Neutral Citation Number: [2025] EWHC 1189 (Comm)

CL-2021-000253

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN THE MATTER OF THE STATE IMMUNITY ACT 1978
AND AN ARBITRATION CLAIM:

Royal Courts of Justice,
Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 16 May 2025

Before:

Sir William Blair
(Sitting as a Judge of the High Court)

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Between:

(1) CC/DEVAS (MAURITIUS) LTD.
(2) DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED
(3) TELCOM DEVAS MAURITIUS LIMITED
(4) CCDM HOLDINGS LLC
(5) DEVAS EMPLOYEES FUND US LLC
(6) TELCOM DEVAS LLC

Claimants

-and-

THE REPUBLIC OF INDIA

Defendant

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Ricky Diwan KC, Tariq Baloch KC, Miriam Schmelzer (instructed by **Gibson, Dunn & Crutcher LLP**) for the Claimants
Sudhanshu Swaroop KC (instructed by **White & Case LLP**) for the Defendant

Draft decision circulated: 14th May 2025

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Approved Decision on consequential matters

This judgment was handed down at 10.30am on 16 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR WILLIAM BLAIR

Sir William Blair:

1. This decision deals with consequential matters following my judgment given on 17 April 2025 at [2025] EWHC 964 (Comm) in proceedings to enforce arbitration awards against the Defendant (the Republic of India) under s.101 of the Arbitration Act 1996. Only the 4th to 6th Claimants appeared on this matter. The judgment answers a question identified for preliminary resolution by Sir Nigel Teare in an order he made on 23 October 2024 and concerns India's claim to state immunity.

2. The question is whether India has submitted to the adjudicative jurisdiction of the English Courts by prior written agreement within the meaning of s.2(2) of the State Immunity Act 1978 (SIA) by its ratification of the New York Convention 1958 (NYC) and thereby its consent under Article III to the English Courts recognising and enforcing the Awards. The precise question (the "s.2 question") is set out in paragraph 7 of my judgment. Suffice it to say that what is contemplated is ratification of the NYC, on its own, and regardless of whether India agreed to arbitration.

3. The 4th to 6th Claimants contended that the answer is "yes", India contended that the answer is "no". I found in favour of India on the question.

4. Three consequential matters arise for decision: (1) the 4th to 6th Claimants' application for permission to appeal; (2) costs consequent on the judgment; (3) the form of the Order resulting from the judgment.

5. The parties agreed that these issues could be decided on the papers without a further hearing. I received their submissions and supporting material in two tranches, the second being responsive on 6 May 2025.

(1) The 4th to 6th Claimants' application for permission to appeal

6. The parties do not agree on whether an appeal has a real prospect of success. However, I do not need to decide whether that threshold is passed. In my view, permission to appeal should be granted because the matter in issue presents "*some other compelling reason*" (CPR 52.6(1)(b)). That is because the issue has implications for state immunity that is not limited to the dispute in question.

An issue in relation to the effect of ratification of the ICSID Convention arose in *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2025] 1 Lloyd's Rep 66. It was held that Spain had submitted to the adjudicative jurisdiction of the UK court by prior written agreement by virtue of Article 54(1) of the ICSID Convention. In reaching that conclusion, the Court of Appeal identified doubts as to whether the result would be the same under the NYC. This case raises that question for decision. I am told that a further appeal in the *Infrastructures Services* case is now pending before the Supreme Court. These matters are firmly in the purview of the appellate courts, and this is a case for permission to appeal, therefore. The 4th to 6th Claimants have provided draft grounds of appeal, and I give permission to appeal on those grounds.

(2) Costs consequent on the judgment

7. India as the successful party seeks an order that the 4th to 6th Claimants shall pay to India its costs of and occasioned by the hearing of the s. 2 question, on the standard basis, such costs to be subject to detailed assessment if not agreed. India seeks an order that the 4th to 6th Claimants shall pay to India the sum of £365,000 as payment on account of these costs, within 14 days of the date of the order. It says that its costs as of 18 March 2025 total £582,900.33 and in respect of which it seeks a detailed assessment.

8. The 4th to 6th Claimants submit that costs should be reserved, alternatively stayed, pending the outcome of the 4th to 6th Claimants' application for recognition and enforcement. This is because:

   i) The 4th to 6th Claimants are award creditors far in excess of any costs order payable to India.

   ii) If they succeed in obtaining recognition and enforcement of the arbitration awards they hold, the 4th to 6th Claimants would be entitled to set off any costs order in India's favour against the sums owed to them pursuant to CPR 44.12 and/or to the Court's general discretion as costs.

   iii) The 4th to 6th Claimants have every prospect of ultimately prevailing given that the Netherlands courts (the Netherlands being the seat of the

arbitration) have already rejected India's challenges based on the arbitration agreement being vitiated by illegality allegations.

iv) In due course the Court can have regard to the totality of India's conduct and the circumstances in which the illegality allegations were constructed in deciding whether any costs order should be made in favour of India given that the illegality allegations form the basis for India to invoke state immunity in the first instance.

v) It is no answer for India to say that the 4th to 6th Claimants chose to pursue the s.2 SIA point. As was recognised in the judgment, there are formidable issues of delay in play in these proceedings by reason of India's conduct. It was right and proper for the 4th to 6th Claimants to pursue reasonable avenues to try and cut through that delay, which is caused by India's multiple challenges to the awards at the seat.

9. India responds that:

i) The basis for its invocation of state immunity is the rule in s.1 SIA. The illegality allegations which the 4th to 6th Claimants raise are relevant to the exception to immunity in s.9 of the SIA, which they seek to invoke.

ii) However, the costs order that India seeks concerns the hearing of the s. 2 question. The illegality allegations have nothing to do with this question.

iii) The 4th to 6th Claimants chose to raise and pursue the s. 2 SIA question, and they should now bear the costs consequences of that choice, in the normal way.

iv) The merits of India's entitlement to costs in relation to the s. 2 SIA question can and should be determined now.

v) There is no legal basis for staying the costs issue. As to set off, the mere possibility that a party who loses an interlocutory matter may have some future entitlement to costs is not a basis to deny the successful party their

costs of the interlocutory matter, or to deny a payment on account in respect of those costs.

vi) The assertion that "*India chose not to pursue the so-called "illegality allegations" in the arbitration proceedings but instead had those determined in liquidation proceedings in India without a full trial*" is strongly disputed in the context of s.9 SIA and cannot form the basis of the Court's decision on costs.

10. My view of these contentions is as follows. I agree with India that since the 4th to 6th Claimants sought to have the applicability of the consent provisions in s. 2(2) SIA decided as a discrete question, the fact that it may have been reasonable to take this course in an attempt to simplify proceedings, cannot in itself be a reason to withhold the usual incidence of costs in favour of India as the successful party. I also accept that the court cannot base its decision on the disputed assertion that India chose to withhold the illegality allegations in the arbitration proceedings.

11. All other things being equal, India is, in my view, entitled to an order now for its costs of and occasioned by the hearing of the s.2 question. As noted, it says its costs total £582,900.33 as of 18 March 2025 in respect of which it seeks a detailed assessment, with the sum of £365,000 as a payment on account.

12. However, the more difficult question is as to the impact of the arbitration awards against it in favour of the 1st to 3rd Claimants, and whether India should be entitled to payment now, or whether the 4th to 6th Claimants are right that this liability should be set off against the awards. There are apparently disputed issues as to the validity of assignments in favour of the 4th to 6th Claimants, but these have not been explored in this hearing.

13. So far as the courts of England and Wales are concerned, the awards are disputed, since India contests whether it entered into an arbitration agreement – if it did, then by s. 9 State Immunity Act, where a State has agreed in writing to submit a dispute to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration. This was a

point I made in paragraph 9 of the judgment, which includes an agreed statement as to the respective positions of the parties as to s.9 SIA.

14. However, I think it is relevant that the awards have been upheld in the Courts of the seat, and indeed in other jurisdictions in which the illegality allegations have arisen other than India itself. The decisions in the Netherlands go right up to the Supreme Court. This is not a situation in which (as India puts it) the 4th to 6th Claimants are "*simply asserting that they might succeed in their substantive claim*". They have substantive grounds, and the English courts are supportive of arbitration and the enforcement of awards.

15. India relies on the statement of Norris J in *Redstone Mortgages v B Legal* [2015] EWHC 745 (Ch) at [23] that, "*The ordinary expectation would be that an order for costs would be made at the conclusion of the preliminary issue. Reserving the costs simply requires another judge on another day to adjudicate upon how the costs of the earlier determination of issues on which he or she did not adjudicate should be borne*". This was quoted with approval by Birss J in *Unwired Planet International Ltd v Huawei Technologies Co., Ltd* [2015] EWHC 3837 (Ch) at [21].

16. The general point is clear, but it does depend on the facts. In most instances, the decision as to the incidence of the costs of preliminary issues like the present one is made when the application is decided. It does not wait the outcome of the litigation. Also, from a practical point of view, it is the judge who decided the application who is in the best position to decide the incidence of costs. But this case is rather different, because it concerns a dispute as to arbitration awards which have been the subject of a considerable number of rulings in favour of the 4th to 6th Claimants in various courts. If at the end of the day, the 4th to 6th Claimants are successful in these proceedings as well, and the awards are upheld, the question could reduce simply to a calculation of the amount of costs due to India on this application, for set off against India's overall liability. I say "could" because that reflects my view at this time, but if costs are reserved then at the conclusion of the proceedings, it would be for the judge hearing the matter to decide at that stage, including any issues relating to assignment which were not explored in this hearing. If on the other hand the awards are not upheld, the

4th to 6th Claimants' contention that the costs of the present application should not follow the event is likely to lapse, with the same caveat that it would be for the judge hearing the matter to decide.

17. The matter is not altogether easy, but this is an exceptional case. Exercising my discretion, I have come to the conclusion that, no doubt exceptionally, on the facts of this case, costs should be reserved. It would be unjust to decide the incidence of costs now, because India may be held in the English courts, as in the courts of the seat, to owe much more under the awards, and in these circumstances, costs are better dealt with against the background of the proceedings as a whole.

18. I should say something about the quantum of India's costs, since I am in the best position to express a view on this. The 4th to 6th Claimants object that there is no justification for India's costs being (it appears) 30% greater than their costs. They say that this cannot be explained by reference to legal research. Both parties engaged in heavy research, and this cannot justify the disparity in legal fees. They submit that India's costs totalling £582,900.33 "*appear to exceed* [the 4th to 6th Claimants'] *costs by around 30%*".

19. India responds that the 4th to 6th Claimants have not provided their own statement of costs to support that assertion. Even assuming their calculation to be accurate, it would still mean that the 4th to 6th Claimants' own costs of the s.2 SIA question are at least £448,000. India says that two other points made by the 4th to 6th Claimants, being that they took the lead in preparing the legal position, and that India had a smaller counsel team, are wrong or irrelevant.

20. There was no detailed challenge by the 4th to 6th Claimants to India's Statement of Costs dated 18 April 2025. As noted, India seeks a detailed assessment of its costs, with the sum of £365,000 as a payment on account. There is no suggestion from the 4th to 6th Claimants that this would not be a case for a payment on account. Should it be relevant, had I been deciding this question, I would have proceeded on the basis that India's recoverable costs would likely be reduced on an assessment given that this was a relatively short hearing (1 ½ days), but not drastically so because of the importance of the issues to the

parties. I do not think that the 4th to 6th Claimants' other points have any weight. I would have ordered a payment on account of £330,000 (which is roughly 2/3rds of £500,000).

(3) The form of the Order

21. The parties have agreed the form of the order depending on the outcome, and it can now be finalised. I am grateful for their assistance.