

# FEDERAL COURT OF AUSTRALIA

## CC/DEVAS (Mauritius) Ltd v Republic of India [2021] FCA 975

File number: NSD 347 of 2021

Judgment of: **STEWART J**

Date of judgment: 13 August 2021

Catchwords: **ARBITRATION** – international arbitration – where applicants seek to enforce an award under s 8(3) of the *International Arbitration Act 1974* (Cth) – where respondent is a foreign State – where respondent appeared conditionally to require service and claim immunity under the *Foreign States Immunities Act 1985* (Cth) – where applicants now apply for leave to serve outside of Australia – consideration of requirements

Legislation: *Federal Court of Australia Act 1976* (Cth) s 19(1)  
*Foreign States Immunities Act 1985* (Cth) ss 10(7), 23, 24, 25  
*International Arbitration Act 1974* (Cth) ss 3(1), 8(3)  
*Judiciary Act 1903* (Cth) s 39B(1A)  
*Federal Court Rules 2011* (Cth) rr 10.42, 10.43, 13.01, 28.44(3)  
*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Opened for signature 10 June 1958. 330 UNTS 3 (entered into force 7 June 1959)

Cases cited: *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; 142 ACSR 616  
*Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116; [2006] QB 432

Date of hearing: 13 August 2021

Registry: New South Wales

Division: General

National Practice Area: Commercial and Corporations

Sub-area: International Commercial Arbitration

Number of paragraphs: 25

Counsel for Applicants: J Hogan-Doran SC

Solicitor for Applicants: Norton Rose Fulbright

# ORDERS

NSD 347 of 2021

**BETWEEN:**                    **CC/DEVAS (MAURITIUS) LTD**  
First Applicant

**DEVAS EMPLOYEES MAURITIUS PRIVATE LTD**  
Second Applicant

**TELECOM DEVAS MAURITIUS LTD**  
Third Applicant

**AND:**                         **THE REPUBLIC OF INDIA**  
Respondent

**ORDER MADE BY: STEWART J**

**DATE OF ORDER: 13 AUGUST 2021**

## **THE COURT ORDERS THAT:**

1. The applicants have leave to amend the originating application filed on 21 April 2021 in the form annexed to their interlocutory application filed on 6 August 2021 save that the return day shall be two months and seven days after the date of service.
2. Pursuant to r 10.43 of the *Federal Court Rules 2011* (Cth) and s 24(5) of the *Foreign States Immunities Act 1985* (Cth) (**FSIA**), the applicants have leave to serve the amended originating application on the respondent in India by means of diplomatic service, in accordance with s 24 of the FSIA.
3. The proceedings be returnable on the earlier of:
  - (a) 9:15 am Australian Eastern Standard Time or Australian Eastern Daylight Time (as applicable) on the date being two months and seven days after the date that service of the amended originating application is effected on the respondent by delivery by the Department of Foreign Affairs and Trade to the department or organ of the Republic of India that is equivalent to that department, or to some other person on behalf of and with the authority of the Republic of India (not including that day of service). If the date two months and seven days after such service is a day on which the registry of this Court is not open for business, that date shall be next the day on which the registry is open for business; or

(b) 9:15 am on Wednesday, 27 April 2022.

4. The applicants shall notify the Court of the actual return date in accordance with order 3(a) upon being notified of the date of service for the purpose of listing the proceeding before the docket judge or a duty judge or registrar.
5. The applicants shall have liberty to apply ex parte by arrangement in writing with the Court.
6. Costs of this application be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

### STEWART J:

#### A. Introduction and background

1 These are my reasons for granting the applicants leave to serve the respondent, the Republic of India, outside Australia in accordance with s 24 of the *Foreign States Immunities Act 1985* (Cth). The applicants sought such leave in circumstances where the respondent has already filed a conditional notice of address for service in the proceeding. Why the applicant takes that course requires some explanation.

2 The proceeding was commenced by originating application in April 2021. The originating application sought an order pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth) (**IAA**) that the award on quantum of the Permanent Court of Arbitration in Case No. 2013-09 dated 13 October 2020 against India (the **Award**) be enforced as if it were a judgment of the Court. Further orders for payment of, or judgment for, the following sums were sought:

- (1) US\$50,497,600 plus interest thereon in favour of the first applicant, CC/Devas (Mauritius) Ltd;
- (2) US\$10,300,800 plus interest thereon in favour of the second applicant, Devas Employees Mauritius Pte Ltd;
- (3) US\$50,497,600 plus interest thereon in favour of the third applicant, Telecom Devas Mauritius Ltd; and
- (4) US\$10 million plus interest thereon in favour of the applicants.

3 In short, the applicants seek enforcement of an arbitral award and judgment in sums that together exceed US\$120 million.

4 The originating application indicated that it was not intended to serve the application on the respondent. That was in reliance on r 28.44(3) of the *Federal Court Rules 2011* (Cth) which provides that an application to enforce a foreign award under s 8(3) of the IAA may be made without notice to any person. Nevertheless, the applicants gave informal notice of the application to the respondent by hand delivering a copy of the originating application and supporting affidavit to the High Commission of India in Canberra on 6 May 2021. Further notice was given on 7 May 2021 by sending the originating application and supporting affidavit by email to legal counsel for the respondent in the arbitration conducted under the auspices of

the Permanent Court of Arbitration in the arbitration proceeding that led to the Award that the applicants seek to enforce.

5 The matter came before me for case management in the arbitration list for the first case management hearing on 19 May 2021. The respondent appeared, “subject to jurisdiction”, by counsel who explained that his appearance was a limited appearance pursuant to s 10(7) of the Immunities Act. That subsection provides that a foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity. It was thus clearly a conditional appearance.

6 Expressly without prejudice to any claim the respondent may make to foreign state immunity, or any objection to the Court’s jurisdiction, or any conditional appearance, orders were made by consent that:

- (1) the respondent file and serve any notice of appearance on or before 3 June 2021; and
- (2) the respondent notify the applicants in writing on or before 15 June 2021 (subsequently extended to 21 June 2021) as to the issues which it would propose to contend against the relief sought in the originating application, including any claim for immunity under the Immunities Act and any stay of the application.

7 The stated purpose of the respondent producing the document referred to in the second subparagraph above, as it was explained by senior counsel for the applicants, was for case management purposes so that the Court and the parties would be informed “as to the lay of the land on what issues are likely to arise in these proceedings.” It was said to be “purely an informative document for case management purposes.” Those characterisations were accepted by counsel for the respondent.

8 On the designated day of 3 June 2021, the respondent filed a notice of address for service under the Rules which states the following:

The Republic of India, the Respondent, asserts its immunity as a foreign State to the jurisdiction of the courts of Australia in respect of these proceedings and does not submit to the jurisdiction.

Pursuant to r 13.01 of the *Federal Court Rules 2011* (Cth), this Notice is accompanied by an application and affidavit seeking (1) an order that the originating application of CC/Devas (Mauritius) Ltd & Ors be set aside, (2) a declaration that the originating application has not been duly served on the Respondent and (3) a stay of the proceedings. The application also seeks, (3) in the alternative to order (2), and to the

extent service has been validly effected (which is denied), an order setting aside that service.

Subject to the above, the Respondent gives notice of its address for service for the limited purpose of appearing conditionally to assert its immunity and have the originating application set aside and, as part of that assertion, to seek a declaration that the Applicants have failed to serve the initiating process on the Respondent in accordance with Part III of the *Foreign States Immunities Act 1985* (Cth):

[Place]: [Australian solicitors' address and email address]

9 At the same time, the respondent filed an interlocutory application in which it sought the orders referred to in the notice of address for service. It also filed an affidavit which attached inter-solicitor correspondence in which the following contentions were put on behalf of the respondent:

- (1) The effect of s 25 of the Immunities Act is that the applicants are required to effect service of any application in a manner contemplated by ss 23 and 24 of the Immunities Act.
- (2) The requirements as to service under the Immunities Act have not been met.

10 The respondent subsequently furnished a document purportedly in compliance with the order at [6(2)] above, which it titled "Statement of Issues". I say "purportedly" because the document goes way beyond the case management purposes expressly identified at the hearing and is more in the nature of a detailed pleading. The document is more than five pages and raises the following matters:

- (1) **Reservation of rights:** The respondent "formerly protests and objects" to any requirement that, prior to determination of issues of service, it be required to indicate any other issues which it would propose to contend against the relief sought in the originating application, and that insofar as the document sets out issues other than in relation to service it is made under protest.
- (2) **Service:** The respondent contends that the Immunities Act requires that a foreign State be served with an application pursuant to s 8 of the IAA in order that it can effectively assert its claim to immunity. Service of the originating process was required to be effected pursuant to s 24 of the Immunities Act through the diplomatic channel, and absent such service, and by reason of s 25 of the Immunities Act, the applicants have failed to serve the initiating process as required.
- (3) **Stay:** The proceeding should be stayed pending determination of (a) a proceeding pending before the Supreme Court of the Netherlands concerning the respondent's

application to set aside an award on jurisdiction and merits issued in the arbitration proceeding on 25 July 2016, and (b) a proceeding before pending before the District Court of The Hague concerning the respondent's application to set aside the Award issued in the arbitration proceeding on 13 October 2020.

- (4) **Foreign State Immunity:** The respondent "protests and objects" to any requirement that it state the issues relating to immunity which it would propose to contend against the relief sought in the originating application in advance of the applicants identifying their contentions as to the bases upon which they contend that the respondent is not immune.
- (5) **If service and immunity determined adverse to the respondent:** Under protest and as a matter of courtesy only, the respondent indicates that if service and immunity are determined adversely to it and the proceeding is not stayed, the issues that might arise include a list of matters impugning the Award or the applicants' ability to enforce the Award.

11 The applicants' response to the respondent's contention that there had been no proper service on the respondent, and that the proceeding could not proceed without such service, was to file an interlocutory application for leave to serve the originating application outside Australia.

12 There was debate thereafter between the parties in correspondence, and at one stage also with me in a case management hearing, as to the proper course for the proceeding. The most obvious course would have been to first decide the respondent's contention that service was required. If that contention was upheld, then the applicants' application for leave to serve out of the jurisdiction would be dealt with next. If the result on service was the other way, then the proceeding could progress to deal with the other matters and the need for the application for leave to serve outside Australia would fall away. The respondent pressed its application with respect to service even though it had entered an appearance and was before me, albeit conditionally.

13 Ultimately the parties agreed that there should be an order by consent setting aside all previous orders in the proceeding. Such an order was made by me on 29 July 2021. The applicants then filed an interlocutory application for ex parte relief to amend their originating application and for leave to serve the amended originating application out of the jurisdiction.

14 In short, as the applicants explained by senior counsel at the case management hearing on 15 July 2021, the applicants wished to avoid the risk that they were successful on the service issue



at first instance with the result that the proceeding then progressed to determination on the other issues and for their success on the service issue to be later reversed at one or other level of appeal. That would result in them having to start again. The safe course was therefore for them to start again now.

**B. The application for service outside Australia**

15 Rule 10.43(4) of the Rules provides that a party applying for leave to serve an originating application on a person outside Australia must satisfy the court that:

- (1) the court has jurisdiction in the proceeding; and
- (2) the proceeding is of a kind mentioned in r 10.42; and
- (3) the party has a prima facie case for all or any of the relief claimed in the proceeding.

16 I am satisfied that the Court has jurisdiction in the proceeding, as it is an application for relief under s 8(3) of the IAA; it is a matter arising under a law made by the Parliament and is thus a matter in respect of which jurisdiction is conferred on this Court: *Judiciary Act 1903* (Cth), s 39B(1A); *Federal Court of Australia Act 1976* (Cth), s 19(1).

17 I am satisfied that the application is for relief contemplated by item 10 of r 10.42 of the Rules, namely a proceeding for an order under Div 28.5 of the Rules in relation to an arbitration under the IAA.

18 Insofar as the applicants having a prima facie case is concerned, as indicated, the application is for orders under s 8(3) of the IAA that the Award be enforced as if it were a judgment or order of the Court. The Award was apparently rendered by the Tribunal pursuant to Art 8 of the *Agreement between the Government of the Republic of India and The Government of the Republic of Mauritius for the Promotion and Protection of Investments*, signed on 4 September 1998 and entered into force on 20 June 2000. That agreement is in the nature of a bilateral investment treaty, or BIT.

19 Article 8 of the BIT provides that if a dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under the BIT cannot be settled amicably through negotiations between the parties to the dispute within six months from the date of request for settlement, the investor may, amongst other options, submit the dispute to an ad hoc arbitral tribunal set up in accordance with the Arbitration Rules of the United Nation's Commission on International Trade Law, 1976. Such a provision has been

characterised as an open offer to investors to arbitrate in accordance with its terms: *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116; [2006] QB 432 at [32]; *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; 142 ACSR 616 at [179].

20 In addition to the Award, the applicants tendered the terms of the appointment of the Tribunal and an earlier award on jurisdiction and merits. In the circumstances, at least at a prima facie level, the applicants have established that they have an award in their favour pursuant to the agreement between the parties to arbitrate.

21 In terms of s 3(1) of the IAA, a “foreign award” is an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Opened for signature 10 June 1958. 330 UNTS 3 (entered into force 7 June 1959) (commonly referred to as the New York Convention) applies. The Award is a foreign award.

22 As a foreign award, the Award is entitled to recognition and enforcement under s 8(3), subject to Pt II of the IAA.

23 The method of service proposed by the applicants is by the diplomatic channel as provided for in s 24 of the Immunities Act.

24 The applicants brought to my attention a number of matters which they described as being in accordance with their obligations of full and frank disclosure in an ex parte application. Each of those matters is something that might be raised by the respondent in due course, but none is such as to cause me to doubt that the applicants have established a prima facie case at this stage.

### **C. Conclusion**

25 For the above reasons, I was satisfied to grant the applicants the leave that they sought. I also granted the applicants leave to amend the originating application in respects that do not call for reasons or explanation.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 17 August 2021