Australian Federal Court Backs India on Sovereign Immunity: Another Twist in the Devas v. India Saga

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The Federal Court of Australia ("**Federal Court**"), in its recent judgement in the *Republic of India v. CCDM Holdings, LLC*[1] ("**Judgement**"), held that the Republic of India ("**India**") was entitled to jurisdictional immunity from Australian Courts in proceedings seeking recognition and enforcement of foreign arbitral awards dealing with disputes arising from 'non-commercial' legal relationships. The Court's judgment was rendered with respect to an appeal filed by India against an **interlocutory judgement** of a primary judge of the same court, rejecting India's sovereign immunity claim.

Background of the Dispute

Three Mauritian entities of the Devas group ("**Original Applicants**") had commenced arbitration proceedings in 2012 under the 1998 India-Mauritius BIT, impugning India's actions with respect to an agreement for leasing of space spectrum capacity entered between Devas Multimedia Private Limited (an Indian company in which the Original Applicants held shares) and Antrix Corporation Limited (an Indian state-owned entity). In 2011, India's Cabinet Committee on Security decided to annul the said agreement, citing an increased demand for allocation of spectrum towards meeting various military and public utility needs ("**Annulment**"). The arbitration proceedings that followed culminated in a jurisdiction and merits award in 2016[2] and a quantum award in 2020 ("**Quantum Award**")[3]. The Original Applicants have since sought to enforce the Quantum Award against India in different jurisdictions, discussed **here**.[4]

Proceedings Before the Primary Judge

The Original Applicants commenced proceedings before a primary judge of the Federal Court ("**Primary Judge**") in April 2021 for recognition and enforcement of the Quantum Award. In May 2023, the Original Applicants were substituted with three US entities of the Devas Group which were respectively assignees of each of the Original Applicants (collectively the "**Applicants**").

India asserted that it was immune to the jurisdiction of the Federal Court under section 9 of the Foreign State Immunity Act, 1985 ("**Act**"), which states: "*Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.*" An exception to this general rule of immunity is provided in section 10(1), which states: "*A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.*" Section 10(2) further provides that a State may submit to jurisdiction "*by agreement or otherwise*". The Applicants argued that by ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**"), India has submitted to the jurisdiction of Australian courts by agreement within the meaning of Section 10(1) and (2) of the Act in relation to proceedings for recognition and enforcement of foreign arbitral awards.

In deciding whether India has waived its immunity, the Primary judge invoked the judgement of the High Court of Australia ("**High Court**) in *Kingdom of Spain v Infrastructure Services* ("***Spain v. Infrastructure Services***")[5], which dealt with a similar claim of jurisdictional immunity by Spain with respect to enforcement of an ICSID Convention award. Observing that that the "*standard of conduct for submission by agreement under Section 10(2) requires either express words or an implication arising clearly and unmistakably by necessity from the express words used*", the Primary Judge held that ratification of the Convention by India amounts to a "*clear and unmistakable necessary implication*" that it has agreed to submit to the jurisdiction of Australian courts as per Section 10(2).[6] The Primary Judge opined that permitting India to take a sovereign immunity defence would be inconsistent with Article III of the Convention, which requires all Contracting States to "*recognize arbitral awards as binding and enforce them*".[7]

The Primary Judge noted that India had made a commercial reservation to the Convention, per which it would "*apply the Convention only to differences arising out of legal relationships [. . .] which are considered as commercial under the*

Law of India." ("**Commercial Reservation**"). However, he did not consider this to be relevant to the instant case as enforcement of the Quantum Award was sought in Australia, which had made no such reservation.[8]

The Primary Judge thus rejected India's claim to jurisdictional immunity, while granting leave to appeal to the Full Court of the Federal Court ("**Full Court**").

The Full Court Judgement

India appealed the judgement of the Primary Judge to the Full Court, contending that he erred in rejecting India's plea on jurisdictional immunity. The Full Court framed two issues for consideration: (1) by ratifying the Convention, did India waive foreign state immunity in respect of enforcement of an award that is generally within the scope of the Convention but excluded by its Commercial Reservation ("**Issue 1**"), and (2) is the Quantum Award outside the scope of India's Commercial Reservation? ("**Issue 2**").[9]

On Issue 1, India asserted that it had not submitted to the jurisdiction of Australian courts with respect to proceedings for recognition and enforcement of awards that fell outside the scope of its Commercial Reservation. The Applicants submitted that the Commercial Reservation is a unilateral reservation that does not oblige other contracting States to the Convention ("**Contracting States**") to limit recognition and enforcement of such awards in the same manner.

In considering these submissions, the Full Court undertook a detailed analysis of the rules set out in the Vienna Convention on the Law of Treaties ("**VCLT**") that deal with the legal effects of reservations made by a State while expressing its consent to bound by a treaty. The Court observed that as the Commercial Reservation is a reservation "*expressly authorised*" by Article I (3) of the Convention, it falls within the terms of Article 20(1) of the VCLT and does not require any subsequent acceptance by other Contracting States. To determine the legal effects of the Commercial Reservation, the Court turned to Article 21 of the VCLT, read with the *Guide to Practice on Reservations to Treaties* published by the International Law Commission. Based on the foregoing analysis, the Court concluded that "*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 (. . .)."[10] Applying the said understanding, the Full Court opined that obligations under the Convention undertaken towards or by a Contracting State that has made a commercial reservation are limited by such reservation. Both India and Australia thus had no obligation towards each other to enforce awards that do no not pertain to "commercial" relationships under Indian law.[11]

The Full Court then considered whether India's ratification of the Convention, qualified by its Commercial Reservation, entails a "*clear and unmistakable necessary implication*" that it has waived its immunity from Australian courts (as per the standard articulated in *Spain v. Infrastructure Services*). The Court found that no such implication arises as India's ratification of the Convention subject to the Commercial Reservation is "*a sufficiently (un)equivocal expression of India's intention not to waive foreign State immunity in proceedings enforcing the Convention in respect of non-commercial disputes (. . .).*" [12]

Despite the parties not contesting Issue 2, the Full Court determined the issue for the sake of completeness of legal analysis. Interestingly, given the absence of evidence on what constitutes "commercial" relationships under Indian law, the Full Court approached the question of whether the Quantum Award fell within the scope of the Commercial Reservation from the perspective of Australian law (following case law from the High Court[13]). In doing so, the Court considered Section 11 of the Act, which provides for a "commercial transaction" exception to foreign State immunity. While acknowledging that considerations under Section 11 and those concerning India's Commercial Reservation are different, the Full Court opined that there is a significant overlap between the two and proceeded to analyse the Quantum Award under Section 11. The Applicants had invoked the exception under Section 11 as a separate ground before the Primary Judge, which he rejected on the ground that 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*" and was not thus not a "commercial transaction". Reiterating the Primary Judge's reasoning, the Full Court concluded that the Quantum Award is not an award dealing with differences arising from a "commercial" relationship.[14]

It is interesting to consider if the court's approach would have been any different if it were answering this question from an Indian law perspective. The position under Indian law on whether awards rendered in investor-State arbitrations

("**Investment Awards**") can be considered as pertaining to "commercial" relationships is ambiguous. Of particular relevance are two Delhi High Court judgements, in which the court opined that Investment Awards cannot be considered "commercial" for the purposes of enforcement under Part II of the Arbitration and Conciliation Act (which implements the Convention in India).[15] Critics of these judgements, on the other hand, have emphasised that there is enough basis in Indian law and policy to suggest that Investment Awards are commercial in nature. Perhaps the strongest argument in this regard is that India's 2016 Model BIT expressly states that Investment Awards "*shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention*."[16]

Reflections on the Judgement

The Applicants have filed a special leave to appeal the Full Court judgement ("**Judgement**") to the High Court. The reflections shared below are thus subject to a potential reconsideration of the Judgement by the High Court.

Firstly, prevailing uncertainty regarding enforceability of Investment Awards in India (as discussed above) is what has prompted investors such as Devas to seek enforcement of such awards in other jurisdictions. In this regard, the Judgement could render Australia an unfavourable enforcement jurisdiction for Investment awards to which India is a party. This is because India could invoke jurisdictional immunity in all future enforcement proceedings until the ambiguity concerning the commercial nature of Investment Awards under Indian law is resolved (either through legislative action or a Supreme Court ruling).

Secondly, this Judgement may have significant implications for enforcement in Australia of all Investment Awards not rendered under the ICSID Convention and thus subject to enforcement under the Convention ("**Convention Awards**"). *Spain v. Infrastructure Services* has settled the position that jurisdictional immunity is not available to a foreign State under Australian law with respect to enforcement of ICSID Convention awards. This Judgement, however, casts a shadow of doubt on the enforceability of Convention Awards in Australia by leaving the door open for other Contracting States that have made a commercial reservation to the Convention to invoke jurisdictional immunity in enforcement

proceedings for such awards.

Given its likely implications, it is no surprise that the Judgement has come in for criticism by some commentators[17] who have highlighted the following issues: (1) the Full Court's approach to commerciality of Investment Awards is inconsistent with that of courts in comparable jurisdictions such as the US and Canada, which have enforced Convention Awards despite these States having made a commercial reservation to the Convention, and (2) the characterisation of the Quantum Award as 'non-commercial' is contrary to the wide interpretation of term "commercial" envisaged in the UNCITRAL Model Law[18], which has the force of law in Australia.[19]

All stakeholders will now have to wait and watch how the High Court, if and when it takes up the appeal, deals with the Full Court's findings.

[1] *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2 ("**Judgement**").

[2] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, PCA Case No. 2013-09, UNCITRAL ("**CC/Devas Arbitration**"), Award on Jurisdiction and Merits (25 July 2016).

[3] CC/Devas Arbitration, Award on Quantum (13 October 2020).

[4] Jeanne Huang, *The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?*, Coonflictoflaws.net, https://conflictoflaws.net/2024/the-indian-satellite-saga-and-retaliation-recognizing-the-supreme-court-of-indias-judgment-abroad/#_edn1.

[5] *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11.

[6] *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266, ¶ 51 ("**Primary Judgement**").

[7] Primary Judgement, ¶43.

[8] Primary Judgement, ¶58.

[9] Judgement, ¶54.

[10] Judgement, ¶67.

[11] Judgement, ¶68.

[12] Judgement, ¶72.

[13] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54.

[14] Judgement,¶82.

[15] *Union of India v. Vodafone Group,* 2018 SCC OnLine Del 8842, ¶¶ 90-91; *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors*, SCC OnLine Del 6755, ¶¶ 29-30.

[16]Model Text for the Indian Bilateral Investment Treaty (2016), Article 27.5, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.

[17] Micheal Lee, *Check for NYC Reservations: Federal Court of Australia Affirms India's Sovereign Immunity Against Recognition and Enforcement of Non-ICSID Arbitral Award*, Steptoe Clients Alerts (26 March 2025), https://www.steptoe.com/en/news-publications/check-for-nyc-reservations-federal-court-of-australia-affirms-indias-sovereign-immunity-against-recognition-and-enforcement-of-non-icsid-arbitral-award.html?tab=overview.

[18] UNCITRAL Model Law on International Commercial Arbitration (1985), Article I(1), footnote 2 states as follows: "*The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. [. . .].*"

[19] International Arbitration Act 1974, Section 16(1).