Foreign states are not immune from the jurisdiction of Canadian courts in proceedings for enforcement of an arbitral award

January 20, 2023

CC/DEVAS (MAURITIUS) LTD. & al. v. REPUBLIC OF INDIA - 500-11-060766-223

Air India, Ltd. v. C. CC/DEVAS (MAURITIUS) LTD., 2022 QCCA 1264 was featured in *Lexpert's Top 10 Business Decisions of 2021/2022*.

Read the decision: CC/Devas (Mauritius) Ltd. c. Republic of India, 2022 QCCS 4785

The Québec Superior Court recently issued its first ever decision on sovereign immunity from suit in relation to the enforcement of awards arising from an investor-state arbitration under the India-Mauritius Bilateral Investment Treaty (BIT).

On Dec. 23, 2022, BLG was victorious in the Superior Court of Québec in having an application from the Republic of India (ROI) seeking to dismiss our clients' suit for the recognition and enforcement of international arbitral awards rejected by the Court.

The ROI had sought to avoid the recognition and enforcement in Québec of arbitral awards exceeding US$111 million rendered against it in favour of Devas Multimedia investors.

The judgment on immunity means that enforcement proceedings can move forward before the Québec Superior Court. Justice Pinsonnault found that the commercial activity exception applies to the present enforcement proceedings as the subject matter of the dispute, "was plainly a commercial investment dispute involving the ROI". Moreover, by agreeing to an arbitration clause and taking an active role in the arbitration proceedings carried out under the UNCITRAL Rules, the ROI waived any defence of immunity.

BLG has been working with our clients since late 2021 as part of their global enforcement efforts against the ROI to recover more than US$111 million that remain unpaid under the awards. Since that time, BLG has seized before judgment US$55 million in Indian assets (US$38 million from the Airport Authority of India (AAI) and

US$17 million from Air India) in the hands of the International Air Transport Association (IATA), based in Montréal. Since then, the ROI, Air India, AAI and IATA have each retained separate law firms and launched countless challenges and applications to quash the seizures. These challenges are under appeal.

The Decision

In this latest decision, Justice Pinsonnault dismissed the ROI's application to dismiss pursuant to the *State Immunity Act*. Justice Pinsonnault declared that the ROI is not immune from the jurisdiction of the Superior Court of Québec.

The Superior Court accepted the investors' arguments regarding the commercial nature of the investment treaty arbitration, finding that the "Treaty Awards which led to a monetary condemnation against the ROI, result directly from the ROI's failure to honour its contractual obligations and undertakings under the BIT – not the Devas Agreement - that was entered into to, inter alia, incite the citizens of Mauritius to make financial and commercial investments in India".

Justice Pinsonnault dismissed the ROI's argument that the dispute related to a sovereign act by the ROI because the expropriation of the plaintiffs' investments was the result of a policy decision taken for national and societal needs. He found that the policy decision of the ROI "cannot be considered in a vacuum without the BIT, a commercial treaty pursuant to which the ROI not only accepted to promote investments in India by Mauritius and its citizens but also offered a certain form of financial protection should their investments be expropriated in whole or in part under specific circumstances more fully set out in the BIT".

He therefore held that "by executing the BIT, the ROI decided and accepted to conduct commercial activities within the meaning of Section 5 of the SIA, to promote investments in India".

Although the Court found that the Commercial Activity Exception was sufficient to justify the dismissal of the ROI's application, it nevertheless agreed with the Devas investors that "the ROI's agreement to proceed with the Treaty Arbitration pursuant to the provisions of the BIT and its participation to the arbitration process thereunder constituted a clear and unequivocal waiver of its jurisdictional immunity in subsequent enforcement proceedings". Moreover, Justice Pinsonnault found that the ROI's agreement to arbitrate while being a signatory of the New York Convention "also amounts to a clear and unequivocal submission of the jurisdiction of the courts seized with the resulting enforcement action."

Notably, Justice Pinsonnault dismissed the ROI's argument that an agreement to arbitrate could not be considered a waiver of state immunity for the enforcement of the award other than at the seat of arbitration. Justice Pinsonnault commented that the ROI's position "interferes with the good functioning of the international arbitration system which allows parties to have reasonable expectations that an arbitration award may be rendered and enforced".

Key Takeaways & Legal Implications

The case will impact the law regarding enforcing arbitration awards against foreign states in Québec. It confirms that the *State Immunity Act* does not preclude the enforcement of commercial arbitration awards against a foreign state in Canada.

Although enforcement proceedings against foreign states that refuse to honour the result of arbitration can be challenging, this decision confirms Canada's status as an arbitration-friendly jurisdiction and Canadian courts' clear commitment to the principle that arbitral awards are binding and shall be enforced.

The BLG team

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