SCC File No. 38562

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

THE REPUBLIC OF IRAQ, THE MINISTRY OF INDUSTRY OF THE REPUBLIC OF IRAQ, THE MINISTRY OF DEFENCE OF THE REPUBLIC OF IRAQ, and THE SALAH ALDIN STATE ESTABLISHMENT

APPLICANTS
(Respondents)

and

INSTRUBEL, N.V.

RESPONDENT
(Appellant)

and

INTERNATIONAL AIR TRANSPORT ASSOCIATION

APPLICANT
(Mise en cause)

BETWEEN:

INTERNATIONAL AIR TRANSPORT ASSOCIATION

APPLICANT
(Impleaded Party)

and

INSTRUBEL, N.V.

RESPONDENT
(Appellant)

and

THE REPUBLIC OF IRAQ, THE MINISTRY OF INDUSTRY OF THE REPUBLIC OF IRAQ, THE MINISTRY OF DEFENCE OF THE REPUBLIC OF IRAQ, and THE SALAH ALDIN STATE ESTABLISHMENT

RESPONDENTS
(Respondents)

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Rule 27 of the *Rules of the Supreme Court of Canada*

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PART I — OVERVIEW AND FACTS

A. Overview

1. The present case arises in the context of recognition and enforcement proceedings against the Applicants the Republic of Iraq, the Ministry of Industry of the Republic or Iraq, the Ministry of Defence of the Republic of Iraq and the Salah Aldin State Establishment (collectively, "**Iraq**"). The respondent, Instrubel, N.V. ("**Instrubel**") has been chasing its arbitration award debt against Iraq for decades. In **July 2013**, the Superior Court of Quebec granted Instrubel's application for a seizure before judgment in the hands of the third-party garnishee ("**IATA**") because Instrubel succeeded in establishing that without the measure, its debt would be in peril. It is time for these proceedings to move forward.

2. The Applications for Leave to Appeal raise no issue of public importance. The Court of Appeal's decision (the "**Appeal Judgment**") corrected two errors in the Superior Court's decision (the "**First Judgment**") that were based on a misinterpretation of the facts of this case; one pertaining to the nature of the services rendered by IATA to the Iraqi Civil Aviation Authority ("**ICAA**"), and another related to the comingling of the relevant funds in IATA's bank account. The Appeal Judgment rests on the application of settled principles of law to these two narrow points of mixed fact and law.

3. In a nutshell, the Court of Appeal decided that the Superior Court erred in finding that IATA collected specific property in the course of its relationship with ICAA. It also found that the Superior Court erred in finding that the relevant funds were identifiable in a bank account. Neither Iraq nor IATA comes close to identifying a palpable and overriding error in the Appeal Judgment, as required by this Court's most recent decision in *Salomon v. Matte Thomson.*[1]

4. Instead, Iraq and IATA's Applications for Leave to Appeal attempt to sensationalize the Appeal Judgment as signalling the demise of the law of mandate and of the global civil aviation regime, respectively. Neither of these portrayals is accurate.

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[1] *Salomon v. Matte-Thompson*, 2019 SCC 14, para. 34 ("*Salomon*").

5. First, with respect to the law of mandate, the Appeal Judgment reflects the well-settled principle, confirmed by this Court in *Quebec c. C.P. Desjardins de Montmagny*[2] that the consequences that flow from a relationship of mandate, whether that relationship is traditional or *sui generis*, depend on the particular facts. As the Court of Appeal rightly rectified, the statement from *Victuni v. Minister of Revenue*[3] on which the First Judgment and the Applicants rely is not a one-size-fits-all statement of the law of mandate that purports to obviate the need for a proper factual and contextual analysis in each case (QCCA paras. 31-33).

6. Second, with respect to IATA's doomsday predictions regarding the stability of the global civil aviation regime, it may well be that IATA will have to reorganize its internal affairs to conform to the Appeal Judgment. Individuals, businesses and organizations all over the world have to adjust to court rulings from time to time. The fact that IATA is impacted by this particular ruling does not transform this routine consequence into a matter of public importance.

7. Finally, Iraq raises a subsidiary question as to whether the Superior Court of Quebec has jurisdiction to garnish assets located outside the province of Quebec when the garnishee who controls the assets is located within the province of Quebec. But the Court of Appeal did not decide the case on this basis, and ironically, Iraq itself contends that the answer to this question is obvious. This subsidiary *obiter* issue clearly does not justify granting leave in this case.

B. Facts and Procedural History

8. The facts relevant to these Applications for Leave to Appeal were well-canvassed in the courts below. For ease of reference, the key facts are summarized below.

9. Instrubel is seeking to enforce in Quebec arbitral awards dated February 6, 1996 and March 12, 2003 rendered by the International Court of Arbitration in Paris in its favour against Iraq. The awards were worth approximately $32 million as of March 12, 2003, plus interest. Instrubel filed its application for recognition and enforcement of the awards on March 11, 2013. To date, Iraq has failed to pay any of the amounts due to Instrubel (QCCA paras. 7-8; QCCS para 2).

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[2] *Quebec (Revenue) v. Caisse Populaire Desjardins de Montmagny*, [2009] 3 SCR 286, para. 27 ("*Montmagny*").
[3] *Victuni v. Minister of Revenue (Que.)*, [1980] 1 SCR 580, p. 584 ("*Victuni*").

10. Believing that the recovery of its debt was in peril, on July 30, 2013, Instrubel requested and obtained a writ of seizure before judgment in the hands of IATA. The Solemn Declaration filed in support of the Application for the Writ of Seizure before Judgment explains that IATA bills and collects air navigation and aerodrome charges payable by airlines and countries to Iraq in order to be permitted to fly over Iraq's airspace. IATA is headquartered in Montreal (QCCA para. 8).

11. The Writ of Seizure ordered IATA: (i) to "appear"; (ii) to "declare under oath the amounts of money, securities or movables belonging to Defendants [in its] possession for whatever purpose or grounds"; and (iii) to "hold them until the Court has ruled upon the matter" (QCCA para. 10).[4]

12. As the Court of Appeal explained, the Writ merely operationalizes the relevant provisions of the *Code of Civil Procedure*. As per former article 625 CCP, "[t]he writ orders the garnishee to appear on the day and at the hour fixed to declare under oath what sums of money he owes to the debtor or will have to pay him and what moveable property he has in his possession belonging to him, and not to dispossess himself thereof until the court has pronounced upon the matter." (QCCA para. 28; Emphasis added).

13. On August 5, 2013, Iraq brought a Motion to Quash the Writ, raising a plethora of grounds, including (i) lack of full and frank disclosure; (ii) insufficiency of allegations; (iii) foreign state's immunity against seizures before judgment; and (iv) foreign state property's immunity from execution (QCCS para. 5).[5]

14. Meanwhile, on August 12, 2013, IATA filed a "negative declaration" stating that it possessed a sum of $166M USD that it claimed belonged to ICAA and not to Iraq, and likewise claiming that the funds were immune from seizure (QCCA para. 11; QCCS paras. 6-7).[6] Instrubel filed a contestation of IATA's negative declaration on November 14, 2013 (QCCA para. 12; QCCS para. 12).

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[4] See also Writ of Seizure before Judgment by Garnishment dated July 30, 2014 (the "**Writ**"), **D.A.A., p. 82**; *Code of Civil Procedure*, CQLR c C-25, art. 625 (now *Code of Civil Procedure*, CQLR c C-25.01, art. 711).
[5] See Also Motion to Quash a Writ of Seizure before Judgment, dated August 5, 2013, **D.A.A., pp. 83-95**.
[6] See also Solemn Declaration of the Garnishee filed by IATA on August 12, 2013 at paras. 13, 14, 20, **D.A.A., p. 96**.

15. Iraq chose to proceed first on only two (2) of the grounds it invoked in its Motion to Quash, namely those pertaining to falsity and sufficiency. The Superior Court of Quebec dismissed both grounds on November 12, 2013.

16. On December 11, 2013, pursuant to an application brought by IATA, the Superior Court authorized IATA to release all amounts in excess of $90M CAD and to transfer the $90M CAD to its attorneys' trust account. $90M CAD was transferred to McMillan's trust account in Montreal on February 9, 2015 (QCCA para. 12; QCCS paras. 13-14; 17).[7]

17. On September 28, 2015, over two years after the Superior Court authorized the seizure on July 30, 2013, Iraq filed an amendment to its Motion to Quash to allege another ground, namely, that the Superior Court of Quebec lacked jurisdiction over the seizure because the bank account used by IATA to collect the charges was at the USB Bank in Switzerland. The Superior Court authorized the amendment on November 30, 2015 (QCCA para. 13).[8]

18. On March 21, 2016, the Superior Court granted Iraq's Motion to Quash on its new jurisdictional ground (2016 QCCS 1184). The Court of Appeal granted leave to appeal from the Superior Court's decision on June 10, 2016.[9]

19. The appeal was delayed several times because Iraq's counsel sought three (3) extensions to file Iraq's written materials on the grounds that it was no longer receiving instructions and was not being paid.[10] IATA asked that it be granted the same extension.[11] Eventually, on April 7, 2017 Iraq's counsel simply filed its argument plan from first instance in order to preserve its clients' rights. Finally, in February 2018, Iraq sought the Court of Appeal's permission to file proper written submissions, which permission was granted on consent on March 7, 2018.[12]

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[7] See also Order rendered by the Honourable Claude Décarie, J.S.C. on December 11, 2013, **D.A.A., pp. 133-134**.
[8] See also Judgment on the Motion to Amend, November 30, 2015, **D.A.A. pp. 156-160**.
[9] Jugement sur la Requête pour permission d'appeler (Marcotte, J.A.), 10 juin 2016, rectifié le 13 juin 2016, **D.A.A. pp. 198-204**.
[10] *Instrubel c. Republic of Iraq*, 2017 QCCA 194.
[11] *Ibid*, para. 1.
[12] *Instrubel c. Republic of Iraq*, 2018 QCCA 365.

20. The appeal was heard on August 29, 2018. On January 22, 2019, the Court of Appeal rendered judgment reversing the First Judgment (2019 QCCA 78).

21. It should be noted that the sole ground in issue in these Applications is that of the Superior Court's jurisdiction over the July 30, 2013 seizure. All of Iraq and IATA's arguments regarding the applicability of state immunity to the seized funds and the legal relationship between Iraq and the ICAA remain to be adjudicated.

C. Lower Court Decisions

a. Superior Court (Hamilton J.)

22. The Superior Court of Quebec framed the issue as an inquiry as to whether IATA owed a debt to Iraq or held property on Iraq's behalf in Switzerland.

23. The first judge concluded that "[u]nder Québec law, the relationship is a mandate whereby IATA is acting on behalf of Iraq" (QCCS para. 57). Based on this characterization, and citing to *Victuni*, the first judge held that this necessarily meant that the obligation between IATA and Iraq could not be characterized as a debt (QCCA para. 57). In a single paragraph, the first judge moreover concluded that "the funds belonging to Iraq were readily identifiable, and therefore that they continued to belong to Iraq" (QCCS para. 59).

24. The first judge then found that the Superior Court does not have jurisdiction to issue a writ of seizure before judgment by garnishment when (1) the garnishee is domiciled in Québec but (2) the property held by the garnishee on behalf of the defendant is outside Québec (QCCS para. 60). Accordingly, the Superior Court struck the words "either … or at any of its worldwide branches" from the Writ of Seizure and ordered IATA to file a new declaration.

b. Court of Appeal (Rochette, Schrager and Healy J.J.A.)

25. The Court of Appeal unanimously reversed the Superior Court's decision on two errors of mixed fact and law. First, it found that the Superior Court erred in finding that IATA was collecting specific property belonging to Iraq in the course of a mandate. Rather, IATA was collecting debts:

> [43] IATA owes ICAA a sum of money corresponding to sums collected on its behalf from various airlines less the fees earned by IATA in doing so. This obligation is, based on basic legal principles, a debt, and this is

> so irrespective of the characterization of the contract between IATA and ICAA as a mandate or some *sui generis* relationship. ICAA never owned the debts due it by various airlines in consideration of landing at Iraqi airports. It does not now own the funds collected in satisfaction of those debts and deposited by IATA in its bank account. IATA's obligation is to pay a sum of money not to give the dollar bills received from third parties. […] (Emphasis added)

26. The Court of Appeal moreover noted that the trial judge, "through his real rights analysis of ICAA's share of the bank account", had erred in ascribing the attributes of a trust or patrimony by appropriation to the relationship, a position that neither Iraq nor IATA have ever taken. As the Court of Appeal correctly pointed out, it was nowhere suggested that IATA was a trustee or that the account was a trust or patrimony by appropriation as understood within the meaning of Arts. 1260 *ff* CCQ (QCCA paras. 44, 48).

27. The Court of Appeal thus applied the settled principle of private international law that a debt is located where it is collectible, which is ordinarily the domicile or principal place of business of the account debtor (IATA) (QCCA para. 42). Given that IATA is domiciled in Montreal, the Court of Appeal rightly concluded that IATA's debt to Iraq could properly be the subject of a garnishment order issued by the Quebec courts (QCCA paras. 42, 51).

28. Second, in *obiter*, the Court of Appeal further found that the Superior Court had in any event committed a reversible error in concluding that the relevant funds were identifiable in IATA's bank account. The Court of Appeal considered the entire factual context, namely that (i) IATA deducts its fees and remits the remaining balance of funds to ICAA from a bank account where all similar sums collected for the accounts of other mandators are deposited and subject to similar operations; (ii) money is fungible and IATA had no obligation to keep the dollars collected segregated rather than deposit them in a bank account; (iii) while IATA contended that it had an accurate accounting of the amounts collected from each client, there was no information on the totality of claims against the fund or evidence that the amounts on deposit were at all times sufficient to satisfy all potential claims against the fund; (iv) there was no evidence that the funds were ever segregated (other than by accounting calculation) let alone that once the funds were deposited in Switzerland the funds due to ICAA were identifiable; and (v) IATA is the owner or

title-holder of the bank account with full power and control over the account, including to withdraw funds (QCCA paras. 34-36; 45).

29. Considering the entire factual context the Court of Appeal concluded:

> [39] While all tracing cases ultimately turn on their own facts, the principles enunciated in the case law do not support the reasons of the trial judge. Briefly stated, on the issue of tracing, the judge confused quantification of the amounts due by IATA to ICAA with their identification in IATA's bank account. This constitutes reversible error.

30. The Court of Appeal therefore allowed the appeal and set aside the Superior Court's judgment.

PART II – ISSUES IN DISPUTE

31. The only issue before this Court is whether leave to appeal should be granted in the present case.

32. In an attempt to paint the issues with the broadest possible brush, Iraq frames its principal question for leave as a general inquiry as to who owns funds that a person holds for the account of another (whether it be as mandatary, depositary, administrator of the property of another) and whether the deposit in a bank account of such sums in the name of the holder has the effect of nullifying the property rights of a third party.[13]

33. The answer is: it depends. Where, as here, a party (i) collects debts and (ii) deposits the sums it collects on account of the debts of all of its other clients in one account from which it pays itself management fees and provides no evidence of identification of funds, there are no legal principles at stake. The relationship is one of debtor-creditor, and in any event, the funds have lost their identity according to well-settled principles of the law of tracing.

34. Should leave to appeal be granted, the appeal will turn on purely factual issues, or at best, on issues of mixed fact and law.

35. Iraq's subsidiary question and IATA's question regarding the territorial jurisdcition of Quebec courts do not form the basis of the Court of Appeal's decision and certainly cannot justify granting leave in the present case.

[13] Avis de demande d'autorisation d'appel, 22 mars 2019, **D.A.A.**, p. 2.

PART III – ARGUMENTS

A. The Appeal Judgment Applies Settled Principles of Private International Law and the Law of Mandate to the Facts of this Case

36. Both the Superior Court and the Court of Appeal stated that the basic issue in this case is whether the seized assets are to be regarded as a debt or as property (QCCA para 16; QCCS para 53). Both courts likewise agreed that if the seized assets are regarded as a debt, the jurisdictional issue is resolved according to settled principles of private international law. As the Superior Court explained:

> [60] If the Court had concluded that IATA owed a debt to Iraq, then the jurisdiction issue would be much easier: IATA would be a party domiciled in Québec which owed a debt to Iraq. The fact that IATA had deposited the funds which gave rise to the debt in a bank account in Switzerland would not be relevant. The Québec courts would have jurisdiction to issue a writ of seizure by garnishment against IATA, because all that is being seized is the debt and not the bank account. The fact that contractually the debt is payable in New York also would not be relevant, because IATA is in Québec. IATA would be ordered not to pay its debt to Iraq pending the final judgment, and might ultimately be ordered to pay the debt to Instrubel if Instrubel is successful on the merits. None of this would have any impact on the bank account, which IATA would be free to do with as it pleased, provided that it did not pay its debt to Iraq. (emphasis added)

The Court of Appeal applied the same settled principles (QCCA para. 42).[14]

37. It is not disputed that IATA has total control over the bank account in question (QCCA para 45) and that the bank account itself was not seized. In fact, after the seizure, IATA, of its own initiative, transferred an amount corresponding to the amounts it owed to Iraq to another IATA account.[15]

38. Yet, the Superior Court decided the characterization question in a few paragraphs. Citing to four provisions in the Contract between IATA and ICAA, the Court concluded that the contract

[14] See Art. 1566 CCQ and the list of references cited at footnote 33 of the Appeal Judgment.
[15] Letter from M[e] Eric Vallières to M[e] Peter Kalichman dated January 22, 2016, para. 1 ([…] Please note that the ICAA amounts were sent to another account (51G) after the issuance of the seizure in this matter)". **D.A.A., p. 171**.

is one of mandate (QCCS paras. 56-57). The Superior Court then concluded that if the contract is one of mandate, the funds collected by IATA necessarily belong to ICAA and cannot not be a debt: "Under Québec law, the relationship is a mandate whereby IATA is acting on behalf of Iraq. This means that the funds collected by IATA on behalf of Iraq belong to Iraq and IATA has an obligation to remit them to Iraq, as opposed to the funds belonging to IATA and IATA having a debt to Iraq." (QCCS para. 57; emphasis added)

39. This logical leap between the finding of a contract of mandate and the assumption that "[this] means that the funds collected by IATA on behalf of Iraq belong to Iraq" is the key error in the Superior Court's reasoning: the Superior Court assumed that the seized assets were property belonging to ICAA *because* it found a contract of mandate. Contrary to this Court's decision in *Montmagny,* the Superior Court did not analyze the particular facts and context to determine the full and proper interpretation of the legal situation. This one-size-fits-all approach to the law of mandate, and its application to the facts, is the principal error the Court of Appeal corrected.

40. As the Court of Appeal explained, a contract of mandate does not necessarily mean that assets collected by the mandator belong to the mandatary. Mandates can differ and have different legal implications. Moreover, contracts are often mixed – or *sui generis* as the Court of Appeal noted (QCCA para. 43) – containing aspects of service contracts or other relationships. These propositions are not contentious at law nor in the caselaw of this Court.[16]

41. For example, in *Montmagny*, this Court had to determine whether the Crown held a property right in the GST and QST amounts collected by suppliers – as mandataries – acting on the Crown's behalf. Like Iraq and IATA in this case, the Crown in *Montmagny*, relying on *Victuni*, sought to establish "a general principle that, in performing its obligations, the mandatary does not discharge a debt, but delivers over property belonging to the mandator".[17] This Court rejected that approach,

[16] See e.g. *Montmagny*; POPOVICI, Adrian, *La couleur du mandat*, Thémis: Montréal (1995), p. 205; LAMONTAGNE, Denys-Claude and B. LAROCHELLE, Droit spécialisé des contrats, Volume 1 : Les principaux contrats : la vente, le louage, la société et le mandat, Yvon-Blais: Cowansville (2000), EYB2000DSC44, p. 2; CIMON, Pierre, « Contrats, sûretés et publicité des droits » in Collection de droit 2018-2019 vol. 7, École du Barreau du Québec: Montréal (2018), EYB2018CDD111, p. 2.
[17] *Montmagny*, para. 20.

noting that the legal characterization of the relationship between the tax authorities and the suppliers could not be considered in isolation from the overall context of the collection system.

42. In particular, this Court explained that the mandate to collect funds for a mandator, "and then to remit, not the amounts collected, but a balance resulting from offsetting claims" of the mandator and mandatory qualitatively "differs from the mandate in issue in *Victuni*, which related to the acquisition and development of an immovable".[18]

43. Likewise, in the present case, the Court of Appeal rightly held that the Superior Court's references to *Victuni* and *Harp*[19] were *obiter dicta* taken out of context (QCCA para. 32). As the Court of Appeal put it, in *Victuni* "[there] was no consideration of whether the mandator possessed a real right on the deposit. There is accordingly no statement of the law of mandate applicable to the facts or legal issue in the present case to be found in that *dictum*."

44. The Court of Appeal appreciated these nuances and carefully applied them to the facts at hand:

> [34] […] I underline that in the present case IATA deducts its fees and remits the remaining balance of funds to ICAA from a bank account where all similar sums collected for the accounts of other mandators are deposited and subject to similar operations.
>
> [35] While the current facts are not identical to the situation in *Montmagny*, the judge's paragraph 58 quoted above is ultimately aimed at addressing the "ownership problem" of the dollars collected and deposited in an account with many other dollars collected from others (i.e. airlines) and for still other parties (i.e. entities of other countries performing functions similar to ICAA). <u>There can be no issue that money is fungible and that IATA had no obligation to keep the dollars collected segregated rather than deposit them in a bank account</u>. […] (emphasis added)
>
> […]

[18] QCCA para. 34; citing *Montmagny*, para. 27.
[19] *Harp Investments Inc. (Syndic de)*, [1992] RJQ 1581 (SC).

> [43] **IATA owes ICAA a sum of money corresponding to sums collected on its behalf from various airlines less the fees earned by IATA in doing so. This obligation is, based on basic legal principles, a debt, and this is so irrespective of the characterization of the contract between IATA and ICAA as a mandate or some *sui generis* relationship.** ICAA never owned the debts due [to] it by various airlines in consideration of landing at Iraqi airports. It does not now own the funds collected in satisfaction of those debts and deposited by IATA in its bank account. **IATA's obligation is to pay a sum of money not to give the dollar bills received from third parties.** It would be otherwise if IATA had collected some tangible asset on behalf of and owned by ICAA. The latter would have a real right in the object. A seizure of the asset would need to be effected in the place and before the courts where the piece of property was physically situated. (Underlining in the original; Bold characters added.)

45. Moreover, characterizing the legal relationship as one of mandate cannot give Iraq real rights in a bank account that it would not otherwise have. This too is uncontroversial: the bank account is a contract of loan between IATA and the Swiss Bank in which Iraq, which has no contract with the bank nor title or authority over the account, cannot claim to have real rights (QCCA paras. 47, 49).[20]

46. Contrary to Iraq and IATA's assertions, the Appeal Judgment does not cast uncertainty upon the law of mandate, nor the law of trust or of patrimony by appropriation. Indeed, the Court of Appeal is clear that its decision does not purport to decide these issues in the case of a trust or patrimony by appropriation, since neither legal relationship is alleged or engaged in this case (QCCA paras. 45-48).

47. For the same reason, Iraq's claims that the "*conséquences pratiques les plus importantes de l'arrêt se feront sentir en matière d'insolvabilité*"[21] and that "*des conséquences importantes se feront également sentir en matière de fiscalité*"[22] are likewise greatly exaggerated. The Appeal Judgment does not purport to impact the analysis as to whether any property is trust property

[20] Art. 2327 CCQ; *R. v. Légaré*, [1978] 1 S.C.R. 275, p. 283-284.
[21] Iraq's Memorandum, para. 49.
[22] Iraq's Memorandum, para. 50.

pursuant to civil law principles or "property held by the bankrupt in trust for any other person" pursuant to s. 67(1)(a) of the *Bankruptcy and Insolvency Act*.[23]

48. Simply put, the Applicants do not point to any error of law, palpable and overriding error of fact, or palpable and overriding error of mixed fact and law in the Court of Appeal's reasoning on this first issue, much less one that would warrant the intervention of this Court.

B. The Court of Appeal Applied Settled Principles Regarding the Law of Tracing to the Facts of this Case

49. Although technically in *obiter*, the Court of Appeal conducted a thorough analysis of the principles of the law of tracing and rightly concluded that the Superior Court erred in law and made palpable and overriding errors of mixed fact and law in finding that the amounts owed to Iraq were identifiable.

50. On the assumption that Iraq necessarily owned the funds in the account as mandator, the Superior Court went on to consider whether title to the funds had been impacted as a result of the comingling of funds in IATA's account. The Superior Court referred to the facts in the Joint Stipulations filed by the parties and concluded, without further explanation, that the funds were still readily identifiable:

> [59] However, the comingling of funds in a bank account can affect ownership rights. In the present matter, the funds were comingled in the bank account with funds belonging to other countries. The parties filed a joint stipulation specifying that the bank account in Switzerland contained only funds collected by IATA on behalf of its clients, that the management fees payable to IATA by its clients were at times debited from the funds held in the account, and that IATA maintained records of the amounts collected on behalf of each of its clients. The Court concludes that the funds belonging to Iraq were readily identifiable, and therefore that they continued to belong to Iraq. (Emphasis added)

51. Iraq contends that the Court of Appeal reversed the Superior Court's conclusions on this point without explaining the Superior Court's error and without any reference to the evidence.[24] This is simply false.

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[23] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
[24] Iraq's Memorandum, para. 41.

52. The Court of Appeal clearly explained that the Superior Court (i) failed to take relevant facts into account and (ii) conflated the legal standard of identification with that of quantification. The Court of Appeal's reasons are meticulous, with detailed references to the evidence. After underlining that "in the present case, IATA deducts its fees and remits the remaining balance of funds to ICAA from a bank account where all similar sums collected for the accounts of other mandators are deposited and subject to similar operations" (QCCA para 34), the Court of Appeal went on to explain:

> [36] I disagree with [the Superior Court's] analysis. The only evidence on record, in this regard, is a solemn declaration and a joint statement demonstrating that from IATA's point of view it had an accurate accounting of the sums it collected from each of its clients from which the judge extrapolated that it had an accurate record of all ICAA money going into the Swiss account. One is left to assume that the same was the case with all other clients whose money was on deposit in that account. However, there is no information on the claims against the fund. For example, if any client (including ICAA) disputed the amount due to it by IATA, then the claims against the fund could potentially exceed the aggregate funds on deposit so that it would not be possible to earmark any one mandator's "property". Moreover, the monies collected by IATA for ICAA would emanate from a number of airlines who overflew Iraq or used airport facilities there. From the discussion of tracing in the judgment and the record it is not possible to discern whether IATA made bulk collections from airlines which it then divided in its accounting amongst the various agencies like ICAA that it represented, or whether IATA collected individually from each airline for each national agency. Though I highly doubt that it is the latter, there is no evidence that sums received by IATA for ICAA were ever segregated (other than by accounting calculation) let alone that once funds were deposited in Switzerland, the sums due to ICAA were identifiable.
>
> [37] In order to be traceable, funds must be identified and not merely quantified. If funds cannot be quantified and identified (i.e. traced), there can be no claim to ownership at Common Law and I would hazard to say in Civil Law. In *Jetsgo*, this Court made it abundantly clear that given that money is fungible, once funds are co-mingled, they cannot be traced. Speaking through Rochon, J.A., the Court subscribed to case law of the Ontario Court of Appeal and the British Columbia Court of Appeal. The Court validated the position of the trustee in bankruptcy who maintained that sums deducted from payroll according to the agreement with employees to defray part of the group insurance

> premiums fell into the mass and were not the property of the (mandator) insurance company.
>
> [38] This Court stated categorically in *Norbourg*, that funds deposited in a bank account lose their identity. As such, the Court distinguished a long line of cases on tracing from the specific facts before it in *Norbourg*, which concerned the manner in which different accounts of the bankrupt investment firm were set up. The issue was the tracing of monies remitted to it for investment since certain funds had greater liquidation values than others. The ultimate issue was whether on liquidation there should be one mass or several, corresponding to the different funds.
>
> [39] <u>While all tracing cases ultimately turn on their own facts, the principles enunciated in the case law do not support the reasons of the trial judge</u>. Briefly stated, on the issue of tracing, <u>the judge confused quantification of the amounts due by IATA to ICAA with their identification in IATA's bank account. This constitutes reversible error</u>. (Emphasis added)

53. There is nothing controversial in this reasoning, nor is there any conflict with the Ontario Court of Appeal's decision in *Guarantee Company of America*[25], as IATA contends.[26] As the Quebec Court of Appeal readily pointed out, the rules on identification of funds can vary depending on the context: "the discussion of identification of funds, or tracing, in such body of case law revolves around specific statutory enactments (e.g. – Section 67(1) (a) of the *Bankruptcy and Insolvency Act*), trust provisions or simply the analysis of the rights of parties *inter se*." (QCCA para. 40). The discussion of tracing in *Guarantee Company of America* arises in one such context: s. 67(1)(a) of the *BIA*. Ultimately, both courts agree that tracing cases turn on their own facts.

54. Iraq and IATA further argue that it was not open to the Court of Appeal to find that the evidence was insufficient to establish identity of funds because the parties filed Joint Stipulations as to the contents of the account. This is quite a stretch. Joint Stipulations are no more than a statement of the facts on which the parties can agree. No party renounces to arguing the legal implications of any fact contained in – or omitted from – Joint Stipulations. Notably, IATA was

[25] *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9.
[26] IATA's Memorandum, paras 40 c), 76.

specifically asked to provide information as to the other claims against the account and it refused to do so. IATA and Iraq must bear the consequences of that choice.[27]

C. The Applications for Leave to Appeal Raise No Questions of Public Importance

i. The Impact on IATA's Internal Operations is Not a Matter of Public Importance

55. Though the question IATA submits is framed as one of jurisdiction – "*Do Québec Courts have the proper territorial jurisdiction to garnish E&F Client Funds held by IATA outside of the province of Québec, and collected from international airlines in its capacity as mandatory of worldwide foreign civil aviation and airport authorities, where neither the parties, nor the transaction giving rise to the garnishment or even the related funds have any connection with Canada or Québec?*" – a quick reading of its Memorandum makes clear that IATA's main concern is its own internal operation of its Enhancement and Financing Services ("**E&F Services**").

56. The Appeal Judgment does not pose a threat to the stability of the civil aviation regime nor does it turn IATA into an "automatic teller machine" as IATA contends. IATA may very well have to organize its affairs differently as a result of the Appeal Judgment. This is not a matter of public importance.

57. IATA's attempt to raise issues regarding potential claims of state immunity in relation to the funds should also be resisted. As noted above, Iraq and IATA chose to postpone all debate on issues of state immunity, and it is improper to invite this Court to draw any conclusions whatsoever on these questions in the context of this Application for Leave.

ii. Iraq's Subsidiary Question Does Not Form the Basis of the Appeal Judgment

58. In order to bolster its Application for Leave, Iraq lists a second subsidiary question, namely whether the Superior Court had jurisdiction to issue the Writ of Seizure if the asset seized was not a debt: "*Les tribunaux des provinces ont-ils le pouvoir d'ordonner la saisie en mains tierces de*

[27] Letter from M[e] Eric Vallières to M[e] Peter Kalichman dated January 22, 2016, (confirming "There is no particular evidence of the allocation of the various sums in the bank account, other than IATA's internal calculation for each client. As already mentioned the amount calculated for the ICAA as of that date was 166,652,878.55. The allocation of the other amounts is confidential. […]". **D.A.A., p. 171** (Emphasis added).

biens situés à l'extérieur du ressort lorsque les biens en question sont entre les mains d'une personne qui est elle-même sous la juridiction du tribunal?"

59. Given its principal conclusion that the relationship between IATA and Iraq is one of debtor/creditor, the Court of Appeal did not discuss this issue. The Court stated in *obiter* that "[the result] would be otherwise if IATA had collected some tangible asset on behalf of and owned by ICAA. The latter would have a real right in the object. A seizure of the asset would need to be effected in the place and before the courts where the piece of property was physically located." (QCCA para. 43).

60. Given that this issue does not form the basis for the Court of Appeal's decision, this Court should decline to grant leave on the basis of this question. Ironically, Iraq itself takes the view that the answer to this question is uncontroversial: "*les principes de base du droit international démontrent clairement qu'un tribunal provincial ne peut émettre une ordonnance de saisie en mains tierces portant sur un bien situé à l'extérieur du ressort.*"[28]

61. In the circumstances, the public interest would not be served by granting leave on the basis of an issue that does not form part of the reasoning of the judgment on appeal, in order to permit a debtor who claims the answer is obvious to continue evading payment.

D. The Appeal Judgment is Correct from Both a Legal and a Policy Perspective

62. Finally, it is important not to lose sight of the context in which the Court of Appeal's judgment was rendered: an action for recognition and enforcement of arbitration awards that have gone unpaid for decades, with the resulting cat-and-mouse game that creditors are far too often forced to play. As the Court of Appeal rightly pointed out, the consequence of Iraq and IATA's position would be to prolong this game indefinitely, as funds may transit from one account to another:

[28] Iraq's Memorandum, para. 57.

> [50] More significantly it seems that the Appellant and others in similar positions which seek to execute an unsatisfied claim would be forced into an international "shell game" of somehow discovering (or guessing) where the mandatary/garnishee (IATA), deposited the money – a virtually impossible task. The law, correctly applied, should not lead, in my view, to such unworkable results. As the *in personam* debtor of ICAA, it matters not whether IATA deposited the money it collected and giving rise to such indebtedness in a bank account in Geneva, New York or Montreal. The *situs* of its bank account does not change the situs of the debt IATA owes to its creditor. As such, that funds were initially collected in Montreal or at an IATA branch office in another country is inconsequential. Thus, the judge should not have struck the words "either… or at any of its [IATA's] worldwide branches" from the writ of garnishment.

63. The Court of Appeal's decision rests on settled principles and is sound from both a legal and a policy perspective. The Applications for Leave should accordingly be dismissed.

PART IV – COSTS

64. The Respondent seeks its costs on these Applications for Leave to Appeal.

PART V – CONCLUSIONS

65. The Respondent seeks an order dismissing the Applications for Leave to Appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MONTREAL, April 26th, 2019

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PART IV – AUTHORITIES

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