IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

HC/OS 900/2021
HC/SUM 5125/2021
HC/SUM 5275/2021

In the matter of Section 29 of the International Arbitration Act (Cap 143A, 2002 Rev Ed)

And

In the matter of an arbitration between Deutsche Telekom AG as Claimant and the Republic of India as Respondent

Between

DEUTSCHE TELEKOM AG
(Germany Registration No. T8UF0327J)

…Plaintiff

And

THE REPUBLIC OF INDIA
(ID Unknown)

…Defendant

DEFENDANT'S WRITTEN SUBMISSIONS

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Dated this 29th day of November 2021.

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INTRODUCTION

1. The Singapore courts have recognised the reality that states take time to react to legal proceedings. As the High Court held in *Josias Van Zyl and others v Kingdom of Lesotho* [2017] 4 SLR 849 ("***Josias Van Zyl***") at [71]:[1]

> "***States require time to respond to proceedings brought against them, and enforcement proceedings are no exception.*** Proceedings to enforce an award may be brought in any jurisdiction in which the respondent State has assets, independent from that jurisdiction's connection to the underlying arbitration or the merits of the substantive dispute. ***The need for time and opportunity to respond applies with equal force.***" [Emphasis added.]

2. Parliament has recognised this reality and enshrined it in legislation by way of section 14(2) of the State Immunity Act (Cap 313, 2014 Rev Ed), which provides:[2]

> "Any time for entering an appearance (whether prescribed by Rules of Court or otherwise) shall begin to run 2 months after the date on which the writ or document is so received."

3. By way of HC/SUM 5125/2021 ("**SUM 5125**"),[3] the Defendant, the Republic of India, seeks a declaration that under section 14(2) of the State Immunity Act, it has two months to apply to set aside the order granting leave for the Plaintiff (the "**Leave Order**") to enforce an arbitral award dated 27 May 2020 (the "**Final Award**"), in addition to the 21-day period stipulated in the Leave Order. Alternatively, if the Court is of the view that section 14(2) does not apply to this case, the Defendant seeks an extension of time of two months to file the application to set aside the Leave Order. In that latter

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1 Defendant's Bundle of Authorities ("**DBOA**"), Vol 1, Tab 21.
2 DBOA, Vol 1, Tab 10.
3 Bundle of Defendant's Cause Papers ("**DB**"), Tab 1 (DB3-4).

situation, the rationale behind section 14(2) would apply even if the subsection were found to technically not apply because of the phrase "entering an appearance".

4. When applying *ex parte* for the Leave Order *vide* HC/OS 900/2021 ("**OS 900**"),[4] the Plaintiff did not bring section 14(2) of the State Immunity Act to the Court's attention, in breach of its duty of full and frank disclosure. Nor did the Plaintiff highlight any of the Defendant's potential defences to enforcement of the Final Award under the State Immunity Act or the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "**IAA**"). Instead, the Plaintiff simply asserted that it believed that 21 days would be sufficient time for the Defendant to respond.[5]

5. This was inexplicable. Less than two months prior to filing OS 900, the Plaintiff had acknowledged that, in accordance with the US Foreign Sovereign Immunites Act (the "**FSIA**"), the Defendant would have 60 days from the date of deemed service to respond to its petition to enforce the Final Award in the United States.[6] The parties had expressly recognised the reality that states require additional time to respond to legal proceedings, and the Plaintiff consented to an *additional* extension of time of more than 7 weeks beyond the 60 days provided via statute.[7] In other words, in the United States, the Plaintiff was content to give the Defendant at least 3 months and 3 weeks to respond.

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4 Bundle of Plaintiff's Cause Papers ("**PB**"), Tab 1 (1PB3-4).
5 1st Affidavit of Ina Roth dated 2 September 2021 ("**IR's 1st Affidavit**") at [27] (PB19).
6 2nd Affidavit of Aditya Singh dated 25 November 2021 ("**AS's 2nd Affidavit**") at Exhibit AS-7, p. 48, [3] (DB230).
7 AS's 2nd Affidavit at Exhibit AS-7, p. 47-48 at [4]-[5] (DB229-230).

6. However, the Plaintiff takes a drastically different position in this action. The Plaintiff now insists that the 21-day timeline stipulated in the Leave Order is a "*strict*" timeline.[8] It also now suggests that the fact that states do need more time to respond is no longer a relevant consideration.[9]

7. Against the backdrop of the State Immunity Act and the Plaintiff's own previous positions, the Plaintiff's present position is plainly untenable. In the first place, the 21-day timeline is not even prescribed by the Rules of Court. Instead, Order 69A rule 6(4) provides that where the leave order is served out of jurisdiction, the setting aside application may be filed "*within such other period as the Court may fix*".[10] In other words, the 21-day period in the present case came from the Plaintiff. For the Plaintiff to now say that period is "*strict*" is bootstrapping.

8. Given the established fact that states take time to respond to enforcement proceedings, it is submitted that the Defendant should be granted two further months to respond to the Leave Order, whether pursuant to the State Immunity Act or otherwise. The Defendant has also explained on affidavit that an administrative error in sending the documents to the wrong department, the Diwali festive season, the existence of parallel proceedings, and various internal approvals which had to be obtained to instruct local counsel have collectively affected its ability to respond to the Leave Order.

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8 Unsigned 3rd Affidavit of Ina Roth, as exhibited to the 1st Affidavit of Axl Rizqy dated 18 November 2020 ("**IR's 3rd Affidavit**") at [36]-[37] (2PB64-65).
9 IR's 3rd Affidavit at [37] (2PB65).
10 DBOA, Vol 1, Tab 9.

9. Having failed to give full and frank disclosure, and seeking to capitalise on the unreasonableness of its self-created timeline of 21 days, the Plaintiff now tries to steal a march on the Defendant by way of HC/SUM 5275/2021 ("**SUM 5275**"). The Plaintiff is essentially saying that the Defendant should only be granted two further months to file its setting aside application if the Defendant provides security in the full outstanding amount under the Final Award (around US$137,228,887) within 7 days. The Plaintiff does not specify when such security would be returned to the Defendant.

10. There is no basis for the Plaintiff's application, and we are not aware of any case in which such a surprising order was made. None of the legal grounds cited by the Plaintiff in its summons are sustainable. In particular, the provision in the IAA which the Plaintiff specifically relies on is patently inapplicable. That provision only empowers the Court to order security in the situation where an adjournment of the enforcement proceedings in favour of setting aside proceedings is ordered.[11] That is not our situation.

11. Order 69A rule 6(4) of the Rules of Court provides that, if the award debtor applies within the period stipulated by the Court to set aside the leave order, "*the award shall not be enforced… until after the application is finally disposed of*".[12] If the Defendant had applied to set aside the Leave Order within the 21-day timeframe proposed by the Plaintiff, the Plaintiff would not have been entitled to enforce the Final Award. There is no reason to require the Defendant to provide security simply to obtain two further months to file the setting aside application, especially when that two-month period is

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11 Section 31(5) of the IAA (DBOA Tab 2).
12 DBOA Vol 1, Tab 9.

prescribed by the State Immunity Act.

12. The Defendant respectfully submits that its application in SUM 5125 should be granted, while the Plaintiff's application in SUM 5275 should be wholly dismissed with costs.

BACKGROUND FACTS

13. On 2 September 2013, the Plaintiff commenced the Arbitration against the Defendant pursuant to a bilateral investment treaty between the Defendant and the Federal Republic of Germany (the "**Germany-India BIT**").[13]

14. On 13 December 2017, the Tribunal issued its Interim Award on matters of jurisdiction and liability (the "**Interim Award**"), which found that the Tribunal had jurisdiction over the dispute and that the Defendant was liable to the Plaintiff.[14] The Defendant's application to set aside the Interim Award at the seat of the Arbitration, *i.e.*, Switzerland, was dismissed by the Swiss Federal Supreme Court on 11 December 2018.[15]

15. Subsequently, the Tribunal issued the Final Award on 27 May 2020, which ordered the Defendant to pay US$93.3 million (exclusive of interest, costs, and disbursements) to the Plaintiff.[16]

US enforcement proceedings

16. The Plaintiff only took steps to enforce the Final Award some eleven months later, when it filed a Petition to Recognize and Confirm the Final

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13 IR's 3rd Affidavit at [8(a)] (2PB54).
14 IR's 3rd Affidavit at [8(b)] (2PB54-55).
15 IR's 3rd Affidavit at [8(c)-(d)] (2PB55).
16 AS's 1st Affidavit at [11] (DB8).

Award (the "**US Petition**") before the US District Court for the District of Columbia on 19 April 2021 (the "**US Proceedings**").[17]

17. The US Petition was delivered to India's Department of Legal Affairs of the Ministry of Law and Justice, which served as India's receiving authority for all matters arising out of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "**Hague Convention**"), on 3 May 2021.[18] On 2 June 2021, the Ministry of Law and Justice sent the documents to India's Department of Space, which is the entity with oversight of the proceedings relating to the Arbitration,[19] and 2 June 2021 was certified as the date of service.

18. Based on the 60-day deadline applicable under section 1608(d) of the FSIA, the Defendant was to file its Motion to Dismiss the Plaintiff's Petition to enforce the Final Award within 60 days from 2 June 2021, *i.e.*, by 2 August 2021.[20] However, the parties agreed that the Defendant should have seven further weeks, *i.e.*, until 23 September 2021, to file the Motion to Dismiss.[21] The parties stated, in their Joint Motion to the Court dated 23 July 2021 (the "**Joint Motion**") that: [22]

> "There is good cause to establish the briefing schedule described above. In particular, ***foreign-State respondents often require additional time to confer with counsel in the preparation of written submissions.*** This challenge of coordination has been further exacerbated by the ongoing COVID-19 pandemic…." [Emphasis added.]

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17 IR's 3rd Affidavit at [40] (2PB66).
18 IR's 3rd Affidavit at [40] (2PB66).
19 AS's 2nd Affidavit at [18]; see also Exhibit AS-5, p. 24 at [4] (DB188, 206).
20 AS's 2nd Affidavit at Exhibit AS-7, p. 48, [3] (DB230).
21 AS's 2nd Affidavit at Exhibit AS-7, p. 47-48 at [4]-[5] (DB229-230).
22 AS's 2nd Affidavit at Exhibit AS-7, p. 48, [4] (DB230).

19. In other words, the parties agreed that the Defendant was to be allowed 3 months and 3 weeks from the operative date of service to apply to set aside Plaintiff's US Petition to enforce the Final Award on the limited ground of sovereign immunity.

Singapore enforcement proceedings

20. On 2 September 2021, the Plaintiff commenced enforcement proceedings in Singapore *vide* OS 900.[23] This was more than 15 months after the Final Award had been issued.

21. As the application for leave to enforce the Final Award was *ex parte*, the Plaintiff had an obligation to make full and frank disclosure in the application (see *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)* [2021] SGHC 124 ("***Hydralift***") at [176]-[177]).[24] Yet, there were glaring and serious omissions from the Plaintiff's supporting affidavit. In the 1st Affidavit of Ina Roth dated 2 September 2021 ("**IR's 1st Affidavit**"):

(a) the Plaintiff did not mention, much less draw the Court's attention to, the existence of section 14(2) of the State Immunity Act, which extends time for states to enter an appearance (or take any corresponding procedure) by 2 months – instead, the Plaintiff simply asserted its self-styled belief that "*a period of 21 days after service*

23 IR's 3rd Affidavit at [9] (2PB55).
24 DBOA, Vol 1, Tab 22.

is a reasonable period for [the Defendant] to take out any application to set aside any orders made in [OS 900]";[25]

(b) the Plaintiff did not draw the Court's attention to the possibility that the Defendant would be invoking sovereign immunity. This was even though, in the US Proceedings, the Plaintiff was aware that the Defendant had already objected to the jurisdiction of the US Court under the FSIA by way of the Joint Motion dated 23 July 2021;[26] and

(c) the Plaintiff did not mention any grounds on which the Defendant might have been expected to rely on to object to the enforceability of the Final Award.

22. It was on this flawed basis that the Leave Order was granted *ex parte* on 3 September 2021.[27] On the next working day, *i.e.*, 6 September 2021, the Plaintiff filed a request for the Singapore Ministry of Foreign Affairs to effect service of, *inter alia*, the Leave Order on the Defendant under section 14(1) of the State Immunity Act,[28] even though the Plaintiff had not previously highlighted section 14(2) to the Court when seeking the Leave Order.[29]

Events leading up to the filing of SUM 5125

23. On 20 October 2021, the Singapore High Commission in New Delhi (the "**Singapore High Commission**") dispatched a set of documents (the "**Documents**") by way of a diplomatic note to the Consular, Passports, and

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25 IR's 1st Affidavit at [27] (1PB19).
26 AS's 2nd Affidavit at Exhibit AS-7, p. 48, [7] (DB230).
27 AS's 1st Affidavit at Exhibit AS-1, p. 12 (DB16).
28 AS's 1st Affidavit at Exhibit AS-2, p. 19-20; see also p. 17-18 (DB21-24).
29 See paragraph 21(a) above.

Visa Division of the Indian Ministry of External Affairs (the "**MEA**").[30] The Leave Order formed a part of these Documents.[31]

24. It is uncommon for the Defendant to receive requests regarding investment treaty award enforcement proceedings from the Singapore High Commission,[32] and the MEA does not have a fixed protocol for responding to such requests.[33]

25. By mistake, the Documents were sent to India's Central Bureau of Investigation ("**CBI**") on 21 October 2021, as the MEA had been expecting certain documents from Singapore which were relevant to a CBI investigation.[34] The CBI reviewed the Documents, found that they were not relevant to its investigation, and returned the Documents to the MEA on 28 October 2021. The Documents were then correctly dispatched to the Department of Space a day later on 29 October 2021.[35]

26. On the same day, the Defendant notified its international counsel, White & Case LLP ("**W&C**"), of the Documents and requested assistance.[36] W&C began the process of instructing Singapore counsel on 1 November 2021.[37] It took time to identify and contact Singapore counsel, and then to engage Singapore counsel, and the process involved various approvals which had to be obtained internally within the Indian Government.[38] Moreover, the

30 AS's 1st Affidavit at [13] (DB9).
31 AS's 1st Affidavit at [13(a)]; see also Exhibit AS-2, p. 75-76 (DB9, 79-80).
32 AS's 2nd Affidavit at [20] (DB189).
33 AS's 2nd Affidavit at [19] (DB188).
34 AS's 2nd Affidavit at [21]-[22] (DB189).
35 AS's 2nd Affidavit at [22] (DB189).
36 AS's 2nd Affidavit at [28] (DB191).
37 AS's 2nd Affidavit at [30] (DB191-192).
38 AS's 2nd Affidavit at [30] (DB191-192).

Diwali festive period coincided with this period.[39]

27. The Documents were sent to Drew & Napier LLC ("**D&N**") on 8 November 2021, and D&N was engaged on 9 November 2021.[40]

28. If service was effected on 20 October 2021, the 21-day period would have expired shortly after 9 November 2021, with the implication that the Defendant could be out of time to apply to set aside the Leave Order.[41]

29. Thus, D&N wrote to counsel for the Plaintiff, WongPartnership LLP ("**WP**") on the evening of 9 November 2021 seeking their confirmation that, pursuant to paragraph 2 of the Leave Order read with s 14(2) of the State Immunity Act, the Defendant had the right to apply to set aside the Leave Order within 2 months and 21 days after service.[42] D&N also worked expeditiously to prepare SUM 5125, so that the Defendant would be able to file the application once the Plaintiff's response was received by noon on 10 November 2021.[43]

30. WP's reply on 12.39 PM on 10 November 2021 did not provide any substantive response to the Defendant's request.[44] Accordingly, in the interest of unequivocally preserving its right to apply to set aside the Leave Order, the Defendant filed SUM 5125 later that same day, and sought an urgent hearing date for the application from the Duty Registrar. The Duty Registrar fixed a Pre-Trial Conference ("**PTC**") for the next morning,

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39 AS's 2nd Affidavit at [30] (DB191-192).
40 AS's 2nd Affidavit at [31] (DB192).
41 AS's 1st Affidavit at [16] (DB11).
42 AS's 1st Affidavit at [18]-[19]; see also Exhibit AS-3, p. 126-7 (DB11-12, 130).
43 AS's 2nd Affidavit at [31] (DB192).
44 AS's 1st Affidavit at [20]; see also Exhibit AS-4, p. 128 (DB12, 132).

11 November 2021, and granted an interim stay of enforcement of the Final Award pending the PTC or further order.

31. At the PTC, the learned Assistant Registrar Karen Tan Teck Ping fixed SUM 5125 for hearing and granted an interim stay of enforcement of the Final Award pending the disposal of SUM 5125.

SECTION 14(2) OF THE STATE IMMUNITY ACT APPLIES TO EXTEND THE TIME FOR APPLYING TO SET ASIDE THE LEAVE ORDER BY 2 MONTHS

32. By virtue of section 14(2) of the State Immunity Act,[45] the time for the Defendant to apply to set aside the Leave Order only begins to run 2 months after the date of service of the Leave Order.

Section 14(2) of the State Immunity Act applies to an application to set aside the Leave Order

33. The Plaintiff has invoked the process under section 14(1) of the State Immunity Act to effect service of the Leave Order on the Defendant.[46] Sections 14(1) and (2) provide for when service is deemed to have been effected on a State, and the time for the State to enter an appearance:[47]

> "14.— (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Ministry of Foreign Affairs, Singapore, to the ministry of foreign affairs of that State, and service shall be deemed to have been effected when the writ or document is received at that ministry.
>
> (2) ***Any time for entering an appearance*** (whether prescribed by Rules of Court or otherwise) ***shall begin to run 2 months after*** the date on which the writ or document is so received." [Emphasis added]

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45 DBOA, Vol 1, Tab 10.
46 See IR's 3rd Affidavit, Tab 1 at p. 42-43 (PB, Vol 2, Tab 4).
47 DBOA, Vol 1, Tab 10.

34. Section 14(2) applies not only to the entry of appearance, but also to "any corresponding procedure". This is pursuant to section 2(2)(*b*) of the State Immunity Act, which provides:[48]

> "(2) In this Act —
>
> …
>
> (b) references to entry of appearance and judgments in default of appearance ***include references to any corresponding procedures***." [Emphasis added]

35. Contrary to what the Plaintiff suggests,[49] the fact that there is no express requirement for the Defendant to enter an appearance when seeking to set aside the Leave Order does not render section 14(2) inapplicable.

36. Rather, the key question is this: what is the "*corresponding procedure*" to an entry of appearance in the context of an application to enforce an arbitral award? It is respectfully submitted that this must be the filing of an application to set aside the Leave Order.

37. This was the English High Court's reading of section 12(2) of the UK State Immunity Act 1978 (c 33),[50] which is in *pari materia* with section 14(2) of the State Immunity Act,[51] in *Norsk Hydro ASA v The State Property Fund of Ukraine & Ors* [2002] EWHC 2120 (Comm) ("***Norsk Hydro***").[52]

38. In *Norsk Hydro*, the order granting leave to enforce the award included a provision giving the respondents (who included Ukraine) 21 days to apply

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48 DBOA, Vol 1, Tab 10.
49 IR's 3rd Affidavit at [35] (2PB64).
50 DBOA, Vol 1, Tab 14.
51 DBOA, Vol 1, Tab 10.
52 DBOA, Vol 1, Tab 23.

to set it aside:[53]

> "To the respondents: within 21 days of service of this order, you may apply to set aside this order and the award shall not be enforced until after the expiration of that period, or, if you apply to set aside this order within the 21 days, until after the application has been finally disposed of."

39. However, less than two months and 21 days after the leave order was made, the claimant obtained an interim third-party debt order *ex parte*. Ukraine successfully applied to set aside the orders, and the English High Court held:[54]

> "(4) As it seems to me, ***section 12 means what it says. It deals with procedure. It is not to be confined to the court's 'adjudicative jurisdiction'. The two-month period is an acknowledgement of the reality that states do take time to react to legal proceedings.*** It is understandable that states should have such a period of time to respond to enforcement proceedings under section 100 and following of the 1996 Act; not untypically, an award will be made in one country but enforcement may be sought elsewhere, perhaps in a number of jurisdictions, where assets are or are thought to be located. ***I therefore decline to read words into section 12 so as to preclude its application to the enforcement of awards*** under CPR r 62.18.
>
> (5) In so far as it remains in dispute, I am satisfied that ***the wording in section 12(2) of the 1978 Act, 'Any time for entering an appearance (whether prescribed by rules of court or otherwise)' applies to the time period to be set by the court as available to a defendant to seek to set aside an order for enforcement*** under CPR r 62.18(9). If need be, section 22(2) of the 1978 Act ('references to entry of appearance . . . include references to any corresponding procedures'), though, I suspect, primarily designed for other purposes, is capable of supporting such a construction; for my part, however, I would be inclined to arrive at my conclusion on the wording of section 12(2) standing alone but read in context." [Emphasis added]

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53 DBOA, Tab 23 at [7] (p. 563F-G).
54 DBOA, Tab 23 at [25(4)]-[25(5)] (p. 570E-G).

40. *Norsk Hydro* was referred to with approval by the Honourable Justice Kannan Ramesh in *Josias Van Zyl*.[55] The issue before the learned Judge was whether a leave order had to be served pursuant to section 14(1) of the State Immunity Act, and in this context, the learned Judge considered whether the phrase "entry of appearance" in section 14(2) corresponded with an application to set aside an order granting leave to enforce, though he was not required to determine the issue.

41. The learned Judge expressed a preference for the approach in *Norsk Hydro*, over the conflicting approach in *AIC Limited v The Federal Government of Nigeria* [2003] EWHC 1357 (QB) ("***AIC Limited***"), where section 12 of the UK State Immunity Act[56] was held not to apply to an application to set aside the registration of a judgment. The learned Judge held in *Josias van Zyl* (at [71]):[57]

> "[Stanley Burnton J's conclusion in *AIC Limited*] conflicts with *Norsk Hydro* ([12] *supra*), which was not cited in *AIC Limited*. ***In Norsk Hydro, 'entry of appearance' was clearly equivocated with an application to set aside an order granting leave to enforce.*** Moreover, Stanley Burnton J's approach appears too literal and narrow; s 2(2)(*b*) (equivalent to s 22(2) of the UK Act) must exist precisely to cater to such differences as Stanley Burnton J identified. In my view, the correct approach is to first ask whether the proceedings in question are intended to fall within the scope of s 14. The stages of the proceedings in question cannot be expected to be identical to the steps of entry of appearance and judgment in default in s 14. A corresponding provision need not necessarily be the same in texture and terminology. That would defeat the purpose of s 2(2)(*b*) of the Act. ***I therefore prefer the approach in Norsk Hydro.***" [Emphasis added]

42. The learned Judge also recognised the reality that states take time to

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55 DBOA, Vol 1, Tab 21.
56 DBOA, Vol 1, Tab 14.
57 DBOA, Vol 1, Tab 21.

respond to proceedings against them, and that different considerations arise when a State is faced with enforcement of an Award. The learned Judge explained (at [45]-[46]):[58]

> "This accorded with the underlying purpose of s 14 [of the State Immunity Act]. ***The two-month time period*** in s 12 [of the UK State Immunity Act] ***serves to acknowledge 'the reality that states do take time to react to legal proceedings'.*** It is not disproportionately generous, since often 'an award will be made in one country but enforcement may be sought elsewhere, perhaps in a number of jurisdictions, where assets are or are thought to be located' (*Norsk Hydro* ([12] *supra*) at [25(4)]). I thus agreed with the reasoning at [19] of the AR's GD ([1] *supra*) that:
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> > ***States require time to respond to proceedings brought against them, and enforcement proceedings are no exception.*** Proceedings to enforce an award may be brought in any jurisdiction in which the respondent State has assets, independent from that jurisdiction's connection to the underlying arbitration or the merits of the substantive dispute. ***The need for time and opportunity to respond applies with equal force.***
>
> It is true that enforcement of an arbitral award cannot be said to take a respondent State by surprise, since it would have participated in the arbitral proceedings. However, ***different considerations come into play when a State is faced with the potential enforcement of an arbitral award against it in a particular jurisdiction***, as compared to the considerations at play in the underlying arbitral dispute. The grounds for setting aside an award at the seat of jurisdiction and for refusing enforcement in another jurisdiction are different, and Singapore courts clearly recognise the right of a party to elect between the 'active' remedy of setting aside at the seat of arbitration and the 'passive' remedy of resisting enforcement elsewhere: *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [71]." [Emphasis added.]

43. It is only logical that applying to set aside the Leave Order should be a "corresponding procedure" to entering an appearance. A defendant enters an appearance in a writ action to officially communicate its intention to defend or challenge the action (see *Singapore Court Practice* (Jeffrey

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58 DBOA, Vol 1, Tab 21.

Pinsler gen ed) (LexisNexis Singapore, 2021) at [12/1/1]).[59] By parity of logic, in the context of proceedings to enforce an arbitral award, the "*corresponding procedure*" must be the step taken by the defendant to evince its intention to challenge the order granting leave to enforce the arbitral award. Naturally, this step would have to be the application to set aside the Leave Order.

44. In view of the above, the Plaintiff respectfully submits that section 14(2) of the State Immunity Act clearly applies to the present facts.

The Defendant has 2 months and 21 days from the date of service of the Leave Order to apply to set it aside

45. Section 14(2), which provides that timelines "***shall begin to run 2 months*** *after the date on which the writ or document is so received*" (emphasis added),[60] grants a two-month extension without qualification. As the Leave Order provides that the Defendant would have 21 days to apply to set it aside, it follows that this 21-day deadline must be extended by an additional 2 months by virtue of section 14(2).

46. The English High Court's decision in *Norsk Hydro* is again instructive. In that case, the leave order had stated that the respondent could apply to set aside the order "*within 21 days of service of this order*". The Court held that the two-month period prescribed in section 12(2) of the UK State Immunity Act was to be added to the 21-day period:[61]

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59 DBOA, Vol 2, Tab 31.
60 DBOA, Vol 1, Tab 10.
61 DBOA, Vol 1, Tab 23 at [54(6)].

> "In the result, the Smith order cannot stand. The Morison order was served on Ukraine on 24 July, 2002. That order gave Ukraine a 21-day period within which to apply to set it aside. ***To that 21-day period must be added the two months provided for in section 12(2) of the 1978 [UK State Immunity] Act***. The total period therefore expired on or about 15 October, 2002. The Smith order was made on 13 September. It was accordingly premature; it was, it must be stressed, granted by way of enforcement; it was not a freezing order; there was, however, no jurisdiction to enforce the award until 15 October." [Emphasis added.]

47. A similar position was taken in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm).[62] In that case, the leave order drawn up by the claimants' solicitors had given the Government of Pakistan 31 days after service of the leave order to apply to set it aside. The High Court observed (at [54]) that the claimants had "*failed to provide properly for the time in which the [Government of Pakistan], as a state entity, could apply to set aside the order*", citing section 12(2) of the UK State Immunity Act. Accordingly, the claimant resubmitted its application, and a new leave order was granted giving the Government of Pakistan 2 months and 23 days after service to apply to set the order aside.

48. Accordingly, in the present case, the 2-month period prescribed in section 14(2) of the State Immunity Act should be added to the 21-day period in the Leave Order, such that the Defendant has 2 months and 21 days after service to apply to set aside the Leave Order.

49. The Plaintiff argues that, even if section 14(2) applies to the present facts, the Defendant should be given a period shorter than 2 months to respond.

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62 DBOA, Vol 1, Tab 18.

None of the Plaintiff's arguments is persuasive.

50. First, the Plaintiff asserts that by confirming that it had appointed D&N (in the letter from D&N to WP on 9 November 2021), and by filing SUM 5125 on 10 November 2021, the Defendant has already entered an appearance and taken a step in the proceedings.[63] Accordingly, the Plaintiff asserts that any application to set aside the Leave Order has to be brought within 21 days of 9 November 2021. This argument is critically flawed for multiple reasons.

51. Neither the Leave Order nor the State Immunity Act stipulates that the Defendant has 21 days *from entering an appearance* to apply to set aside the Leave Order. The premise of the Plaintiff's argument is simply wrong.

52. Further, in the context of an application to set aside the Leave Order, it is the filing of the setting aside application which is the equivalent to entering an appearance.[64] Plainly, the letter from D&N to WP stating that D&N had been instructed did not constitute entering an appearance.

53. Nor did filing the Notice of Appointment constitute entering an appearance. The Notice was only filed pursuant to the Court's directions at the PTC on 11 November 2021, which were made to facilitate the Defendant's access to the electronic court file for OS 900. Moreover, at the PTC, D&N put on record that the Defendant's filing of the Notice of Appointment of Solicitor

63 IR's 3rd Affidavit at [60] (2PB74).
64 See paragraphs 36 to 44 above.

would not be considered a step in the proceedings, nor would it be equivalent to entering an appearance.[65]

54. Similarly, filing SUM 5125 to clarify the deadline for filing the setting aside application did not constitute entering an appearance. In fact, in the supporting affidavit for SUM 5125, the Defendant made it crystal clear that it "*does not admit and reserves the right to dispute*" the position that service was effected on 20 October 2021.[66]

55. The Plaintiff's argument that the Defendant has submitted to the jurisdiction of the Singapore Courts by filing SUM 5125 and taking a step in the proceedings[67] is erroneous. SUM 5125 is similar in nature to an application for an extension of time. In this regard, the Court of Appeal has unequivocally held that an application for an extension of time to file a Defence does not constitute taking a step in the proceedings (see *Carona Holdings Pte Ltd v Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [94]).[68]

56. The Defendant reiterates that neither these submissions, nor any of its previous submissions or affidavits, amounts to a submission of jurisdiction to the Singapore courts. The Defendant does not accept that the Court has jurisdiction in this matter and reserves its right to dispute the Court's jurisdiction at the appropriate juncture.

57. Secondly, the Plaintiff suggests that shorter timelines are warranted because "*the legislative intent of s 14(2) of the [State Immunity Act] is to*

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65 AS's 2nd Affidavit at [11] (DB186).
66 AS's 1st Affidavit at [16] (DB11).
67 IR's 3rd Affidavit at [60] (2PB74).
68 DBOA, Vol 1, Tab 17.

give sufficient time to allow the foreign ministry to give notice to the competent authority in its own State and for necessary consultations to take place", and that *"the necessary notice and consultations would already have taken place by 9 November 2021 (at the latest), when D&N was allegedly formally appointed as India's Singapore counsel*".[69]

58. This submission is completely erroneous. Section 14(2) grants a two-month extension without qualification and does not state that time shall begin to run upon a State completing its necessary internal consultations. The purposive approach to statutory interpretation is "*not an excuse for rewriting a statute*" (*Tan Cheng Bock v Attorney*-General [2017] 2 SLR 850 at [50]).[70]

59. In any case, the necessary consultations could not possibly have been completed by 9 November 2021, when D&N was only appointed on that date.[71] Obviously, D&N would need time to review and understand the facts and the legal findings in the current proceedings.

60. Thirdly, the Plaintiff also suggests that, even if section 14(2) applies and the Defendant has not yet entered an appearance, the Defendant is entitled only to a period of *two months after service of the Leave Order* to apply to set it aside.[72] This obviously contradicts the plain wording of section 14(2). Section 14(2) provides that time "shall *begin to run* 2 months" after the date of service. Section 14(2) does not provide that time is *limited* to two months

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69 IR's 3rd Affidavit at [62] (2PB74).
70 DBOA, Vol 2, Tab 26.
71 AS's 2nd Affidavit at [32] (DB192).
72 IR's 3rd Affidavit at [64] (2PB75).

after the date of service.

61. In view of the above, the Defendant respectfully submits that the correct position must be that section 14(2) affords it 2 months and 21 days after service of the Leave Order to apply to set it aside.

ALTERNATIVELY, THE DEFENDANT SHOULD BE GRANTED AN EXTENSION OF TIME UNTIL 11 JANUARY 2022 TO APPLY TO SET ASIDE THE LEAVE ORDER

62. Without diluting the force of the above, it is respectfully submitted that, even if we were to put section 14(2) aside, the Defendant should be granted an extension of time of two months to file the application to set aside the Leave Order.

63. In the first place, the 21-day period is not prescribed by the Rules of Court (2014 Rev Ed). Instead, Order 69A rule 6(4) of the Rules of Court provides:[73]

> "Within 14 days after service of the order ***or, if the order is to be served out of the jurisdiction, within such other period as the Court may fix***, the debtor may apply to set aside the order and the award shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the order, until after the application is finally disposed of." [Emphasis added.]

64. The 21-day timeline was ordered because the Plaintiff, in breach of its obligation to give full and frank disclosure, failed to highlight sections 2(2)(*b*) and 14(2) of the State Immunity Act to the Court. Instead, the Plaintiff merely expressed its belief that "*a period of 21 days after service is a reasonable period for India to take out any application to set aside any*

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73 DBOA, Vol 1, Tab 9.

orders made".[74] In other words, the purportedly "*strict*"[75] 21-day timeline had been entirely engineered by the Plaintiff.

65. It is trite that this Court has the discretion to extend time pursuant to Order 3 rule 4(1), which provides that "*the Court may, on such terms as it thinks just, by order extend … the period within which a person is required … by any judgment, order … to do any act in any proceedings*".[76]

66. In fact, even after the period for applying to set aside the leave order has expired and judgment has been entered, the Court can still grant a retrospective extension of time to file the setting aside application.

67. In *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 3 SLR 725 ("***Bloomberry Resorts***"),[77] the leave order was served on the second plaintiff and the first plaintiff on 4 January 2017 and 10 March 2017, respectively. The plaintiffs did not apply to set aside the leave orders within the stipulated 14 days, and judgment was entered against them on 20 June 2017.[78] Six months later, on 21 December 2017, the plaintiffs applied to, *inter alia*, set aside the leave orders and the judgment and sought an extension of time to do so on the basis of new evidence, which had been discovered post-award, that was suggestive of fraud and corruption.[79]

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74 IR's 1st Affidavit at [27] (1PB19).
75 IR's 3rd Affidavit at [36]-[37] (2PB64-65).
76 DBOA, Vol 1, Tab 5.
77 DBOA, Vol 1, Tab 16.
78 DBOA, Vol 1, Tab 16 at [6].
79 DBOA, Vol 1, Tab 16 at [52].

68. The Honourable Justice Belinda Ang granted a retrospective extension of time (of 11 and 9 months, respectively) for the plaintiffs to apply to set aside the leave orders.[80] The learned Judge explained that Order 3 rule 4(1) of the Rules of Court gave the Court discretion to grant an extension to achieve justice in the circumstances of the case: [81]

> "The words 'such terms as it thinks just' ***gives the court discretion to grant time extension in order to achieve justice in the circumstances of the case. Generally, the factors the court takes into consideration in deciding whether to grant an extension of time are: (a) the length of delay; (b) the reasons for delay***; (c) the chances of the defaulting party succeeding on appeal if the time for appealing were extended; and (d) the degree of prejudice to the would-be respondent if the extension of time were granted: see *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [29]; *AD v AE* [2004] 2 SLR(R) 505 at [10]) ***with the courts generally focusing on the first two***: *Falmac Ltd v Cheng Ji Lai Charlie and another matter* [2014] 4 SLR 202 at [14]. The first two factors are relevant to the present application for time extension." [Emphasis added.]

69. The learned Judge held that, as the plaintiffs' reasons for the delay and allegations of fraud were bound up with the merits of the plaintiffs' application to challenge enforcement of the award, it was within the Court's discretion to extend time and defer matters to the substantive hearing proper. Significantly, despite the fact that 9 and 11 months had already lapsed and judgment had already been entered, the Court held that this approach was "*in the overall interest of justice having regard also to the minimal prejudice caused to the defendants*."[82]

70. It is respectfully submitted that the Court's approach in *Bloomberry Resorts*

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80 DBOA, Vol 1, Tab 16 at [51].
81 DBOA, Vol 1, Tab 16 at [49].
82 DBOA, Vol 1, Tab 16 at [54].

was correct as it prioritised substantive over procedural matters. As explained below, the factors identified in *Bloomberry Resorts* point to the conclusion that a two-month extension of time should be granted to the Defendant in this case.

The additional time sought is relatively short

71. The additional time sought by the Defendant, *i.e.*, two months, is relatively short, as compared to the retrospective extensions of time of 9 and 11 months granted in *Bloomberry Resorts*.[83]

72. Similarly, in *Astro Nusantara International BV and others v PT First Media TBK* [2018] HKCFA 12, the Hong Kong Court of Final Appeal granted a retrospective extension of time of 14 months to a defendant to file a setting aside application.[84]

73. It bears emphasis that, in the US Proceedings, the Plaintiff had consented to the Defendant being granted an additional seven weeks to file its Motion to Dismiss, on top of the 60-day period already afforded by the FSIA.[85] Moreover, the Motion to Dismiss filed in the US Proceedings is more limited in scope than the Singapore application to set aside the Leave Order, as it only contains immunity-related defences.[86] The two months now sought by the Defendant is reasonable.

74. Even if this Honourable Court is of the view that section 14(2) of the State Immunity Act does not apply, it is submitted that the 2-month period

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83 See paragraph 68 above.
84 DBOA, Vol 1, Tab 15 at [86]-[88].
85 See paragraph 18 above.
86 AS's 2nd Affidavit at [38] (DB194).

prescribed therein remains a good *indicative* approximation of the minimum additional time that a State may need to respond to legal proceedings. The Defendant's request for two additional months cannot therefore be described as excessive or extravagant, particularly given that the Defendant's time to prepare the setting aside application will run over the year-end holidays.

The Defendant reasonably requires the additional time sought to consider its response to the Leave Order

75. The Defendant has credible reasons for seeking a two-month extension of time to file its application to set aside the Leave Order.

76. As the Honourable Justice Kannan Ramesh recognised in *Josias Van Zyl,* "*the reality [is] that states do take time to react to legal proceedings … and enforcement proceedings are no exception*".[87]

77. This reality was also recognised by both parties in their Joint Motion filed in the US Proceedings on 23 July 2021, which stated that "*[i]n particular, foreign-State respondents often require additional time to confer with counsel in the preparation of written submissions. This challenge of coordination has been further exacerbated by the ongoing COVID-19 pandemic*".[88]

78. It is also relevant to note that India's Department of Space, which is the entity with oversight of the present proceedings, has been involved in several parallel arbitrations and court proceedings. Time is therefore

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87 DBOA, Vol 1, Tab 21 at [45].
88 AS's 2nd Affidavit at Exhibit AS-7, p. 48, [4] (DB230).

required for the Defendant to respond to developments in various legal proceedings.[89]

79. The Plaintiff contrives multiple reasons for objecting to an extension of time. None of them are valid.

80. First, the Plaintiff suggests that the Defendant would already be well aware of the grounds for resisting enforcement in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**").[90] However, the Defendant would have to carefully consider its grounds for resisting enforcement on a jurisdiction-specific basis, as the laws across jurisdictions are not uniform.

81. As noted in Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at p. 3745:[91]

> "The Convention's objectives were to facilitate the recognition and enforcement of foreign awards, by providing uniform international grounds on which recognition could be denied. ***Contrary to the foregoing analysis, nothing in the Convention was intended to establish uniform international grounds requiring denials of recognition***; that is made crystal clear by Article V's use of the term 'may' and by Article VII(1)'s residual savings or 'more-favorable-right" clause.' [Emphasis added.]

82. It has also been recognised in Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Kluwer Law International; Oxford University Press, 6th Ed, 2015) at [11.65] that:[92]

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89 AS's 2nd Affidavit at [49] (DB199).
90 IR's 3rd Affidavit at [38] (2PB65).
91 DBOA, Vol 2, Tab 29.
92 DBOA, Vol 2, Tab 30.

> "In an ideal world, the provisions of the New York Convention and of the Model Law would be interpreted in the same way by courts everywhere. Sadly, this does not happen. There are inconsistent decisions under the New York Convention, just as there may be inconsistent decisions within a national system of law (although the latter may be corrected on appeal). Nevertheless, it is useful to consider how national courts in different parts of the world have applied the different grounds for refusal set out in the New York Convention …."

83. The Plaintiff also relies on the fact that the Defendant has filed its Motion to Dismiss in the US Proceedings.[93] However, the US Motion to Dismiss was limited to immunity-related defences and did not detail the New York Convention grounds for resisting enforcement, which the Defendant is entitled to raise at a later date if it does not prevail in setting aside the application on immunity grounds.[94] In any case, the legislative provisions on state immunity would plainly differ across jurisdictions.

84. More fundamentally, a state against whom an award has been issued does not know where enforcement will be sought until service is effected. It would be unreasonable to expect that, upon the Final Award being issued, the Defendant would have to start preparing to resist potential enforcement applications in multiple jurisdictions around the world.[95]

85. In addition, states require time to instruct local counsel. Local counsel, in turn, require time for reviewing the file, considering the merits of the case, and preparing the necessary applications. As the Honourable Justice Kannan Ramesh affirmed in *Josias Van Zyl,* "*Proceedings to enforce an*

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93 IR's 3rd Affidavit at [44], [49] (2PB66-67).

94 AS's 2nd Affidavit at [38] (DB194); see also the Motion to Dismiss at IR's 3rd Affidavit, Tab 9, p. 102-103 (2PB150-151).

95 AS's 2nd Affidavit at [39] (DB194).

award may be brought in any jurisdiction in which the respondent State has assets … The need for time and opportunity to respond applies with equal force."[96]

86. Secondly, the Plaintiff says that W&C and the deponent Mr Singh would have the relevant experience and expertise to advise India in respect of OS 900 in less time than the Defendant has sought.[97] This is wrong.

87. Mr Singh is not qualified in Singapore.[98] Nor is W&C permitted to advise the Defendant on the local law relevant to OS 900. Under section 171(4)(*a*) of the Legal Profession Act (Cap 161, 2009 Rev Ed),[99] a Qualifying Foreign Law Practice is entitled "*to practise Singapore law in, and only in, the permitted areas of legal practice, in accordance with such terms and conditions as may be prescribed*". The permitted areas of legal practice exclude "*appearing or pleading in any court in Singapore, representing a client in any proceedings instituted in such a court or giving advice, the main purpose of which is to advise the client on the conduct of such proceedings, except where such appearance, pleading, representation or advice is otherwise permitted*" (rule 50(1)(*g*) of the Legal Profession (Law Practice Entities) Rules 2015).[100] Under these Rules, W&C had to instruct local counsel to advise and represent the Defendant in respect of OS 900 and these proceedings.

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96 DBOA, Vol 1, Tab 21 at [45].
97 IR's 3rd Affidavit at [45] (2PB67).
98 AS's 2nd Affidavit at [29] (DB191).
99 DBOA, Vol 1, Tab 4.
100 DBOA, Vol 1, Tab 3.

88. Thirdly, the Plaintiff similarly says that D&N has had recent experience representing India in disputes arising from investment arbitration and would be well able to advise India in respect of OS 900 in less time than it has sought.[101] This argument is obviously flawed. Every case has to be analysed on its own facts.

89. The Plaintiff also turns its focus to the Defendant itself, arguing that "*India has been involved in numerous other investment treaty arbitrations … and would be very familiar with the subject-matter*."[102] This argument too is untenable for the same reason.

90. Fourthly, the Plaintiff relies on the fact that the Defendant did not apply to set aside the Final Award.[103] This misses the point. It is settled law that a party may raise objections to the award at the stage of enforcement even if it had not applied to set aside the award at its seat (see the Court of Appeal's decision in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [71]).[104]

91. Fifthly, the Plaintiff makes the surprising allegation that there is "*a public record of [the Defendant] pursuing cynical litigation tactics and strategies to frustrate enforcement of arbitral awards*".[105] It then goes on to suggest that, upon been served, the Defendant "*would have been more than aware*" of what it had to do in response to the Singapore proceedings, and that the

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101 IR's 3rd Affidavit at [46] (2PB67).
102 IR's 3rd Affidavit at [47] (2PB68).
103 IR's 3rd Affidavit at [39] (2PB65).
104 DBOA, Vol 1, Tab 25.
105 IR's 3rd Affidavit at [54] (2PB70).

Defendant dragged its feet by formally instructing Singapore counsel only on the day before the 21-day period allegedly expired, "*manufactur[ing]*" the urgency of the hearing of its application "*to deprive [the Plaintiff] of a proper opportunity to respond" and "artificially create reasons*" for an interim stay of enforcement, and "*refus[ing]*" to give the Singapore High Commission any acknowledgment of service.[106] In short, the Plaintiff is accusing the Defendant of an abuse of process.

92. At the outset, it is inappropriate for the Plaintiff to cast doubt on when D&N was formally appointed by saying that D&N was "*allegedly*" formally instructed on 9 November 2021, as the Plaintiff does thrice in its affidavit.[107] D&N was instructed on 9 November 2021, and only received the relevant documents from the Defendant on 8 November 2021.[108]

93. Nor does the Plaintiff's story make any sense. The Defendant would have gained no advantage by waiting until 10 November 2021 to seek clarity that it had 2 further months to apply to set aside the Leave Order. To the contrary, given the serious consequences that could ensue if the Defendant were out of time to apply to set aside the Leave Order, it would have been in the Defendant's interest to obtain such clarity as soon as it was able to do so.[109]

94. If the Defendant were being deliberately coy in not acknowledging receipt of the Documents, D&N would not have written to the Plaintiff's counsel on 9 November 2021 and filed SUM 5125 on 10 November 2021. Instead, the

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106 IR's 3rd Affidavit at [49]-[52] (2PB69-70).
107 IR's 3rd Affidavit at [28], [50], [62] (2PB62, 69, 74).
108 AS's 2nd Affidavit at [31] (DB192).
109 AS's 2nd Affidavit at [16] (DB187).

Defendant would only have informed the Plaintiff of the receipt of the Documents after it was in a position to file an application to set aside the Leave Order.

95. There is, in any event, no truth to the Plaintiff's tale. As explained above, the Documents were initially delivered to the wrong department, and were only sent to the Department of Space (the responsible government entity) after 9 days.[110] The next working day, W&C started the process of instructing Singapore counsel.[111] It then took 9 days for the Defendant, through W&C, to engage D&N, bearing in mind that various approvals had to be obtained internally within the Indian Government, and that the Diwali festive period fell within the same period.[112] There is no basis whatsoever to criticise the Defendant for undue delay.

96. As for the accusation that the Defendant has often pursued cynical tactics and enforcement strategies, the Plaintiff selectively relies on a few news articles and a US District Court decision that recite accusations by investors.[113] Moreover, although it exhibited an article suggesting that the Defendant had asked state-run banks to withdraw funds from their overseas accounts, the Plaintiff did not exhibit a subsequent article recording the Defendant's denial of the same.[114]

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110 AS's 2nd Affidavit at [21]-[23]; see also Exhibit AS-6, p. 44-45 (DB189-90, 226-7).
111 AS's 2nd Affidavit at [28], [30] (DB191-2).
112 AS's 2nd Affidavit at [30] (DB192).
113 IR's 3rd Affidavit at [54(a)-(b)] (2PB71-72).
114 AS's 2nd Affidavit at [45(b)]; see also Exhibit AS-11 at p. 530-532 (DB197, 712-4).

97. Further, the US District Court decision did not find that the Defendant had engaged in cynical tactics to frustrate enforcement efforts.[115] Similarly, while it has been reported that the shareholders of Devas have threatened the Defendant with a new claim under the Mauritius-India BIT over its alleged efforts to thwart enforcement of arbitral awards, it appears from the media report that this action has not been commenced, much less determined.[116]

98. It is therefore inappropriate for the Plaintiff to rely on these allegations as established facts. Respectfully, this Court should disregard these serious and unjustified allegations, bearing in mind that the threshold for finding abuse of process is "*necessarily a high one*" (*Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal* [2019] 2 SLR 77 at [94]).[117]

99. The sharp point is that, as the courts have recognised, states require time to respond to proceedings brought against them. The Plaintiff has no credible basis to deprive the Defendant of the time it needs to respond to the Plaintiff's claim.

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115 AS's 2nd Affidavit at [45(c)] (DB197); see also the US District Court decision at IR's 3rd Affidavit, Tab 20, p. 304-325 (2PB352-373).

116 AS's 2nd Affidavit at [45(d)] (DB198); see also the article referenced at IR's 3rd Affidavit, Tab 23, p. 339-346 (2PB387-394).

117 DBOA, Vol 1, Tab 24.

The Defendant has prospects of succeeding in any application to set aside the Leave Order

100. The Plaintiff has alleged that "*it is telling that [AS's 1st Affidavit] is unable to set out or even allude to any potential basis for India to resist enforcement of the Final Award*".[118] This argument is disingenuous.

101. D&N was only instructed on 9 November 2021, just one day before SUM 5125 was filed.[119] Accordingly, AS's 1st Affidavit, which was prepared at very short notice, was not meant to be comprehensive, and detailed consideration of the Defendant's substantive responses to the Leave Order could not have been undertaken by that time.[120]

102. The Plaintiff's argument is also mischievous because the shoe is on the other foot. It is the *Plaintiff* who should have identified the potential grounds for the Defendant to resist enforcement of the Final Award in its *ex parte* application for the Leave Order.

103. It is trite that an applicant in an *ex parte* application has a duty to make full and frank disclosure to the court of all matters, factual or legal, which might be material to the application, and which are within its knowledge, even if those matters are prejudicial to its claim. This duty extends to disclosing all defences "*that might be reasonably raised by the defendant*". All material facts should be fairly stated in the affidavit, and it is not sufficient that the relevant facts may be distilled somewhat from somewhere in the

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118 IR's 3rd Affidavit at [70] (2PB77).
119 AS's 2nd Affidavit at [59] (DB202).
120 AS's 2nd Affidavit at [59] (DB202).

voluminous exhibits filed (see *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [83], [87], and [94]).[121]

104. Hence, in its *ex parte* application for the Leave Order, the Plaintiff should have highlighted the Defendant's potential grounds for resisting enforcement of the Final Award. As the Honourable Justice Vinodh Coomaraswamy recently held in *Hydralift* (at [179]), a party seeking to enforce an arbitral award must disclose all potential defences to enforcement that it can reasonably anticipate.[122]

105. The Plaintiff also should have highlighted the Defendant's potential claim to state immunity. In *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] 1 WLR 2829 ("***Gold Reserve***"), the Court held (at [71]) that it must be informed of arguments concerning state immunity as, *inter alia*, the Court is required to give effect to state immunity even though a state does not appear:[123]

> "When a judge is faced with an application for permission to enforce an award against a state as if it were a judgment the judge will have to decide whether it is likely that the state will claim state immunity. If that is likely then he would probably not give permission to enforce the award but would instead specify (that being the language of CPR part 62.18(2)) that the claim form be served on the state and consider whether it was a proper case for granting permission to serve out of the jurisdiction. He would envisage that there would be an inter partes hearing to consider the question of state immunity. For that reason any applicant for permission must draw the court's attention to those matters which would suggest that the state was likely to claim state immunity. ***Indeed, since the court is required by section 1(2) of the State Immunity Act 1978 to give effect to state immunity even though the state does not appear, it is***

121 DBOA, Vol 2, Tab 27.
122 DBOA, Vol 1, Tab 22.
123 DBOA, Vol 1, Tab 19.

> ***important that the court be informed of the available arguments with regard to state immunity***." [Emphasis added]

106. Section 3(2) of the State Immunity Act similarly provides, "*A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question*".[124] Accordingly, it is submitted that the observations in *Gold Reserve* are relevant and pertinent.

107. Yet, in breach of its obligation to give full and frank disclosure, the Plaintiff did not disclose to the Court the Defendant's potential argument that it was entitled to state immunity. This was even though, in the US Proceedings, the Defendant had already alluded to its claim to state immunity, as the parties' Joint Motion stated:[125]

> "For the avoidance of doubt, ***India respectfully objects to the jurisdiction of this Court under the [Foreign Sovereign Immunities Act]***, and is appearing at this time only to request an extension of time for its response. India expressly preserves all privileges, immunities, and jurisdictional defenses. India further reserves the right to seek additional time to submit its Reply, following the submission of Petitioner's Opposition." [Emphasis added.]

108. The Plaintiff also did not disclose the India's National Company Law Tribunal ("**NCLT**") decision dated 25 May 2021, which ordered the liquidation of Devas Multimedia Private Limited ("**Devas**").[126] By way of background, the Plaintiff's case is that its indirect acquisition of shares in Devas constitutes the investment which is protected by the Germany-India BIT.[127] The NCLT held that Devas had been incorporated with a fraudulent

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124 DBOA, Vol 1, Tab 10.
125 AS's 2nd Affidavit at Exhibit AS-7, p. 48-49, [7] (DB230-231).
126 AS's 2nd Affidavit at Exhibit AS-9, p. 57-170 (DB239-352).
127 IR's 1st Affidavit at [14]-[15] (1PB14-15).

motive to collude, connive, and procure the Devas agreement that was the subject of the Arbitration.[128] In so holding, the NCLT also expressed the view that the Devas agreement would be "*void ab initio and it would not create any legal rights, much less civil rights to Devas*".[129]

109. The NCLT's decision was affirmed by the National Company Law Appellate Tribunal ("**NCLAT**") on 8 September 2021.[130] The NCLAT also considered that Devas' shareholders were aware of the Devas agreement and, as indirect owners of Devas, bore responsibility under Indian law for the fraudulent activities engaged in by Devas.[131]

110. Considering the findings of the NCLT and NCLAT, and the orders to wind up Devas, the Defendant clearly has credible grounds to argue, *inter alia*, that the Plaintiff did not make a qualifying investment under the Germany-India BIT by acquiring shares in Devas. Article 1(b) of the Germany-India BIT defines "*investment*" as "*every kind of asset invested in accordance with [Indian laws]*".[132]

111. If this is correct, the Defendant is immune from the jurisdiction of this Court under section 3(1) of the State Immunity Act,[133] as it did not consent to arbitrate the dispute with the Plaintiff under the Germany-India BIT. It would also mean that there was no valid arbitration agreement between the Plaintiff and the Defendant, with the implication that the Final Award contains decisions on matters beyond the scope of the submission to

128 AS's 2nd Affidavit at Exhibit AS-9, p. 152, [32] (DB334).
129 AS's 2nd Affidavit at Exhibit AS-9, p. 146, [21] (DB328).
130 AS's 2nd Affidavit at Exhibit AS-10, p. 171-528 (DB354-710).
131 AS's 2nd Affidavit at Exhibit AS-10, p. 496-505, [206]-[224] (DB678-686).
132 IR's 1st Affidavit at Tab 2, p. 143 (1PB151).
133 DBOA, Vol 1, Tab 10.

arbitration, and valid objections to the enforceability of the Final Award can be raised pursuant to section 31(2) or 31(4) of the IAA.

112. Yet, the Plaintiff did not highlight the NCLT's decision to the Court when applying *ex parte* for the Leave Order. In fact, the Plaintiff did not mention, much less draw the Court's attention to, any of the Defendant's potential grounds for resisting enforcement of the Final Award.

113. Considering the Plaintiff's lack of full and frank disclosure, it would not be right for the Defendant not to be accorded sufficient time to file its application to set aside the Leave Order, and to present the Court with the full picture relating to the enforceability of the Final Award.

The Plaintiff would suffer no real prejudice even if an extension of time is granted

114. Finally, the Plaintiff would suffer no real prejudice even if an additional two months is afforded to the Defendant to apply to set aside the Leave Order.

115. First, if SUM 5125 is granted, this would, at most, result in a two-month delay to the Plaintiff's ability to enforce the Final Award in Singapore, even if the Defendant's objections ultimately do not prevail. But it is unclear how the Plaintiff would be irremediably prejudiced merely as a result of this delay of two months.

116. The Plaintiff, moreover, cannot seriously claim to be prejudiced because it has been purportedly left out of pocket. The allegedly outstanding amount of US$137,228,887 represents only around 0.1% of the Plaintiff's revenue in 2020, which the Plaintiff declared on its website to be about EUR 101

billion (or about US$113 billion at current exchange rates).[134] It is evidently not the case that the Plaintiff's finances would be materially affected even if it is unable to enforce the Final Award for two additional months.

117. Secondly, if the Plaintiff were truly in a hurry to enforce the Final Award against the Defendant's assets in Singapore, the Plaintiff would not have waited over 15 months after the Final Award was issued to commence enforcement proceedings in Singapore.[135]

118. More broadly, if enforcement against the Defendant in any jurisdiction were truly pressing, the Plaintiff would not have agreed to the Defendant having not only the undisputed two-month period that it was entitled to under the FSIA in the US Proceedings, but also a further extension of almost two months within which to file its Motion to Dismiss.[136]

119. Thirdly, the Plaintiff's concern[137] that the Defendant's assets in Singapore will be dissipated is contrived. The allegation that the Defendant is pushing the IPO of Life Insurance Corporation of India ("**LIC**") in order to dissipate its assets in Singapore and frustrate enforcement attempts by the Plaintiff is completely baseless.

120. The contemplated listing of LIC was announced around February 2020, months before the Final Award was issued, and it was originally targeted for the second half of the 2021 financial year. The contemplated listing of LIC is aimed at raising funds of more than 900 billion rupees (approximately

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134 AS's 2nd Affidavit at [43]; see also Exhibit AS-8 at p. 55 (DB196, 237).
135 AS's 2nd Affidavit at [44] (DB196).
136 See paragraph 18 above.
137 IR's 3rd Affidavit at [56], [59] (2PB73).

US$12.2 billion) for the Defendant to finance its operational needs. Plainly, the listing of LIC is not something that is directed at prejudicing the Plaintiff's enforcement of a US$135 million award.[138]

121. Further, the Plaintiff says that assets of the Defendant in Singapore may be dissipated if LIC *Singapore* is sold.[139] But LIC Singapore is owned by LIC, not the Defendant.[140] The Plaintiff ignores the fact that each company is a separate legal entity and provides no basis for piercing the corporate veil. The Plaintiff has no credible basis for suggesting that any assets in Singapore might be dissipated.

122. In summary, each factor considered for granting an extension of time in *Bloomberry Resorts*[141] supports granting the Defendant an extension of time until 11 January 2022 to apply to set aside the Leave Order.

THE PLAINTIFF IS NOT ENTITLED TO ANY SECURITY

123. There is no legal or factual basis for the Plaintiff to seek security of the award sum plus interest (in the sum of US$137,228,887) if the Defendant's application in SUM 5125 is allowed.

124. If section 14(2) of the State Immunity Act is held to apply to the present case, there is no reason for the Defendant to be penalised for relying on its statutory entitlement. Parliament has recognised and provided for the reality that states take time to respond to proceedings. There is no reason

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138 AS's 2nd Affidavit at [47] (DB198).
139 IR's 3rd Affidavit at [59] (2PB73).
140 AS's 2nd Affidavit at [48] (DB198).
141 DBOA, Vol 1, Tab 16.

why the Plaintiff should be permitted any security as a result.

125. Even if section 14(2) of the State Immunity Act does not apply, and the Defendant is granted a two-month extension of time to apply to set aside the Leave Order, there is still no reason why this difference of *two months* should entitle the Plaintiff to security for the pendency of the entire setting aside proceedings.

126. If the Defendant had filed the setting aside application by 10 November 2021, enforcement of the Final Award would have been stayed pursuant to the terms of the Leave Order, without the Plaintiff being entitled to any security. There is no reason why the Defendant being allowed two additional months to file its application should drastically change the circumstances such that the Plaintiff is entitled to security for the full awarded amount.

127. Indeed, none of the grounds cited in the Plaintiff's summons supports the Plaintiff's demand for security.

No basis for security under section 31(5) of the IAA

128. The Plaintiff's summons specifically states that it is made pursuant to section 31(5) of the IAA. This is somewhat surprising. Section 31(5) of the IAA provides:[142]

> "***Where***, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, ***the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority of the country***

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142 DBOA, Vol 1, Tab 1.

> ***in which***, or under the law of which, ***the award was made***, the court may —
>
> (a) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, so much of the proceedings as relates to the award; and
>
> (b) on the application of the party seeking to enforce the award, order the other party to give suitable security." [Emphasis added]

129. Section 31(5) does not apply for the simple reason that the Defendant has not applied to set aside or suspend the Final Award.[143]

No basis for security under section 18(2) read with the First Schedule of the Supreme Court of Judicature Act

130. The Plaintiff's summons also states that it is made pursuant to section 18(2) and the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("**SCJA**"),[144] which enumerates the general powers of the court. However, none of these provisions provides for a general power to order security amounting to the quantum of an arbitral award.

131. Notably, the Plaintiff did not specify which paragraph of the First Schedule it is relying on. The closest provision appears to be paragraph 15 of the First Schedule, which states:[145]

> "**Interim payment**
>
> 15. Power to order a party in a pending proceeding to make interim payments to another party or to a stakeholder or into court on account of any damages, debt or other sum, excluding costs, which he may subsequently in the proceeding be adjudged to be liable to pay."

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143 IR's 3rd Affidavit at [8(f)] (2PB55).
144 DBOA, Vol 1, Tab 11.
145 DBOA, Vol 1, Tab 11.

132. However, even paragraph 15 is not applicable to our facts. An application for interim payment is akin to an application for summary judgment. The Court has to be satisfied that the plaintiff will obtain judgment for a substantial amount at trial. It is not even sufficient for the Court to be of the view that the claim is *likely* to succeed; the Court must be satisfied that the claim *will* succeed (see *Singapore Court Practice* (Jeffrey Pinsler gen ed) (LexisNexis Singapore, 2021) at [29/10/6] and [29/11/2]).[146]

133. This is plainly not an application for interim payment. Indeed, the Plaintiff does not cite Order 29, rule 10 of the Rules of Court,[147] which is the provision for applications for interim payment, as a basis for its application in its summons.[148]

No basis for security under Order 23 rule 1 of the Rules of Court

134. The Plaintiff's summons next states that it is made pursuant to "s 32 of the Rules of Court".[149] There is no such thing as section 32 of the Rules of Court, so we are left guessing what the Plaintiff is referring to in an application for payment of more than US$137 million. Perhaps the Plaintiff meant Order 32, but that concerns the mode of making an application and does not provide a basis for security to be ordered.[150]

135. Or perhaps the Plaintiff meant Order 23 of the Rules of Court. Order 23 rule 1(1) provides:[151]

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146 DBOA, Vol 2, Tab 32.
147 DBOA, Vol 1, Tab 7.
148 See SUM 5275 (PB, Tab 3, 1PB7-8).
149 See SUM 5275 (PB, Tab 3, 1PB7-8).
150 DBOA, Vol 1, Tab 8.
151 DBOA, Vol 1, Tab 6.

> "Where, ***on the application of a defendant to an action or other proceeding in the Court***, it appears to the Court —
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction;
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;
>
> (c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, ***it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding*** as it thinks just."
>
> [Emphasis added]

136. This provision plainly does not assist the Plaintiff. The scope of Order 23 is clearly confined to applications for security for the costs of an action or other proceeding. The Plaintiff's primary prayer for relief in SUM 5275 is for security in the sum of US$137,228,887,[152] which is the entire outstanding amount allegedly due under the Final Award.[153] This is not an application for security of the costs of this action.

No basis to invoke the Court's inherent jurisdiction to order security

137. The three specific provisions that the Plaintiff expressly cited in its summons quite patently do not provide any basis for the orders sought in SUM 5275. The Plaintiff thus will have to fall back on the inherent

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152 See SUM 5275 (PB, Tab 3, 1PB7-8).
153 IR's 3rd Affidavit at [72] (2PB78).

jurisdiction of the Court, which is also listed in the summons after the specific provisions already discussed above.

138. However, there is no basis to order security pursuant to the inherent jurisdiction of this Court. Recourse to the court's inherent jurisdiction is inappropriate, save in the most exceptional cases, where there is an existing rule already covering the situation at hand (see *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [81]).[154]

139. There already exist rules covering when security can be ordered, however. As explained above, section 31(5) of the IAA already delineates when security in the sum of the award can be ordered,[155] while Order 23 rule 1 of the Rules of Court already delineates when security for costs can be ordered in court proceedings.[156] This is therefore not an "exceptional case" that necessitates recourse to the court's inherent jurisdiction.

140. This conclusion is fortified by the UK Supreme Court's decision in *IPCO (Nigeria) Ltd v Nigerian Petroleum Corporation* [2017] 1 WLR 970 ("***IPCO***").[157] In *IPCO*, the UK Supreme Court held that the court did not have the jurisdiction or power (whether under the UK Arbitration Act 1996 (c 23), the Civil Procedure Rules or otherwise) to require a party resisting enforcement of a New York Convention award to give security for all or part of the outstanding amount of the award as a condition of it being entitled to

154 DBOA, Vol 2, Tab 28.
155 See paragraphs 128 to 139 above.
156 See paragraphs 134 to 136 above.
157 DBOA, Vol 1, Tab 20.

oppose enforcement on the grounds provided by section 103(3) of the UK Arbitration Act,[158] *i.e.*, the UK equivalent of section 31(4) of the IAA.

141. In overturning the English Court of Appeal's decision that enforcement of the award be adjourned on condition that the award debtor provide security of US$100 million, Lord Mance JSC in *IPCO* explained (at [41]) that Articles V and VI of the New York Convention,[159] which correspond with section 31 of the IAA, constitute a comprehensive code:[160]

> ***"In my opinion, the conditions for recognition and enforcement set out in articles V and VI of the [New York Convention] do constitute a code***. Just as article V codifies the grounds of challenge (see *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), para 16-137), so the combination of articles V and VI must have been intended to establish a common international approach, within the field which they cover. ***They contemplate that a challenge under article V may only be made conditional upon the provision of security in one situation falling within their scope. Had it been contemplated that the right to have a decision of a properly arguable challenge, on a ground mentioned in article V (domestically, section 103(2) and (3))*** might be made conditional upon provision of security in the amount of the award, that could and would have been said. The Convention reflects a balancing of interests, with a prima facie right to enforce being countered by rights of challenge***. Apart from the second paragraph of article VI [i.e. the equivalent of section 31(5) of the IAA], its provisions were not aimed at improving award creditors' prospects of laying hands on assets to satisfy awards.*** Courts have, as noted in *Dardana v Yukos*, other means of assisting award creditors, which do not impinge on award debtors' rights of challenge, eg disclosure and freezing orders." [Emphasis added.]

142. In any event, there are no factors to justify an order for security in this case. None of the factors raised by the Plaintiff is persuasive:

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158 DBOA, Vol 1, Tab 12.
159 DBOA, Vol 1, Tab 2.
160 DBOA, Vol 1, Tab 20.

(a) The Plaintiff alleges that any application to set aside the Leave Order "*would have little chance of success*". As explained at paragraphs 100 to 111 above, this is not true. Certainly, the Court is not in a position to come to this conclusion based on the limited material that the Plaintiff has put forward.

(b) The Plaintiff relies on the fact that the Defendant did not apply to set aside the Final Award.[161] This is fundamentally flawed. As explained at paragraph 90 above, a party may resist enforcement even if it has not applied to set aside the award in the seat court.

(c) The Plaintiff claims that it would be prejudiced by any delay in its enforcement efforts if the Defendant's application is granted.[162] As explained at paragraphs 114 to 121 above, this is off the mark.

(d) The Plaintiff's final reason is that the award sum is substantial.[163] However, the fact that the award sum is substantial, coupled with the fact that enforcement would have been "delayed" in any event if an application to set aside the Leave Order had been filed by 10 November 2021, is precisely why the balance of the parties' competing interests lies against ordering the Defendant to provide security. At the least, it would cut both ways.

143. In view of the above, it follows that the Plaintiff has no basis to invoke the Court's inherent jurisdiction to seek security from the Defendant.

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161 IR's 3rd Affidavit at [70] (2PB78).
162 IR's 3rd Affidavit at [71] (2PB78).
163 IR's 3rd Affidavit at [72] (2PB78).

CONCLUSION

144. The Defendant respectfully submits that SUM 5125 should be allowed, either on the basis that: (a) section 14(2) of the State Immunity Act applies; or alternatively (b) that the Defendant is permitted an extension of time until 11 January 2022 to file an application to set aside the Leave Order. Further, SUM 5275 should be dismissed with costs to the Defendant.

Dated this 29th day of November 2021.

SOLICITORS FOR THE DEFENDANT
DREW & NAPIER LLC