FEDERAL COURT OF AUSTRALIA

Republic of India v CCDM Holdings, LLC [2025] FCAFC 2

Appeal from:	*CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266
File number:	NSD 1306 of 2023
Judgment of:	**SARAH C DERRINGTON, STEWART AND FEUTRILL JJ**
Date of judgment:	31 January 2025
Catchwords:	**ARBITRATION** – investor-State arbitration under a bilateral investment treaty – originating application seeking recognition and enforcement of foreign arbitral award under the **New York *Convention*** *on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) – interlocutory application to set aside the originating application on the basis of foreign State immunity **PRIVATE INTERNATIONAL LAW** – where foreign State respondent asserts sovereign immunity under s 9 of the *Foreign States **Immunities Act** 1985* (Cth) – whether there has been a submission to the jurisdiction of the Court within the meaning of s 10(2) of the Immunities Act – where the foreign State has signed the New York Convention with a reservation that the Convention be applicable only to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India" – where the differences which are the subject of the arbitration were not within the reservation – whether the respondent waived immunity in respect of proceedings in respect of an award in such an arbitration – no waiver – appeal allowed **PUBLIC INTERNATIONAL LAW** – where Art I(3) of the New York Convention allows a State on signing the Convention to declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making the declaration – what legal effects such a reservation has under Art 21 of the *Vienna Convention on the Law of Treaties* (1969) – whether the reserving State has any obligation to the accepting States with regard to arbitral awards outside the scope of the reservation, and vice versa

Legislation:	*Foreign States Immunities Act 1985* (Cth) ss 9, 10, 11, 38 *International Arbitration Act 1974* (Cth) s 8, Sch 1 *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) Arts I, II, III, IV, V, XIV *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) Arts 53, 55 *United Nations Commission on International Trade Law Arbitration Rules 1976* *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 115 UNTS 331 (entered into force 27 January 1980) Arts 2(1)(d), 19, 20, 21, 31, 32
Cases cited:	*CC/Devas (Mauritius) Ltd v Republic of India (No 2)* [2023] FCA 527 *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2023] HCA 11; 275 CLR 292 *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; 223 CLR 331 International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) (Document A/66/10/Add.1) Gaillard E and Bermann G (eds), *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 2016) Kölbl A, "Article XIV" in Wolff R (ed), *New York Convention* (CH Beck, Hart and Nomos, 2nd ed, 2019) Nacimiento P, "Article XIV" in Kronke H et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) van den Berg AJ, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981)
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Arbitration

Number of paragraphs:	84
Date of hearing:	23 May 2024
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Solicitor for the Appellant:	White & Case
Counsel for the Respondents:	B Walker SC, J A Hogan-Doran SC and A Garsia
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ORDERS

NSD 1306 of 2023

BETWEEN:	**REPUBLIC OF INDIA** Appellant
AND:	**CCDM HOLDINGS, LLC** First Respondent
	DEVAS EMPLOYEES FUND US, LLC Second Respondent
	TELCOM DEVAS, LLC Third Respondent

ORDER MADE BY: **SARAH C DERRINGTON, STEWART AND FEUTRILL JJ**

DATE OF ORDER: **31 JANUARY 2025**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1 and 2 made by the primary judge on 24 October 2023 be set aside and replaced with orders that:
   (a) The applicants' originating application dated 21 April 2021 (as subsequently amended) be set aside by reason that the respondent is immune from the jurisdiction of the Federal Court of Australia in this proceeding pursuant to s 9 of the *Foreign States Immunities Act 1985* (Cth).
   (b) The applicants pay the respondent's costs of the interlocutory application dated 12 April 2022.
3. The respondents pay the appellant's costs of the appeal.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The central question in this appeal is whether, by ratifying the **New York *Convention*** *on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), the Republic of India "submit[ted] … by agreement" within the meaning of s 10(2) of the *Foreign States* ***Immunities Act*** *1985* (Cth) to the jurisdiction of the Federal Court of Australia. The relevant proceeding is brought by the respondents against India for the recognition and enforcement of an arbitral award pursuant to s 8 of the *International* ***Arbitration Act*** *1974* (Cth).

2 The primary judge answered the above question in the affirmative, finding that India's agreement to the New York Convention constituted "by way of clear and unmistakable necessary implication" submission by agreement within the meaning of s 10(2) of the Immunities Act in respect of proceedings against it for recognition and enforcement, where the award and "what appears on its face to be an agreement with India to arbitrate the underlying dispute" is tendered: *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266 (**J**) at [31], [51] and [103].

3 The appeal, with leave of the primary judge, is against his Honour's dismissal of India's interlocutory application to set aside the originating application for the enforcement of the award. For reasons that we will come to, in our view the appeal must succeed on the basis that India did not waive its right to foreign state immunity that it enjoys under s 9 of the Immunities Act. Any waiver by India of its immunity in proceedings in the Court for the enforcement of an award under the New York Convention is limited by its reservation on ratifying the Convention to the Convention being applicable only to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India." The "differences" that were determined by the arbitral award that is the subject of the proceeding below were not "commercial" in that sense. Thus, India did not waive its foreign state immunity in the proceeding by ratifying the Convention.

4 The result is that the appeal should be allowed and the relevant orders of the primary judge set aside and replaced with orders to the effect that the originating application (as subsequently amended) be set aside under s 38 of the Immunities Act.

Background

5 The original applicants in the primary proceeding were all incorporated in Mauritius. They were CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Pte Ltd and Telecom Devas Mauritius Ltd. On 16 May 2023, the primary judge made orders substituting each of those applicants with CCDM Holdings LLC, Devas Employees Fund US LLC and Telcom Devas LLC respectively on the basis of assignments of the original applicants' rights and interests in the arbitral awards to the new applicants. The orders were made without prejudice to any claim to immunity or objection to jurisdiction by India and without affecting the right of India to apply to set aside those orders after the determination of India's claim to immunity. See *CC/Devas (Mauritius) Ltd v Republic of India (No 2)* [2023] FCA 527.

6 On 4 September 1998, India and Mauritius concluded a bilateral investment treaty (**the BIT**). The BIT included mutual promises that the contracting parties would treat investors of the other contracting party fairly and equitably and, subject to narrow exceptions, not nationalise or expropriate their investments.

7 Article 8 of the BIT provided for a regime of international arbitration, including for the resolution of claims made by investors against India for violations of the protections afforded to them under the BIT. Relevantly, that regime included an option for binding ad hoc arbitration in accordance with the *United Nations Commission on International Trade Law Arbitration Rules 1976* with certain modifications with regard to the appointment of arbitrators. The primary judge characterised Art 8 of the BIT as a standing offer to the investors of the other contracting party, whose investments qualified as investments under the terms of the BIT, to settle disputes in accordance with that provision, including by arbitration.

8 In July 2012, the original applicants commenced arbitral proceedings against India administered by the Permanent Court of Arbitration at The Hague. The original applicants alleged that they had made qualifying investments in India within the meaning of the BIT, that India had expropriated those investments without compensating them in breach of the BIT, and that India's conduct also constituted a breach of the promises in the BIT to Mauritius of "fair and equitable treatment" (Art 4(1)) and the "most favoured nation" clause (Arts 4(2) and (3)). The original applicants sought an award declaring India liable to make reparations, as well as declarations of breach of the BIT.

9 The investments which the original applicants claimed in the arbitral proceedings to be qualifying investments for the purposes of the BIT comprised their respective shareholdings in

an Indian company, Devas Multimedia Pte Ltd (**Devas India**), and through that shareholding, an indirect interest in an agreement made between Devas India and **Antrix** Corporation Ltd, a corporation wholly owned by India under the administrative control of the Department of Space (**the Devas/Antrix Agreement**). That agreement with Antrix (to which India itself was not a party) was in respect of the lease of space segment capacity in the S-band electromagnetic spectrum on two Indian satellites yet to be built, launched and operated by the Indian Space Research Organisation.

10 On 17 February 2011, the Indian Cabinet Committee on Security decided to annul the Devas/Antrix Agreement, referring to "an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements" and to the Government not being "able to provide orbit slot in S band to Antrix for commercial activities" (**the Annulment**).

11 On 3 July 2012, the original applicants as claimants commenced the arbitral process by sending a notice of arbitration to India. In the arbitration, India challenged the jurisdiction of the tribunal, including whether the underlying dispute engaged the promises contained in the BIT.

12 On 25 July 2016, the arbitral tribunal issued an Award on Jurisdiction and Merits. On 13 October 2020, the tribunal issued the Quantum Award, being the award which is the subject of the amended originating application in the primary proceeding.

The relevant statutory and treaty provisions

13 Before turning to the reasoning of the primary judge, and in order to understand that reasoning, it is necessary to identify the principal statutory and treaty provisions relevant to that reasoning and to the resolution of this appeal.

The Foreign States Immunities Act

14 Part II of the Immunities Act deals with immunity from jurisdiction. Section 9 provides as follows:

> Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

15 Section 10 deals with submission to jurisdiction, and provides relevantly as follows:

> (1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.

(2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia.

(3) A submission under subsection (2) may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise). …

16 Section 11 contains the following provisions in relation to commercial transactions:

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.

(2) …

(3) In this section, ***commercial transaction*** means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

(a) a contract for the supply of goods or services;

(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and

(c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

The International Arbitration Act and the New York Convention

17 Part II of the Arbitration Act applies to arbitration agreements and arbitral awards referred to in the New York Convention which is reproduced as Sch 1 to the Act.

18 Article I(1) of the New York Convention provides that the Convention "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."

19 Article I(3) provides that when signing, ratifying or acceding to the Convention, any State may "declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

20 Article II(1) provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

21 Article III provides as follows:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

22 Article IV provides that to obtain the recognition and enforcement of a foreign award, the party applying for recognition and enforcement shall, at the time of the application, supply the duly authenticated original award or a duly certified copy and the original arbitration agreement or a duly certified copy.

23 Article V provides that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof of one or other of the defences listed in Art V(1). Also, by Art V(2), recognition and enforcement of an arbitral award may be refused where the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country, or recognition or enforcement would be contrary to the public policy of that country.

24 It is common ground that India ratified the New York Convention with effect from 11 October 1960 subject to the reservation allowed under Art I(3) that it would "apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India." Also, Australia acceded to the Convention with effect from 24 June 1975 without reservation.

The Vienna Convention on the Law of Treaties

25 The general principles of treaty interpretation are set out in the ***Vienna Convention*** *on the Law of Treaties* (1969) which reflects customary international law and is therefore applicable to treaties pre-dating its entry into force in 1980: ***Kingdom of Spain*** *v Infrastructure Services Luxembourg S.à.r.l* [2023] HCA 11; 275 CLR 292 at [38]. Article 31 provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty. Article 32 provides that interpretative assistance may be gained from extrinsic sources in order to confirm the meaning resulting from the application of Art 31, or to determine the meaning when interpretation according to Art 31 leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."

26 As will be seen, a key issue in the appeal is the effect of India's reservation on ratifying the New York Convention. Article 2(1)(d) of the Vienna Convention defines a reservation as being a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to *exclude or to modify the legal effect of certain provisions of the treaty in their application* ***to that State*** (emphases added). Articles 19 to 21 of the Vienna Convention are presently relevant to that issue. Article 19 provides that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation to the treaty unless the reservation is prohibited by the treaty, the treaty provides that only specified reservations are permissible (which does not include the reservation in question), or where the reservation is incompatible with the object and purpose of the treaty. Article 20 deals with the acceptance of and objections to reservations. Relevantly, Art 20(1) provides that a reservation expressly authorised by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

27 Article 21 deals with the legal effects of reservations and of objections to reservations. Its terms are as follows:

> 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
>
> 3. …

28 Articles 22 and 23 are not presently relevant.

The primary judgment

29 The primary judge identified three main issues for determination (J[31]-[33]).

Issue 1: applicable principles for submission to jurisdiction

30 The first issue was to identify the principles which are relevantly applicable to determine whether a submission by agreement had been made for the purposes of s 10(2) of the Immunities Act. It is not necessary to traverse what the primary judge held in that regard. We

will return to the relevant principles as identified from *Kingdom of Spain* under the heading "Appeal Issue 1" (at [57]ff) below.

Issue 2: the broad question

31 The second issue (**Issue 2**) was whether, by ratifying the New York Convention, India submitted within the meaning of ss 10(1) and (2) of the Immunities Act to the jurisdiction of the Court in relation to proceedings for recognition and enforcement of a foreign arbitral award in circumstances where the applicants tender a copy of the award together with what appears on its face to be an agreement to arbitrate the underlying dispute.

32 His Honour "put to one side" the various sub-issues arising under Issue 2, which we will come to, and considered "the broad question" whether the terms of the New York Convention convey a submission to jurisdiction on the part of a State party. As the New York Convention does not explicitly use the words "waiver" and "foreign State immunity", his Honour approached that question on the basis that the applicants had to establish a clear and unmistakable implication by necessity from the words actually used. (J[41]-[42].)

33 His Honour reasoned that the promises contained in Art III of the New York Convention are promises made by each Contracting State to all other Contracting States. Both India and Australia, among the 170 other signatories, are parties to that set of promises. His Honour reasoned that India, along with all other Contracting States, requires by Art III that Australia relevantly shall recognise arbitral awards as binding and enforce them, just as Australia requires India to recognise and enforce relevant arbitral awards within its jurisdiction. That is, his Honour reasoned, India agreed by the terms of the Convention that relevantly Australia will recognise and enforce arbitral awards which fall within the scope of the Convention; if India is a party to such an arbitral award, it is an obvious and necessary implication that India is requiring Australia to recognise and enforce that award. His Honour concluded that as Australia would be unable to recognise and enforce such an award if India were at liberty to oppose the recognition and enforcement on the ground of foreign State immunity, the terms of Art III are inconsistent with India being able to deploy such a defence. (J[43].)

34 His Honour held that at the stage of dealing with foreign State immunity, an applicant for recognition and enforcement need not go further than to tender what appears on its face to be an arbitration agreement, and need not establish that the apparent arbitration agreement is valid or applicable which is a question to be deferred to a subsequent stage of the proceedings pursuant to Art V (J[44]).

35 His Honour accordingly concluded, at that stage of the analysis, that "the text of the New York Convention supports the Applicants' argument as to submission by agreement in the present case by way of clear and unmistakable necessary implication" (J[51]).

Issue 2(b): limited to a commercial or private law dispute?

36 His Honour identified that Issue 2 entailed a number of subsidiary issues (J[32]). Although not made express, that was evidently for the purpose of seeing whether any one or more of them had the result that his Honour's preliminary conclusion with regard to the "broad question" of waiver was displaced or altered. Only one of those sub-issues is presently relevant, namely sub-issue (b) – "Is any application of the New York Convention to arbitral awards to which a State is a party limited to only such awards involving a commercial or private law dispute (as opposed to disputes concerning the conduct of the State acting in its governmental capacity)?"

37 The primary judge found no textual basis for India's submission that the term "differences" in Art I of the New York Convention is limited to the fields of commerce or private law. His Honour noted that Art I(3) permits Contracting States to declare that they will apply the Convention only to differences which are considered as "commercial" under their national law but reasoned that "that kind of reservation is not directly relevant to the present dispute, in that Australia did not make any such reservation and Australia is the State where recognition and enforcement is presently sought" (J[58]).

38 The primary judge noted that Article II limits the Convention to differences which have arisen, or which may arise, between the parties to an arbitration agreement "in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration" (J[59]).

39 After noting that the effect of Art 31 of the Vienna Convention is that primacy must be given to the written text of the Convention, and finding no textual support for India's submission limiting its application to commercial or private law disputes, the primary judge turned to the preparatory work of the New York Convention to which recourse may be had pursuant to Art 32 of the Vienna Convention for the specific purposes referred to in that article (J[61]-[62]). His Honour traversed the preparatory work that led to the New York Convention and concluded that that work shows that although "private law disputes" were a primary focus, the Convention is not limited to only such disputes (J[63]-[85]).

40 His Honour concluded that there is no ambiguity or obscurity in the meaning of the Convention in its application to States or State instrumentalities resulting from the application of Art 31 of the Vienna Convention. His Honour reasoned that the language used in Arts I-III is too broad and general to permit a construction whereby the Convention would apply to States only where the awards involve a commercial or private law dispute. Further, his Honour concluded that the meaning ascertained in accordance with Art 31 does not lead to a result which is manifestly absurd or unreasonable, and that the preparatory work tends to confirm the meaning resulting from the application of Art 31 in evidencing a clear rejection of any limitation to awards involving a commercial dispute (J[86]).

41 The primary judge also considered the views of expert commentators (J[87]-[92]). His Honour found the views of Professors Albert Jan van den Berg and Andrea Bjorkland to be the most illuminating on the present controversy as they deal specifically with disputes with States under the New York Convention concerning investments or bilateral investment treaties. Those commentators say that the Convention does not exclude from its field of application an arbitration agreement or award between a State and a foreign national relating to an investment dispute. His Honour said that he was not referred to any academic commentary that disagreed with those particular views.

42 Finally on this question, his Honour considered 30 occasions of foreign courts having applied the New York Convention to investor-State arbitral awards, 20 of which involved breaches by States of bilateral investment treaties. As none of those occasions involved Indian courts recognising and enforcing the arbitral awards, his Honour reasoned that they cannot serve to clarify India's intentions as to the meaning of the Convention. However, his Honour found that they support the cogency of the views expressed by Professors van den Berg and Bjorklund. (J[93].)

Conclusion on Issue 2

43 The primary judge concluded that none of the sub-issues to Issue 2 detracted from what he had found to be the clear and unmistakable submission by agreement within the meaning of s 10(2) of the Immunities Act on the part of India to the recognition and enforcement by the Court of the award. On that basis, his Honour concluded that India is not immune from the jurisdiction of the Court in the proceeding and that its interlocutory application should be dismissed with costs.

Issue 3: The commercial transaction exception

44 The primary judge identified a further issue (**Issue 3**), namely whether the requirements for the application of the commercial transaction exception to immunity in s 11 of the Immunities Act were established.

45 Although strictly unnecessary to do so given his conclusion that India had submitted under s 10 of the Immunities Act, his Honour then considered whether the commercial transaction exception to foreign State immunity in s 11 applies. His Honour concluded that the applicants had failed to make good their submission based on that section (J[104]-[121]). It is unnecessary for present purposes to traverse his Honour's reasoning although we will return to aspects of it under the heading "Appeal Issue 2" (at [76]ff]) below.

The grounds of appeal

46 There is in effect one ground of appeal, expressed in paragraph 3(a) of the notice of appeal, namely that the primary judge erred in finding that India, by ratifying the New York Convention, submitted within the meaning of ss 10(1) and (2) of the Immunities Act to the jurisdiction of the Federal Court to proceedings for recognition and enforcement of a foreign arbitral award in circumstances where the applicants for recognition and enforcement tender a copy of the award together with what appears, on its face, to be an agreement to arbitrate the underlying dispute.

47 Paragraph 3(b) of the notice of appeal then identifies six errors, or categories of error, that the primary judge is said to have made in reaching his ultimate conclusion with regard to immunity, errors (ii) and (iii) being the relevant ones for present purposes:

> ii. finding that India's agreement to Art III of the New York Convention includes both an agreement and a requirement by India that Australia recognise and enforce an award to which India is a party, and that the terms of Art III are inconsistent with India being able to oppose the recognition and enforcement of that award on the ground of foreign State immunity (at J[43]; see also at J[58]);
>
> iii. finding that the agreement of a signatory foreign State to the text of the New York Convention constitutes, "by way of clear and unmistakable necessary implication", submission by agreement within the meaning of s 10(2) of the FSIA to the jurisdiction of the Federal Court of Australia in proceedings of the kind brought by the Respondents here, and that there is no aspect of the text, purpose, objects or context of the New York Convention which would lead to a different conclusion (at J[51], [58]-[61], [62]-[85]);
>
> [noting that ground (vii) was not pressed]

48 Paragraph 3(c) of the notice of appeal then asserts that the primary judge ought to have found that the respondents had not established that India had submitted to the jurisdiction of the Federal Court for recognition and enforcement of the award.

The notice of contention

49 By their notice of contention, the respondents contend that the judgment below should be affirmed on two grounds in addition to those relied on by the Court in reaching its judgment.

50 The first contention deals with question of "the rules of procedure" referred to in Art III of the New York Convention. It is related to appeal ground 3(b)(v) which raises the same issue and only arises if it is found that the primary judge erred and that the substantive laws of sovereign immunity in ss 9, 10 and 11 of the Immunities Act are within the meaning of "rules of procedure." Given that it is not necessary to deal with that ground, it is also not necessary to deal with the first contention.

51 The second contention challenges the primary judge's conclusion that the commercial transaction exception from immunity in s 11 of the Immunities Act does not apply. That contention was not pressed and therefore falls away.

The principal issue in the appeal

52 As mentioned, the principal issue in the appeal is whether, by ratifying the New York Convention, India submitted to the jurisdiction of the courts of Australia under s 10(2) of the Immunities Act in proceedings for the enforcement of an arbitral award against it as a party to the award.

53 That principal issue throws up a number of sub-issues, but in our view the appeal is most conveniently dealt with by focussing on one, namely whether by ratifying the New York Convention India submitted to the jurisdiction of the Court in respect of an award that by India's reservation under Art I(3) was not within the scope of India's obligations under the Convention. That issue can be approached on the assumption in the respondents' favour, without deciding, that the primary judge is correct in his conclusion that the scope of the Convention is not limited to awards to which a State is a party and which involve a commercial or private law dispute (as opposed to disputes concerning the conduct of the State acting in its governmental capacity).

54 There are accordingly two issues to consider.

55 First, by ratifying the New York Convention did India waive foreign state immunity in respect of the enforcement of an award that is generally within the scope of the Convention but excluded by India by its reservation under Art I(3)?

56 Secondly, is the award in this case outside the scope of India's commercial reservation, ie did the award arise out of a legal relationship, whether contractual or not, which is considered as commercial under the law of India? As will be seen, this is not a disputed issue between the parties and is covered briefly in these reasons only for the sake of completeness.

Appeal Issue 1: Is India's submission limited by its reservation?

57 It is convenient at this point to identify what was decided in *Kingdom of Spain* with respect to the requirements for establishing a waiver of foreign state immunity under s 10(2) of the Immunities Act. The Court identified the principle of international law to be that waiver of immunity, to be effective, is required to be "express" (at [22]-[23]). That should be understood as "requiring only that the expression of waiver be *derived* from the express words of the international agreement, whether as an express term or as a term implied for reasons including necessity" ([25], emphasis in the original). Any inference of waiver of immunity "must be drawn with great care when interpreting the express words of that agreement in context" ([26]). If an international agreement does not expressly use the word "waiver", "the inference that an express term involves a waiver of immunity will only be drawn if the implication is clear from the words used and the context" ([26]). The expression of consent must be "in a clear and recognisable manner" ([26]).

58 Against that background of international law, the Court held that there was no basis to interpret s 10(2) of the Immunities Act as excluding "the possibility of a waiver of immunity being evidenced by implications inferred from the express words of a treaty in their context and in light of their purpose" ([27]). "A high level of clarity and necessity are required before inferring that a foreign State has waived its immunity in a treaty because it is so unusual, and the consequence is so significant" ([28]). Putting the matter slightly differently, the Court said that waiver by implication only arises where the waiver is "unmistakable" ([29]).

59 As summarised at [33] above, the primary judge reasoned (at J[43]) that India agreed by the terms of the Convention that Australia will recognise and enforce arbitral awards which fall within the scope of the Convention; "[i]f India is a party to such an arbitral award, it is an obvious and necessary implication that India is requiring Australia to recognise and enforce that award." His Honour concluded that as Australia would be unable to recognise and enforce

such an award if India were at liberty to oppose the recognition and enforcement on the ground of foreign State immunity, the terms of Art III are inconsistent with India being able to deploy such a defence. The primary judge also reasoned that the Art I(3) provision for reservations in respect of disputes arising from commercial relationships "is not directly relevant to the present dispute, in that Australia did not make any such reservation and Australia is the State where recognition and enforcement is presently sought" (J[58]).

60 One of the errors that India contends that the primary judge made focusses on the fact that India ratified the New York Convention subject to the reservation that it would apply it only to differences arising out of legal relationships considered to be commercial under its law. The essence of India's submission is that by its "commercial reservation" India did not submit to a process in an Australian court enforcing against it an award that is outside of that reservation. To put it differently, it is said that to the extent that India waived its foreign state immunity by ratifying the New York Convention, it has only waived immunity with regard to awards meeting the description of those that it undertook to enforce and not with regard to awards outside of that description.

61 The respondents' answer to India's submission is to say that the reciprocity in Art III is that States shall enforce awards to which the Convention applies and shall do so without discriminating against foreign awards and to refuse to do so only within the common grounds articulated in Art V. They submit that the "commercial reservation" is a unilateral reservation that does not oblige other States to limit recognition and enforcement in the same way. They submit that by ratifying Art I, even with its own reservation with respect to the enforcement of the Convention in its own territory, India agreed that Australia can enforce the Convention in its territory without the commercial reservation. Also, it is said that Australia undertook to other Contracting States, including the investors' home State, that it would enforce the Convention without reservation in Australia.

62 Reliance by India on its commercial reservation directs attention to Arts 19 to 21 of the Vienna Convention as outlined at [26]-[27] above. India's reservation is a reservation contemplated by Art 20(1) of the Vienna Convention, being one expressly authorised by the treaty (by Art I(3)) and therefore not requiring any subsequent acceptance by other Contracting States. Article 21 is then engaged with regard to the effects of the reservation.

63 The International Law Commission published a *Guide to Practice on Reservations to Treaties* as an addendum to the Report of the Commission to the General Assembly on the work of its

sixty-third session (2011) (Document A/66/10/Add.1). The Guide contains a set of guidelines with commentaries based on law and practice relating to reservations. Guideline 4 concerns "Legal effects of reservations and interpretive declarations."

64 Guideline 4.2.4 deals with the "Effect of an established reservation on treaty relations" relevantly as follows:

> 1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.
>
> 2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.
>
> 3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

65 As explained in the commentary, the first paragraph sets out the principle contained in Art 21(1)(a) of the Vienna Convention. The second paragraph explains the consequences of that principle specifically when an established reservation excludes the legal effect of certain provisions of the treaty, and the third does the same when the reservation modifies that legal effect. It may be a matter of some debate whether the reservation in the present case is one that excludes the legal effect of certain provisions of the treaty or modifies them. It does not matter, because the consequence is the same. The point is that a validly established reservation affects the treaty relations of the reserving State in that it excludes or modifies the legal effect of one or more provisions of the treaty with respect to a specific aspect "on a reciprocal basis" (Guideline 4.2.4, Commentary (8)).

66 The result is that the reserving State "is not only released from compliance with the treaty obligations which are the subject of the reservation but also loses the right to require the State … with regard to which the reservation is established to fulfil the treaty obligations that are the subject of the reservation." Also, "the State … with regard to which the reservation is established is released from compliance with the obligation which is the subject of the reservation with respect to the reserving State or organisation." As it has been put, "[a]

reservation operates reciprocally between the reserving State and any other party to the treaty, so that both are exempted from the reserved provisions in their mutual relations." See Guideline 4.2.4, Commentary (26)-(27).

67 Thus, the effect of a reservation is that between the reserving and accepting state (which in the case of the New York Convention is all other states), the reservation modifies the provision of the treaty to the extent of the reservation for each party reciprocally (see Art 21(1)(a) and (b) of the Vienna Convention). As noted in the definition at Art 2(1)(d) of the Vienna Convention, a valid reservation can "exclude" or "modify" the legal effect of certain provisions of the treaty "in their application to that State." It is those final words that bear particular weight here, for waiver must be considered in the context of the reservation modifying the application of the Convention to India as a Contracting State to the Convention.

68 Thus, India has no obligation to Australia to enforce the New York Convention other than in respect of "differences arising out of legal relationships, whether contractual or not, which are considered as commercial" and, critically, vice versa. To be clear, that means that Australia has no obligation to India to enforce awards that do not arise from differences arising from legal relationships which, in India, would not be considered as commercial, and India has no right to insist on Australia enforcing such awards.

69 That analysis is not affected by Art XIV of the New York Convention which provides that a contracting State shall not be entitled to avail itself of the Convention against other Contracting States "except to the extent that it is itself bound to apply the Convention." Thus, even though Australia has obligations to other States that have not made commercial reservations to enforce the Convention in relation to differences arising from non-commercial relationships, India cannot insist on Australia enforcing the Convention in respect of such disputes. The effect of the reservation is to thus modify the relationship between the reserving state and other states in the application of the Convention between and amongst them. See van den Berg AJ, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981) at 14-15; Nacimiento P, "Article XIV" in Kronke H et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) at 545-549; Kölbl A, "Article XIV" in Wolff R (ed), *New York Convention* (CH Beck, Hart and Nomos, 2nd ed, 2019) at 556-557; UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016) at 329-330.

70 The result is that we are persuaded that the primary judge erred in concluding that by reason of Art III India requires Australia to enforce an award within the scope of the Convention – Australia is not bound to India to enforce the Convention on a basis that is broader than India's reservation. It is also not the case, as the primary judge said, that the promises contained in Art III are promises made by each Contracting State to all other Contracting States – the promises made to, and by, a Contracting State that has made a commercial reservation under Art I(3) are limited by its reservation.

71 The question then becomes whether by ratifying the Convention subject to the "commercial reservation" India submitted to the jurisdiction of an Australian court within the meaning of s 10(2) of the Immunities Act in a proceeding to enforce an award under the Convention that arises from a dispute falling outside that reservation. More specifically, does India's ratification of the Convention in those circumstances give rise to a waiver of foreign State immunity in "a clear and recognisable manner" to the requisite "high level of clarity and necessity" such that it is "unmistakable" as identified in *Kingdom of Spain* at [26], [28] and [29]?

72 There is much to be said in support of a conclusion that by ratifying the Convention India waived immunity in respect of awards that are within India's commercial reservation. That is essentially for the reasons that the primary judge gave in respect of awards within the scope of the Convention as a whole (ie without regard to any reservation). However, it is hard to see how India, by ratifying the Convention, can have waived that immunity in respect of awards that are outside that reservation. By its reservation, India made it plain that it did not and would not treat differences arising from legal relationships that are not commercial (ie non-commercial disputes) as being subject to the Convention. Moreover, as explained, other Contracting States have no obligation to India in respect of such disputes. India's ratification of the Convention subject to the commercial reservation is (at least) a sufficiently equivocal expression of India's intention not to waive foreign state immunity in proceedings enforcing the Convention in respect of non-commercial disputes to defeat any argument that it clearly and in a recognisable manner waived immunity in such proceedings.

73 The effect of India's commercial reservation is to qualify its obligation and undertaking under Art III to "recognise arbitral awards as binding and enforce them" as being applicable only to awards determining differences arising from legal relationships which are considered as commercial under *its* law. No necessary implication arises from India's qualified obligation under Art III that it waives foreign state immunity in respect of other awards.

74 Notably, in concluding that Spain, by becoming a party to the ICSID Convention (ie the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1966)), had waived its immunity from proceedings in an Australian court to recognise and enforce an award under that Convention, the High Court in *Kingdom of Spain* referred to Art 53 of that Convention as having the effect that awards shall be "binding" on Contracting States and the preservation in Art 55 of immunity from execution only ([69]). Article 53(1) states that each Contracting State "shall abide by and comply with the terms of the award" ([71]). There are two critical features of that reasoning that distinguish the present case. First, the obligation undertaken by Spain under the ICSID Convention was not qualified in the way India's obligation is qualified under the New York Convention – Spain was obliged to recognise the relevant award as "binding" and to "abide by and comply with the terms of the award" whereas India has no obligation under the New York Convention to recognise as binding and enforce an award that is excluded by its reservation. Secondly, under the New York Convention there is no express preservation of foreign state immunity in some limited way so as to give rise to the implication, which arose under the ICSID Convention, that immunity is not preserved in relation to matters outside that limitation.

75 In the result, India did not waive foreign state immunity in respect of awards that do not determine differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India.

Appeal Issue 2: Is the award a non-commercial award?

76 The respondents did not contend or adduce evidence to the effect that the award is an award within the scope of India's reservation. That is to say, they did not contend or seek to prove that the award determines differences arising out of a legal relationship that is considered as commercial under the law of India. Consideration of this issue is therefore essentially a formality. India also did not adduce evidence about its law on this point but it did assert that the award is outside the scope of its reservation.

77 Consequently, what the law of India contemplates as being commercial is not something on which there was evidence. That engages the presumption that the foreign law is the same as Australian law: *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; 223 CLR 331at [125] per Gummow and Hayne JJ, [248]-[249] per Callinan J, [267] per Heydon J. Thus, the question of whether the award in this case is within the scope of India's commercial reservation can be approached from the perspective of Australian law.

78 As mentioned, the respondents contended before the primary judge that the requirements of the commercial transaction exception to foreign state immunity in s 11 of the Immunities Act were satisfied. In doing so, the respondents expressly disavowed any contention that the BIT or the Devas/Antrix Agreement were "commercial transactions" in s 11(3), the former not being commercial in nature and the latter not being a transaction which India itself had entered into (J[33]). Rather, the respondents contended that the Annulment was "a like activity in which the State has engaged" within the meaning of s 11(3). The primary judge held against them on that question. The second contention in their notice of contention sought to challenge that conclusion, but that contention was abandoned.

79 Although the considerations under s 11 and those in relation to India's commercial reservation are different, they have significant overlap. The respondents' acceptance that the BIT and the Annulment are not commercial transactions and their abandonment of the contention that they are "like transactions" carries with it the acceptance that the dispute that is the subject of the award is not readily characterised as arising from a commercial relationship.

80 In the course of dealing with the s 11 point, the primary judge held (at J[111]) that "the conduct of India which was the subject matter of the dispute in the arbitration which produced the Quantum Award was the alleged breach by India of its obligations under the BIT, giving rise to a claim for monetary compensation for those alleged breaches. The rights in issue in the arbitration were not merely the rights as expressed in the BIT, but also the alleged right of the Claimants to compensation for the alleged breaches. … [T]he source of the right to compensation was both the Annulment and the BIT, in that the BIT alone did not give rise to a right to compensation without there also being a breach of the BIT constituted by the Annulment."

81 By that analysis, which is not challenged in the appeal, the differences between the respondents as claimants and India as respondent that were the subject of the arbitration, and hence the award, arose from the BIT and the Annulment. The respondents were not a party to the BIT and the Annulment was not directed at them or at any agreement to which they were a party. India's relationship with the BIT was in the realm of public international law that gave international law rights to private investors in India. That was not a commercial relationship. Also, India's annulment of the Devas/Antrix Agreement was decided by the Cabinet Committee on Security on the basis of "an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other

public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements" (J[11]). As the primary judge found, the Annulment "was made by the body vested with the highest form of executive policy-making in India, and was stated to be for reasons of public policy" (J[120]). The Annulment was also not based on, nor did it arise from, a commercial relationship.

82 In the circumstances, the award is not an award with regard to differences that arose from a commercial relationship.

Disposition

83 For those reasons, the appeal should be allowed. Orders 1 and 2 made by the primary judge on 24 October 2023 should be set aside. India's interlocutory application to set aside the originating application on the basis that India is immune from the proceeding should have succeeded. Setting aside the originating application in circumstances where the proceeding is inconsistent with the immunity is provided for by s 38 of the Immunities Act. The primary judge's order 1 and 2 should accordingly be replaced with orders that:

1. The applicants' originating application dated 21 April 2021 (as subsequently amended) be set aside by reason that the respondent is immune from the jurisdiction of the Federal Court of Australia in this proceeding pursuant to s 9 of the *Foreign States Immunities Act 1985* (Cth).
2. The applicants pay the respondent's costs of the interlocutory application dated 12 April 2022.

84 The respondents should pay the costs of the appeal.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Sarah C Derrington, Stewart and Feutrill.

Associate:

Dated: 31 January 2025