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Quebec Court of Appeal Rules on State Immunity From Pre-judgment Enforcement Measures: Does This Open the Door for a "Double Waiver"?

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In *Republic of India v CCDM Holdings* (**2024 QCCA 1620**), the Quebec Court of Appeal ("the Court") recently confirmed that India had waived its immunity from enforcement and reinstated a pre-judgment attachment of State assets which a first instance decision had previously quashed. Given creditors' **perennial efforts** to have their awards enforced against States that refuse to pay, this post reflects on the Court's findings as to the effect of the arbitration agreement on immunity from enforcement measures and suggests it is time to reconsider the idea of a "double waiver".

Background

The dispute is part of a **lengthy saga** between Devas and its shareholders, and the Indian Government. The proceedings before the Quebec courts arise from two awards rendered by a PCA tribunal against India (on the **merits** and **quantum**) ("Treaty awards"). Devas sought enforcement of the Treaty awards in Quebec and obtained pre-judgment seizure of assets held by the International Air Transport Association ("IATA") on behalf of the Airport Authority of India ("AAI"). In 2022, the Quebec Superior Court rendered three decisions: **one** annulling the seizure; **a second** ruling the seizure unenforceable following entry into force of Quebec's IATA law; and **a third** declaring India does not enjoy immunity under the Canadian State Immunity Act ("the Act"). Last December, the Court reviewed these decisions.

A seizure against assets of Air India has already been annulled on appeal (**2022 QCCA 1264**, discussed **here**). Indian courts have also annulled a billion-dollar ICC award, but this award remains subject to many enforcement proceedings around the world (such as in these recent cases before the **Dutch** and **US** courts, discussed **here** and **here**). Finally, a **second treaty arbitration** is pending against India, alleging a violation of its obligations by avoiding enforcement.

Key Findings

In its decision, the Court confirmed a principled application of the waiver exception under **Article 4(2)(a) of the Act**. Even though the Act does not contain a specific arbitration exception (unlike its

UK and **US** counterparts), the Court concluded that consenting to arbitration constitutes an *express* waiver of immunity from jurisdiction. Most crucially, the Court confirmed that, by consenting to arbitration, a State not only submits to the adjudicative power of an arbitral tribunal, but "what it truly *submits* to in an *explicit* manner is an 'international system of justice' in which *courts* also have an essential and integral role to play" (citing **Frédéric Bachand**, p. 83, who is now himself a judge at the Court of Appeal). Other Canadian courts have previously reasoned in much the same way (see ***Collavino*** and ***Sunlodges***). What this means is that by consenting to arbitration, a State expressly waives its immunity from jurisdiction and necessarily accepts the possibility of measures being taken or orders being made against it. Any other reading of consent to arbitration would fundamentally misconceive the structure and purpose of the entire arbitral process.

Interestingly, even though India's waiver resulted from its express consent to arbitration under the relevant BIT, the Court also added that India's attempt to invoke immunity goes against its obligations under **the New York Convention**, particularly those in Article 3. Few courts around the world view ratification of the New York Convention alone as a waiver of immunity (see e.g., the **Australian Federal Court** in the same saga, taking inspiration from **another Australian case**, that dealt with the same issue in relation to **ICSID awards**, discussed **here** and in similar cases **here**). However, this is a discussion which the Court and this post do not address head-on. Instead, the point here is that the ratification of the New York Convention combined with an agreement to arbitrate (**whether by contract or by a route prescribed in the treaty**) amount to more than the mere implicit waiver of immunity that would fall short of the requirement under Article 4(2)(a). Their combined meaning is that States necessarily submit themselves to the jurisdiction of the relevant court for both recognition and enforcement proceedings, making the waiver express within the meaning of the Act.

Importantly, the Court also corrected and overturned the judgment that quashed the pre-judgment attachment, offering relevant clarifications on the possibility to take such measures without the need for an explicit waiver or an "immediate" decision on the sovereign immunity claim's merits. Relying on previous decisions of **its own** and the **Ontario Court of Appeal**, the Court clarified that the obligation to *immediately* determine claims of sovereign immunity applies only to jurisdictional challenges or motions to dismiss a seizure, not to the actual taking of pre-judgment attachments. These are conservatory measures intended to preserve assets pending a final decision on the merits. As a **previous decision** of the Court confirms, a judge may order such measures pursuant to **Article 3138 of the Quebec Civil Code** even if it lacks jurisdiction over the merits of the dispute. According to the Court, this makes the taking of pre-judgment attachment measures compatible with the presumption of immunity—just as the Supreme Court confirmed in ***Instrubel***.

Moving Towards a Double Waiver

With its decision, the Court has indicated an openness in Canada to a double waiver of immunity, which has been described by **Philippa Webb** as "an argument that challenges assumptions about a cast-iron customary rule". The idea of double waiver is that once a State waives its immunity from jurisdiction, this not only extends to recognition and enforcement as relating to the steps required to convert an award into a judgment, but also to the actual enforcement measures needed to execute a debt against assets. Put differently, an agreement to arbitrate should ultimately have the effect of waiving immunity from execution as well as from jurisdiction.

In practice, however, cases that recognize the possibility of such a double waiver are still the exception to the rule. The view that immunity from execution or enforcement measures is a separate affair, even when States consent to arbitration, continues to dominate the practice. Many courts, including the **ICJ**, the **UK House of Lords**, and the **French *Cour de cassation***, have maintained the status quo rule that consent to jurisdiction does not imply consent to taking measures of constraint. Similarly, while the rule's customary nature can be **challenged**, national legislation such as the UK State Immunity Act and the US Foreign State Immunities Act, as well as the not-yet-in-force UN Convention on Jurisdictional Immunities of States and Their Property ("**UNCSI**") adopt the same approach. Taking enforcement measures against a foreign State's assets thus requires – generally speaking – a separate and express waiver of immunity from execution. The same goes for pre-judgment attachments, as illustrated by a recent **US court decision**.

By contrast, there are a handful of cases that consider that when States waive their immunity from jurisdiction, they do so for actual enforcement measures as well. This "double waiver" was most famously found in the French case of ***Creighton v Qatar*** where the *Cour de cassation* held that an arbitration agreement providing for arbitration under the ICC Rules amounts to an implied waiver of immunity from execution. Similar rulings exist in **Sweden** and the **US**, as well as more recently in **Ukraine**, **India**, and the **UK** (where the High Court recently departed from the more reluctant **default position**, discussed **here**).

The Value of International Arbitration as a Principled System

These double waiver cases show that the status quo is not settled practice, and that there is room for developing the law in this area. In a previous **article**, Fabien Gélinas and I have already argued that "it is illogical that a state's consent to the process waives any immunity with respect to jurisdiction but not with respect to execution." No rule of international law seems to justify the current practice, which is mired in the varying judicial approaches of municipal systems. The problem of immunity from execution (i.e., from actual enforcement measures) stresses once again the immense value of international arbitration as a principled system that safeguards at least a small measure of the rule of law internationally at a time when states cannot systematically be trusted to honour their commitments. In this respect, the example of the **1989 Santiago Resolution** has retained much of its resonance:

> "It recognizes that certain general principles are essential in making international arbitration an efficient, effective, and just undertaking whenever states are involved […] [and] it highlights how international arbitration is able to evolve over time" (Brenninkmeijer and Gélinas, p. 587).

The point is that the burden of a separate and express waiver of immunity from enforcement measures is archaic and misplaced. As a matter of principle, the double waiver should and will ultimately come to be recognized. It is the reasonable result of a State consenting to arbitration, and it fits within the evolution of international arbitration law. The double waiver is a mere application of the principle of *pacta sunt servanda* and is supported by the functioning of the New York Convention and the most basic idea of the rule of law which it embodies. Here, the Court

acknowledged that principled argument and seems to have opened the door for the law to further move in that direction.

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