different transaction, India was found liable of breaching its obligation of fair and equitable treatment under the bilateral investment treaty it had entered into with Germany.[9]

[21] On November 14, 2018, The Hague District Court dismissed the application to have the Award on the Merits set aside. On February 12, 2019, India appealed before The Hague Court of Appeal, which dismissed that appeal in a judgment rendered on February 16, 2021.[10]

[22] Meanwhile, on May 25, 2020, an award on the quantum was rendered in the Telekom Arbitration in Germany. This award ordered India to pay US$93.3 million and arbitration costs.[11]

---

7 Award on the Merits, *supra*, at note 1.

8 Permanent Court of Arbitration, case number 2013-09, Procedural Order No. 7, December 21, 2016. [PCA order of December 2016]

9 Permanent Court of Arbitration, case number 2014-10, Interim Award, December 13, 2017.

10 Based on the translations of these judgments, which were filed in the record. CCDM/Devas pointed out that the Dutch Supreme Court has since dismissed the appeal from the judgment of The Hague Court of Appeal, quashing the Award on the merits, such that the judgment should now be considered final. However, this foreign judgment, which was rendered after the appeal was filed (February 6, 2023), is not in the record.

11 Permanent Court of Arbitration, case number 2014-10, Interim Award, December 13, 2017.

[23] On October 13, 2020, India was also ordered to pay the Devas Investors and Shareholders US$111 million in damages to compensate for the unlawful and unjustified expropriation of 40% of their investments in that state.[12]

[24] Contemporaneously, Devas and certain members of its board of directors were accused of additional financial crimes and were condemned to pay significant sums.

[25] On November 4, 2020, the Supreme Court of India ("**SCI**") examined the territorial jurisdiction of the Indian courts seized of the appeals brought by the parties in response to the ICC Award. It suspended the application of this award pending a judgment on the grounds raised.[13] That same day, passed by order in council, India amended the *Arbitration and Conciliation Act*, *1996* to compel the court to suspend arbitral awards when it is of the opinion, on a *prima facie* basis, that the contract that is the subject of the judgment or the decision-making process are tainted by fraud or corruption.[14]

[26] On January 18, 2021, India's Ministry of Corporate Affairs authorized Antrix to begin dissolution and liquidation proceedings against Devas. On January 18, 2021, Antrix filed a petition to do so before the National Company Law Tribunal ("**NCLT**"), which ordered the suspension of Devas's executive committee the next day and appointed a provisional liquidator reporting to the Indian Ministry of Corporate Affairs.[15] In the following days, this liquidator withdrew from all attorneys acting on behalf of Devas their mandate to act in the various international proceedings for the recognition and enforcement of the arbitral awards. On February 24, 2021, faced with the provisional liquidator's actions and wanting to maintain their legal representation in American cases, the Devas Investors and Shareholders asked the American courts to order the provisional liquidator to refrain from settling with Antrix with regard to the ICC Award.[16]

[27] On February 5, 2021, India filed an originating application before The Hague District Court to have the Award on the Quantum set aside; this application was dismissed on February 16, 2021, as was the appeal from the Award on the Merits.[17]

---

12 Award on the Quantum, *supra*, at note 3.

13 *Devas Multimedia Private Limited v. Antrix Corporation Limited*, Supreme Court of India, IA No. 107899/2020, November 4, 2020.

14 *Arbitration and Conciliation (Amendment) Ordinance, 2020* (India), Act No. 14 of 2020, November 4, 2020.

15 *Antrix Corporation Limited v. Devas Multimedia PVT Ltd & Anr*, NCLT, CP No. 06/BB/2021, January 17, 2021.

16 *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.,* No. C-18-1360 TSZ, U.S. Dist. Ct, February 24, 2021 (United States).

17 Based on the translations of these judgments that were filed in the record.

[28] On May 25, 2021, the NCLT made a final liquidation order against Devas,[18] which was subsequently confirmed by the National Company Law Appellate Tribunal on June 7, 2021.[19]

[29] On January 17, 2022, the SCI dismissed Devas's appeal from the liquidation and final dissolution orders made by the NCLT, confirming that its liquidation was justified since it had been constituted fraudulently and for unlawful purposes ("**SCI Judgment**").[20]

[30] On April 14, 2022, based on the SCI Judgment, India filed an application with The Hague Court of Appeal requesting that the arbitral awards rendered against India be set aside. This application was dismissed on February 6, 2023.

[31] Meanwhile, on November 15, 2021, the Devas Investors and Shareholders filed an application for recognition and enforcement of foreign arbitration awards (Award on the Merits and Award on the Quantum) before the Quebec Superior Court as well as a first application for seizure before judgment by garnishment for the sums held by IATA belonging to AAI. This last step gave rise to a statement by IATA confirming that it held a sum of US$6,819,613 belonging to AAI.

[32] On November 24, 2021, the Devas Investors and Shareholders were authorized *ex parte* to proceed with a seizure before judgment by garnishment of the funds held by IATA for AAI ("**Granosik Judgment**").[21] This seizure was followed by a second application for seizure before judgment by garnishment, also granted *ex parte* on December 21, 2021, this time targeting funds held by IATA but belonging to Air India ("**Buchholz Judgment**").[22] This led to a new affidavit from IATA in which it claimed that on December 21, 2021, it held US$17,306,658 on behalf of Air India and US$12,767,745 on behalf of AAI.

[33] This was followed by applications from AAI, Air India and IATA to quash the seizures and notification by CCDM/Devas of a notice of continuance regarding the proceeding of the Devas Investors and Shareholders. These applications were heard on January 4 and 5, 2022, leading to the judgment rendered by Pinsonnault, J. on January 8, 2022 ("**Judgment Quashing the Seizure**"),[23] dismissing Air India's application to

---

18 *Antrix Corporation Limited v. Devas Multimedia Private Limited*, NCLT, C.P. No. 06/BB/2021, May 25, 2021.

19 *Devas Multimedia Private Limited v. Antrix Corporation Limited*, NCLT Appellate Jurisdiction, Company Appeal (AT) (CH) No. 17 of 2021, June 7, 2021.

20 *Devas Multimedia Private Limited v. Antrix Corporation Limited & Anr.*, C.A. No. 5766/2021, Supreme Court of India, January 17, 2022.

21 *CC/Devas (Mauritius) Ltd. c. Republic of India*, C.S. Montréal, No. 500-17-119144-213, November 24, 2021, Granosik, J. [Granosik Judgment].

22 *CC/Devas (Mauritius) Ltd. v. Republic of India*, (December 21, 2021), Montreal, 500-17-119144-213 (Sup. Ct.), Buchholz, J.

23 *CC/Devas (Mauritius) Ltd. c. Republic of India*, 2022 QCCS 7 [Judgment Quashing the Seizure].

quash the seizure before judgment by garnishment ordered with regard to its property held by IATA but reducing its scope by 50%, and quashing the seizure by garnishment ordered on November 24, 2021, with regard to AAI's assets. The Judgment Quashing the Seizure is included in the second appeal: leave to appeal was granted to CCDM/Devas, with an order staying the provisional execution notwithstanding appeal ordered by the judge.[24] It should be noted that, as part of a separate case, Air India and CCDM/Devas obtained leave to appeal this same judgment regarding the outcome of the second seizure.[25] That appeal has already been decided and the order to seize Air India property has been quashed ("**Air India Judgment**").[26]

[34] On May 5, 2022, in response to the seizures before judgment by garnishment ordered in the file, a bill was tabled at the National Assembly of Québec that led to the adoption of Bill 206, *An Act respecting the International Air Transport Association* ("***IATA Act***"*),* the following month, i.e., on June 1, 2022. The *Act* states that "[t]his Act has effect from May 5, 2022" and that the sums held by IATA for the benefit of foreign governments or organizations of foreign governments are exempt from seizure.[27]

[35] On June 27, 2022, AAI filed a new application to quash the seizure before judgment by garnishment dated November 24, 2021, stating that the *IATA Act* had the effect of retroactively exempting from seizure any money held by IATA in relation to a "participant in its financial services", including the sums held and seized in November 2021.

[36] On September 6, 2022, Pinsonnault, J. rendered a judgment on the scope of the *IATA Act* ("**Judgment on the application of the IATA Act**").[28] He concluded that it was up to the Court of Appeal to rule on the validity of the seizures before judgment by garnishment ordered in November and December 2021, insofar as two appeals were already before that Court in connection with these seizures, in regards to which he considered himself to be *functus ex officio*. He acknowledged, however, that he would have to rule on the alternative declaratory conclusion relating to the sums received after the *IATA Act* came into force on May 5, 2022, since that issue had not been decided.[29] He concluded that the sums paid to IATA after May 5, 2022, were exempt from seizure, notwithstanding the orders of November 24, 2021, and that, because that seizure consisted of successive seizures, the clear wording of the *IATA Act* precluded any

---

24 *CCDM Holdings c. Airport Authority of India*, 2022 QCCA 625, Marcotte, J.A. [Marcotte Judgment].
25 *Air India Ltd c. CC/Devas (Mauritius) Ltd.*, 2022 QCCA 218, Baudouin J.A.
26 *Air India, Ltd* c*. CC/Devas (Mauritius) Ltd*, 2022 QCCA 1264, leave to appeal to the SCC refused, 40462 (May 11, 2023) [Air India Judgment].
27 Bill 206 (private), *An Act respecting the International Air Transport Association*, 2nd Sess, 42nd Leg, Quebec, 2022 [*IATA Act*].
28 *CC/Devas (Mauritius) Ltd. v. Republic of India*, 2022 QCCS 3272 [Judgment on the application of the *IATA Act*].
29 *Ibid.* at paras 20 and 50.

enforcement after May 5, 2022.[30] That judgment is the subject of the third and final appeal.

[37] The filing of the application for recognition and enforcement of the two arbitral awards in November 2021 was followed, in January 2022, by the filing of a letter and certificate from the Deputy Director of Global Affairs Canada certifying that India is a foreign state within the meaning of section 14 of the *State Immunity Act* ("***SIA***").[31]

[38] On March 16, 2022, India filed an application *de bene esse* to dismiss the application for recognition and enforcement of arbitral awards, on the grounds that it benefits from a strong presumption of immunity under sections 3 and 6 of the *SIA*. In a judgment rendered on December 23, 2022, Pinsonnault, J. dismissed this application and stated that India does not benefit from immunity under the *SIA* by virtue of the application of the commercial activity exception and the waiver exception ("**Judgment on Immunity**").[32] This judgment is the subject of the first appeal. Leave to appeal from that judgment was granted by a judge of this Court with a suretyship of $20,000 to guarantee the payment of the legal costs.[33]

[39] The three appeals should therefore be addressed in the order designated in the proceedings and arguments rather than in the chronological order of the judgments under appeal. Accordingly, this Court will examine the grounds raised with regard to the Judgment on Immunity, then the appeal from the Judgment Quashing the Seizure, and lastly the appeal from the Judgment on the application of the *IATA Act*.

B. The Republic of India c. CCDM Holdings LLC. et al. (500-09-030393-235)

[40] In the first case, India appealed from the judgment[34] dismissing its application to dismiss on the basis of state immunity, which was intended as a bar to the application for recognition and enforcement of the two arbitral awards.[35]

1. Judgment on Immunity

[41] On December 23, 2022, Pinsonnault, J. dismissed India's application to dismiss. As a foreign state within the meaning of section 2 of *the SIA*, India benefits from the strong presumption of immunity set out under section 3(1) of the *SIA*. Pinsonnault, J. determined that it was incumbent upon CCDM/Devas to rebut this presumption and that they had succeeded in doing so by rightly relying on the commercial activity exception and the waiver exception. He noted that the Treaty includes the following obligations:

---

30 *Ibid*. at paras. 62–78.
31 *State Immunity Act* (R.S.C., 1985, c. S-18) [*SIA*].
32 *CC/Devas (Mauritius) Ltd c. Republic of India,* 2022 QCCS 4785 [Judgment on Immunity].
33 *Republic of India c. CCDM Holdings,* 2023 QCCA 327, Vauclair, J.A. [Vauclair Judgment].
34 Judgment on Immunity, *supra*, at note 32.
35 Award on the Merits, *supra*, at note 1; Award on the Quantum, *supra*, at note 3.

- 4(1): obligation of fair and equitable treatment;
- 6(1): obligation not to expropriate or nationalize investments;
- 6(3): positive obligation to compensate investors to ensure fair and equitable compensation;
- 8(1) and (2): obligation to use the alternative dispute settlement mechanism that was implemented.[36]

[42] He then concluded that the commercial activity exception applied in this case and that India did not benefit from any immunity since its activities are commercial in nature when analyzed in context:[37]

- Antrix is the marketing arm of India;
- The arbitral awards are directly related to a decision India made not to fulfil its commitments under the Treaty, which aims to encourage foreign investment and is clearly a trade agreement;
- The Devas Agreement allows for Antrix to lease part of the spectrum capacity that India was granted by the United Nations;
- The Devas Agreement is undeniably commercial in scope;
- By investing in Devas, the Devas Investors and Shareholders financed Indian trade activities;
- India's decisions led to the termination of the Devas Agreement, a commercial contract.[38]

[43] The judge also relied on specific findings of the PCA Arbitral Tribunal to conclude that the relationship between Devas and India was strictly commercial, specifically that:

- India decided to unilaterally terminate the Devas Agreement;
- The court seized of the Antrix Arbitration dismissed Antrix's argument that it terminated the Devas Agreement on the ground of force majeure;
- India's decision, having led to termination by Antrix, prevented a trade agreement from being carried out;

---

36 Judgment on Immunity, *supra*, at note 32, at paras 39–42.
37 *Ibid*. at paras 65–88.
38 *Ibid*. at paras 89–108.

- While 60% of the spectrum capacity was expropriated for purposes in the public interest, 40% was expropriated without such purpose;

- The estimated fair and equitable compensation for the expropriation of 40% was estimated at $111 million.[39]

[44] Pinsonnault, J. accordingly dismissed the argument that the termination of the Devas Agreement was merely India exercising its sovereign power. In his opinion, by entering into the Treaty, India agreed to conduct commercial activities. Since the Devas Agreement is the mechanism by which Devas Investors and Shareholders make their investments within the meaning of the Treaty, India's actions thereupon took place within a commercial context. Consequently, the commercial activity exception had to be applied and India could not benefit from immunity as a sovereign state within the meaning of the *SIA.*[40]

[45] Although he found that the commercial activity exception applied, which, in his opinion, was sufficient to declare that India did not have State immunity, the judge nevertheless examined the waiver exception.

[46] He concluded that this exception applied since by agreeing to submit to the arbitration process and to an award of the PCA Arbitral Tribunal, India also agreed that said award could be enforced. He based this conclusion on his interpretation of the wording of section 4(2)(a) of the *SIA*, comparing it in particular with the wording of other provisions of the *SIA*. He considered that an explicit waiver was not required any more than a written waiver, since the legislator expressly considered other forms of waiver.[41]

[47] According to the judge, India committing to an arbitration process was a clear and unequivocal waiver of its immunity. He noted that Canadian case law recognizes that ratifying bilateral treaties that provide for arbitration and agreeing to participate in the arbitration process are forms of waiving immunity.[42]

[48] He considered that this conclusion was not only consistent with the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("***New York Convention***"),[43] which is incorporated into Canadian[44] and Quebec law[45] and ratified by

---

39 *Ibid*. at paras 109–125.

40 *Ibid*. at paras 125–143. "The activity at stake herein is predominantly commercial: the ROI breached a commercial treaty by annulling a commercial contract without offering a *fair and equitable compensation* to the investors being the Plaintiffs".

41 *Ibid*. at paras 153–157.

42 *Ibid*. at paras 158–163.

43 *United Nations Convention on Foreign Arbitral Awards*, June 10, 1958, 330 UNTS 28 (coming into force in Canada on August 10, 1986) [*New York Convention*].

44 *United Nations Foreign Arbitral Awards Convention Act*, R.S.C., 1985, c. 16 (2nd Supp.).

India,[46] but also with the case law of other common law states, such as the United States and Australia, and even that of the Indian courts. Thus, in its capacity as a signatory to the *New York Convention*, India could not consider that it had immunity from the arbitration process to which it knowingly agreed to submit.[47]

[49] The judge then examined India's alternative argument, based on the SCI Judgment. He partially rejected CCDM/Devas's objection to the filing and use of the SCI Judgment to establish that the Devas Agreement was tainted by fraud and thereby rebut the waiver exception raised by CCDM/Devas. He authorized the filing of the judgment, but solely to prove the fact that the SCI affirmed the legality of the Devas liquidation process in India in the circumstances more fully set out in that judgment. The judge also pointed out that the SCI Judgment could be of some relevance in the context of an eventual hearing on the merits.[48]

[50] At the same time, the judge dismissed India's claims based on the SCI Judgment stating that the Devas Agreement was tainted by fraud and consent to the arbitration process was thereby vitiated, which would preclude the application of the immunity waiver exception. In his opinion, the SCI Judgment does not have the authority of *res judicata* in Quebec. He explained that both the parties and the cause of action are different from those in the arbitral awards, and that the SCI Judgment is irrelevant in this case insofar as the issues addressed therein are unrelated to the issue of immunity. In his opinion, India was seeking to contradict the arbitral awards *ex post facto*, notwithstanding the fact that the PCA Arbitral Tribunal ruled out both the inadmissibility raised and the effect of the allegations of fraud arising from the SCI Judgment, by refusing to suspend arbitration pending the SCI Judgment.[49] He added that India never raised the argument of fraud in arbitration, asserting it only before the SCI.

[51] In the end, Pinsonnault, J. concluded that the argument of the rebuttable presumption of validity of the SCI Judgment was of no use in this case, insofar as India invoked that decision as evidence without requesting that it be recognized in Quebec.

[52] Lastly, with regard to the semi-authentic nature of the certified SCI Judgment, he specified that the facts set out in a semi-authentic act are not binding on Quebec courts and that India could not therefore rely on the SCI Judgment to rule out the application of the waiver exception or of the Treaty itself.[50]

---

45 Art. 652 para 3 CCP. See also Luc Chamberland, ed, *Le grand collectif – Code de procédure civile, Commentaires et annotations*, 8th ed, vol. 2 "Articles 391 à 836" (Montreal: Yvon Blais, 2023) at art. 652, Pierre J. Dalphond.

46 *The Foreign Awards (Recognition And Enforcement) Act*, *1961* (India), Act No. 45 of 1961, November 30, 1961.

47 Judgment on Immunity, *supra*, at note 32, paras 164–174.

48 *Ibid*. at paras 187–259.

49 *Ibid*. at paras 185–226.

50 *Ibid*. at paras 227–251.

2. Grounds of appeal

[53] On appeal, India argued that the judge made a palpable and overriding error in concluding that the commercial activity exception was applicable in this case. This error resulted from his overly broad examination of the context for the decision to terminate the Devas Agreement. The heart of the matter, India argued, was this decision to terminate the Agreement, and it was on the basis of this decision alone, taken separately, that the commercial activity exception should have been examined. Consequently, since the decision to terminate the Devas Agreement was based on national interest considerations, as acknowledged by the PCA Arbitral Tribunal, this would justify excluding the application of the commercial activity exception.

[54] India also argued that the judge erred in concluding that agreeing to submit to arbitration, in accordance with its international commitments under the *New York Convention*, constituted an express waiver of its immunity within the meaning of the *SIA*. According to India, the legislator specifies in section 4(2)(a) that an explicit waiver is required, whereas section 12 of the same *Act* states that a waiver may be implied. It follows that the mere fact of submitting to a court cannot be characterized as an explicit waiver.

[55] Finally, India argued on an alternative basis that even if the waiver exception were to be accepted, the waiver must be considered null since the SCI concluded that the Devas Agreement—which was the basis for the two arbitral awards that CCDM/Devas were seeking to have recognized and enforced before the Quebec courts—was entered into fraudulently.

[56] CCDM/Devas argued that the judge was right to recognize the applicability of the commercial activity exception (section 5 of the *SIA*). According to CCDM/Devas, the judge followed the analytical framework proposed by La Forest, J. in *Re Canada Labour Code,*[51] in accordance with the contextual approach recommended therein, which requires that the activity as a whole and its context be considered. The judge was justified in analyzing the entire decision-making process that led to the conclusion of the Devas Agreement and even the actions subsequent thereto.

[57] CCDM/Devas also argued that the judge was correct in concluding that the immunity waiver exception (section 4(2)(a) *SIA*) applied. Indeed, two elements taken together, namely India's ratification of the *New York Convention* and India's acceptance that the dispute be arbitrated under the Treaty in accordance with the rules of the United Nations Commission on International Trade Law ("**UNCITRAL**"), amounted to an explicit waiver.

---

[51] *Re Canada Labour Code*, [1992] 2 SCR 50, at 73. See also *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, at para 33 [*Kuwait Airways* (SCC)]; *Homburg v. Stichting Autoriteit Financiele Markten*, 2016 NSSC 317 (CanLII), at para 40.

[58] As stated above, India maintained that the judge erred in concluding that these two exceptions apply. It first addressed the commercial activity exception, then the explicit waiver exception, in the same order as the trial judge. However, this Court is of the opinion that it is better to first consider whether the file shows that India has expressly waived its immunity under subsection 4(2)(a) *SIA*. A positive response would make it possible to find that the exception provided for in subsection 4(2)(a) applies, without having to examine the commercial activity exception set out under section 5 of the *SIA*. In any event, it should be noted that the commercial activity exception under section 5 of the *SIA* may be conceptually considered as a form of implicit waiver of immunity, as suggested by Fox and Webb:[52]

> Even express consent as waiver of immunity by the foreign State when reduced to legislative form by appearance in court or the taking of a step in the proceedings involves some extension beyond a statement in words that the national court may proceed. A bolder use of implied waiver was developed so as to result in loss of immunity from the State's voluntary undertaking of a business of the same kind as carried on by a private person. Here, three legal techniques are combined: consent of the State to the local jurisdiction construed by its engaging in a transaction on that basis; conduct of a business whose commerciality distinguishes it from the more usual activity of a State for the public benefit; and engaging in that business with and in the manner of a private person, the private law nature of the transaction engaged in supplying additional evidence that the State voluntarily intended to subject itself to the national court. Thus introduced by way of implied waiver, we find the two tests most frequently employed to determine the non-immunity of a transaction: private law character and commerciality.
>
> [References omitted]

[59] Moreover, as our colleague Bachand, J.A. pointed out when he was a professor, since the commercial activity exception is likely to make the outcome of international arbitration dependent on purely political considerations,[53] the waiver exception is the most promising avenue for rebutting the presumption of immunity. He noted that the very essence of international arbitration entails that arbitral and national courts act in tandem to give full effect to arbitral awards:

> Consent to final and binding arbitration constitutes, first and foremost, an explicit submission to the jurisdiction of a private tribunal – an explicit submission which, in the case of a foreign state, necessarily amounts to a waiver of jurisdictional immunity in connection with the arbitral proceedings themselves. But by consenting to arbitration, a sovereign state does not only submit to the tribunal's jurisdiction, because what it truly *submits* to in an *explicit* manner is an

---

[52] Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd ed, (Oxford: Oxford University Press, 2013) at 403.

[53] Frédéric Bachand, "Overcoming Immunity–Based Objections to the Recognition and Enforcement in Canada of Investor–State Awards" (2009) 26:1 *Journal of International Arbitration* 59 at 73 and 75.

> "international system of justice" in which *courts* also have an essential and integral role to play. Indeed, arbitration, both domestic and international, is best characterized as a hybrid process in which adjudicative power is shared between arbitrators and judges: while arbitral tribunals are given an exclusive power to decide the merits as well as extensive powers over procedural issues and the management of arbitral proceedings, courts exercise crucial functions aimed at either assisting the arbitral process to ensure its effectiveness, or controlling the legality of the process. Conceiving consent to arbitration as an explicit submission to nothing more than the tribunal's power fundamentally misconceives the nature and inherent characteristics of the process.[54]
>
> [References omitted; italics in the original]

[60] This Court is therefore of the opinion that it is appropriate to consider whether the waiver exception under section 4(2)(a) of the *SIA* applies as the trial judge concluded, which would suffice, if applicable, to dismiss India's claim that it benefits from state immunity.

3. Applicable legal principles

3.1 Relevant provisions of the *SIA*

[61] Under section 3(1) of the *SIA*, foreign states enjoy immunity from the jurisdiction of any court in Canada. Section 4 sets out both the circumstances under which states waive immunity and the exceptions to this rule:

State immunity	**Immunité de juridiction**
3 (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	**3 (1)** Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.
Court to give effect to immunity	**Immunité reconnue d'office**
(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.	**(2)** Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance.

[54] *Ibid.* at 83.

Immunity waived

4 (1) A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).

State submits to jurisdiction

(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it

(a) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;

(b) initiates the proceedings in the court; or

(c) intervenes or takes any step in the proceedings before the court.

Exception

(3) Paragraph (2)(c) does not apply to

(a) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or

(b) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained

Renonciation à l'immunité

4 (1) L'État étranger qui se soumet à la juridiction du tribunal selon les modalités prévues aux paragraphes (2) ou (4), renonce à l'immunité de juridiction visée au paragraphe 3(1).

Soumission à la juridiction du tribunal

(2) Se soumet à la juridiction du tribunal l'État étranger qui :

a) le fait de manière expresse par écrit ou autrement, avant l'introduction de l'instance ou en cours d'instance;

b) introduit une instance devant le tribunal;

c) intervient ou fait un acte de procédure dans l'instance.

Exception

(3) L'alinéa (2)c) ne s'applique pas dans les cas où :

a) l'intervention ou l'acte de procédure a pour objet d'invoquer l'immunité de juridiction;

b) l'État étranger a agi dans l'instance sans connaître les faits qui lui donnaient droit à l'immunité de juridiction, ces faits n'ayant pu être suffisamment établis auparavant, et il

before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

Third party proceedings and counter-claims

(4) A foreign state that initiates proceedings in a court or that intervenes or takes any step in proceedings before a court, other than an intervention or step to which paragraph (2)(c) does not apply, submits to the jurisdiction of the court in respect of any third party proceedings that arise, or counter-claim that arises, out of the subject-matter of the proceedings initiated by the state or in which the state has so intervened or taken a step.

Appeal and review

(5) Where, in any proceedings before a court, a foreign state submits to the jurisdiction of the court in accordance with subsection (2) or (4), that submission is deemed to be a submission by the state to the jurisdiction of such one or more courts by which those proceedings may, in whole or in part, subsequently be considered on appeal or in the exercise of supervisory jurisdiction.

a invoqué l'immunité aussitôt que possible après l'établissement des faits.

Demandes incidentes

(4) La soumission à la juridiction d'un tribunal qui s'opère soit par l'introduction d'une instance soit par l'intervention ou l'acte de procédure qui ne sont pas soustraits à l'application de l'alinéa (2)c), vaut pour les interventions de tiers et les demandes reconventionnelles découlant de l'objet de cette instance.

Appels

(5) La soumission à la juridiction d'un tribunal intervenue selon les modalités prévues aux paragraphes (2) ou (4) vaut également pour les tribunaux supérieurs devant lesquels l'instance pourra être portée en totalité ou en partie par voie d'appel ou d'exercice du pouvoir de contrôle.

3.2 The *New York Convention* and the Treaty

[62] The *New York Convention* was concluded in New York on June 10, 1958, and came into force on June 7, 1959. Its purpose is to give full effect to arbitration agreements (article II (3) of the *New York Convention*).

[63] India ratified it on July 13, 1960, and Canada acceded to it on May 12, 1986. The relevant provisions are worded as follows:

Article I **Article premier** La présente

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake

Convention s’applique à la reconnaissance et à l’exécution des sentences arbitrales rendues sur le territoire d’un État autre que celui où la reconnaissance et l’exécution des sentences sont demandées, et issues de différends entre personnes physiques ou morales. Elle s’applique également aux sentences arbitrales qui ne sont pas considérées comme sentences nationales dans l’État où leur reconnaissance et leur exécution sont demandées.

2. On entend par « sentences arbitrales » non seulement les sentences rendues par des arbitres nommés pour des cas déterminés, mais également celles qui sont rendues par des organes d’arbitrage permanents auxquels les parties se sont soumises.

3. Au moment de signer ou de ratifier la présente Convention, d’y adhérer ou de faire la notification d’extension prévue à l’article X, tout État pourra, sur la base de la réciprocité, déclarer qu’il appliquera la Convention à la reconnaissance et à l’exécution des seules sentences rendues sur le territoire d’un autre État contractant. Il pourra également déclarer qu’il appliquera la Convention uniquement aux différends issus de rapports de droit, contractuels ou non contractuels, qui sont considérés comme commerciaux par sa loi nationale.

Article II

1. Chacun des États contractants

to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III
Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

reconnaît la convention écrite par laquelle les parties s'obligent à soumettre à un arbitrage tous les différends ou certains des différends qui se sont élevés ou pourraient s'élever entre elles au sujet d'un rapport de droit déterminé, contractuel ou non contractuel, portant sur une question susceptible d'être réglée par voie d'arbitrage.

2. On entend par « convention écrite » une clause compromissoire insérée dans un contrat, ou un compromis, signés par les parties ou contenus dans un échange de lettres ou de télégrammes.

3. Le tribunal d'un État contractant, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention au sens du présent article, renverra les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être appliquée.

Article III
Chacun des États contractants reconnaîtra l’autorité d’une sentence arbitrale et accordera l’exécution de cette sentence conformément aux règles de procédure suivies dans le territoire où la sentence est invoquée, aux conditions établies dans les articles suivants. Il ne sera pas imposé, pour la reconnaissance ou l’exécution des sentences arbitrales auxquelles s’applique la présente

> Convention, de conditions sensiblement plus rigoureuses, ni de frais de justice sensiblement plus élevés, que ceux qui sont imposés pour la reconnaissance ou l'exécution des sentences arbitrales nationales.

[64] The Treaty includes the usual conventional clauses found in bilateral investment treaties, namely those providing for the obligation of fair treatment (clause 4(1) of the Treaty), the prohibition on expropriation or nationalization of foreign investments (clause 6(1)), the compensation of investors to ensure their fair and equitable compensation (clause 6(3)), and the submission of any disputes between an investor of one Contracting Party and the other Contracting Party concerning an investment to one of the dispute settlement mechanisms provided for in clause 8, which is worded as follows:

> **ARTICLE 8 – SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY**
>
> **(1)** Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> **(2)** If such dispute cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor may submit the dispute to:
>
> **(a)** arbitration in accordance to the law of the Contracting Party. or
>
> **(b)** if the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, of March 18, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or
>
> **(c)** to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law; or
>
> **(d)** to an *ad hoc* arbitral tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:

(i) The appointing authority under Article 7 of the Arbitration Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.

(ii) The parties shall appoint their respective arbitrators within two months.

4. Application to the facts

[65] Before considering how these rules apply to the facts of this case, it should be recalled that the Court has already noted that [TRANSLATION] "[t]he question of the immunity from the jurisdiction of a foreign state is a question of public order that, save in exceptional circumstances, must be decided immediately, at the stage of the application to dismiss, in the same way, for example, as would the question of the court's ratione materiae jurisdiction".[55]

[66] It should also be noted that in this case, the standard of review applicable to the application to dismiss based on the waiver exception under section 4(2)(a) of the *SIA* is that of correctness, since it is a question of law.[56]

[67] Consequently, it is necessary to determine whether the trial judge erred in law by concluding that the waiver exception applied and by dismissing, on this basis, India's application to dismiss.

4.1 Did the judge err in concluding that the waiver exception arising from the commitment and consent to submit the dispute to arbitration applied?

[68] CCDM/Devas argue that by signing the Treaty, which includes an arbitration clause, and agreeing to submit to arbitration, India waived its jurisdictional immunity. This waiver applies both to the court seized of an eventual arbitration and to state courts called upon to hear the applications for recognition and enforcement of arbitral awards likely to result therefrom.

[69] The fundamental issue to be considered is whether the ratification of the Treaty and India's agreement to submit to arbitration constitute, in light of the ratification of the *New York Convention*, a waiver of the immunity made "explicitly … by written

---

55 *New Jersey (Department of the Treasury of the State of), Division of Investment c. Trudel*, 2009 QCCA 86, at para 22 [*Trudel*].

56 See *Tanny c. United States Attorney General*, 2023 QCCA 1234, at paras 18–20, application for leave to appeal to SCCrefused, 41029 (May 30, 2024) [*Tanny*], quoting *Dostie c. Procureur général du Canada*, 2022 QCCA 1652, at para 22, application for leave to appeal to SCC refused, 40597 (July 27, 2023).

agreement or otherwise either before or after the proceedings commence" within the meaning of section 4(2)(a) of the *SIA*.

[70] As the trial judge noted, section 4(2)(a) of the *SIA* is the only provision of that statute where the legislator added "or otherwise" after the words "by written agreement". Clearly, the legislator did not limit the explicit consent of the state to consent in writing. However, in other provisions of the *SIA*, the legislator adopted different wording, sometimes narrower, sometimes, at first glance, broader:

- In section 11(1) on injunctions, the State must simply consent in writing to the relief sought against it;

- In section 12(1)(a) on the execution of judgments, the State must have waived its immunity from such execution "expressly or by implication";

- In section 12(5) on the waiver of immunity conferred on a foreign central bank, the waiver applies only if the foreign bank, authority or government explicitly waives it.

[71] It appears from these provisions that if the word "otherwise" means, as CCDM/Devas argue, that it is possible to waive immunity by other means than in writing, it remains that the waiver must be explicit and, in this sense, it cannot be presumed.[57] Case law has interpreted the requirement of an explicit waiver to mean that the waiver "must be explicit, it must be unequivocal or unconditional and it must be certain".[58]

[72] Voluntary submission to arbitration satisfies the requirement of an express or explicit waiver since this waiver results from a request to this end or from an arbitration clause included in the contract or treaty entered into by the parties or for their benefit. Of course, such a clause specifically applies only to arbitration courts. However, submitting to arbitration *necessarily* includes the process of recognition and enforcement that follows before domestic courts. This conclusion, shared by several authors of scholarly commentary, is necessary to ensure the effectiveness of international arbitral awards.[59]

---

57 *Defense Contract Management Agency – Americas (Canada) v. Public Service Alliance of Canada*, 2013 ONSC 2005, at para 45; Xiaodong Yang, *State Immunity and International Law (*Cambridge: Cambridge University Press, 2012) at 342.

58 *United States of America v. Zakhary*, 2015 FC 335, at para 27.

59 See in particular: Mees Brenninkmeijer & Fabien Gélinas, "Execution Immunities and the Effect of the Arbitration Agreement" (2020) 37:5 *Journal of International Arbitration* 549 at 586–587; Andrea K. Bjorklund, "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-polization of International Investment Disputes" (2011) 21:1 *American Review of International Arbitration* 211 at 240; Alexis Blane, "Sovereign Immunity as a Bar to the Execution of International Arbitral Awards" (2009) 41:2 *New York University Journal of International Law and Politics* 453 at 483.

[73] In the article referred to above, Bachand, J.A. presented an in-depth analysis of the issue within the specific framework of an arbitration held under the aegis of a bilateral investment treaty.[60] While he could only note that the *SIA* does not expressly deal with arbitration and that in this respect it deviates from similar laws of other states, he also noted that Canadian case law did not have much to say on the matter. He nevertheless discussed the few judgments that touched on the issue.

[74] The most significant of these cases was *Collavino Incorporated v. Yemen (Tihama Development Authority),*[61] concerning a dispute between an organ of the Republic of Yemen (TDA) and Collavino, which had been settled by an arbitral tribunal in accordance with the contract binding the parties. The arbitral award condemned TDA to pay a significant sum to Collavino. While it did not think that TDA was the *alter ego* of Yemen, the Court of Queen's Bench of Alberta concluded that it nevertheless benefited from immunity as an organ of the state. Collavino claimed that TDA had waived its immunity, because it had agreed to submit to the arbitration process. Although the Court dismissed this argument due to the distinction between Yemen, the signatory of the arbitration clause, and TDA, which was not its *alter ego*, it nevertheless asserted that it had no doubt that consent to an arbitration process constituted a valid waiver:

> Section 4 of the *State Immunity Act* sets out the terms for waiver of jurisdictional immunity by a foreign state. The waiver argument against Yemen is moot on the basis that I have found that the TDA is not the alter ego of Yemen. On the other hand, I have no doubt that the TDA waived immunity for enforcement purposes pursuant to s. 12 of the *State Immunity Act*. It did so by agreeing to international commercial arbitration. Otherwise, the effect of an Award could be thwarted by successfully claiming state immunity in jurisdictions where the TDA has exigible assets.[62]

[75] In his article, Bachand, J.A. also reached this conclusion. In his view, submitting to the international arbitration process constitutes an explicit waiver of state immunity within the meaning of the *SIA*, making it possible to reconcile that law with the rules of international law:

> When all the key elements of the analysis that precedes are put together, the following conclusion emerges: courts sitting in jurisdictions which support the international arbitration system by allowing for the recognition and enforcement of foreign awards are courts to which a foreign state explicitly submits, within the meaning of section 4(2)(a) of the *State Immunity Act*, when it explicitly undertakes to resort to international commercial arbitration. At the very least, this is a reasonable alternative to the first impression reading most people make of that provision, and that suffices to conclude that the language of section 4(2)(a) of the Act can indeed be reconciled with the international rule preventing states

60 F. Bachand, *supra*, note 53 at 82.
61 *Collavino Incorporated v. Yemen (Tihama Development Authority)*, 2007 ABQB 212 [*Collavino*].
62 *Ibid.* at para 139.

> from invoking their jurisdictional immunity in foreign recognition and enforcement proceedings.[63]

[76] This conclusion was also shared by author Mark A. Cymrot:

> The Canadian State Immunity Act (Canada SIA) does not contain a specific arbitration waiver, but like many States, including France, Switzerland and Sweden, and the UNCSI, Canada considers arbitration agreements to be waivers of immunity over proceedings in support of arbitration.[64]
>
> [References omitted]

[77] *Sunlodges,*[65] rendered in 2020, repeated the theory set out in the article by Bachand, J.A. In that case, after obtaining an arbitral award against Tanzania, the Sunlodges company filed an application for recognition and enforcement of the award before the Ontario courts, followed by a motion for a Mareva injunction targeting an aircraft located in Canada belonging to Tanzania. The Superior Court of Justice of Ontario concluded that by submitting to an arbitration process under the aegis of a treaty, Tanzania had waived its right to invoke its immunity and at the same time consented to conservatory and interlocutory measures being taken against it. Tanzania could not hide behind a restrictive interpretation of the exceptions set out in the *SIA* to avoid the imposition of such measures.

[78] In this case, India's attempt to invoke state immunity in jurisdictions where it may hold assets that would allow for the enforcement of arbitral awards goes against its obligations under both the *New York Convention* and the Treaty.

[79] India is a party to the *New York Convention*, which provides, in article III, that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in

---

63 F. Bachand, *supra*, note 53 at 86–87.

64 Mark A. Cymrot, "Enforcing Sovereign Arbitral Awards – State Defences and Creditor Strategies in an Imperfect World" in Tom Ruys, Nicolas Angelet and Lucas Ferro (eds), *The Cambridge Handbook of Immunities and International La*w (Cambridge: Cambridge University Press, 2019) 350 at 356.

65 *Sunlodges Ltd v. The United Republic of Tanzania,* 2020 ONSC 8201 [*Sunlodges*] at paras 10–14: "When making submissions about sovereign immunity, counsel for Tanzania first took me to Canadian cases holding that the Crown cannot be enjoined. Tanzania argues that the rules Canadian courts apply to its own state must, as a matter of comity, also be applied to foreign states. While I agree with that principle as a general rule, the scheme underlying bilateral investment treaties pursuant to which the arbitral award was issued modifies that rule. The whole point of bilateral investment treaties is to remove or limit defences of involving sovereign immunity in cases involving nationalization or expropriation. By submitting to a bilateral investment treaty and by entering arbitrations under it, a sovereign state consents to have orders made against it. That is the fundamental quid pro quo for sovereign investment. It would not be appropriate for this court to remove that fundamental quid pro quo precisely when it becomes important. … By agreeing to the UNCITRAL rules in the Bilateral Investment Treaty, Tanzania also agreed to the possibility of interim or interlocutory awards being made against it." [Emphasis added].

accordance with the rules of procedure of the territory where the reward is relied upon", unless a party raises valid grounds to contest such recognition and enforcement.

[80] By ratifying the *New York Convention* and entering into the Treaty, which includes a dispute settlement clause referring the parties to arbitration, and by participating in such arbitration proceedings without reserving its right to claim immunity, India must be considered to have accepted that any resulting award could be subject to recognition and enforcement proceedings. In doing so, it waived, *by necessary implication*, jurisdictional immunity under the *SIA*.

[81] The ratification of the *New York Convention* and signature of the Treaty do not amount to a mere *implied* waiver of immunity, which would be insufficient within the meaning of section 4(2)(a) of the *SIA*, as India argues. Rather, these elements indicate instead that India had *necessarily* submitted to the jurisdiction of the courts at the stage of recognition and enforcement of awards by consenting to the terms of the *New York Convention* in this regard. Any other interpretation of the terms of this convention would deprive it of its effect, i.e., ensuring the effectiveness of international arbitral awards. This "necessary implication" constitutes an explicit waiver under subsection 4(2)(a) of the *SIA*.

[82] India is wrong to assert that the Canadian legislator, unlike that of the United States or England, deliberately and knowingly chose not to include an arbitration exception in the *SIA*.

[83] This Court is of the opinion that the *SIA* forms a coherent whole. Even though it is possible to refer to foreign law and international law in the context of the analysis, it is important to remain cautious before giving too much weight to these external sources,[66] especially as in this case, where parliamentary debates do not indicate a willingness to rule out such an exception.[67]

[84] Lastly, although it is not determinative, it is accepted in the case law of several foreign courts[68] that a state submitting to international arbitration thereby waives its immunity from the jurisdiction of the courts likely to be called upon to recognize and enforce the resulting award.

---

66 See *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, at paras 60 and 63 [*Kazemi*].

67 House of Commons, *House of Commons Debates*, 32-1, Vol. 10 (June 23, 1981); House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes*, 32-1, Vol. 3, No. 59 (February 2, 1982); Senate, Standing Committee on Legal and Constitutional Affairs, *Minutes*, 32-1, Booklet 10 (March 19, 1981).

68 See in particular *NML Capital Limited v. Republic of Argentina* [2011] UKSC 31 (United Kingdom); *Svenska Petroleum Exploration AB v. Government of Lithuania and AB Geonafta*, [2006] EWCA Civ 1529 (United Kingdom); S&R Davis International, Inc. v Republic of Yemen, 218 F.3d 1292 (11th Cir. 2000) (United States); *Creighton c. Qatar*, Cass civ 1re, 6 July 2000, [2000] Bull civ I 207 (France); *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999) (United States).

[85] In this respect, the Australian example is undoubtedly the most relevant. In *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.,*[69] the High Court of Australia recently concluded that signing the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ("ICSID")[70] constituted a waiver of state immunity.

[86] The Federal Court of Australia followed a similar line of reasoning in *CCDM Holdings, LLC v. Republic of India*[71] regarding the same arbitral awards at issue here. Drawing inspiration from *Kingdom of Spain*,[72] the Federal Court of Australia concluded that the fact that India had signed the *New York Convention* constituted, in itself, a waiver of its state immunity in international arbitration.[73] In doing so, however, the Federal Court of Australia ruled on the basis of the signing of the *New York Convention* alone and did not rule on whether India had actually consented to the arbitration between it and the investors:

> I conclude at this stage of the analysis that the text of the New York Convention supports the Applicants' argument as to submission by agreement in the present case by way of clear and unmistakable necessary implication. For completeness, I do not think there is any aspect of the purpose, objects or context of the New York Convention which would lead to a different conclusion.[74]

[87] *A fortiori*, in this case, it must be concluded that the waiver resulting from India submitting to arbitration under the Treaty was explicit. This waiver also satisfies the other requirements set out in case law in that it was also unequivocal, certain, and unconditional. It is recognized that while states may indeed waive immunity in advance, the waiver only takes effect once the dispute has sufficiently materialized. In this case, India's waiver was unequivocal and certain since the international arbitration was in response to a dispute that was present and actual. In addition, clause 8 of the Treaty constitutes an unconditional waiver in that India accepted international arbitration by signing the Treaty and agreed that arbitral awards may eventually be rendered against it, without expressly reserving, in the Treaty, its right to raise its jurisdictional immunity with respect to enforcement.

---

69 *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.*, [2023] HCA 11 (High Court of Australia) (Australia) [*Kingdom of Spain*], at paras 27–29.

70 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18, 1965, 575 RTNU 161, coming into force in Canada on November 1, 2013 [ICSID].

71 *CCDM Holdings, LLC v Republic of India (No 3)*, [2023] FCA 1266 (Federal Court of Australia) (Australia) [*CCDM Holdings FCA*].

72 *Kingdom of Spain, supra*, at note 69.

73 *CCDM Holdings FCA*, *supra* at note 71.

74 *Ibid.* at para 51.

[88] This interpretation of the waiver exception is consistent with pan-Canadian case law,[75] the teachings of the Supreme Court of Canada,[76] the guiding principles of arbitration, and Canada's international commitments to promote the effectiveness of arbitral awards,[77] but also, and above all, to the *SIA* and the *New York Convention.*[78] As our colleague Bachand, J.A. rightly points out, it avoids a potestative outcome where the enforcement of a binding arbitral award within the meaning of a treaty or a contractual commitment depends on the goodwill of the state, which could decide, after a long and costly arbitral process, to hide behind its immunity to avoid its undesirable effects.[79]

4.2. Did the judge err in refusing to give effect to the SCI Judgment with respect to the findings of fraud, in the context of the debate on state immunity?

[89] India argues that the trial judge erred in refusing to give effect to the SCI Judgment rendered on January 17, 2022, which states that the Devas Agreement was entered into fraudulently.[80]

[90] India asserts that the validity and legality of an investment are essential in international law to seek the protection of a bilateral investment treaty. In India's opinion, because the SCI Judgment concluded that the investment was fraudulent, it cannot be covered by the Treaty and its arbitration clause, such that the PCA Arbitral Tribunal did not have jurisdiction to arbitrate the dispute between the parties.

[91] According to India, the SCI Judgment confirms that Devas's investment was fraudulent. As a semi-authentic act whose facts have been proved *prima facie*, this judgment was binding on Pinsonnault, J. He erred in considering that the conclusion of the SCI Judgment relating to fraud was only an *obiter* when it was the very basis of the decision to set aside the ICC arbitral awards. According to India, the judge could not authorize CCDM/Devas to prove the Devas Agreement to review an issue that had already been decided by the SCI, thereby discrediting the administration of justice.

[92] The Court is of the opinion that Pinsonnault, J. was justified in concluding that by attempting to make this question an issue at the preliminary stage of the debate on immunity, and by challenging the very basis of the order of December 21, 2016 (which

---

75 *Canadian Planning and Design Consultants Inc. v. Libya*, 2015 ONCA 661, at paras 9–12 [*Canadian Planning*]; *Sunlodges, supra*, note 80, at paras 10–15 and 33–34; *Collavino*, *supra*, note 61, at para 139; *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2003 FC 1517, at para 65; rev'd for other reasons in *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2005 FCA 28.

76 *Kazemi*, *supra*, note 66, at paras 60–63; *Kuwait Airways* (SCC) *supra*, note 51, at paras 13–14; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, at para 27 [*Schreiber* (SCC)].

77 L. Chamberland, *supra*, note 45, at art. 620, Pierre J. Dalphond.

78 *New York Convention*, *supra*, at note 43.

79 F. Bachand, *supra*, note 63 at 73 and 75.

80 SCI Judgment, *supra*, at note 20.

dismissed India's application for a suspension pending the outcome of the criminal proceedings before the SCI)[81] without doing so earlier in the arbitration process, India was attempting to circumvent the recognition and enforcement of arbitral awards in Canada. By arguing that the investments were no longer covered by the Treaty, because they had been deemed fraudulent after the fact by the SCI, India was indirectly impugning the jurisdiction of the PCA Arbitral Tribunal, which rendered the arbitral awards both on the merits and the quantum to deprive these awards of any impact.

[93] This Court does not see any grounds for intervention with regard to the judge's ruling on this subject. He concluded that the legality of Devas's investments could not be contested in the context of a proceeding for the recognition and enforcement of arbitral awards before the Superior Court. This conclusion was all the more necessary since the PCA Arbitral Tribunal had already dismissed the allegations of fraud argued by India at a preliminary stage, on December 21, 2016, after the Award on the Merits but before the Award on the Quantum. At the time, the PCA Arbitral Tribunal had dismissed these allegations in these terms:

> 16. The Tribunal notes that the CBI Charge Sheet contains no charge against any of the Claimants in the present case. The Devas-related defendants under the Charge Sheet are designated as: (1) Devas Multimedia Private Ltd.; (2) Mr. R. Viswanathan, President and CEO of that company; (3) Mr. M. G. Chandrasekhar, Director of the same company; (4) Mr. D. Venugopal, Director of the same company; (5) Mr. M. Umesh, Chartered Accountant. While the Tribunal is aware of the corporate structure used for the Claimant's investments in India, the Tribunal cannot disregard the fact that the Claimants are not legally identical with Devas Multimedia Private Ltd.
>
> 17. In addition, … no evidence of wrongdoing on the [part of Messrs. Viswanathan, Chandrasekhar and Venugopal] or on the part of Devas Multimedia Private Ltd was adduced. Moreover, no request for relief to the present Tribunal was made by the Respondent on the basis of alleged criminal activities by the Claimants under the Indian Penal Code or the Prevention of Corruption Act.[82]
>
> [References omitted]

[94] The PCA Arbitral Tribunal found not only that India had failed to present any evidence of the fraudulent nature of the Devas Agreement during the arbitration, but also that the parties to the Agreement termination proceedings were legal entities with legal personalities separate from Devas; consequently, neither party to the arbitration was the subject of any allegation of fraud.[83]

[95] The arbitral awards are final; they have dismissed the argument of fraud and any contestation of them has thus far been rejected by the courts.[84] India cannot try to raise

---

81 PCA order of December 21, 2016, *supra*, at note 8.
82 *Ibid*.
83 *Ibid.*
84 According to the documents filed in the record and the information provided by the parties.

this argument again by seeking to bind the Superior Court to a subsequent foreign judgment, despite the arbitral tribunal already deciding the issue in an interim judgment. In addition, this argument makes it impossible to overturn the presumption of the valid and enforceable nature of arbitral awards, which is recognized both by case law and scholarly commentary:

> [TRANSLATION]
>
> The first—and most important—finding is that arbitral awards are presumed valid and enforceable and that the grounds set out in article 653(2) CCP are exhaustive. As an exception to this general rule, the party against whom the arbitral award is rendered may ask the court to refuse to recognize and enforce it, only if the party is able to prove the existence of one of the grounds indicated in article 653(2), CCP. Even in such a context, the courts maintain the discretion to determine whether the application for refusal should be granted.[85]
>
> [Emphasis added; references omitted]

[96] India has alleged none of the grounds provided for in article 653(2) CCP, although they constitute an exhaustive list of the grounds allowing a court to refuse to recognize an arbitral decision. India remained silent on the issue, limiting itself to raising state immunity.

[97] In this context, this Court concludes that the trial judge did not err in refusing to give effect to the SCI Judgment according to which the Devas Agreement had been entered into fraudulently.

5. Conclusion

[98] In sum, the trial judge did not err by concluding that the waiver exception of section 4(2)(a) of the *SIA* applied and made it possible to rebut India's presumption of jurisdictional immunity in the context of the application for recognition and enforcement of arbitral awards. This is sufficient to dismiss India's ground of appeal based on state immunity, and it does not therefore appear necessary to address the commercial activity exception, which is also based on a waiver. Furthermore, as this would have been a mixed question, it would have required a high degree of deference from the Court.

[99] Finally, the Court considers that the trial judge did not err in refusing to give effect to the SCI Judgment, which concluded that the Devas Agreement had been entered into fraudulently.[86]

---

85 Fabien Gélinas and Giacomo Marchisio, "L'arbitrage consensuel et le droit québécois : un survol" (2018) 48 *Revue Générale de Droit* 445 at 464, citing *Rhéaume c. Société d'investissements l'Excellence inc*, 2010 QCCA 2269, at para 61; *Coderre c. Coderre*, 2008 QCCA 888, at para 45.

86 SCI Judgment, *supra*, at note 20.

[100] Consequently, none of the grounds of appeal raised by India presents a bar to the application for recognition and enforcement of the awards rendered on the merits and quantum by the PCA Arbitral Tribunal. India is not immune from the jurisdiction of the Quebec Superior Court in these proceedings, and the Superior Court rightly dismissed its application to dismiss.

6. Was the judgment requiring that India provide a suretyship appropriate?

[101] On March 14, 2023, in the judgment giving leave to appeal in this case, Vauclair, J.A. suspended the proceedings in first instance and ordered India to furnish a suretyship of $20,000 before March 31, 2023, to guarantee payment of the costs on appeal.[87] The amount has since been held in trust by counsel for India, pending the outcome of the appeal.

[102] India argues that there is no final decision on the question of state immunity and therefore it retains its immunity in Canadian courts pending the outcome of its appeal. It contends that Vauclair, J.A. did not have the authority to order a suretyship and that doing so was a premature exercise of the Court's jurisdiction.

[103] In addition, in accordance with the general approach prevailing in other countries, including the United States[88] and the United Kingdom,[89] courts must or should refrain from ordering sureties against foreign sovereign states based on the presumption that a state is solvent and will comply with the orders of foreign courts. India notes that the decision rendered by the U.S. district court in the parallel enforcement proceedings between the parties in the United States complied with this principle by refusing to order it to furnish a suretyship.[90]

[104] In short, India is relying on the law of other states to impugn the judge's decision, without that law having any standing in Quebec law. The issue, however, is to determine whether it benefited from the presumption of immunity at the appellate stage such that a suretyship order could not be made against it.

[105] The power of the Court of Appeal or of one of its judges to order a suretyship is expressly provided for in article 364 CCP:

---

87 Vauclair Judgment, *supra*, at note 33.

88 *Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, 2020 WL 417794, 2020 U.S. Dist. Lexis 12794 (United States); *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66 (United States).

89 *Hulley Enterprises Ltd. (a company incorporated in Cyprus) and other companies v. Russian Federation*, [2021] EWHC 894 (Comm), [2021] 1 WLR 3429 (United Kingdom).

90 *CC/Devas (Mauritius) Ltd. v. Republic of India,* 2022 WL 273620, 2002 U.S. Dist. Lexis 53416 (United States).

364. The Court of Appeal or an appellate judge, on their own initiative or on an application by the respondent, may, for good cause, subject an appeal to the provision of a suretyship to guarantee payment of the appeal costs and of the judgment amount if the judgment is affirmed.	**364.** La Cour d'appel ou un juge d'appel, d'office ou sur demande de l'intimé, peut, pour un motif qui le justifie, assujettir un appel à un cautionnement afin de garantir le paiement des frais de l'appel et du montant de la condamnation si le jugement est confirmé.
The Court or the judge determines the amount of the suretyship and the time limit within which the appellant is required to furnish the surety.	La cour ou le juge fixe le montant du cautionnement et le délai à l'intérieur duquel l'appelant est tenu de fournir une caution.

[Emphasis added]

[106] When Vauclair, J.A. ruled on the suretyship application, the Judgment on Immunity had been rendered and had decided the matter. Notwithstanding the appeal, the presumption of immunity had to give way to the presumption of validity of the judgment. Indeed, [TRANSLATION] "the Appellant obtained leave to appeal from the judgment …, its grounds of appeal are therefore serious, but the presumption of validity of the judgment remains".[91] As the judgment was presumed valid, Vauclair, J.A. did not have to rule on the question of immunity or draw on the presumption of immunity to rule on the suretyship. If he believed that there was reason to justify it, he could grant the suretyship application. In this case, he justified his decision to order a suretyship in these terms:

> [9] Also, considering the particular circumstances of the dispute, the manner in which the parties are conducting the case and the appeal, I would order the suretyship sought by the respondents in the amount of $20,000, to guarantee payment of the appeal costs.[92]

[107] Among the reasons recognized by case law, the fact that one party resides outside of Quebec and has no assets in the province may justify ordering a suretyship to guarantee the costs on appeal.[93] The same applies when a party behaves in a way

---

91 *Rioux c. Murphy,* 2008 QCCA 1431, at para 11. The presumed validity of judgments places the burden of demonstrating an error that requires intervention on the appellant. The Court established this principle in particular in *Pateras c. M.B.,* 1986 CanLII 3718, at paras 4–5, which has been cited many times since by this Court.

92 Vauclair Judgment, *supra*, at note 33.

93 See for example: *Specter Aviation c. Laprade,* 2021 QCCA 183, at para. 26 (Bachand, J.A.); *Luft v. Magien Succession,* 2019 QCCA 1043, at para 5; *Galtrade SRL c. Ricova International inc.,* 2019 QCCA 992, at para 5 (Hamilton, J.A.); *Arora c. Domtar,* 2018 QCCA 1225, at para 5 (Marcotte, J.A.); *Cran-Québec II c. Excavations Mario Roy inc.,* 2017 QCCA 1983, at para 12 (Rancourt, J.A.).

that, without being fraudulent, raises suspicion or appears unreasonable.[94] In *Richer c. Sirois*, Mainville, J.A. said the following on the subject:

> [TRANSLATION]
>
> [30] Suretyship on appeal is an exceptional measure. It can be granted only for a reason that justifies it, in particular, convincing evidence that without it, the rights recognized in the trial judgment would be at risk—which is clearly not the case here—or if it is necessary to guarantee the costs on appeal. In this case, Sirois and Neon are not claiming that their rights resulting from the trial judgment would be at risk in the absence of a suretyship. Their application relies exclusively on the allegedly dilatory nature of the appeal.[95]
>
> [References omitted]

[108] Here, the question of whether India has assets in Quebec had not yet been decided definitively when Vauclair, J.A. rendered his decision, that question being the subject of this appeal, in file number 500-09-029899-226. It was one reason that justified ordering the suretyship, especially as in this case, several elements show that although it is not necessarily fraudulent, India's behaviour [TRANSLATION] "raises suspicion" as it keeps finding reasons to avoid paying the sums it was condemned to in the arbitral awards. Indeed, Pinsonnault[96] and Granosik, J.J.[97] concluded, at the preliminary stage, that several investigations had been launched against Devas and that a process had even been initiated to have Devas liquidated.

[109] On this subject, it is important to recall that the termination of the Devas Agreement occurred in 2011 and that section 271(e) of the *Companies Act, 1996* was amended by India in 2013[98] to add a ground for dissolving and liquidating companies based on allegations of fraud. Based on this amendment, Antrix sought the dissolution and liquidation of Devas on January 18, 2021, the same day it obtained India's authorization to do so. This matter was heard urgently the following day, the Devas Board of Directors was dismissed without further notice, and a provisional liquidator was appointed on January 19, 2021.[99] This process continued until the dissolution of Devas, confirmed by the SCI on January 17, 2022.[100] As soon as the provisional liquidator was

---

94 *9326-7557 Québec inc. c. Di Zazzo,* 2019 QCCA 2051. See also *9323-0506 Québec inc. c. Isabel,* 2019 QCCA 1497.

95 *Richer c. Sirois*, 2021 QCCA 711 (Mainville, J.A.), citing *Droit de la famille — 172312*, 2017 QCCA 1554 (Mainville, J.A.); *Droit de la famille — 17418*, 2017 QCCA 373 (Bélanger, J.A.); *Endorecherche inc. c. Laval University*, 2019 QCCA 277.

96 Judgment Quashing the Seizure, *supra,* note 23 at para 53.

97 Granosik Judgment, *supra* at note 21.

98 *The Companies Act*, *2013*, (India) Act No. 18 of 2013, para. 271(e).

99 *Antrix Corporation Limited v. Devas Multimedia PVT Ltd & Anr*, NCLT, CP No. 06/BB/2021, January 17, 2021.

100 SCI Judgment, *supra*, at note 20.

appointed, he put an end to the mandates of counsel for Devas worldwide in the disputes to have the ICC Award recognized and enforced.

[110] A criminal case was also initiated based on a denunciation prepared and filed after the Antrix Arbitration ended and a few months before the ICC Award on September 14, 2015. It was only a few days after the Award on the Merits, on August 11, 2016, that the latter filed criminal fraud charges against Devas and its board of directors. Based on these accusations of fraud, which had not yet led to any convictions, India sought to convince several courts, including the Quebec courts, to reject applications for recognition and enforcement of arbitral awards.

[111] Finally, following the ICC Award, India established a new corporate structure called NewSpace with responsibilities that were similar, if not identical, to those of Antrix, and several media reported that Antrix would eventually be absorbed by NewSpace, so that its assets would no longer be available for the execution of the ICC Award.

[112] Without ruling on the veracity of these factual and procedural elements on which no debate on the merits has yet taken place, this Court is of the opinion that they were sufficient to convince Vauclair, J.A. that there were grounds justifying the suretyship order "guarantee payment of the appeal costs".

[113] This ground of appeal should therefore be dismissed.

C. CCDM Holdings, LLC et al. c. The Airport Authority of India et al. (500-09-029899-226)

1. Judgment Quashing the Seizure

[114] In the judgment rendered on January 8, 2022, Pinsonnault, J. noted at the outset that the short hearings of November 24 and December 21, 2021, did not reflect all the time the authorizing judges spent analyzing the applications for seizure. He noted, moreover, that the facts alleged in the proceedings and the affidavits as well as the facts emanating from the exhibits submitted in support of the proceedings met the criteria for sufficiency justifying the authorization of a seizure on a *prima facie* basis. That being the case, he concluded that an *ex parte* hearing could not give rise to the seizure carried out in this case in the absence of exceptional circumstances or an emergency, since neither AAI or IATA are in danger of [TRANSLATION] "disappearing".

[115] Citing *Trudel*,[101] decided by this Court, and *Schreiber,* decided by the Court of Appeal for Ontario,[102] the judge concluded that the question of immunity should instead

[101] *Trudel*, *supra*, note 55, at para 22.

[102] *Schreiber v. Federal Republic of Germany*, [2001] O.J. No. 524, at para 16 (CA Ont.) [*Schreiber* (CA)], aff'd by *Schreiber* (SCC), *supra*, at note 76.

be decided on the merits immediately in the presence of all parties concerned. In his opinion, this question had to be decided before a seizure could be ordered, to preserve the integrity of the fundamental principle of state immunity. This was all the more so, in his opinion, in the absence of proof of service to AAI and the fact that it cannot be assumed that the exception that applies to the state could be invoked by AAI as a state agency of India, since it was not a party to the India Arbitration or concerned by the resulting condemnation.[103]

[116] The judge therefore dismissed the seizure of AAI's assets held by IATA (and reduced the seizure of Air India's assets by 50%). He then ordered the provisional execution notwithstanding appeal of his judgment, considering that the balance of convenience favoured AAI and Air India, which, according to him, would suffer greater harm than CCDM/Devas because of such a seizure.[104]

[117] It should be recalled that CCDM/Devas obtained leave to appeal and a stay of the provisional execution notwithstanding appeal ordered by the trial judge.[105]

2. Grounds of appeal

[118] On appeal, CCDM/Devas essentially raised two questions:

1. Did the trial judge err in law by finding that AAI's defence regarding its immunity had to be decided on the merits before an order for seizure before judgment could be made against it?

2. Did the trial judge err in fact and in law by finding that the presumption of immunity applied separately to AAI after concluding that India could not benefit from this presumption, and by determining that CCDM/Devas had not demonstrated that the exceptions provided for under the *SIA* applied to AAI?

[119] Shortly before the hearing, the parties filed additional submissions to address the impact of the Air India Judgment rendered by this Court quashing the seizure against Air India.[106] CCDM/Devas dispute the relevance of the decision on the debate formed on appeal because, they argue, this ruling does not characterize AAI's role in relation to India or settle the question of the immunity that AAI claims under the *SIA*. For its part, AAI argues that the judgment dismisses CCDM/Devas' argument based on AAI's status as India's *alter ego* and must lead to the dismissal of the arguments that CCDM/Devas raised in their factum.

---

103 Judgment Quashing the Seizure, *supra,* note 23 at paras 88–112.
104 *Ibid*. at paras 126–133.
105 Marcotte Judgment, *supra*, at note 24.
106 Air India Judgment, *supra,* at note 26.

3. Analysis

3.1. Did the trial judge err in law by finding that AAI's defence regarding its immunity had to be decided on the merits before an order of seizure before judgment could be made against it?

[120] CCDM/Devas maintained that by concluding that the question of immunity should have been decided on the merits rather than *ex parte* and that by quashing the seizure order against AAI's assets based on the presumption of immunity, the judge erroneously interpreted the case law and failed to [TRANSLATION] "immediately" rule on the question of immunity, which should have been decided during the application to quash the seizure.

[121] According to CCDM/Devas, the judge's approach deprived the seizure before judgment of its conservatory effect by allowing the state seeking to take advantage of the delay caused by the debate on immunity to protect its assets from a future seizure by removing them from the country in the meantime. They noted that the case law the judge relied on to make his decision certainly recognizes the obligation to rule immediately on the application to dismiss based on a lack of jurisdiction due to state immunity to avoid a case from proceeding on the merits when the judge might not have jurisdiction. However, none of the judgments cited discusses the possibility of ordering a seizure before judgment by garnishment, especially where it has been demonstrated that the seizure meets the demanding criteria of article 518 CCP, as is the case here.[107]

[122] In addition, CCDM/Devas noted that section 3 the *SIA* does not contain any limitations like those of its U.S. counterpart, the *Foreign Sovereign Immunities Act,*[108] that would make it possible to argue that conservatory measures are subject to the presumption of immunity. Furthermore, section 17 of the *SIA* provides that the rules of procedure remain applicable insofar as they do not preclude the application of the law, which should include the provisions of the Quebec *Code of Civil Procedure* relating to seizure before judgment. In this respect, CCDM/Devas noted that article 516 CCP expressly states that seizure before judgment may be carried out "before the commencement ... of a proceeding"[109] and that article 3138 CCQ[110] authorizes Quebec

---

[107] Article 518 CCP is worded as follows:

518. With the authorization of the court, the plaintiff may seize the defendant's property before judgment if there is reason to fear that recovery of the claim might be jeopardized without the seizure.	518. Le demandeur peut, avec l'autorisation du tribunal, 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.

[108] *Foreign Sovereign Immunities Act*, Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C., s. 1610(d).

[109] Article 516 CCP is worded as follows:

courts to order conservatory measures even if they have no jurisdiction over the merits of the dispute.

[123] Moreover, CCDM/Devas argued that while under Canadian case law state immunity is a procedural bar to the exercise of the jurisdiction of courts,[111] the presumption of immunity does not prevent an *ex parte* notice of enforcement of seizure by garnishment from being issued: none of the sources cited in the judgment conclude that such a seizure must be refused when the conditions set out under articles 516 to 518 CCP are otherwise met and the exception to immunity has been *prima facie* established.

[124] AAI responded that it is a separate legal entity from India and an "agency of a foreign state" within the meaning of the *SIA* benefiting from a strong presumption of immunity to which Canadian courts must give effect to *ex officio*.

[125] Although it recognized that an *ex parte* seizure can be authorized under certain exceptional circumstances where there is an emergency, it claimed that no such circumstances existed in this case. Moreover, according to AAI, CCDM/Devas bore the burden of proving that the exception to immunity applied, which they failed to do. They cannot reduce this burden to a mere *prima facie* demonstration. In this respect, AAI noted that the application for seizure before judgment by garnishment only briefly addresses AAI's role, with the affidavit in support of the application for seizure providing only a vague description of its structure and activities by indicating that it is held and controlled by India and must be regarded as a government corporation. It added that

---

516. The purpose of a seizure before judgment is to place property in the hands of justice while a proceeding is pending. A seizure before judgment is carried out in the same manner and according to the same rules as a seizure after judgment, subject to the rules of this chapter.	516. La saisie avant jugement a pour but de mettre les biens sous la main de la justice pendant l'instance; elle est pratiquée de la même manière et obéit aux mêmes règles que la saisie après jugement, sauf les règles du présent chapitre.
A seizure before judgment may be carried out before the commencement or in the course of a proceeding or while the case is under appeal, but in the latter case with the authorization of the court of first instance.	Elle peut être pratiquée avant l'introduction de l'instance ou en cours d'instance; elle peut aussi l'être lorsque l'affaire a été portée en appel, mais en ce cas avec l'autorisation du tribunal de première instance.
A third person is given custody of the seized property, unless the seizor authorizes the bailiff to leave the property in the custody of the person from whom it is seized.	Les biens saisis sont confiés à la garde d'un tiers, à moins que le saisissant n'autorise l'huissier à les laisser sous la garde du saisi.

[110] See *infra*, at para [149].

[111] *Kazemi*, *supra*, note 66, at para 34.

there is nothing to suggest that its immunity was argued before the authorizing judge, who made little of the question.

[126] AAI also argued that section 3 of the *SIA*[112] codifies the fundamental principle of state immunity and expressly provides that agencies of foreign states benefit from a presumption of immunity before "any court in Canada" ("immune from the jurisdiction of any court in Canada"). It also refers to subsection 3(2) of the *SIA,* which states: "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".

[127] According to AAI, the mere fact that the *SIA* does not contain any specific reference to seizures before judgment is not sufficient to rule out state immunity, which should instead apply to every stage of the judicial process, including pre-trial conservatory measures. According to AAI, courts cannot issue such orders without first ruling on the merits on the question of immunity, which can be done *ex parte* only in an emergency, which has not been demonstrated in this case. Here, despite the "procedural bar" preventing domestic courts from exercising their jurisdiction over foreign states,[113] the authorizing judge did not draw any conclusions enabling him to rule out AAI's strong presumption of immunity, while CCDM/Devas failed to demonstrate that the exception to immunity applied. Consequently, the authorizing judge did not have jurisdiction to order the seizure before judgment by garnishment and the order rendered had to be quashed, as Pinsonnault, J. decided.

[128] AAI claimed that CCDM/Devas's interpretation of these sections of the *SIA* and case law is erroneous since, notwithstanding articles 518 CCP and 3138 CCQ*,* the legislator instead chose to prohibit the court from exercising jurisdiction it would otherwise have had.

[129] Finally, according to AAI, the trial judge was right to refuse to decide the question of immunity before AAI had been validly served. Nor did he err in finding that this debate must take place *inter partes,* except in exceptional circumstances, and that in this case, there was no emergency to proceed *ex parte*.

[130] IATA, for its part, reiterated the arguments raised by AAI, adding some details. It recalled that in *Kazemi*, the Supreme Court of Canada indicated that the *SIA* is a complete codification of Canadian law on immunity, without, however, ruling out customary international or common law principles that may help interpret the provisions, in the event of ambiguity.[114] Furthermore, it considered that it is appropriate to interpret the lack of references to conservatory measures in the *SIA* as meaning that they are covered by immunity in the same way as any other stage of the proceedings. According

---

112 See *SIA*, section 3, *supra,* at para [61].
113 Based in that regard on the remarks of the Supreme Court in *Kazemi*, *supra*, note 66, at para 34.
114 *Ibid.* at para 54.

to IATA, the ordinary meaning of the terms used in section 3 of the *SIA* supports the idea that conservatory measures are covered by jurisdictional immunity, since the term "jurisdiction" means any proceedings before a court of justice. Moreover, such an interpretation is consistent with section 12 of the *SIA*, which deals with the execution of judgments and provides that immunity applies to execution measures sought in a subsequent proceeding. Additionally, since the purpose of section 3 of the *SIA* is to ensure the equality of sovereign states, as soon as a decision of a court has the effect of subjecting a foreign state to its jurisdiction, immunity must be applied. According to IATA, customary international rules also support the idea that pre-trial judgments (including seizure before judgment by garnishment) are subject to immunity from the jurisdiction of the courts. So long as these customs constitute a general practice and *opinio juris* exists, in the absence of a law to the contrary, they are incorporated into Canadian law.[115] It concluded by pointing out that the commercial activity exception cannot be invoked in the context of a pre-trial judgment (or a conservatory measure).

[131] So what does this mean?

[132] The Court is of the opinion that the trial judge committed a reviewable error of law when he determined that the judge could not authorize the seizure *ex parte* before the question of immunity from jurisdiction was decided on the merits.

[133] First of all, he was mistaken as to the scope of the judgments he cited. Neither *Trudel*,[116] decided by our Court, nor *Schreiber*, decided by the Court of Appeal for Ontario,[117] support the argument that the authorizing judge is required to decide the question of immunity when issuing a notice of execution of seizure before judgment. Rather, these two rulings were rendered in the context of an application to dismiss where it was appropriate to rule [TRANSLATION] "immediately" on immunity, as seen in the following excerpt from *Trudel*, in which Chamberland, J.A. wrote the following on behalf of the Court:[118]

> [TRANSLATION]
>
> [22] Even though caution should be exercised in matters of applications to dismiss, it was ill-advised in the circumstances. In *Gillet c. Arthur*, the Court recalls that [TRANSLATION] "the judge seized of an application to dismiss relating to a specific point of law must decide, whatever the difficulty or complexity of the question may be". The question of a foreign state's immunity from the jurisdiction of the courts is a question of public order that, save in exceptional circumstances,

115 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para 86.
116 *Trudel*, *supra*, note 55, at para 22.
117 *Schreiber* (CA), *supra*, at note 102.
118 *Trudel*, *supra*, note 55, at para 22; for other judgments deciding the issue of state immunity from jurisdiction of the courts at the application to dismiss stage, see in particular *Kazemi*, *supra*, at note 66; *Kuwait Airways* (SCC) *supra*, at note 51; *Tanny*, *supra*, at note 56; *El Ansari v. Morocco (Government of the Kingdom of)*, J.E. 2002-1640 (Sup. Ct.).

> must be decided immediately, at the stage of the application to dismiss, in the same way, for example, as would the question of the court's ratione materiae jurisdiction.
>
> [References omitted; emphasis added]

[134] Chamberland, J.A. also echoed Doherty J.A. of the Court of Appeal for Ontario in *Schreiber* concerning the need to immediately decide the issue of jurisdictional immunity raised in an application to dismiss:

> [TRANSLATION]
>
> [26] Also in *Schreiber*, but before the Court of Appeal for Ontario, Doherty, J.A. explained why, in his opinion, the need to immediately decide the question of jurisdictional immunity is based as much on the wording of the law as it is on practical considerations:
>
> > [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 were 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 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.[119]
>
> [References omitted; emphasis added]

[135] It should be noted that the Court of Appeal for Ontario's judgment was upheld by the Supreme Court of Canada, which did not rule directly on the question of

---

[119] *Trudel*, *supra*, note 55, at para 26, citing *Schreiber* (CA), *supra*, note 102, at paras 16–18.

inadmissibility but referred to the Court of Appeal's reasons on this subject without calling them into question.[120]

[136] In several other judgments on orders for seizure before judgment, the question of the jurisdiction of the court and, more broadly, of state immunity from such jurisdiction, was discussed only at the time of the application to quash the order for seizure,[121] without the jurisdiction of the judge who made the order for seizure being called into question.

[137] It should also be noted that in *Canada (Procureur général) c. Tremblay,*[122] following a seizure before judgment carried out in the hands of the Royal Canadian Mounted Police, the Court recognized that the Crown should have benefited from immunity against all execution measures, including seizure before judgment,[123] and ordered that this seizure be quashed at the stage of the application to quash the seizure, without the authorizing judge being reproached for failing to first decide the question of immunity.[124]

[138] Similar reasoning was also adopted by the Court in *Instrubel.*[125] In that case, an international arbitral award was rendered condemning Iraq to compensate Instrubel, a Dutch company. Instrubel had obtained a seizure before judgment in Quebec in the hands of IATA. Iraq was seeking to have it quashed, invoking in particular the lack of jurisdiction of the Quebec courts over property located outside Quebec. The Court nevertheless concluded that the order for seizure was valid after determining that the sum held by IATA could be seized by a third party. At the same time, the Court clarified the principles applicable to seizures before judgment, including that a lack of jurisdiction is a reason to quash the seizure rather than a criterion required to justify granting the seizure.[126] It should be noted that in that particular case, the debate concerned the Superior Court's jurisdiction to authorize the seizure of property located outside Quebec

---

120 *Schreiber* (SCC), *supra*, note 76, at para 10.

121 *Kuwait Airways Corporation c. Irak (République de l')*, 2009 QCCA 728, at para 1 [*Kuwait Airways* (CA)], rev'd on other grounds by *Kuwait Airways* (SCC) *supra*, at note 51; *Tracy v. Iran (Information and Security)*, 2017 ONCA 549 [*Tracy v. Iran*], at para 23; *Canadian Planning*, *supra*, note 75, at para 12; *Republic of Irak v. Export Development Corp.*, [2003] R.J.Q. 2416 (CA) [*Republic of Iraq v. Export Development Corp*.], at paras 1–3; *Sunlodges, supra*, note 65, at para 8. In some of these rulings, the judges ordering conservatory measures ruled *ex parte* on the question of state immunity from jurisdiction of the courts, but in all cases a full debate on the question was held subsequently. Several of these conservatory measures have been ordered under the rules of procedure in other Canadian provinces and should therefore be applied cautiously in this case.

122 *Canada (Procureur général) c. Tremblay*, [1999] R.J.Q. 1601 (CA).

123 Dussault J. also rejected the analogy to the *SIA*, considering that the commercial activity exception did not apply in proceedings concerning the Canadian government.

124 In another case, a seizure before judgment was ordered against the DPCP. It was only at the stage of quashing the seizure that the court examined the question of the DPCP's immunity as an organ of the state: *Québec (Procureur général) c. 9148-5847 Québec inc.*, 2012 QCCA 1362.

125 *Instrubel c. Republic of Iraq*, 2019 QCCA 78 [*Instrubel* (CA)], aff'd by *International Air Transport Association v. Instrubel, N.V.*, 2019 SCC 61 [*Instrubel* (SCC)].

126 *Instrubel* (CA), *supra*, note 125, at paras 22–27.

and the parties had agreed to discuss the question of immunity at a later stage.[127] It can be inferred, however, that if jurisdictional immunity had been a bar to the order for seizure before judgment, it would necessarily have been raised *proprio motu* by the Quebec Superior Court, the Court of Appeal of Quebec, or even the Supreme Court of Canada, which was not the case.

[139] The judge also relied on *Barer v. Knight Brothers LLC*[128] to affirm that with respect to recognizing foreign judgments, jurisdictional issues must always be decided first. However, that judgment was also rendered in the context of an application to dismiss. It stated that the first grounds of inadmissibility to be raised and decided are those relating to jurisdiction, a logical conclusion since it would be incongruous for a court to rule on specific grounds of inadmissibility without ensuring that it had the jurisdiction necessary to adjudicate them. Yet, this ruling does not support the trial judge's statement that the question of jurisdiction must be decided at the stage of the application for a seizure before judgment presented *ex parte*.

[140] In addition, although it has been established in the debate that in terms of dismissing the case, the judge must decide the legal arguments invoked [TRANSLATION] "immediately", whether this concerns the limitation period, a court's lack of absolute jurisdiction, or state immunity from the jurisdiction of the court under the *SIA*, this is not necessarily the case for a seizure before judgment, as the court does not always have all the elements available to rule on immunity[129] and decide the question [TRANSLATION] "on the merits", as the trial judge suggests.

[141] The trial judge therefore erred in law by transposing the judge's obligation to rule on the question of immunity at the application to dismiss stage to the context of a seizure before judgment, when that seizure can always be quashed on a legal ground,[130] including a question of jurisdiction[131] and, *a fortiori*, a question of immunity. Because a party does not waive its immunity when it files an application to quash on this ground, in accordance with the wording of section 4(3) of the *SIA*,[132] it was

---

127 *Instrubel, n.v. c. Ministry of Industry of The Republic of Iraq*, 2016 QCCS 1184, at para 10, rev'd on other grounds by *Instrubel* (CA), *supra*, note 125, at paras 22–27, aff'd by *Instrubel* (SCC), *supra*, at note 125.

128 *Barer v. Knight Brothers LLC,* 2019 SCC 13, at para 80.

129 In accordance with article 520 *CCP*, a seizure before judgment is ordered according to the seizor's instructions, supported by the seizor's affidavit. State immunity from the jurisdiction of the courts and exceptions thereto, in particular those relating to commercial activities, may raise mixed questions of fact and law. These questions cannot be decided based solely on the instructions provided at the time of the seizure. The situation in this case is different from the one described in *Tanny*, where "[a]ll of the allegations required to allow the judge to determine whether the respondent benefitted from immunity appear in the application to authorize a class action": *Tanny*, *supra*, note 56, at para 23.

130 *Deloitte & Touche inc. c. Banque Laurentienne du Canada*, [1995] RJQ 1301 (CA), at 1305. See also *Société de développement de la Baie James c. Gestion pourvoirie Mirage inc.*, 2012 QCCA 1699, at paras 13–15.

131 *Instrubel* (CA), *supra*, note 125, at para 23.

132 See *SIA*, section 4, *supra*, at para [61].

incorrect, moreover, to argue that the state would be forced to make a choice resulting in a waiver of its right to raise state immunity.

[142] Moreover, contrary to what the judge noted, leaving the question of immunity unanswered does not make it necessary to hold an unnecessary trial. Indeed, the party claiming to be immune from the jurisdiction of the courts may file an application to quash the seizure within five days or an application to dismiss the appeal on the merits based on this legal argument.[133] It is only at that time, in the presence of the parties and a joined issue, that the court can and must decide the matter [TRANSLATION] "immediately", without being able to refer it to the trial judge.

[143] As CCDM/Devas argue, postponing the order for seizure before judgment pending a ruling on the question of immunity runs the obvious risk that the assets will no longer be available to the creditor when the question is decided on the merits, thus stripping this action of its usefulness as a conservatory measure.[134] This is a real risk that the judge did not consider in this case, simply mentioning the lack of urgency due to the fact that AAI and IATA are in no danger of disappearing in the meantime. Although they are not likely to disappear, it is nevertheless likely that the assets held by IATA on behalf of AAI will be returned to it before the debate on the merits takes place and will therefore no longer be available to the creditor when the time comes. It should also be noted that as of the date of the seizure, AAI stopped using IATA's services and remitting funds to that organization.

[144] However, at the stage of dismissing or quashing the seizure before judgment, the risk is no longer that the assets will not be available to the creditor through some manoeuvre. The risk is instead that of imposing legal proceedings, including a trial, when the court may not have the jurisdiction required vis-à-vis one of the parties, due to that party's immunity, and that the judgment rendered may not be enforceable against it.[135] At such a stage, it is clear that the question of immunity must be decided immediately, without delay, or run the risk that the trial would lose any usefulness should Quebec courts lack jurisdiction.[136] No such risk exists, however, at the stage of an *ex parte* order for seizure before judgment.

[145] It should be noted that the criteria that justify authorizing a seizure before judgment are completely different from the criteria that apply at the dismissal stage. In

---

133 Art. 522 CCP. This deadline is not mandatory: *Construction MP Gamelin inc. c. Mochon*, 2021 QCCS 719. See also *Y.S. Bruyère Construction Ltée c. Hull (Ville de)*, J.E. 92-335 (CA).

134 *DDH Aviation Inc. v. Fox*, J. E. 2002-1293, at para 47 (CA) [*DDH Aviation*]; Charles Belleau, "Les saisies avant jugement et le séquestre", in Denis Ferland and Benoît Emery, eds, *Précis de procédure civile du Québec,* 6th ed, vol. 2 (Montréal: Éditions Yvon Blais, 2020) at 467, No. 2–1215.

135 *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, at paras 15–21; Denis Ferland and Benoit Emery, *Précis de procédure civile du Québec*, 6th ed., vol. 1 (Montreal: Yvon Blais, 2020) at 583, No. 1–1287.

136 Hubert Reid and Claire Carrier, *Code de procédure civile du Québec: Jurisprudence. Doctrine.* 39th ed, coll. "Alter ego" (Montreal: Wilson & Lafleur, 2023) at s. 168/268.

terms of seizures before judgment, the following must be demonstrated: (1) the existence of a *prima facie* debt, (2) the applicant's fear that it will not be able to collect its debt, (3) that this fear is based on the debtor manoeuvring to protect its assets from a possible judgment.[137] At that point, there was nothing to indicate that the judge had to rule on his jurisdiction or that he had to postpone examining the application for seizure pending an adversarial debate on his jurisdiction or the immunity that the debtor may wish to invoke. The authorizing judge's role was limited to ruling based on the three criteria, which form a complete list.

[146] As noted above, Pinsonnault, J. concluded that these criteria were met based on the procedures, exhibits and affidavits filed in support of the applications for seizure. He wrote:

> [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.

---

[137] *Desjardins Assurances générales inc. c. 9330-8898 Québec inc.*, 2019 QCCA 523, at para 35; *Lynch Suder Logan c. Wilson Logan*, 2010 QCCA 1023, at paras 7–9.

> [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.[138]

[147] It is only at the stage of a possible application to quash the seizure that questions of jurisdiction and immunity must be decided.[139] At that point, the urgency of the situation will have been tempered by the order for a seizure made. The judge should then have all the information required to decide the question of immunity but could, if he or she does not have all the information required and if necessary, supplement the seizure with orders intended to balance its effect pending a decision on immunity.[140] A judge may otherwise decide if the new elements filed by the debtor or the third-party garnishee justify quashing the ordered seizure.[141] However, this exercise must not turn into an appeal from the decision ordering the seizure.[142] Such an approach is supported by consistent case law.[143]

[148] The specific scheme of the *SIA* does not in any way change this approach with regard to seizures before judgment. Notwithstanding the strong presumption of state immunity from jurisdiction of the courts, which only the state can waive,[144] it is a question of jurisdiction, which need not be analyzed at the stage of the seizure before judgment, as our Court noted in *DDH Aviation*, otherwise there is a risk of going against the legislator's clear intention with regard to seizures before judgment:

> [47] Appellants argue that a provisional or conservatory measure cannot be authorized under article 3138 C.C.Q. unless it is shown that there is already an action instituted before the Court of another jurisdiction and unless the request emanates from that Court. I do not agree. The text of the article contains no such limitations. It is sometimes very difficult, if not impossible, to first file an action in another jurisdiction before seeking the protection of a provisional or conservatory measure contemplated by our Civil Code or Code of Civil Procedure. The purpose of the legislation, and the intent of the legislator, could be defeated if the interpretation advanced by Appellants was accepted, because the time required to institute the action in another jurisdiction might allow the defendant to take a course of action which would render the provisional or conservatory measures

---

138 Judgment Quashing the Seizure, *supra,* note 23.
139 *Instrubel* (CA), *supra*, note 125, at para 23.
140 *Dancause c. 9064-3032 Quebec inc.*, 2013 QCCA 1657, at para 8; C. Belleau, *supra*, note 134, at 513, No. 2–1310.
141 C. Belleau, *supra*, note 134, at 504, No. 2–1292.
142 *Ibid.* at 504, No. 2–1293.
143 *Kuwait Airways* (CA), *supra*, note 121, at para 1, rev'd on other grounds by *Kuwait Airways* (SCC) *supra*, at note 51; *Tracy v. Iran*, *supra*, note 121, at para 23; *Canadian Planning*, *supra*, note 75, at para 12; *Republic of Iraq v. Export Development Corp.*, *supra*, note 121, at paras 1–3; *Sunlodges, supra*, note 65, at para 8.
144 *Kuwait Airways* (SCC), *supra*, note 51, at para 22.

> useless, ineffective, or academic. The submission that the request must be made by the Court outside of Quebec, rather than by the interested party (plaintiff), is entirely without merit.[145]

[149] In that case, the Court further concluded that it was not necessary for an underlying proceeding to have already been initiated outside Quebec to order the seizure, based in particular on the rules of private international law set out under the CCQ, article 3138 in particular, which clearly states that the lack of jurisdiction does not bar courts from ordering provisional or conservatory measures:

3138. A Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.	**3138.** L'autorité québécoise peut ordonner des mesures provisoires ou conservatoires, même si elle n'est pas compétente pour connaître du fond du litige.

[150] As Professor Gérald Goldstein explained, summarizing the Court's conclusions in *DDH Aviation*, the required prerequisites such as that a debate has been initiated in another jurisdiction [TRANSLATION] "is inconsistent with the very purpose of provisional measures, since the time required to institute the action would allow the defendant abroad to take a course of action that would render the provisional measure useless or ineffective".[146] Drawing on case law, he also confirmed that the procedure for a seizure before judgment is one of the provisional and conservatory measures referred to in article 3138 CCQ.[147]

[151] More recently, in *Ortega Figueroa c. Jenckel*, our Court quoted Professor Goldstein's comments with approval,[148] affirming that the Quebec court had jurisdiction to order provisional measures even if it had no jurisdiction over the merits of the dispute:

> [TRANSLATION]
>
> [25] Article 3164 CCQ also enshrines the principle of jurisdictional reciprocity, also referred to as the "mirror principle", according to which the authority granted to Quebec courts is extended to foreign authorities when the dispute is substantially connected with the state whose authority is seized of the matter.
>
> ...
>
> [31] Professor Goldstein notes, in this respect,, that article 3138 CCQ can be distinguished from article 3140 CCQ by its broader scope. Article 3140 CCQ is, indeed, expressly limited in that it applies exclusively (1) in an emergency or

---

145 *DDH Aviation*, *supra*, at note 134.

146 Gérald Goldstein, *Droit international privé*, vol. 2, coll. Commentaires sur le Code civil du Québec (DCQ) (Cowansville, Qc: Yvon Blais, 2012) quoting *DDH Aviation*, *supra*, note 134, at para 47.

147 G. Goldstein, *supra*, note 146, quoting *Ekinciler Demir Ve Celik San a.s. c. Bank of New York*, 2007 QCCS 1615, at para 19.

148 *Ortega Figueroa c. Jenckel*, 2015 QCCA 1393 [*Ortega Figueroa c. Jenckel*].

> serious inconvenience and (2) for the sole purpose of protecting a person who is present in Quebec or protecting the person's property if it is situated there.
>
> [32] The text of article 3138 CCQ is not restricted in this way and would therefore allow the implementation of extraterritorial conservatory measures …
>
> [33] It follows from the application of the "mirror principle" that the German court would have, like a Quebec court, jurisdiction to order provisional measures for the conservation of the deceased's assets situated outside its borders even if it does not have jurisdiction over the merits of the dispute.[149]
>
> [References omitted; emphasis added]

[152] These principles of private international law must be reflected in the issue of state immunity from the jurisdiction of the courts, with the necessary adaptations[150] since Quebec courts, while aware that they do not have the jurisdiction required to hear a dispute on the merits, have nevertheless acknowledged that they have jurisdiction to order conservatory measures under the rules of private international law.[151] It seems logical that a court would also be able to order such conservatory measures, even when state immunity from the jurisdiction of the courts is involved, unless these questions are, *prima facie*, so obvious as to be a bar to such measures, provided that these issues can be more fully debated at a later date, as is the case with respect to an application to quash a seizure.[152]

[153] To conclude otherwise would lead to an incoherent and contradictory result that the legislator cannot have desired, under the rules of interpretation of laws[153] since, on the one hand, following the interpretation of the *SIA* proposed by AAI, the Quebec Superior Court would be prevented from deciding an application for a seizure before judgment concerning assets situated in Quebec in a case that is before it, until the

---

149 *Ibid.*, at paras 25 and 31–33, quoting G. Goldstein, *supra*, note 146, at 106.

150 It should be noted that state immunity from the jurisdiction of the courts falls under the second paragraph of article 168 CCP, which concerns applications with no legal basis, rather than under article 167 CCP, which covers the declinatory exception and the lack of jurisdiction of a court, in particular in matters of private international law. Nevertheless, state immunity is considered by our Court to be a question of jurisdiction when it comes to applying the rules of inadmissibility: *Trudel*, *supra*, note 55, at paras 22 and 27.

151 *Ortega Figueroa c. Jenckel*, *supra*, note 148, at para. 33. See also *Droit de la famille — 131294*, 2013 QCCA 883, at para 43; *Droit de la famille — 182220*, 2018 QCCS 4482, at para 23; *Droit de la famille — 182044*, 2018 QCCS 4115, at para 18.

152 It should be pointed out, however, that unlike state immunity from the jurisdiction of the courts, which is considered to be a question of subject-matter jurisdiction, the rules of private international law generally fall within the scope of territorial jurisdiction, although this issue is the subject of some theoretical debate: Sylvette Guillemard, "Les problèmes de qualification de la compétence internationale des tribunaux québécois: la solution réside dans l'alliance du Code de procédure civile et du Code civil du Québec", (2019) 60:1 *Les Cahiers de Droit* 219. However, the analogy between these two schemes is nevertheless possible. See on this subject: D. Ferland and B. Emery, *supra*, note 135, at 564, No. 1–1260.

153 Pierre-André Côté and Mathieu Devinat, *Interprétation des lois*, 5th ed (Montreal: Thémis, 2021) Nos. 1182–1183.

debate on immunity has taken place. However, it could, on the other hand, under article 3138 CCQ*,* render an order for seizure before judgment concerning assets situated in Quebec in a case over which it has no jurisdiction on the merits and that is not before it.

[154] Certainly, in this case, at the stage of the application for a seizure before judgment by garnishment, the jurisdiction of Quebec courts remained uncertain since it depended on the debate on immunity from jurisdiction. However, since the *ex parte* conservatory measures were [TRANSLATION] "essentially temporary, liable to revision" and [TRANSLATION] "ordered only to help the main proceedings progress", as the Minister of Justice's comments on article 3138 CCQ show,[154] they do not determine under any circumstances the outcome of the debate to be held at a later date, on the merits or immunity.[155]

[155] It should be recalled in this respect that according to Pinsonnault, J., CCDM/Devas provided sufficient elements to meet the criteria for a seizure before judgment and he concluded that the authorizing judges would have been justified in granting these seizures, if it had not been for the question of state immunity that should have been decided first.[156]

[156] However, the Court considers that in this case, CCDM/Devas did not have to demonstrate that the Quebec courts had jurisdiction under the *SIA* at that point and that this question should have been raised and discussed at a later date, when the application to quash the seizure was before Pinsonnault, J. in January 2022. AAI did not seek to quash the seizure on the basis of its immunity. Instead, it attempted to shift the focus of the debate by questioning whether an *ex parte* order should be made at this stage, without debating the question of immunity [TRANSLATION] "immediately" as the case law states. This approach is the result of a misinterpretation of the *SIA* and case law rendered at the dismissal stage. It disregards the particular nature and objectives of

---

154 Ministry of Justice, *Commentaires du ministre de la Justice : Le Code civil du Québec* (Québec: Publications du Québec, 1993) art. 3138.

155 In *Kazemi*, LeBel J. stated the following: "Functionally speaking, state immunity is a 'procedural bar' which stops domestic courts from exercising jurisdiction over foreign states. In this sense, state immunity operates to prohibit national courts from weighing the merits of a claim against a foreign state or its agents". *Kazemi*, *supra*, note 66, at para 34 (references omitted).

156 Judgment Quashing the Seizure, *supra,* note 23 at para. 53. However, the judge's reasons are contradictory on this point. He stated in paragraph 53 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". However, he stated in paragraph 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".

seizures before judgment and the legislator's clear intention not to impose a series of requirements on the process that would deprive it of its effectiveness.[157]

[157] By agreeing with AAI on this point, the trial judge erred in law and expanded the scope of immunity case law at the preliminary stage of dismissal by including seizures before judgment.[158] In doing so, he ventured beyond the grounds for quashing the seizure provided for in article 522 CCP without holding a debate or ruling on the real ground for quashing the seizure, AAI's immunity.[159]

3.2. Did the trial judge err in fact and in law by finding that the presumption of immunity applied separately to AAI after concluding that India could not benefit from this presumption, and by determining that CCDM/Devas had not demonstrated that the exceptions provided for under the *SIA* applied to AAI?

[158] The second ground of appeal concerns AAI's legal characterization and its relationship with India. In the opinion of Pinsonnault, J., since AAI is a separate legal entity, the presumption of immunity it enjoys under the terms of the *SIA* is independent of India's. As a result, not only could Granosik, J. not allow a seizure against AAI before the question of its immunity had been decided on the merits, he could also not decide it before AAI had been served.[160]

[159] This question is presented to the Court from a particular angle.

[160] The debate on appeal is now more specific. The Court concluded, on the previous question, that a judge may authorize a seizure before judgment before the question of state immunity is decided on the merits. Similarly, as AAI agreed, the question of service is no longer determinative in that it has since taken place. The only question that remains is whether AAI can be likened to India to allow CCDM/Devas to seize its assets on the basis of its claim against India. In such a case, the question that must then be asked, at a later stage, is whether AAI can invoke immunity under the terms of the *SIA* even if, as we concluded in the first record, India does not have immunity, in this case, on the grounds that it waived it.

[161] However, as the parties indicated at the hearing, this Court is not seized of the merits of this matter. The case is progressing on the merits before the Superior Court. In fact, not only was the case continuing to move along, but this Court learned, just as this

---

157 *L.O.-M. c. É.L.*, 2005 QCCA 634, at paras 26–27; *Griffis c. Grabowska*, 2009 QCCA 2421, at paras 11–12.

158 *Kuwait Airways* (SCC) *supra*, note 51, at paras 15 and 22; *Trudel*, *supra*, note 55, at paras 22–24 and 27; *Sistem Mühendislik Inşaat Sanayi Ve Ticaret Anomic Sirketi v. Kyrgyz Republic*, 2015 ONCA 447, at paras 52–54; *Schreiber* (CA), *supra*, note 102, at paras 16–19, aff'd for other reasons by *Schreiber* (SCC), *supra*, note 76.

159 Judgment Quashing the Seizure, *supra,* note 23, at paras 121–125.

160 *Ibid*. at paras 86 *et seq.*

judgment was about to be rendered, that the judgment on this specific issue was rendered on August 29, 2024 ("**Judgment of August 29**").[161] It is certainly surprising that the parties did not keep the Court informed of the progress of the case and that they did not wonder why the Superior Court delivered its judgment before hearing the outcome of this appeal.

[162] In any event, the situation is quite unusual, since this Court is seized of the question of whether the authorizing judge could be convinced, on a *prima facie* basis, that AAI's funds could be seized on the ground that it is inseparable from the state, when we now know—despite CCDM/Devas appealing from the Judgment of August 29—that the application against AAI was dismissed on the ground that it is indeed an entity that is separate from India.

[163] As unique as the situation may be, the Judgment of August 29 does not make this appeal moot or unnecessary. A seizure before judgment is in effect until the final judgment, and its validity remains relevant to the debate during the appeal from the Judgment of August 29. If this Court dismisses CCDM/Devas's appeal and affirms that the seizure before judgment is invalid, AAI's funds would be released, subject, possibly, to CCDM/Devas attempting to file an appeal with the Supreme Court of Canada and obtaining a stay of the execution of this judgment. Conversely, if this Court allows the appeal and concludes that the seizure is valid, the funds would then remain seized during the appeal from the Judgment of August 29, provided that AAI obtains an order for provisional execution under article 661 CCP.

[164] It is therefore necessary to decide the question, taking care not to encroach on the debate on the merits and looking only at what Granosik, J. had before him, as well as the arguments put forward by CCDM/Devas at the time, which arguments may have changed since, according to the Judgment of August 29.

[165] Sticking strictly to this debate, CCDM/Devas argued before the Court that, before Granosik, J., they met their burden of demonstrating *prima facie* that AAI was the *alter ego* of India and that it was inseparable from it. As a result, not only could CCDM/Devas seize AAI's funds for the claim they have against India, but AAI could not benefit from the immunity that India waived either explicitly or by application of the commercial activity exception. This is a question that the authorizing judge could not decide at that point, but that was no bar, as we have seen, to the seizure. This argument can be found in paragraph 72 of the application for recognition of arbitral awards filed by CCDM/Devas in support of their application for seizure before judgment:

> 72. In light of the following, and as will be further demonstrated at trial, AAI is India, insofar as it is an organ of the State of India inseparable from India or is the *alter ego* of India. As a result, an order from this Honourable Court,

[161] *CCDM/DEVAS (Mauritius) Ltd. c. CCDM Holdings*, 2024 QCCS 3225.

> recognizing and declaring the Treaty Awards enforceable in Quebec, can be executed on AAI's assets.

[166] CCDM/Devas argue that Pinsonnault, J.'s conclusions are irreconcilable and that he erred by maintaining, on the one hand, that Granosik, J. could, on the basis of the case as provided, be convinced that AAI was the *alter ego* of India,[162] but on the other hand, that it could only be concluded that if India were found not to have immunity because of one of the exceptions, that the same would necessarily be true for AAI.[163] For Pinsonnault, J., accepting such reasoning amounted to making AAI "guilty by association" of an action—a contravention of the Treaty—committed by India.[164] The judge wrote:

> [109] As previously mentioned, six years after the execution of the Devas Agreement, on February 17, 2011, the CCS adopted a policy decision to reserve the S-band for national and societal needs, having regard to the needs of the country's strategic requirements, thereby deciding not to provide orbit slot in the S-band to Antrix for its commercial activities.
>
> [110] Paragraph 146 of the Merits Award clearly reveals that it was the ROI who decided to annul unilaterally the Devas Agreement:
>
> > 146. On February 17, 2011, the CCS took the decision to annul the Devas Agreement. On the same day, the Government of India issued a press release announcing that the CCS had decided to annul the Devas Agreement. The press release reads in full:
> >
> > CCS Decides to Annul Antrix-Devas Deal
> >
> > Cabinet Committee on Security (CCS) has decided to annul the Antrix-Devas deal. Following is the statement made by the Law Minister, Shri M. Veerappa Moily on the decision taken by the CCS which met in New Delhi today:
> >
> > "Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix **for commercial activities**, including for those which are the subject matter of existing contractual obligations for S band.
> >
> > In the light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the "Agreement for the lease of space

[162] Judgment Quashing the Seizure, *supra,* note 23, at paras 62–69.
[163] *Ibid*., at paras 86–90, 97, 110.
[164] *Ibid*. at para 111.

> segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28 January 2005 **shall be annulled forthwith**."
>
> [Emphasis added]
>
> [111] On February 25, 2011, citing the decision of the CCS, Antrix gave notice to Devas that the Devas Agreement was terminated pursuant to the provisions of Article 11 entitled "*Force majeure*".[165]

[167] In doing so, Pinsonnault, J. highlighted the singular nature of this case in which, contrary to what often happens, such as in *Mallat*[166] for example, the entity the parties are looking to associate with the state is not the source of the act concerned in the proceedings. AAI is only involved in this case because it holds funds that belong to the state, according to the allegations of CCDM/Devas.

[168] For CCDM/Devas, the question raised by this case is different from the question in our Court's ruling, which quashed the seizure against the Air India funds held by IATA.[167] First, that case did not raise the question of state immunity. Second, Air India is a company incorporated under the Indian *Companies Act*, and has its own legal personality. That being said, although Indian law characterizes AAI as a body corporate, it is a creation of parliament, established by the *Airports Authority of India Act*, *1994* ("***AAI Act***"), a law specific to it, and is inseparable from the state.[168]

[169] AAI argued that, under the terms of section 2 of the *SIA*, it is an agency of India, as it is a separate entity with its own legal personality. As a result, it benefits from the presumption of immunity regardless of whether India has lost its own based on any of the exceptions. Pinsonnault, J. was therefore correct to quash the seizure, as it could not be heard, CCDM/Devas having failed to make any submissions to Granosik, J. that would justify setting aside its presumption of immunity, and AAI is neither the entity targeted by the breach of the Treaty nor a party to the arbitration.

[170] AAI argued that Pinsonnault, J. erred, however, when he concluded *prima facie* that it is the *alter ego* of India. It added that nothing in the application for a seizure or the affidavits supporting it demonstrated an exceptional degree of control by India over AAI and that they appear, on the contrary, to be connected in a manner similar to any government corporation.

---

165 Judgment on Immunity, *supra*, at note 32.
166 *Mallat c. Autorité des marchés financiers de France*, 2021 QCCA 1102 [*Mallat*].
167 Air India Judgment, *supra,* at note 26.
168 *Airports Authority of India Act, 1994*, Act No. 55 of 1994, as amended by the *Airports Authority of India (Amendment) Act 2003* (India).

[171] AAI argued that this case is identical to the one involving Air India. Consequently, and as our Court decided in that case, the burden was on CCDM/Devas to establish a ground that could justify piercing the corporate veil under article 317 CCQ;[169] otherwise, the assets of a company cannot be seized to enforce a claim against its shareholder, even if there is a conclusion that AAI is the *alter ego* of India. AAI added that accepting CCDM/Devas's arguments would result in an absurd outcome where a state agency claiming immunity would be in a more precarious situation than the entity that had not claimed any such immunity (such as Air India).

[172] What is the case here?

[173] It is important to clearly set out the applicable principles. Two obstacles arise in the face of the seizure carried out by CCDM/Devas.

[174] As Pinsonnault, J. rightly pointed out, the first obstacle is that according to the Award on the Merits, AAI is not a party to the Treaty that India allegedly breached. It is therefore necessary to establish that AAI's funds can be seized to enforce this award, whereas AAI is not, *a priori*, obligated under it. This first difficulty was also found in the Air India seizure case.

[175] The second obstacle, which was not mentioned in the Air India Judgment, concerns AAI's jurisdictional immunity. Recall the text of section 2 of the *SIA*:

2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
foreign state includes	*État étranger* Sont assimilés à un État étranger :
(a) …	a) […]
(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and	b) le gouvernement et les ministères de cet État ou de ses subdivisions politiques, ainsi que les organismes de cet État;
(c) …	c) […]
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*	*organisme d'un État étranger* Toute entité juridique distincte qui constitue un organe de l'État étranger. (*agency of a foreign state*)

[169] Air India Judgment, *supra,* at note 26.

État étranger)

[176] This definition reveals that the law distinguishes the state and its internal components, such as departments and political subdivisions, from organs with a separate legal personality designated by law as agencies of the state and to which, despite having a separate legal identity, it extends its state immunity.

[177] If it is found, as argued by CCDM/Devas, that AAI is an inseparable organ of India, i.e., part of the state itself, then its funds may be seized and potentially used to execute a debt of the state. With this in mind, the immunity enjoyed by AAI is necessarily identical to that of the state itself and has the same limits.[170]

[178] With respect, Pinsonnault, J. did not correctly distinguish between these various aspects. On the first aspect, he erred, just as he did for Air India, by being satisfied with an *alter ego* situation that made the seizure possible. He should have asked whether AAI's legal personality is distinct from India's, a question that presented itself differently for Air India. On the second aspect, Pinsonnault, J. did not decide whether, as an *alter ego*—a fact which he accepted—AAI could maintain its immunity when India had waived its own.

[179] Obviously, these questions became secondary for Pinsonnault, J. insofar as he was of the opinion that Granosik, J. could not authorize the seizure before judgment before deciding the question of AAI's immunity on the merits. Since this is not the case, however, as we determined in the previous question, these aspects become determinative. We are, however, at a preliminary stage of a conservatory, rather than an enforceable, seizure. The question to be decided is therefore whether Granosik, J. could, based on the record as constituted before him, conclude that AAI was, *prima facie*, as CCDM/Devas argued, an inseparable organ of India, making the seizure possible and associating AAI's immunity with India's.

[180] However, contrary to what AAI argued, Granosik, J. had sufficient information in the record to conclude, on a *prima facie* basis, that, as CCDM/Devas argued, AAI is an inseparable organ of India, which made it possible to seize its funds and that the exception to the jurisdictional immunity that applied to India also applied to AAI. To support this, he had the text of the *AAI Act*, certain elements of which could suggest such an interpretation. He also had affidavits. Two of them containing elements on which CCDM/Devas based their argument that AAI is inseparable from India.

[181] The first of these was the affidavit of Anne Champion, American attorney for CCDM/Devas, who highlighted AAI's functions as India's civil aviation authority mandatary, responsible for controlling air traffic and airspace and collecting the air navigation charges that airlines and foreign states must pay to fly over Indian airspace.

---

[170] See: *Defense Contract Management Agency - Americas (Canada) v. Public Service Alliance of Canada*, 2013 ONSC 2005, at para 26.

[182] The second was the affidavit of Anuradha Dutt, an Indian attorney for CCDM/Devas. In addition to recalling AAI's government functions, Attorney Dutt stated that AAI is fully controlled by India's Ministry of Civil Aviation, as confirmed by two reports submitted as related exhibits. She also stated the various provisions of the *AAI Act* demonstrating the high degree of control and discretion that India maintains over AAI's structure, finances, operations and activities.

[183] All these elements were also alleged both in the application for recognition of the arbitral awards and in the application to authorize a seizure before judgment, in addition to being repeated in CCDM/Devas's arguments, which conclude that sufficient evidence exists to demonstrate *prima facie* that India is the true owner of AAI's funds.

[184] Granosik, J. was in possession of all this evidence and took it into account. He could, based on this evidence and, in particular, on the *AAI Act*, India's control over AAI, and AAI's role with regard to Indian airspace,[171] conclude that not only was AAI the *alter ego* of India, but that it was an integral and inseparable organ thereof, which made it possible to order a seizure before judgment as a conservatory measure.

4. Conclusion

[185] For all these reasons, Granosik, J. could authorize the seizure before judgment *ex parte* before the question of immunity had been decided on the merits. Similarly, it appears from the record as constituted before him that his conclusion that, *prima facie*, the AAI funds belonged to India and that state immunity did not apply due to any of the exceptions set out in subsection 4(2)(a) or section 5 of the *SIA,* was reasonable.

[186] Since the other conditions of article 518 CCP had been met and were no longer disputed before the Court, the seizure was *a priori* valid and Pinsonnault, J. should not have quashed it at that stage. The appeal is therefore allowed.

D. CCDM Holdings et al. c. The Airport Authority of India et al. (500-09-700124-225)

[187] This third case, let us recall, concerns the possible effect of the *IATA Act*, assented to on June 2, 2022, on the seizure by garnishment ordered on November 24, 2021, concerning the AAI funds that IATA held or could hold in the future. In connection with the adoption of this law, on June 27, 2022, AAI presented a second application to quash this seizure. Given that, as part of the previous case, the Court dismissed the first application to quash the seizure, it is now necessary to rule on this second application.

[188] For ease of reference, the wording of the *IATA Act* is reproduced below:

AN ACT RESPECTING THE LOI CONCERNANT

[171] On these criteria, see *Mallat, supra,* note 166, at paras 107–108.

INTERNATIONAL AIR TRANSPORT ASSOCIATION

AS the International Air Transport Association was incorporated by the Act to Incorporate the International Air Transport Association (Statutes of Canada, 1945, chapter 51);

AS, under section 1 of the Agreement between the Gouvernement du Québec and the International Air Transport Association relating to the privileges granted by the Gouvernement du Québec to the Association and its non-Canadian employees, signed in Montréal on 27 October 1988, the Association is recognized as an international non-governmental organization;

AS the head office of the International Air Transport Association is located in Montréal;

AS, under section 3 of the incorporating act of the International Air Transport Association, the mission of the Association is

(a) to promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;

(b) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service; and

(c) to cooperate with the International

L'ASSOCIATION DU TRANSPORT AÉRIEN INTERNATIONAL

ATTENDU que l'Association du Transport Aérien International a été constituée par la Loi constituant en corporation l'Association du Transport Aérien International (Statuts du Canada, 1945, chapitre 51);

Qu'en vertu de l'article 1 de l'Accord entre le gouvernement du Québec et l'Association du Transport Aérien International relatif aux privilèges consentis par le gouvernement du Québec à l'Association et à ses employés non canadiens, signé à Montréal le 27 octobre 1988, cette association est reconnue comme un organisme non gouvernemental international;

Que le siège de l'Association du Transport Aérien International est situé à Montréal;

Qu'en vertu de l'article 3 de sa loi constitutive, la mission de l'Association du Transport Aérien International est de :

a) promouvoir des transports aériens sûrs, réguliers et économiques au profit de tous, de favoriser le commerce aérien et d'étudier les problèmes qui s'y rattachent;

b) fournir des moyens de collaboration entre les entreprises de transport aérien engagées directement ou indirectement dans le service de transport aérien international;

c) coopérer avec l'Organisation de l'aviation civile internationale et

Civil Aviation Organization and other international organizations;

AS the International Air Transport Association plays an important role in maintaining and developing standards for air traffic safety and efficiency;

AS there is a need to protect the integrity and security of the payment mechanisms and financial services that the International Air Transport Association provides to its members and to other participants;

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS

1. Despite any provision to the contrary, no sum of money held by the International Air Transport Association and required to be paid to a participant in its financial services may be the subject of a seizure in the hands of a third person or of a measure having the same effect.

The first paragraph does not apply in the following cases:

(1) the Association expressly consents to the seizure in the hands of a third person or to the measure; or

(2) the sum of money is in an account held by the Association in a Québec branch of a bank, authorized trust company or financial services cooperative.

For the purposes of the first paragraph, “financial services” means

d’autres organisations internationales;

Que l’Association du Transport Aérien International joue un rôle important dans le maintien et le développement de standards en matière de sécurité et d’efficacité de la circulation aérienne;

Qu’il y a lieu de protéger l’intégrité et la sécurité des mécanismes de paiements et des services financiers que l’Association du Transport Aérien International offre à ses membres et aux autres participants;

LE PARLEMENT DU QUÉBEC DÉCRÈTE CE QUI SUIT :

1. Malgré toute disposition contraire, toute somme d’argent détenue par l’Association du Transport Aérien International et devant être payée à un participant à ses services financiers ne peut faire l’objet d’une saisie en mains tierces ou d’une mesure au même effet.

Le premier alinéa ne s’applique pas dans les cas suivants :

1° l’Association consent expressément à la saisie en mains tierces ou à la mesure;

2° la somme d’argent est dans un compte détenu par l’Association dans une succursale québécoise d’une banque, d’une société de fiducie autorisée ou d’une coopérative de services financiers.

Pour l’application du premier alinéa, on entend par « services financiers » l’ensemble des systèmes de règlement et de compensation de l’Association, incluant notamment les services d’amélioration et de

all of the Association's settlement and clearing systems, including, but not limited to, the IATA Enhancement and Financing Services, the IATA Clearing House, the Billing and Settlement Plan, the Cargo Account Settlement Systems and the IATA Currency Clearing Service.	financement de l'IATA (IATA Enhancement and Financing Services), la chambre de compensation financière de l'IATA (IATA Clearing House), le plan de facturation et de règlement (Billing and Settlement Plan), le système de règlement des comptes de fret (Cargo Account Settlement Systems) et le service de compensation de devises de l'IATA (IATA Currency Clearing Service).
2. This Act has effect from 5 May 2022.	**2.** La présente loi a effet depuis le 5 mai 2022.

[189] The question this case raises calls to mind the principles for the application of the law in time, in particular the distinction between its retroactivity and its immediate (or retrospective) effect. In the first instance, AAI argued in its application to quash the seizure that both the sums held by IATA prior to May 5, 2022, when the *IATA Act* came into force, and the sums that could be received after that date were subject to the new law and were therefore henceforth invalid. AAI presented its arguments as follows in its application to quash:

> 17. Section 1 of the Act states that, effective May 5, 2022, no sum of money held by IATA may, in the circumstances at hand, "*be the subject of a seizure in the hands of a third person or of a measure having the same effect*." The text of the Act is clear and unambiguous: not only can new sums of money belonging to AAI and held by IATA not be seized as of May 5, 2022, but, in addition, as of such date, even sums of money already seized must be released as they may no longer be "the subject of" ("l'objet de") a seizure, irrespective of whether the seizure order was entered prior to or after May 5, 2022.
>
> 18. Notably, the Act does not exclude from the scope of its application ongoing proceedings or ongoing seizures.
>
> 19. Moreover, the Seizure is only an interim, conservatory measure and would only become final and executory if and when it is declared good and valid by this Court following a judgment on the merits, a declaration that is squarely foreclosed by the Act.

1. Judgment on the application of the IATA Act

[190] The judge first decided a question of jurisdiction. CCDM/Devas argued that the judge did not have jurisdiction to hear this new application to quash the seizure since it

was *functus officio* ever since the Judgment Quashing the Seizure had been rendered. Conversely, AAI argued that this new application raised a different question and was not intended to review or vary the judgment previously rendered. In this sense, it was not *functus officio*.

[191] The judge partially accepted the respective positions of the parties. He initially concluded that, due to the appeal from the Judgment Quashing the Seizure, he did not have jurisdiction to rule on the possible effect of the *IATA Act* on the sums received or collected before May 5, 2022. According to him, it would be up to the Court of Appeal, as part of this same appeal, to decide this new question.[172] Next, the judge agreed with AAI and concluded that as the judge charged with the special management of the case, he had jurisdiction to rule on the potential effect of the *IATA Act* on the sums held or that would be held by IATA as of May 5, 2022.[173]

[192] The judge noted, however, that no additional sums had passed through IATA since May 5, 2022, as AAI stopped using its financial services because of the seizure. Despite this situation, he concluded that the question of the application of the *IATA Act* was not moot since AAI could resume its dealings with IATA if it had a guarantee that its funds could not be seized[174] and because CCDM/Devas claimed that in the event that new funds were to pass through IATA, they would not be subject to the new law.[175]

[193] The judge noted that while the *IATA Act* applied to sums held as of May 5, 2022, these sums could not benefit from the exceptions provided under this law. First, not only did IATA not consent to such a seizure, but the seizure was the impetus for the *Act*, which aims to prevent seizures such as those that occurred in this case from happening again, because they damage IATA's reputation.[176] Second, none of these sums are in an account held by IATA in Quebec.[177]

[194] The judge then interpreted the text of the *IATA Act*. In his opinion, the wording was clear and unambiguous: any sums paid to IATA since May 5, 2022, cannot be seized, despite any provision to the contrary. This last clarification, according to the judge, also applied to the conclusions of the judgment on the seizure by garnishment of November 24, 2021, which, it should be recalled, involve all future sums (conclusion C). He wrote:

> [TRANSLATION]

---

172 Judgment on the application of the *IATA Act*, *supra* note 28 at paras 20 and 35–45.
173 *Ibid.* at paras 20 and 47–50.
174 *Ibid*. at para 18.
175 *Ibid.* at paras 54–56.
176 *Ibid.* at para 64.
177 *Ibid.* at para 65.

> [71] The addition of "*[d]espite any provision to the contrary*" necessarily applies to the conclusions of Granosik, J.'s judgment authorizing the garnishment on November 24, 2021, when he specified that it applied to [TRANSLATION] "*all future sums*".
>
> [72] The garnishment as worded is a kind of seizure before judgment consisting of successive seizures compelling the third-party garnishee (IATA) to retain the sums belonging to or intended for the person whose property was seized (AAI) as they are received and starting when the third-party garnishee receives or collects the funds for a member or participant, until it is granted a release of seizure or a court orders it. In the meantime, the third-party garnishee (IATA) must declare all sums it holds for the person whose property was seized (AAI) at the request of the seizing creditor (the Plaintiffs) as was last done on May 10, 2022.
>
> [73] This Court is of the opinion that notwithstanding the date on which the garnishment before judgment was authorized, the seizure by garnishment concerning a sum of money intended for the person whose property was seized (AAI) only crystallizes each time the third-party garnishee (IATA) receives such a sum of money, which it would normally remit to the person whose property was seized (AAI) if it were not for the garnishment before judgment.
>
> [74] It is therefore at each of these times:
>
> - That the Garnishment before judgment takes effect and crystallizes with regard to new sums of money as they are received or collected by IATA for the benefit of its member or participant, the person whose property was seized (AAI); and
>
> - That exemption from seizure of these new sums of money must be determined in light of the *IATA Act*, which has been in force since May 5, 2022.
>
> [75] In other words, the appropriate time to determine whether any "*sum of money held by the* [IATA] *and required to be paid to a participant in its financial services*" is covered by the declaration of exemption from seizure in section 1 of the *IATA Act* is when IATA receives or collects a sum of money that it would normally have to remit to the member or participant involved, for example, AAI, in this case.[178]
>
> [References omitted; emphasis in original]

[195] He therefore concluded that the sums paid to IATA after May 5, 2022, are exempt from seizure, notwithstanding the orders of November 24, 2021.

---

[178] *Ibid*. at paras 71–75.

2. Grounds of appeal

[196] On appeal, all parties invited the Court to rule on the question of the possible effect of the *IATA Act* on the sums held by IATA prior to May 5, 2022. Even if the Court will not benefit from a decision by the trial judge on this point, since he refused to rule on this matter, the parties are right. The proper administration of justice weighs in favour of a decision from the Court on this point to avoid a new debate before the Superior Court and possibly the Court of Appeal. Similarly, the parties were able to put forward all the relevant arguments on this subject, and this issue is intrinsically linked to the matter relating to the effects of the law on sums that could be held after May 5, 2022. This Court will therefore consider this issue.

[197] On the merits of this question, the parties' respective positions are diametrically opposed. CCDM/Devas argued that the effect of the Judgment on the application of the *IATA Act* is to give the *IATA Act* a retroactive effect, both with regard to sums held before May 5, 2022, and those held after that date. According to CCDM/Devas, the only retroactive effect provided for under the law is for the period between the moment the bill was tabled, on May 5, 2022, and the date it received assent, on June 2, 2022, to avoid a [TRANSLATION] "run" to carry out multiple seizures. In this case, the seizure crystallized on November 24, 2021, and applying the *IATA Act* to it would contravene the principle of non-retroactivity of laws since according to articles 711 and 715 CCP, seizures take effect immediately without regard to when the debt justifying the seizure is due. Similarly, the validity of a seizure must be assessed on the date of the seizure, in this case November 24, 2021, and not subsequently. CCDM/Devas added that the judge erred by accepting that the phrase "despite any provision to the contrary", included in section 1 of the *IATA Act*, also refers to the conclusions of the Granosik Judgment allowing the seizure of [TRANSLATION] "all future sums".

[198] They alternatively argued that even if the Court concluded, as the trial judge did, that the seizure only crystallizes when sums are received by the third-party garnishee (in this case IATA), the trial judge erred by failing to characterize the procedural or substantive nature of the *IATA Act*, a question that had been submitted to him by the parties and that is determinative in this case. According to CCDM/Devas, only laws of a purely procedural nature apply as soon as they come into force. According to them, the *IATA Act* is not a purely procedural law, since it affects the very existence of the right to seize sums held by IATA, thereby putting their ability to recover sums due by AAI at risk. The seizure of November 24, 2021, therefore benefits from a vested right that would allow it to have effect, even for sums received after May 5, 2022.

[199] AAI argued that the *IATA Act* applies as soon as it came into force, both because it is a purely procedural law and because it appears from the text of the *Act* that such was the legislative intent. According to AAI, seizures before judgment are a conservatory procedure intended to execute a substantive right without changing the

content or existence thereof. Consequently, no party may argue that they have a vested right in a seizure before judgment.

[200] For AAI, the application of the *IATA Act* as soon as it came into force implies, first, that it produces its effects on sums after May 5, 2022, since they could not be subject to seizure before this date. While articles 711 and 715 CCP refer to possible future sums, for example, in the event of a conditional obligation, it is still necessary for such an obligation to exist, making it reasonably likely that such sums will be held. Here, this was not the case because AAI could cease to do business with IATA at any time, which has borne out.

[201] AAI also argues that since the *IATA Act* applied as soon as it came into force, it also had an effect on the sums held prior to May 5, 2022. According to AAI, a seizure before judgment can be declared valid—and therefore only crystallizes— only at the time of the judgment on the merits, which allows the seizure to operate as an assignment of claims. Before that moment, the seizor has no real right to these sums or any current right to these receivables.[179]

[202] IATA argues that the aim of the *IATA Act* is to preserve the integrity and security of the financial services it offers while maintaining the trust of those who participate in this system by ensuring that their funds cannot be seized. In connection with this objective, IATA maintains that even if the *IATA Act* is a purely procedural law, this characterization is not determinative here because, as the trial judge rightly decided, its text is unequivocal as to the law's application as soon as it came into force. In this sense, not only is it intended to prevent any new seizures after May 5, 2022, but it is intended to put an end to the effects of any existing seizures as of that same date. As for the sums held prior to that date, IATA leaves it to the Court to decide.

[203] In essence, this appeal raises the question of whether, under the principles of transitional law, the *IATA Act* applies to sums held by IATA prior to May 5, 2022, and to sums that it could hold after that date. To answer this question, let us first recall the applicable principles of law, in particular the concepts of retroactivity and immediate application.

3. Applicable legal principles

[204] The problems associated with conflicts of laws in time are not simple, and it would be appropriate to properly distinguish the retroactive effect of a law from the retrospective effect that its immediate application entails.

[205] In their reference book on the subject, professors Pierre-André Côté and Mathieu Devinat present the concept of retroactivity as follows:

> [TRANSLATION]

[179] *Provi-Grain (1986) inc. (Bankruptcy of)*, [1994] RJQ 1804 (CA) [*Provi-Grain*].

> A law has a retroactive effect when it claims to act in the past (*retro agere*). Roubier defined a retroactive law as one that [TRANSLATION] "claims to apply to events that have already occurred" and retroactivity as "transferring the application of the law to a date prior to its enactment, or, as has been said, a fiction of the pre-existence of the law".[180]
>
> [References omitted]

[206] Retroactive law therefore creates a fiction and [TRANSLATION] "requires legal actors and law enforcement to 'act as though' the law was, in the past, other than what it actually was".[181] This is what section 2 of the *IATA Act* does, in this case, by providing that the law applies as of the date it was introduced (May 5, 2022) rather than the date it received assent (June 2, 2022). The preparatory work shows that this provision was intended to prevent a run on seizures between the date the law was tabled and the date of its assent.[182]

[207] While the retroactive effect concerns facts that entirely pre-date the new law, the immediate (or retrospective) effect concerns legal situations in progress at the time the new standard takes effect.[183] The new law will have immediate effect if it governs the future development of an ongoing legal situation without affecting the past, as a retroactive law would. Professors Côté and Devinat summarize this concept as follows:

> [TRANSLATION]
>
> When a new statute is declared applicable going forward to situations already underway, we say it has immediate effect. This notion is used here to describe a situation not only where the facts contemplated by the rule are underway when the law is amended (what Héron calls the general effect of the new statute), but also to describe situations where the legal effects of the rule are underway (what Héron calls the retrospective effect of the statute).[184]
>
> [References omitted]

[208] Conversely, when the law has no immediate effect, the legal situation underway remains governed by the old rule and the litigant can then invoke a vested right.

[209] In theory, the law applies to facts that take place between the moment it comes into force and the moment it is repealed.[185] Even though it is not enshrined in any

---

180 P.-A. Côté and M. Devinat, *supra,* note 153, at No. 477.

181 *Ibid.*, No. 480.

182 Quebec, National Assembly, *Journal des débats de la Commission des transports et de l'environnement*, 42-2, vol 46, No. 35 (May 31, 2022) at 14–15.

183 *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, 2004 SCC 59, at para 46; P.-A. Côté and M. Devinat, *supra,* note 153, at No. 587.

184 P.-A. Côté and M. Devinat, *supra,* note 153, at No. 594.

185 *Ibid.*, at No. 468.

legislative text, a presumption exists against retroactive laws,[186] and a separate[187] though weaker[188] presumption exists in favour of maintaining vested rights, and therefore against the immediate application of the new law to situations that are underway.[189] This last presumption is reversed, however, with respect to a purely procedural law,[190] i.e., provisions "designed to govern only the manner in which rights are asserted or enforced [that do] not affect the substance of those rights".[191]

[210] While the distinction between a law that is purely procedural and one that is not can be obvious in some cases, it raises serious difficulties in others. Professors Côté and Devinat summed up this issue as follows:[192]

> [TRANSLATION]
>
> 706. In summary, a law is purely procedural if its application to a specific case affects only how a right is exercised. If, on the contrary, the application of a procedural law makes it practically impossible to exercise a right or otherwise affects substantive rights, it is not considered "purely procedural", because its application would then affect "substantive rights".
>
> [References omitted]

[211] It goes without saying that these principles and presumptions are only subsidiary. CCDM/Devas were therefore wrong to state in their written submissions that only procedural laws apply as soon as they come into force. While these laws, unlike others, are presumed to apply immediately, on this question, as with all others, legislative intent reigns supreme[193] and it is appropriate to first interpret the text of the new law to understand the legislative intent as to its effect in time.

[212] Of course, the legislator may have explicitly included transitional provisions, which must then be applied.[194] However, the absence of such provisions, as in this case, does not necessarily mean that the solution must be the application of the presumptions outlined above, as the judge may [TRANSLATION] "deduce the legislative

---

186 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, at para 71; *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46, at para 53; P.-A. Côté and M. Devinat, *supra,* note 153, at Nos. 472–474.

187 P.-A. Côté and M. Devinat, *supra,* note 153, at No. 475.

188 *Ibid.*, at No. 650.

189 *Ibid.*, at No. 603. See also section 12 of the *Interpretation Act*, CQLR, c. I-16.

190 *Tanny, supra*, note 56, at para 37; *Mayco Financial Corporation c. Rosenberg*, 2015 QCCA 1231, at paras 21 *et seq.*; P.-A. Côté and M. Devinat, *supra,* note 153, at No. 685. See also section 13 of the *Interpretation Act*, CQLR, c. I-16.

191 *R. v. Dineley*, 2012 SCC 58, at para 10 [*Dineley*]. See also: *R. v. Archambault*, 2024 SCC 35, at paras 203 *et seq.* [the judges agreed on these principles but were divided on their application].

192 P.-A. Côté and M. Devinat, *supra,* at note 153.

193 *Ibid.*, at No. 457.

194 *Ibid.*, at No. 458.

intent in this regard from the text and, thanks to the text, determine the facts that fall under the law and those that escape it".[195] It is only [TRANSLATION] "[i]f the text is silent or if the indications it provides are insufficient to reach a firm conclusion [that] the judge may consider the presumptions of legislative intent".[196]

[213] These principles and this approach should now be applied to the facts of this case.

4. Application to the facts

[214] The parties rightly agree that section 2 of the *IATA Act* explicitly provides that it has retroactive effect to May 5, 2022. As for the rest, the law contains no transitional provisions.

[215] In the first instance, the parties put forward, all at once, arguments related both to the procedural nature of the *IATA Act* and to the legislative intent arising from its text to justify whether or not it applied as soon as it came into force. The judge, however, limited himself to the second aspect of the question to implicitly conclude that the *IATA Act* was immediately applicable. Although CCDM/Devas criticized him for this on appeal, and while some of the judge's reasons are not immune from any criticism, the judge did not commit any errors.

[216] As we have seen, the legislative intent that the new law should apply as soon as it comes into force to situations that were underway does not necessarily require an explicit provision to this effect. This intention may also, as with any interpretative exercise, arise from reading "legislative language in context and in its grammatical and ordinary sense, harmoniously with the scheme and purpose of the legislation at issue".[197]

[217] It is clear from a reading of sections 1 and 2 of the *IATA Act* that the legislator intended to prevent the seizure of any sum held by IATA as of May 5, 2022. One would be hard-pressed to find therein any vested rights for proceedings begun prior to that date concerning future funds. On the contrary, the purpose and aim of the law, which we saw above, i.e., to ensure the integrity and security of IATA services and maintain the trust of participants, cannot be reconciled with the existence of such vested rights.

[218] Similarly, the fact that section 1 of the *IATA Act* makes the holding of funds by IATA the event that triggers the law reveals that the law aims both to prevent the authorization of new seizures as of May 5, 2022, and to stop the effects of previously authorized seizures with respect to future funds. The fact that the legislator made the

---

195 *Ibid.*, at No. 459.

196 *Ibid.*, at No. 461.

197 *Dineley*, *supra*, note 191, at para 44. See also: *Tran v. Canada (Public Safety and Emergency Preparedness),* 2017 SCC 50, at para 50.

law retroactive to the date it was introduced to avoid a run on seizures also reinforces this interpretation.

[219] In reality, the debate between the parties is not so much whether the law applies immediately or not, but rather determining what legal facts are relevant to the analysis to decide whether, as at May 5, 2022, the seizure had crystallized for both the sums held by IATA at that time and for sums it could hold in the future.

[220] As we have seen, the parties' positions on this point are opposed. On the one hand, CCDM/Devas argued that the seizure crystallized on November 24, 2021, both for the funds held by IATA at that time and for the funds it could hold in the future, even after May 5, 2022. They based their argument on both the conclusions of the Granosik Judgment authorizing the seizure, which, in paragraph C, include any future sums held by IATA, and on articles 711 and 715 CCP, which refer to the seizure of conditional debts or debts with a term. AAI was of the opinion that a seizure only crystallizes when the judgment on the merits is rendered. In this sense, the seizure of November 24, 2021, had yet to crystallize on May 5, 2022, even with respect to the funds already held by IATA. The law must therefore apply and renders the entire seizure inoperative. IATA has not taken a clear position on this issue.

[221] With respect, the parties are all wrong, and the judge was right to conclude that, notwithstanding its date of authorization, the seizure before judgment by garnishment crystallizes when the third-party garnishee receives the funds.

[222] First of all, we cannot agree with CCDM/Devas's argument that applying the *IATA Act* to the seizure of November 24, 2021, for funds that IATA could receive after May 5, 2022, amounts to giving it a retroactive effect. It is difficult to see how it could be concluded that sums IATA did not hold on May 5, 2022, could already be seized. While, contrary to what the judge seems to accept, the conclusions of the judgment authorizing the seizure of sums that IATA might hold in the future are not useful for determining whether the *IATA Act* applies immediately, it is nevertheless correct to note that these same conclusions cannot have the effect of deeming fictional the existence of funds as of May 5, 2022, when these funds had not yet been received on that date.

[223] As for the argument relating to articles 711 and 715 CCP, which allow for the seizure of sums that are not yet due when the debt is subject to a term or condition, it remains that the obligational relationship in these cases has already been created. It is not necessary to determine what the solution would be in terms of transitional law in that situation. It is sufficient to note that, here, the situation is different, since AAI did not have an obligation to continue using IATA's services and remit funds to it, as shown by what followed.

[224] In this case, the seizure could not crystallize before IATA actually held the sums on behalf of AAI. The *IATA Act* therefore applies to any sums that IATA may hold starting May 5, 2022, without there being any retroactive effect.

[225] AAI, however, argued that the seizure crystallized even later than the moment when the sum was held by IATA, i.e., when the judgment on the merits—in this case the judgment on the recognition and enforcement of arbitral awards—is rendered because it is only then that the seizure is ultimately declared valid. To support its argument, AAI pointed out that throughout the conservatory phase, facts subsequent to the authorization of the seizure can affect its validity, such as the debtor's bankruptcy[198] or a direct action by another creditor.[199]

[226] These arguments are unconvincing. Admittedly, during its conservatory phase, the seizure does not confer on the seizor a real or current right to the debts of the garnishee,[200] and it is true that it is only when the judgment on the merits confirms the seizor's right that the seizure will result in an assignment of claims in its favour starting from the day of the seizure.[201] However, for the purposes of the rules of transitional law, it is important not to confuse the crystallization of the seizure with the seizor's claim. The assertion that the judgment on the merits makes the seizure before judgment valid is only because the seizure can have an enforceable effect only if the claim is recognized and within the time limit. However, as soon as it is granted, the seizure takes effect by placing the debtor's assets in the hands of the courts, which is precisely what the *IATA Act* intends to prevent with respect to the sums held by IATA.

[227] In this case, the sums held before May 5, 2022, were seized as soon as IATA held them and will, without further action, contribute to the execution of the judgment on the merits, in the event that the creditor is successful. As the author Fraticelli explains, once the judgment on the merits has been rendered, [TRANSLATION] "[t]he conservatory measure that was the seizure before the judgment will simply become a measure of forced execution of the judgment".[202]. It should be added that in this case, it is all the more true as the seizure before judgment is ancillary to an application to homologate an arbitral award that has already recognized the right of the seizing party—in this case, CCDM/Devas.

[228] The seizure of the sums held by IATA prior to May 5, 2022, had therefore crystallized when the law came into force and remains valid, as the *IATA Act* cannot apply, under the principle of non-retroactivity of laws.

---

198 *Provi-Grain, supra,* at note 179.
199 *9183-7708 Québec inc. c. Soltron Realty Inc.*, 2016 QCCA 155, at paras 56–58 [*Soltron Realty*].
200 *Provi-Grain, supra,* note 179, at 5 and 7.
201 *Soltron Realty*, *supra*, note 199, at para 57.
202 Arnaud Fraticelli, "Les saisies avant jugement", in École du Barreau, *Collection de droit 2023-2024*, *Vol. 2 Preuve et procédure* (Montreal: Éditions Yvon Blais, 2023) at 222–223.

5. Conclusion

[229] For all these reasons, the appeal is allowed for the sole purpose of declaring that the *IATA Act* does not apply to the seizure carried out on November 24, 2021, with respect to the sums belonging to AAI that IATA held prior to May 5, 2022.

FOR THESE REASONS, THE COURT:

500-09-030393-235

[230] **DISMISSES** the appeal, with legal costs in favour of the respondents CCDM Holdings, LLC, Devas Employees Fund US, LLC and Telcom Devas, LLC;

500-09-029899-226

[231] **ALLOWS** the appeal of CCDM Holdings, LLC, Devas Employees Fund US, LLC and Telcom Devas, LLC;

[232] **REVERSES** the judgment rendered on January 8, 2022, and, rendering the judgment that should have been rendered;

[233] **REPLACES** paragraphs [140] and [141] with the following:

> [140] **DISMISSES** 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, by Justice Lukasz Granosik;
>
> [141] **REINSTATES** the First Seizure before judgment by garnishment authorized on November 24, 2021, by Justice Lukasz Granosik in file 500-11-060766-223 (500-17-119144-213 before February 21, 2022);

[234] **STRIKES** paragraphs [143] to [148];

[235] **DECLARES** that the garnishment before judgment authorized on November 24, 2021, by the Honourable Lukasz Granosik in file number 500-11-060766-223 (500-17-119144-213 before February 21, 2022) remains valid until a final judgment is rendered in connection with the appellants' proceedings entitled *Modified Judicial Application Originating a Proceeding in Recognition an Enforcement of Arbitration Awards made outside Quebec*;

[236] **THE WHOLE**, with legal costs on appeal in favour of the respondents CCDM Holdings, LLC, Devas Employees Fund US, LLC and Telcom Devas, LLC;

500-09-700124-225

[237] **ALLOWS** the appeal for the sole purpose of adding paragraph [82.1] to the judgment rendered on September 6, 2022:

> [82.1] **DECLARES** that the *International Air Transport Association Act* does not apply to the garnishment authorized by the Honourable Lukasz Granosik on November 21, 2021, with respect to any sums of money received, collected or held by IATA before May 5, 2022;

the other conclusions of the judgment remaining unchanged;

[238] **THE WHOLE**, without legal costs, given the mixed outcome of the appeal.

GENEVIÈVE MARCOTTE, J.A.

BENOÎT MOORE, J.A.

SOPHIE LAVALLÉE, J.A.

Mtre Éric Mongeau
Mtre Patrick Girard
Mtre Vincent Lanctôt-Fortier
Mtre Marianne Bastille-Parent
Mtre Benjamin Herrera
STIKEMAN ELLIOTT
For The Republic of India

Mtre Mathieu Piché-Messier
Mtre Karine Fahmy
Mtre Amanda Afeich
Mtre Dayeon Min
BORDEN LADNER GERVAIS
For CCDM Holdings, LLC; Devas Employees Fund US, LLC and Telcom Devas, LLC

Mtre Corey Omer
Mtre William Brock
Mtre Éloïse Noiseux
Mtre Natalia Koper

English translation of the judgment of the Court by SOQUIJ

DAVIES WARD PHILLIPS & VINEBERG
For Airport Authority of India

Mtre Ioana Jurca
Mtre Marc-Antoine Côté
WOODS
For Air India Limited

Mtre Claude Morency
Mtre Anthony Rudman
DENTONS CANADA
For International Air Transport Association

Dates of hearing: December 11 and 12, 2023