Investment Awards vs Sovereign Immunity: Navigating the Enforcement Maze

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The intersection of foreign State immunity and the enforcement of international arbitral awards has been a hotly contested issues in recent years. First the question was whether a State has waived immunity from court processes concerning recognition and enforcement of arbitral awards by ratifying the *1965 Convention of Settlement of Investment Disputes* (**ICSID Convention**) – to which the answer has been yes in Australia and the England and Wales (among other jurisdictions). More recently, the question has been whether a State's ratification of the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**New York Convention**) constitutes an implicit waiver of sovereign immunity, to which the High Court of Australia most recently held no.

In *CCDM Holdings, LLC v The Republic of India* [2026] HCA 9, the High Court of Australia unanimously held that ratification of the New York Convention does not, of itself, waive foreign State immunity under the *Foreign States Immunities Act 1985* (Cth). The decision aligns Australia with the current position in the United States, Canada, and England and Wales, reinforcing an emerging common law consensus in that regard.

Factual and Procedural Background

The dispute arose from an investment by Mauritian companies in an Indian Government-owned corporation. In 2011, the Indian Government annulled the underlying agreement on public policy and national security grounds. The investors commenced arbitral proceedings against India under Article 8 of the India-Mauritius bilateral investment treaty (BIT), which contemplated ICSID arbitration. As India is not a Contracting State to the ICSID Convention, the arbitration proceeded under UNCITRAL Rules.

In 2020, the tribunal rendered an award of US$111 million. The award creditors

sought enforcement in Australia under the New York Convention. India resisted, invoking immunity under section 9 of the *Foreign States Immunities Act 1985* (Cth).

The Waiver Question in the Lower Courts

At first instance, Jackman J held that India had waived immunity by ratifying the New York Convention, finding a "clear" and "unmistakable" implication—particularly from Article III, read with Articles I(1) and II(1)—that ratification involved waiver and submission to the jurisdiction of other Contracting States.

On appeal, the Full Federal Court did not decide the waiver question definitively. It assumed ratification constituted a waiver, but held that India's reservation—limiting the Convention to disputes "considered commercial under the Law of India"—circumscribed any such waiver. Finding the dispute was not commercial under Indian law, it held that India had not waived immunity in respect of the award.

The High Court's Analysis

The High Court addressed the fundamental question directly: whether ratification of the New York Convention is capable of constituting a waiver of foreign State immunity.

The governing principle is that any waiver in an international agreement must be "clear and unmistakeable", derived from the express words of the agreement, including necessary implications.

The High Court observed that the text of the New York Convention contains no express reference to foreign State immunity. The *travaux préparatoires* revealed an intention to preserve immunity in the courts of other States—a consideration militating against implied waiver.

Crucially, the Court examined Article III, which requires Contracting States to recognise awards as binding and enforce them "in accordance with the rules of procedure of the territory where the award is relied upon". The High Court held this phrase encompasses foreign State immunity rules, qualifying the enforcement obligation by reference to immunity rules in the relevant forum.

The Court also considered subsequent State practice under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*. It found that decisions from the United States, Canada, and England and Wales pointed in the opposite direction: ratification of the New York Convention is not, by itself, a sufficient act of waiver.

Distinguishing the ICSID Convention

The appellants sought to draw an analogy with *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11, where Spain was held to have waived immunity by ratifying the ICSID Convention. The High Court rejected this analogy, identifying material distinctions:

- First, the ICSID Convention is expressly concerned with disputes to which a State is a party, and its *travaux préparatoires* addressed foreign State immunity in detail.
- Second, Article 55 of the ICSID Convention preserves immunity only from execution—implying waiver of immunity from recognition and enforcement. Article III of the New York Convention supports preservation of immunity from jurisdiction altogether.

- Third, the International Law Commission materials relied upon by the appellants did not equate the two Conventions in any dispositive way.

Implications for Enforcement Against States

CCDM Holdings provides an authoritative demarcation between the two principal conventions. For ICSID awards, *Kingdom of Spain* establishes that enforcement against a Contracting State in Australia will not be barred by claims of immunity from jurisdiction. For non-ICSID awards—including investment treaty awards under UNCITRAL or other rules—enforcement against an unwilling State under the New York Convention is foreclosed absent clear and unmistakeable waiver.

Investors must give careful consideration to the availability of ICSID arbitration when contracting with States. Where unavailable, parties should seek clear waivers of immunity if enforcement in Australia or similar jurisdictions is contemplated.

Conclusion

The High Court’s unanimous decision brings welcome clarity. Ratification of the New York Convention does not, of itself, waive foreign State immunity, aligning Australia with the United States, Canada, and (subject to the pending appeal) England and Wales.

For practitioners in cross-border dispute resolution, the message is clear: the choice of arbitral regime and the presence of an express waiver are matters of critical importance warranting attention from the earliest stages of investment planning.