



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN

CCDM Holdings, LLC

First Appellant

Devas Employees Funds US, LLC

Second Appellant

Telcom Devas, LLC

Third Appellant

and

The Republic of India

Respondent

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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Outline of oral submissions

Overarching matters

2. **Ultimate issue:** Whether, within s 10(2) of the *FSIA*, the 1960 conduct of India in ratifying the NYC, subject to reservations, constitutes, without more, an “agreement” submitting to the Federal Court’s jurisdiction in a proceeding to recognise and enforce an arbitral award to which India is a party? **RS [2]**; see also FC [1]. Not in issue are whether there is a valid agreement to arbitrate, or the exceptions in *FSIA* ss 11(1) or 17(2).
- 10 3. **Interpretative approach:** Both s 10(2) and international law require a high level of clarity and necessity before inferring that mere ratification of the NYC constitutes a relevant agreement: *Spain* (JBA 3/11) at [27]-[29]. **RS [13], [24]**
4. ***Spain* distinguishable** on the law and its facts: (1) ICSID (JBA 6/58) expressly deals with immunity, NYC does not. (2) Immunity debated in ICSID *travaux* leading to a compromise; immunity not addressed directly in the NYC *travaux*. (3) ICSID contains an express promise to be bound by the award, unlike NYC. (4) *Spain* proceeded on the basis that the award had becoming ‘binding’: **RS[14]-[15], [35]-[36], [83], [87]; RR[24]**.
5. **The ALRC Report** (JBA 8/90) modelled an Act under which: (1) while a treaty could in principle provide clear evidence of submission, the NYC was not considered to be such a treaty; (2) NYC would provide a background to a loss of immunity if an agreement to arbitrate could be proved in respect to an underlying dispute in which immunity was lost. This aligns with Professor Crawford’s earlier views (JBA 10/110). Parliament took that approach: see, now, the arbitration exception in s 17 *FSIA*. **RS [46], [86]**
- 20 6. **UK/ US position:** That waiver requires more than mere ratification of the NYC is the current UK position (under appeal): (Sir William Blair; JBA 4/21); and, contrary to the Attorney, represents the effect of the US jurisprudence: **RS[84]-[85]; RR [22], [23]**

What must the alleged ‘agreement’ contain to establish waiver within s 10(2) *FSIA*?

7. For the Appellants to succeed, the NYC must be construed as conveying each and all of the following meanings, to the necessary ‘unmistakable’ standard.
- 30 **Contention 1:** Under art I(1), the field of operation of the NYC includes all, or almost all, awards against States, and beyond doubt includes the present category of award (PJ [58], [61], [85], [88]-[92]; *cf* **NOC [2]** and see also AR [11]).

Contention 2: Under art I(3), the reservation mechanism established by the NYC conveys a clear contrary intent to the usual rule of reciprocity – such that India’s reservation narrows the NYC’s field of operation as between India and Australia in a one-way direction only (PJ [43], [58] and the **NOA**; *cf* FFC [64]-[72]).

10 **Contention 3:** Under art III, Australia’s *promise* to recognise/enforce awards against States carries with it by obvious and necessary implication a *requirement by all Contracting States (including India) that Australia perform such promise* – which requirement means that, to avoid inconsistency with art III, India as respondent State must be denied the liberty to assert immunity otherwise available to it in Australia’s courts (PJ[43], [94]-[96]; *cf* **NOC [3]** and see also AR [24]).

Given that the appellants rely upon art III as the manifestation of India’s waiver (AS[20]), contention (3) is addressed first – because if (3) fails, (1) and (2) do not arise.

NOC [3]: India’s subscription to art III is not an agreement within s 10(2) FSLA

8. **Summary of affirmative argument:** (1) Textually, art III is silent on obligations and rights under FSI. (2) The better view of that silence is that the promise of the enforcing State leaves untouched its *obligations* to accord FSI to other States, and the *rights* of such states to FSI. It makes no promise to recognise/ enforce to the exclusion or diminishment of FSI. (3) This view is supported by: (a) the fundamental importance of FSI in international law; the unlikelihood States would promise to depart from it absent clear words (which do not appear in art III); and it being no part of the NYC’s object or purpose to destroy such obligations and rights; (b) the position of non-Contracting States, who surely have not lost their FSI rights; and the unlikelihood that Contracting States are treated worse than non-Contracting States; (c) the mechanism for preserving FSI in the language of ‘*rules of procedure*’; (d) the *travaux*; (e) the fact that the non-enforcing State’s ‘right’ to performance of the enforcing State’s art III obligation is either non-existent (see arts I(3), XIV) or an insecure basis to infer loss of immunity. **RS [14]-[15], [24]-[36], [74]-[87]; RR [12]-[24]**

9. **Error in PJ [43]:** (1) Narrowing the frame to exclude the position of non-Contracting States slanted the analysis; (2) The promises in art III, while made between Contracting States, are to the benefit and burden of the world more generally; (3) Australia’s promise was qualified by FSI; any ‘requirement’ by India (which is denied) that Australia perform such promise was similarly qualified; (4) Where India is an award debtor hauled before the Australian courts, art III does not clearly convey that India is ‘requiring’ Australia to enforce the award against it; an available, indeed preferable, alternative is that India is reserving for its later action whether it ‘requires’ Australia so to act to its detriment; (5) India being ‘at liberty’ to assert its FSI rights does not prevent Australia performing its

obligations once their scope is understood; (6) in any event, art III, in the context of this treaty, does not require each Contracting State to take positive steps, let alone to its detriment, to aid other Contracting States to perform their obligations. RS[21], [76]-[82]

10. **Context and purpose:** (1) State immunity rules were an established part of customary international law when the NYC was concluded; pursuant to which rules States are not understood to waive rights except through unequivocal conduct. And territorial sovereignty is not unqualified: *Jurisdictional Immunities* (JBA 5/31 [57]). (2) The NYC's core object was to improve upon the Geneva Treaties (JBA 7/53-54) in facilitating resolution of commercial/private law disputes between businesspeople across national borders and in promoting international trade: RC items 22, 41.1. The ambition was not an unqualified ability of each State, within its territory, to recognise and enforce awards against other states subject only to art V. Cf PJ [51]. RS [29]-[30], [34]

11. **Rules of procedure and error in PJ [96]:** (1) The reference to 'rules of procedure' confirms that art III obligations are qualified by state immunity principles. (2) The primary judge ought to have addressed this issue as a necessary integer of the textual analysis of art III: cf PJ [43], PJ[96]. (3) Immunity is a procedural rule in international law: JBA 4/15, 5/31, 9/98. (4) Local "rules of procedure" are not limited only to pro-enforcement rules. (5) Considerations of text, object, purpose and art 31(3) support the conclusion that local immunity rules are 'rules of procedure' within art III. (6) Sir William Blair's reasoning is persuasive. (7) Commentators also support this position: JBA 8/86, 8/88, 9/98, 9/101, 9/103, 10/110, 10/112. RS [46], [77], [86]; RR [20]-[22]

12. **Non-Contracting States:** (1) The logic of PJ [43] is that Australia's promise is unqualified by Australia's international law obligations to respect the immunity of respondent States. But art III carves out no awards from its scope (that work is done by art I). If art III applies, it requires Australia to enforce all arbitral awards. Thus, Australia's art III promise extends to awards to which a *non-Contracting State* is a party. (2) Immediately, Contention 3 cannot be accepted; Australia cannot have promised, by agreeing to art III with only some States, that it will recognise/enforce awards against eg Tuvalu and Nauru irrespective of its international law obligations to respect their immunity. (3) Contention 3 cannot be rewritten to a promise to recognise/ enforce awards subject to the FSI of only some States, namely non-Contracting States. It can be rewritten only to a promise to recognise/ enforce awards *subject to the entitlement of any respondent State to immunity under international law*. (4) Once that step is taken, then

the promise/requirement/denial of liberty logic of Contention 3 disappears, and with that, PJ[43] and [96] fall. Once Contention 3 is so narrowed, then all that other Contracting States have ‘required’ by agreeing to art III (if anything) is that Australia recognise/enforce awards in its territory *subject to* a respondent’s entitlement to immunity under international law. From that qualified promise of Australia and any equally qualified “requirement” of other Contracting States, an unmistakable consent to waive immunity cannot be found. **RR [14]-[16]**

- 10 13. **Travaux: (1)** Just as the NYC’s text evinces no intention to achieve the NYC’s objects by alteration or diminution of States’ entitlements to FSI, nor does the preparatory material: **RC** items 4-10, 11, 17, 19, 21-25, 27, 29-30, 32, 36-41 (JBA 7/60-83). **(2)** This is unsurprising. The NYC sought to problem-solve for garden variety awards between non-State actors for which state immunity is irrelevant. It was drafted before the era of BITs and ISDS and when there was limited recognition of a private person being entitled to sue the State for breach of international obligations. *Cf* PJ [70], [86]. **RS [31]-[36]**
- 20 14. **Erroneous conception of the NYC’s multilateral operation:** The NYC does not consist of interdependent obligations flowing to and from the Contracting States: cf PJ[43], AS[40], AR[33]. It is a treaty seeking to establish a global compact for the uniform treatment of arbitral awards. Contracting States undertake obligations owed to all the world and not simply to each other, such that no one party’s promise is ‘dependent on a corresponding performance by the others’: Supp JBA 8/118 [126]. **RR [19]**
15. **Error in PJ [58]:** Art I(3)’s mechanism for making reservations, and the fact India has made reservations under that provision, demonstrate the incongruity of a conclusion that India holds Australia to the full extent of Australia’s obligations under the NYC – ie, with respect to any awards wherever they are made and whether or not they are ‘commercial’. Art I(3), and art XIV, provide powerful context against PJ[43] and [58]. **RS [71]**
16. **Conclusion: (1)** The appellants have not met the demanding threshold for implied waiver (necessity; high degree of clarity; unmistakableness): **RS[13], [16], [80]-[81]; RR[20]. (2)** *Firebird* (JBA 3/10 [85]-[86]) is a useful parallel: **RS[26].**

NOA: India’s reservation precludes a finding of waiver

- 30 17. The PJ’s reciprocity analysis erred as it missed a critical integer. Any ‘requirement’/ ‘consent’ by a reserving State for the purposes of Contention 3 engages any art I(3) reservation declaring how the reserving State will ‘apply’ the NYC. **RS[20], [48]-[67]**

18. (1) Ordinarily (art 21 VCLT embodying customary international law): where one party makes a permitted reservation from its treaty obligations, the correlative is that it has no right to enforce the treaty against other parties in the area of the reservation, and other parties have no obligation to that party to do so. (2) Art I(3) evinces no clear intent to depart from that rule. (3) For awards considered non-commercial under Indian law, the scope of India's obligation to apply the NYC has been contracted, and correlatively so has India's right to compel all other Contracting States to enforce such awards, and their duty to do so. (4) The appellants argued that India's reservation was irrelevant because it had only 'unilateral' effect, and advanced no fallback contention that the Award was within the scope of India's reservation. The FFC having found (per India's NOA) that India's reservation 'imperilled' the analysis at PJ[43], [58], the first two sentences of FC[76] dispose of NOA [5] and render CS [43]-[47] irrelevant (RR[25]-[26]). (5) The narrow procedural fairness challenge in NOA [5] is overstated (RS[71]-[73]).

NOC [2]: NYC's scope under art I(1) excludes this award

19. NOC [2] raises whether an award to which one or more States is a party is always, never, or sometimes (and if so, when), within the scope of art I(1): RR[2]. The Attorney, supporting PJ [58]-[61], [86], gives an 'always' answer inconsistent with the NYC's object not to make provision for inter-State awards: RC items 17.1, 38.5, 38.6. The textual concern influencing the PJ is moot given that at least some awards involving states must be excluded. The Appellants concede some awards are excluded, but give an unprincipled 'sometimes' answer (JBA 10/117, 8/91; compare: 5/30, 6/35, 37, 44) contrived to include this investor/State dispute. NOC [2] gives a principled 'sometimes' answer excluding awards where, as here, the State is sued *qua* sovereign. RS[37]-[47]; RR[3]-[11].
20. (1) The reasons of Katsas J (in dissent) in *Nigeria* (JBA 6/50), and aspects of majority, favour NOC [2]. Whether any particular investor/State award meets the definitional criteria for exclusion will depend on the facts. (2) Commentators, fairly analysed, support this view (*cf* PJ [88]-[92]): Contini (10/119); Sanders (11/122, 123); Haight (9/100); Schachter (10/118); van den Berg (8/84); Cappelli-Perciballi (10/116); Bjorklund (8/86, 87); ICCA (2011, p.107). (3) It reflects the NYC's core concern with private law transactions and complementary distinctions in principles of restrictive immunity: RC items 11.1-4, 17.1, 19, 22, 24.1, 25.1, 26.2, 30.1, 38.5, 41; JBA 4/20; 5/31; Higgins 11/127. (5) In domestic law context, see analogously *ACCC v Baxter* [38]-[44].

Justin Gleeson  

4 November 2025