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What the Full Federal Court of Australia Decided, and Did Not Decide, in Republic of India v CCDM Holdings [2025] FCAFC 2

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In January 2025, a Full Court of the Federal Court of Australia (“Full Court”) upheld a claim by the Republic of India (“India”) to foreign state immunity from proceedings brought by various Mauritian entities (the “Investors”) to enforce an [arbitral award](#) in the Australian courts. The Full Court upheld immunity on the basis of [India’s commercial reservation to the New York Convention](#), and allowed India’s appeal against the [primary judgment](#) (“PJ”) of a single Judge of the Federal Court of Australia.

The Full Court’s [unanimous judgment](#) (“Reasons”) is notable not only for what it *did* decide in allowing the appeal, but also for what it *did not* decide. For example, the appeal did not resolve a threshold issue concerning the scope of the New York Convention, as addressed below.

Further, the outcome stands in contrast to a judgment of the Quebec Court of Appeal, handed down only two months earlier. That judgment held that India had waived its immunity from enforcement through having consented to arbitration under the relevant bilateral investment treaty (as discussed [here](#)).

The application by the Investors for special leave to appeal to the High Court of Australia filed on 28 February 2025 – as well as any notice of contention on the part of India as may be filed – will be closely watched.

Background

These proceedings are the Australian enforcement chapter of a very hard-fought underlying dispute between the Investors and India under the [1998 India-Mauritius Bilateral Investment Treaty](#) (the “BIT”) (see previous coverage on the Blog [here](#), [here](#), [here](#), and [here](#)).

In 2005, a subsidiary of the Investors entered into an agreement with Antrix Corporation Ltd (“Antrix”), a corporation wholly owned by India, for the lease of space segment capacity on two Indian satellites that were yet to be built. Subsequently, in 2011, India decided to reserve that capacity for “national needs [...] having regard to the needs of the country’s strategic requirements”, following which Antrix annulled the agreement.

In July 2012, the Investors commenced arbitral proceedings against India under the BIT

administered by the Permanent Court of Arbitration. In 2016, the tribunal rendered [an award on jurisdiction and on the merits](#), concluding relevantly that there had been an expropriation and a breach of the obligation to afford fair and equitable treatment. In 2020, the tribunal rendered a [quantum award](#), which ordered India to pay compensation in an amount totalling some USD 111 million, plus interest.

The Australian enforcement proceedings related only to the latter quantum award.

What the Full Court Decided

In a crisp judgment, the Full Court zeroed in on a central issue: the scope and consequences of India's reservation under Art I(3) of the New York Convention that India "will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India" (the "commercial reservation"). It was common ground that the underlying dispute did not arise from a commercial relationship (Reasons, [76]-[82]). The issue was whether, and if so how, the reservation operated in circumstances where Australia did not have a reciprocal reservation.

At first instance, the primary judge had held that India's commercial reservation was "not directly relevant", since "Australia did not make any such reservation and Australia is the State where recognition and enforcement is presently sought" (PJ, [58]). The primary judge effectively required a reservation to be accepted or otherwise reciprocated in some way by the enforcing State.

The Full Court rejected this reasoning, on the following bases:

- Arts 19-21 of the [Vienna Convention on the Law of Treaties](#) expressly authorised reservations which did not require any subsequent acceptance by the other contracting States unless the treaty so provides, and that the effect of a reservation relevantly extends to "modifying" for the reserving State in its relations with other parties the provisions of the treaty to which the reservation relates to the extent of the reservation (Reasons, [26]-[27], [62]).
- The International Law Commission's *Guide to Practice on Reservations to Treaties* (Document A/66/10/Add.1) provides that a validly established reservation affects the treaty relations of the reserving State by excluding or modifying the legal effect of one or more provisions of the treaty with respect to a specific aspect on a reciprocal basis, such that the reservation will relevantly act to modify the provision of the treaty as between the reserving State and the accepting State (which, in the case of the New York Convention, is all other States) to the extent of the reservation reciprocally (Reasons, [63]-[67]).
- Thus, India has no obligation to Australia to enforce the New York Convention in respect of matters the subject of India's reservation, and vice versa, such that Australia has no obligation to enforce the New York Convention in respect of those same matters (Reasons, [68]). A Contracting State's promise to recognise arbitral awards as binding and to enforce them under Art III of the New York Convention is limited by any reservations made by that Contracting State (Reasons, [70]).
- Since India had made it plain that matters within its reservation are not subject to the New York Convention, it could not be said to have waived its immunity by virtue of otherwise having ratified the New York Convention (Reasons, [72]).

Accordingly, the Full Court held that India had not unmistakably waived foreign state immunity to

which it was otherwise entitled in the Australian courts (Reasons, [75]).

What the Full Court Did Not Decide

In light of the manner in which it resolved the appeal, the Full Court left open at least two other important questions.

First, whether the New York Convention only applies to awards to which States are parties and where the underlying transaction involves a private law dispute or a commercial transaction by the State. The primary judge had found against India on this question, holding that there was no textual basis in the New York Convention for that limitation (PJ, [58]-[93]). India renewed the issue on appeal by reference to the object and purpose of that treaty. The Full Court, however, put this issue to one side by simply assuming (in the Investors' favour), without deciding, that the primary judge was correct that there was no such limitation (Reasons, [53]; [36]-[44] record the primary judge's reasoning on this question). This threshold issue concerning the scope of the New York Convention was not resolved by the appeal.

Second, if the New York Convention applies to such awards, then whether Art III thereof (which contains the promise of each Contracting State to recognise arbitral awards as binding and to enforce them) effects an "unmistakeable waiver" of State immunity by India in respect of awards that are not excluded by its commercial reservation. The primary judge had also found against India on this question (PJ, [34]-[51]). While the High Court of Australia in *Kingdom of Spain v Infrastructure Services Luxembourg S.a?.r.l.* [2023] HCA 11; (2023) 275 CLR 292 had confined its judgment to the ICSID Convention (see [prior blog post](#)), the primary judge applied the principles as articulated by the High Court of Australia (and which the English Court of Appeal subsequently considered was both "highly persuasive" and "plainly right": *Infrastructure Services Luxembourg S.a?.r.l. v Kingdom of Spain* [2024] EWCA Civ 1257 at [77] (see also *General Dynamics United Kingdom Limited v the State of Libya* [2025] EWCA Civ 134 at [33]-[35], which was handed down after the Full Court's judgment)). In applying those principles, the primary judge concluded that India had "by way of clear and unmistakable necessary implication" submitted to the jurisdiction of the Australian courts by agreement through having ratified the New York Convention.

On appeal, India renewed its submission that it had not waived immunity in any respect by reference to the terms, context, object, and purpose of, and State practice in relation to, the New York Convention. India's detailed submissions on this issue were not recorded in the judgment by the Full Court, because ultimately, the Full Court declined to express any final conclusion on the question. Instead, the Full Court simply observed at [72] that "[t]here is much to be said" for the primary judge's reasoning.

Conclusion

The basis on which the Full Court upheld India's immunity does not yet appear to have received much attention in the various enforcement proceedings around the world. Inevitably, the Full Court's judgment will draw renewed scholarly and judicial attention to the question of the scope and consequences of India's commercial reservation.

The consequences of the Full Court's approach may extend well beyond India, since many other Contracting States ¹⁾ have made a similar commercial reservation (or declaration). The interaction of the terms of these reservations with domestic law as to immunity, including Australia's domestic law, is certain to be tested over time.

Additionally, it may be open to India (in response to the application by the Investors for special leave to appeal) to re-agitate the questions left open by way of a notice of contention. That would allow India to contend that the judgment of the Full Court should be upheld on the ground that the Full Court had failed to decide or decided in error. Whether the High Court of Australia grants special leave (and if so in respect of which question(s)) is, of course, another matter entirely.

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References

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