From Deference to Objectivity: How Courts Are Rewriting the Commercial Reservation



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Introduction

The 1958 New York Convention *('NYC')* is widely regarded as international arbitration's most significant achievement. Having been ratified by over 160 states, , establishing a credible system of enforcement for arbitral awards. Yet the commercial reservation under Article 1(3), which allows the reserving state to limit the application of the *'Convention only to differences …. considered as commercial'* under its own national law, risks jeopardizing the uniformity of the convention. By domesticating the definition of commerciality, the reservation invites forum shopping and inconsistent enforcement.

The *CC/Devas (Mauritius) Ltd. v. Republic of India* brings this latent tension to the surface. Devas Multimedia secured awards totaling approximately $111 million against India after Antrix Corporation (the commercial arm of the Indian Space Research Organization) terminated a 2005 satellite spectrum lease agreement. Antrix cited 'essential security interests' requiring the S-band spectrum for India's defense forces and strategic public services. Relying on its settled domestic jurisprudence, India maintained that the Convention was inapplicable to BIT arbitrations, on the basis that investor–State disputes differ in nature from commercial arbitrations and implicate issues of public international law.

Enforcement attempts across Australia, the United Kingdom, and Canada achieved significantly different results, particularly in their respective approaches to defining commerciality under the convention. Australia strictly deferred to India's view, while Canada applied an objective commercial lens. The UK court

refused to decide the commercial reservation issue, instead ruling primarily that India's NYC ratification does not waive sovereign immunity under s.2(2) SIA 1978 (*para 98*). This article compares the Australian and Canadian approaches, then proposes a '*enforceability-focused objective standard*' to limit abuse while preserving the reservation's purpose.

Australia's Deferential Approach

In *Republic of India v. CCDM Holdings, LLC [2025] FCAFC 2,* the Federal Court of Australia unanimously reversed the enforcement order issued by the primary judge, holding that India is immune under section 9 of the Foreign States Immunities Act 1985 as the enforcement of the award is limited by India's reservation under Article 1(3) of the Convention.

Furthermore, Article 1(3) creates a reciprocal obligation that even the non-reserving States like Australia must honor reservations declared by the reserving States in their mutual relationship *(para 65)*. The court characterized the BIT dispute as arising from '*public international law*' rights between the investor and the sovereign, and certainly not constituting private commercial relationship *(para 81)*. The Indian Cabinet's annulment decision was also motivated by the country's '*strategic requirements*', which reinforces the non-commercial nature of the transaction. It, therefore, concludes that India has not submitted to the jurisdiction of Australian courts under section 10(2) *(para 75)*.

Crucially, the respondent did not adduce evidence to contest the non-commercial nature of the transaction *(para 76)*. In the absence of proof of Indian law to the contrary, the court applied the presumption that foreign law is the same as Australian law (Neilson v. Overseas Project [2005] HCA 54). On that basis, the dispute was characterized as non-commercial under Australian law. The court made clear, however, that reliance on any different characterization under Indian law would have required specific proof of the content and application of Indian law to rebut the presumption *(para 77)*. While this reflects a recognition of state sovereignty, the states could strategically reclassify market activities as policy-driven, which could frustrate investor expectations, undermining the pro-enforcement ethos of the New York Convention, and potentially deterring investment in reserving states like India.

Canada's Objective Approach

The Quebec Court of Appeal (COA) adopted a contrasting approach in *CC/Devas (Mauritius) Ltd v Republic of India* (2024 Quebec CA) by denying immunity to India under both the waiver and commercial activity exception of the State Immunity Act 1985 (sections 4 & 5), and permitted enforcement and asset seizure.

The court primarily based its decision and analysis on the commercial activity under section 5. Contextually, the BIT essentially involved the commercial leasing of India's spectrum capacity which aimed at '*encouraging foreign investment*' and can be termed as a '*trade agreement*' *(para 42)*. The court did not consider the annulment grounds of India's National Security Council materially relevant in the waiver determination. Instead, it focused more on economic substance, investment structure, and financial return of the deal. Such an approach also aligns more closely with the historically expansive interpretation of the commercial reservation under the New York Convention adopted by Indian courts. For instance, in *R.M. Investment and Trading Co. v. Boeing Co.* (1994), the court dealt with a state-level consultancy agreement for the sale of Boeing aircraft in India, and specifically remarked, '*the expression 'commercial' must be construed broadly having regard to the manifold activities which are part of international trade today*' *(para 12).* The Canadian court has interpreted the deal similarly, appreciating its commercial nature under current modalities of international trade.

The Canadian approach upholds the pro-enforcement approach of NYC, but it risks under-appreciating the plain language of Article 1(3), which mandates reference to the domestic law of the reserving State.

Towards an Enforceability-Focused Objective Standard

The Devas saga reveals that the central fault line is not whether Article 1(3) mandates reference to the law of the reserving State, it plainly does, but rather how enforcing courts ought to apply that mandate. Australia's highly deferential approach allows the reserving state's self-characterization, casting a BIT dispute as a subject of public law or invoking annulment as a matter of public policy, to determine the scope of the Convention's applicability. Canada's objective approach, by contrast, considers the substance of the transaction by analyzing what the parties actually accomplished, including the investment of capital through commercial structures in order to receive financial gain.

The courts could, instead, adopt a pro-enforcement objective standard test without entailing a departure from the application of reserving state's law. This approach requires the objective assessment of facts in answering the question of whether the dispute arise from the State's market participation or exercise of core public authority? Courts may assess (i) the nature of act giving rise to the dispute, and (ii) nature of parties' relationship at the time the investment was made.

In Devas, Antrix had entered the satellite capacity market as a commercial counterparty. The subsequent BIT claim merely internationalized the consequences of that commercial decision. Indian courts have themselves consistently treated contracts involving state-owned enterprises as commercial in nature under the Arbitration and Conciliation Act 1996. Therefore, an objective standard gives effect to Article 1(3)'s reference to Indian law, while resisting post-dispute recharacterization of commercial conduct.

Conclusion

Such an objective approach is consistent with the pro-enforcement mandate of the Convention, supporting a narrow construction of the reservation, and aligns with a liberal understanding of commercial activity in contemporary business. Excessive deference risks abuse, whereas an objective approach promotes predictability allowing investors to structure transactions around identifiable commercial elements while preserving space for genuine exercises of sovereignty, such as taxation and non-market regulation.