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Australian Court Judgment Introduces Another Twist in the Antrix-Devas Saga and Provides Vindication for the Delhi High Court

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The Antrix-Devas saga continues to present twists and turns (see previous coverage on the Blog here, here and here). The latest is the recent decision of the Full Court of the Federal Court of Australia (the "Full Court") in *Republic of India v. CCDM Holdings, LLC & Ors.* [2025] FCAFC 2. This decision concerned the attempted enforcement by the Devas entities (the "investors") of an award obtained under the bilateral investment treaty between India and Mauritius ("India-Mauritius BIT") (the "Award"). Enforcement was sought under the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958) ("Convention"), as incorporated under Australian law in the *International Arbitration Act 1974* (Cth) ("International Arbitration Act"). The investors filed an originating application before the Federal Court of Australia ("FCA") for the recognition and enforcement of the Award. In response, India filed an interlocutory application to set aside the originating application on the basis of sovereign immunity. A single judge of the FCA rejected India's interlocutory application, before granting leave for India to appeal to the Full Court.

Decision of the Full Court

In allowing the appeal, the Full Court held that the Award could not be enforced against India under the Convention and the International Arbitration Act on account of India's sovereign immunity (¶ 83), as recognised in Australia's *Foreign States Immunities Act 1985* (Cth) ("Immunities Act"). More specifically, the Full Court held that India had not waived its sovereign immunity – recognised under section 9 of the Immunities Act – in respect of the Award by acceding to the Convention. This was because India had made a reservation under Art. I(3) of the Convention to apply the Convention "*only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial*" under Indian law (¶¶ 24, 71-73). The Full Court observed that, although accession to the Convention could constitute a waiver of sovereign immunity by India in respect of awards, the reservation made by India limited any such waiver to those awards falling within the scope of the reservation. Awards concerning non-commercial disputes under Indian law were therefore excluded (¶ 72).

Significance of the Decision

The decision deserves due consideration because of its careful analysis of the relevant provisions of the *Vienna Convention on the Law of Treaties*, its clear articulation of the meaning and effect of reservations under treaties, and its application of the landmark decision of Australia's High Court in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (discussed here).

In *Kingdom of Spain*, the High Court held that a waiver of sovereign immunity under section 10(2) of the Immunities Act must be "*express*", requiring that the waiver be derived from the express words of an international agreement – either as an express term or as an implied term. On this basis, the High Court held that Spain had waived its sovereign immunity by acceding to the ICSID Convention – as implied from Arts. 53 and 55 of the ICSID Convention. The Full Court applied the same principle in the context of the Convention but arrived at a different conclusion because "*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*".

The Full Court decision is also significant for its brief consideration of another issue which has received significant attention in India and globally; namely, whether the Award arose from a "*commercial*" relationship and therefore fell within the scope of India's reservation to the Convention.

Scope of India's Reservation

At the outset, it should be noted that the investors did not contend before the Full Court that the Award fell within the scope of India's reservation to the Convention (¶ 76). As a result, this issue was not contested and was taken up by the Full Court only as a matter of "*formality*". Further, because there was no evidence of what legal relationships are considered as commercial under Indian law, the Full Court proceeded to examine this issue on the presumption that Indian law was the same as Australian law (¶ 77).

Bearing these limitations in mind, the Full Court held that the Award arose from the India-Mauritius BIT, which was in the realm of public international law and did not constitute a commercial relationship. The Full Court also held that the annulment of the lease agreement for space segment capacity in the S-band spectrum, which was found to constitute a breach of the India-Mauritius BIT, was an action taken by an executive body (India's Cabinet Committee on Security) exercising its policy-making function and did not arise from a commercial relationship. The Full Court thus concluded that the Award did not arise from a commercial legal relationship and did not fall within the scope of India's reservation to the Convention (¶ 81).

Vindication for the Delhi High Court

The reasoning adopted by the Full Court mirrors that of the Delhi High Court in its landmark decision in *Union of India v. Vodafone Group PLC & Anr.* – which was followed in its subsequent decision on interim relief in *Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors.* Both

decisions arose in the context of India seeking an anti-arbitration injunction against a BIT arbitration from its own courts.

In *Vodafone*, the Delhi High Court held that India's *Arbitration and Conciliation Act, 1996* ("Indian Arbitration Act") did not apply to investment treaty arbitrations since Part II (which applies to foreign arbitrations) was restricted to arbitrations arising out of "*commercial*" relationships on account of India's reservation to the Convention. According to the Delhi High Court, investment treaty arbitrations were "*fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances (and are not commercial in nature)*" and rooted in "*public international law, obligations of State and administrative law*" (¶¶ 90-91).

This decision prompted an outpouring of criticism from lawyers and academics (for example, see here, here, here, here and here) on two main grounds. First, that the Delhi High Court had misunderstood the meaning of "*commercial*" relationships and the nature of investment treaty awards and therefore misjudged the scope of India's reservation to the Convention. Second – and a rather curious ground – that the Delhi High Court had unfairly closed the door for the enforcement of investment treaty awards in India under the Convention.

So far as the first ground of criticism is concerned, it is evident that the reasoning of the Delhi High Court was correct. The decision of the Full Court vindicates the view taken by the Delhi High Court nearly seven years ago by concluding, similarly to the Delhi High Court, that the Award (being an investment treaty award) arose from treaty obligations and sovereign action, did not therefore arise out of a "*commercial*" relationship and did not fall within the scope of India's reservation to the Convention.

As to the second ground of criticism, this is misplaced since the lack of means to enforce investment treaty awards in India arises from an evident gap in the legislative framework. The Indian Arbitration Act does not apply to investment treaty arbitration. In fact, there is no legislation at all that applies to investment treaty arbitration. This gap cannot be artificially filled by the courts by overextending the Indian Arbitration Act's application.

Way Forward for India

In light of the decision of the Full Court, which vindicates the decision of the Delhi High Court in *Vodafone*, the debate over whether investment treaty awards can be enforced under the Indian Arbitration Act and the Convention can perhaps be put to rest. That avenue is indeed closed. The focus of legal discourse can now turn towards appropriate legislative intervention.

India should consider enacting a comprehensive law – independent of the Indian Arbitration Act and the Convention – that regulates all aspects of investment disputes. While this law would not confer any substantive rights, it could facilitate early intervention – in the form of legal assistance, monitoring, direct guidance and proposals for amicable settlement – by a designated agency of the Central Government. This law could also create a special court outside the normal hierarchy of Indian courts to expeditiously decide domestic cases relating to an investment dispute and thereby potentially avoid investment treaty arbitration. This law could also confer jurisdiction to enforce investment treaty awards upon the Supreme Court of India. Since this jurisdiction would be conferred under a separate law, the constraints arising from India's reservation to the Convention

would not apply. Further, this method of enforcement may even be preferred by award-holders, since, in view of the decision of the Full Court, the task of enforcing investment treaty awards against India abroad has become more difficult.

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