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Limits on Enforcing Awards Against Third-Party Alter Egos in Canada: The Court of Appeal of Quebec Weighs In

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Enforcing awards against third parties is a perennial issue in international arbitration circles. In *Air India Ltd c CC/Devas (Mauritius) Ltd*, the Court of Appeal of Quebec considered an award creditor's ability to seize assets belonging to an award debtor's *alter ego* under Quebec law. This case offers significant insight for award creditors wishing to enforce against a third party in Quebec. Merely demonstrating that the third party is the award debtor's *alter ego* will not cut it. Though the award creditor sought the Supreme Court of Canada's input on the issue, the latter dismissed the application for leave to appeal the decision in mid-May of this year.

The underlying dispute in this matter is a saga with which readers might be familiar. The dispute concerns a 2005 contract for satellite spectrum capacity and satellite-broadcast wireless access services. The parties to the contract were the respondent, Devas Multimedia Services ("**Devas**"), and Antrix Corporation Limited ("**Antrix**"), an Indian state-owned entity.

In 2010, the Indian Space Commission terminated the contract, triggering an arbitration seated in New Delhi. The tribunal issued two awards. The first award found Antrix liable for breach of contract. The second award ordered the Republic of India to pay Devas USD 562.5 million, plus interest. India refused to pay and unsuccessfully attempted to set aside the awards. Devas, conversely, tried to enforce the awards in several jurisdictions, without success.

In 2021, Devas filed an application for recognition and enforcement of the awards before the Superior Court of Quebec. As a preliminary step, Devas sought interim measures to preserve and enforce on assets within Quebec. Specifically, they sought seizures before judgment by way of garnishment. A "garnishment" order requires a third party to pay to a debtor's creditor sums in the third party's possession belonging to the debtor.

The Court granted orders against two third parties: 1) the Airport Authority of India ("**AAI**"), another state-owned entity; and 2) Air India. The assets of these two entities were in the hands of the International Air Transport Authority ("**IATA**"), against whom the Superior Court ordered writs of garnishment. The Court granted these remedies on an interim basis following *ex parte* hearings.

After learning of the seizure and garnishment orders, AAI and Air India brought motions to dismiss the proceedings and quash the seizures.

Superior Court Decision

In January 2022, the Superior Court heard motions to quash the seizure orders and concluded it was appropriate to pierce the corporate veil as between India and each of AAI and Air India since they were India's *alter egos*. Indeed, according to the facts as alleged—accepted by the Court for the purpose of the motions—the Republic of India was Air India's sole shareholder. This was sufficient in the circumstances to order enforcement measures against Air India (albeit the judge exercised his discretion to halve the amount subject to seizure stipulated in the Court's previous *ex parte* order). However, with respect to the AAI, the Court quashed the seizure. Devas's failure to properly serve AAI with the originating application seeking the awards' recognition and enforcement was fatal to the seizure orders.

Court of Appeal Decision

Air India appealed the decision to maintain the writ of seizure; Devas cross-appealed on Justice Pinsonnault's decision to halve the seizure amount. The order quashing the seizure orders against AAI was not appealed. The Court of Appeal found in Air India's favour and set aside the writ of seizure, concluding that the corporate veil had been improperly pierced.

The Court explained that the Quebec legislature has spoken definitively on when a court is entitled to disregard a corporation's legal separateness from its shareholders. Under article 317 of the Civil Code of Quebec ("**C.c.Q.**"), courts may pierce the corporate veil in three circumstances, namely where one invokes an entity's separate legal personality to: 1) perpetuate fraud; 2) engage in an abuse of rights; or 3) contravene a rule of public order. It is critical to note that the parties agreed Quebec law, not a foreign law, governed the veil piercing issue.

Devas conceded that the facts of this case did not fall within Art. 317 C.c.Q.'s scope. It instead argued that the Court should supplement Art. 317 with a principle of international law recognized in other jurisdictions: that a state-owned entity's assets can be seized to pay a debt owed by that state under an arbitral award. In support, Devas relied on the New York Convention ("**NYC**"), as well as jurisprudence from the U.S. and U.K. validating this approach. Devas argued Quebec should join the chorus of jurisdictions that recognize this rule as vital to ensuring arbitral awards are enforceable against states, which otherwise ordinarily enjoy state immunity.

The Court of Appeal rejected this argument. It held that the existence of a foreign arbitral award does not justify importing foreign laws or principles into Quebec law. The Court relied on Art. III of the NYC for the proposition that awards must be enforced according to the enforcement jurisdiction's procedural law. In this case, that meant Quebec law applied.

In explaining its preference for a ruling based solely on Quebec law, the Court reasoned that the NYC was not meant to require the application of foreign laws in any given state. Rather, it was meant, among other things, to ensure non-discrimination against foreign and non-domestic arbitral awards in a member state's courts. If the Court granted Devas's request to pierce the corporate veil, it would have provided more favourable rules of enforcement in respect of this foreign award than would have been available to a party wishing to enforce a domestic award. The Court found the NYC did not require this.

Since Devas had not established a basis for piercing the corporate veil, the Court of Appeal allowed Air India's appeal and quashed the writ of seizure.

Key Takeaways

The conclusion that Art. 317 C.c.Q. exhaustively sets out the limits of veil piercing under Quebec law is critical to the Court of Appeal's reasoning. Accordingly, although not an "international arbitration" issue *per se*, we believe it merits comment. In that connection, we pause to note that Quebec is a civil law jurisdiction, specifically in private law matters.[1)] The Court of Appeal's reasoning invokes the principles applicable to interpreting the C.c.Q. more generally; it does not apply a broader or international lens.

The Court carefully analyzed the legislative history and jurisprudence surrounding veil piercing in Quebec. The jurisprudence developed under the previous Civil Code (which was silent on the issue of veil piercing) identified four situations warranting veil piercing: 1) fraud; 2) breach of contractual obligations; 3) contravention of public order; and 4) a parent-child company relationship. Article 317 of the current code, the C.c.Q., overtook that jurisprudence by identifying the three cases, described above, in which the court may pierce the corporate veil (fraud, abuse of rights, and public order violations).

The Court rightly noted that, as a matter of statutory interpretation, one must assume the Quebec legislature was aware of the jurisprudence under the old code. Art. 317 represents the legislature's decision to clarify the veil piercing issue by expressly listing the cases in which a court may look past a corporation's separate legal personality. Without expressly referencing it, the Court applied the *expressio unius et exclusio alterius* maxim to Art. 317 C.c.Q. The Court also cited the Supreme Court of Canada's jurisprudence, which holds that: "Courts should avoid needlessly importing or applying common law rules in a matter which . . . is governed by the procedure, methods and principles of the civil law" **(***Gilles E Néron Communication Marketing Inc v Chambre des notaires du Québec*, para 56). In line with that principle, the Court of Appeal stated that Quebec courts should only look to external sources where the C.c.Q. does not govern the matter. In this case, it did.

The Court of Appeal's comments in response to Devas's reliance upon the NYC are interesting. The Court cited Art. III of the NYC for the proposition that recognition and enforcement proceeds in accordance with the enforcing state's procedural law. As a federal state, each Canadian province's procedural law will apply to awards put before their respective courts. **(***Yugraneft Corp v Rexx Management Corp*, para 33). This is consistent with various international authorities (see for example: *African Petroleum Consultants (APC) v Société Nationale de Raffinage*; *Gater Assets Ltd v Nak Naftogaz Ukrainiy*; Société I.A.I.G.C.—Inter-Arab Investment Guarantee Corporation v. Société B.A.I.I.—Banque arabe et internationale d'investissement SA (BAII)).

But query whether the law of veil piercing falls within the "rules of procedure" contemplated in Art. III. In general, the C.c.Q. governs substantive law, not court procedure. Quebec's main procedural law is the *Code of Civil Procedure*. Internationally, courts have considered "rules of procedure" to signify "any law that governs proceedings on a dispute and the enforcement of decisions issued in those proceedings" or "laws on the conduct and organization of proceedings" (see *Cimenco Egypt v Nickelson Industrial Co*). There is also authority that Art. III refers to

procedural law (such as the law of *forum non conveniens*) as distinguished from substantive law.[2)]

Some courts have gone a step further, and excluded rules considered domestically as "procedural" from Art. III's scope. For example, the Italian Court of Cassation concluded that Art. III prevented Italian courts from applying the Italian Code of Civil Procedure's *lis pendens* provisions [see here, para. 23].

In contrast with these authorities, the Quebec Court of Appeal seems to have read Art. III's reference to "rules of procedure" far more broadly than courts in some other jurisdictions (both civil law and common law). One might argue that the law on piercing the corporate veil fits more comfortably within corporate/company law, which is surely substantive, not procedural.

At first glance, the Court of Appeal's approach seems consistent with the one the German Federal Court of Justice took earlier this year (BGH, Beschluss vom 09.03.2023 – I ZB 33/22)]. In that case, the Court considered whether to enforce a foreign arbitral award against non-signatories. The arbitration was seated in Russia, but conducted in the German language and under German law. The Court found German law applied to the arbitration agreement as well. It applied that law to refuse enforcement of an award made against several non-signatories.[3)]

In contrast, the U.S. District Court for the Southern District of New York recently took a different approach (*CBF Indústria de Gusa S/A v. AMCI Holdings, Inc*.). It conducted a conflict of laws analysis to determine which law applied to assess whether a person was an award debtor's *alter ego*. The Court found Swiss law governed, and it applied that law to find a third party liable as an *alter ego*.

Finally, we note the Court of Appeal did not conduct a conflict of laws analysis; it instead relied on the parties' agreement that Quebec law applied. But Canadian courts are not bound by the parties' agreement on questions of law (see for example: *Ernst v Alberta Energy Regulator*, para 15, citing *R v Sappier*; *Intact Insurance Company v Allstate Insurance Company of Canada*). It will be interesting to see if the matter comes to court again, but where the parties contest the law applicable to the arbitration agreement.

As the Supreme Court of Canada denied leave to appeal, this is the last word on enforceability against an award debtor's *alter egos*, at least within Canada's second most populous and only Civil Law jurisdiction. As of this writing, no other Canadian court has commented on the Court of Appeal's approach.

Stay tuned for more developments in this space as cities in various Canadian jurisdictions, including Quebec, Ontario, and British Columbia, gain popularity as arbitral seats.

References

?1 This is a slight oversimplification. Quebec is *technically* a hybrid civil law/common law jurisdiction in that public law and federally regulated matters are governed by the common law. However, the Canadian Constitution confers upon the provinces the authority to regulate "Property and Civil Rights in the Province." Private law matters not falling within a federal head of power (*e.g.*, copyright) thus follow the French civil law tradition. This has been the case since 1774 with the passage of the *Quebec Act*, 14 Geo. III, c. 83 (and subsequent legislation).

?2 *See also* Gary B. Born, *International Commercial Arbitration*, 3rd ed. (Kluwer, 2020), §26.07]. Interestingly, in Quebec, private international law, including the concept of *forum non conveniens*, falls within the C.c.Q. One therefore cannot conclude that *nothing* in the C.c.Q. may be considered "procedural" within the meaning of Art. III of the NYC.

?3 We note the Court does not appear to have expressly taken on whether the law of veil piercing is "procedural law" per Art. III of the NYC. Instead, it analyzed the question under Arts. II and V(1)(a).

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