

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Sir William Blair, sitting as a Judge of the High Court

B E T W E E N:

(1) CC/DEVAS (MAURITIUS) LTD.
(2) DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED
(3) TELCOM DEVAS MAURITIUS LIMITED

Claimants

(4) CCDM HOLDINGS LLC
(5) DEVAS EMPLOYEES FUND US LLC
(6) TELCOM DEVAS LLC

Claimants/Appellants

-and-

THE REPUBLIC OF INDIA

Defendant/Respondent

APPELLANTS' SECOND SUPPLEMENTARY
SKELETON ARGUMENT

1. This is the Appellants' second supplementary skeleton argument, filed pursuant to the permission granted by Lewison LJ on 9 March 2026 for further skeletons "*confined to the effect (if any) of the decision of the Supreme Court in the Kingdom of Spain case*".¹ The Appellants submit that Infrastructure assists in: (i) clarifying the proper approach to consent for the purposes of section 2(2) SIA through the interpretative lens of Articles 31-32 VCLT; and (ii) addressing the application of that test to Article III NYC.

A. The Approach

¹ Save where otherwise appears the Appellants adopt the defined terms and referencing convention in their Appeal Skeleton Argument dated 5 June 2025 ("Appeal Skeleton") and Supplementary Skeleton Argument dated 8 August 2025 ("Supplementary Skeleton"). References to paragraphs are to paragraphs in the Supreme Court's judgment in Spain v Infrastructure Services Luxembourg Sarl [2026] UKSC 9 ("Infrastructure").

2. As restated in Infrastructure, waiver of immunity by treaty requires “a clear and unequivocal expression of the state’s consent to the exercise of jurisdiction...[which] does not require explicit words such as waiver or submission” but can be conveyed by what is “necessarily inherent” in the words and “by what necessarily follows as a consequence of the use of those words”, “necessarily lead[ing] to the conclusion that the state has submitted to the jurisdiction” – at [69].
3. In so holding, the Supreme Court expressly rejected Lord Goff’s (dissenting) “narrow view of express consent” and “uncompromising approach” in Pinochet² to the effect that a waiver “must always be express...including an actual submission to the jurisdiction, as well as an express agreement in advance to submit” – at [51]; [56]; [62]-[63]. India relies (in terms) on the uncompromising approach that a waiver “must always be express” – see India’s appeal skeleton argument at [14]-[15].
4. The binding test in Infrastructure is consistent with the Appellants’ approach in this appeal – see Appeal Skeleton at § C2.1. It does not “collapse[] the distinction between express terms and implied terms” as India suggests. Instead, it recognises that the Court’s task is to construe the express words used through the lens of the VCLT, per Phillips LJ in the Court of Appeal in Infrastructure at [92]; a passage which the Supreme Court expressly endorsed but which India suggests is “incorrect”.³ In this regard, and again contrary to India’s position, the Judge’s approach at [53] of the Judgment was correct insofar as it recognised that “the process of implication does not arise in a discrete sense, as it does in the case of implied contractual terms, since it is a question of construing the words relied on to determine whether the necessary threshold of express agreement is crossed”.
5. The Supreme Court also made clear that the interpretation of the ICSID Convention in that case (and so the interpretation of Article III of the NYC in this case) proceeds from the starting point of Articles 31-32 VCLT, such that:
 - a. A “holistic approach” is required, interpreting the treaty in good faith and “seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to the context, object and purpose of the treaty as a ‘single, combined operation’” – at [75]; [109]; [114].

² At 217C-217D.

³ Respondent’s Skeleton Argument dated 3 July 2025 (“**Respondent’s Skeleton**”) at [15].

- b. Article 32 may be used in two ways: first, as a means of confirming the ordinary meaning of the express words used by application of the primary rule at Article 31 VCLT (but not to change or contradict that meaning); and second, to determine meaning where the primary interpretative mechanism would lead to a manifestly absurd or unreasonable result – at [76]-[77].
 - c. Uniformity is critical, both in the sense of: consent to the relevant treaty as a whole as a function of the “*acceptance of the other parties to th[e] treaty being bound by the obligations contained therein in relation to the first state*” – at [78]; and interpretative uniformity as between states, particularly where there is consensus on meaning – at [79].
6. The above conclusions on the interpretative approach are consistent with the Appellants’ submissions before this Court:
- a. The general approach is precisely that urged on this Court by Ground 1 in this appeal (and was not the approach adopted or followed by the Judge as to the meaning of Article III NYC) – see Appeal Skeleton at [6]; [22]-[28] and [52].
 - b. The Appellants’ position is that the object, purpose and context of the NYC (such context including the entire treaty and its structure and scheme) are of critical importance and were given insufficient prominence by the Judge – see Appeal Skeleton at [7(b)]; [22]-[23]; [30]-[35]; [53] and [55].
 - c. The Appellants further suggest that the Judge lost sight of the importance of uniformity and reciprocity in interpretation of the NYC, which the Supreme Court has now re-emphasised in Infrastructure.

B. Application

7. The Supreme Court’s application of the restated test to the facts of Infrastructure and Articles 54-55 of the ICSID Convention also supports the Appellants’ position in this appeal. This goes beyond the general proposition that international treaties of this type may have the effect of preventing a state from relying on its own domestic state immunity

laws,⁴ and permeates five themes: (i) language; (ii) object/purpose/context; (iii) mutuality and reciprocity; (iv) the analogy with Articles 54-55 of the ICSID Convention; and (v) supplementary means of interpretation under Article 32 VCLT.

(i) Language

8. Applying the correct approach to interpretation set out in Infrastructure, the plain express words of Article III NYC are inconsistent with the preservation of adjudicative immunity and should result in the conclusion that there is “*consent*” within the meaning of s2(2) SIA 1978 for all the reasons set out at Appeal Skeleton § C2.2 and for the same or similar reasons to those set out in in Infrastructure at [81]-[89].

(ii) Object/Purpose/Context

9. The result in Infrastructure was driven in large part by the identification and application of the primary purpose of the ICSID Convention, as a key element of the primary analysis under Article 31 VCLT – see [106]-[118]. The identification of the proper object and purpose of the NYC should likewise drive the result in this appeal.
10. The sole object and purpose of the NYC is to govern and ensure the reciprocal enforcement of agreements to arbitrate and resulting arbitral awards. In that sense the NYC’s purpose is more focused than that of the ICSID Convention which the Supreme Court found to be (primarily) to “*encourage the flow of private investment in foreign sovereign states by offering assurances against sovereign risk in the host state absent satisfactory dispute settlement mechanisms*” – at [106].
11. The object and purpose of the NYC (and the relevant sections of the Arbitration Act 1996, transposing it into domestic law) has been considered extensively by the English Courts, who have consistently held that the purpose is to facilitate the enforcement of awards, and that any exceptions to enforcement should be construed narrowly:

- a. In Dardana Ltd v Yukos Oil Co (No.1) [2002] 1 All ER (Comm) 819 Mance LJ stated at [10] that “*A successful party to a New York Convention award, as defined in s.100(1) has a prima facie right to recognition and enforcement.... recognition or enforcement may be refused*

⁴ Noting in this regard that s17(2) of the State Immunities Act, allows consent by Treaty. As the Supreme Court noted in Infrastructure “*It follows that a state is not immune in relation to proceedings in the United Kingdom where it has submitted to the jurisdiction by a prior written treaty or convention*” [28].

at the second stage only if the other party proves that the situation falls within one of the heads set out in s.103(2)".

- b. In IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn [2005] 2 Lloyd's Rep 326, Gross J held at [11] that, *"there can be no realistic doubt that section 103 of the Act embodies a predisposition in favour of enforcement of the New York Convention Awards, respecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award"*.
- c. In Diag Human SE v Czech Republic [2014] 2 Lloyd's Rep. 283, Eder J set out the principles of the NYC which had been transposed into domestic law, including that *"the Convention comprises an "overall scheme" for "the facilitation of the enforcement of an award." "The scheme reflects a 'pro-enforcement bias'... or ... constitutes a presumptio juris tantum, for the enforceability of an award ..."* (Van den Berg, *The New York Convention 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) ... A key feature of this pro-enforcement bias is the abolition of the "double exequatur" requirement under the New York Convention's forerunner".
- d. In Travis Coal Restructured Holdings v Essar Global Fund [2014] 2 Lloyd's Rep. 494, Blair J noted at [30] that *"[i]t is not in dispute that s. 103 of the Arbitration Act 1996 embodies a strong pre-disposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of the New York Convention itself, the burden of proof being "firmly" on the party resisting enforcement"*.
- e. In Consilient Health v Gedeon Richter [2022] EWHC 1744 (Ch), Miles J observed at [80] that *"[u]nder section 101 the award creditor does not need to show that it has a legitimate interest in enforcing the award as a judgment of the court. The purpose of the NYC is to facilitate the ready enforcement of awards in NYC states. The process is comparatively simple and mechanical"*.
- f. In Hulley Enterprises v Russia [2026] EWHC 456 (Comm), Bright J held at [63]-[64] that *"[t]he purpose of the New York Convention is to facilitate the enforcement of arbitration awards...Against this background,...the grounds for refusing enforcement are to be construed narrowly"*.

12. The consistent approach of the English Courts when asked to interpret the NYC is to adopt a strongly pro-enforcement approach, in order to give effect to its sole purpose of facilitating the enforcement of arbitral awards. In doing so, it drastically improved the position under the previous Geneva Convention (Dicey, Morris and Collins, (16th ed) 1-104). As the editors of Redfern and Hunter (7th Ed) [11-61] note, “[t]he New York Convention has proved to be a highly effective international instrument for the enforcement of arbitration agreements and, more importantly in the present context, arbitration awards”.
13. Analysis of the contents of the entire treaty and its structure and scheme further support the Appellants’ position:
 - a. The NYC provides a complete code for the enforcement of international arbitration awards. Article III provides that “Contracting States shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles” (emphasis added). The seven grounds for refusing recognition of an NYC Award are then exhaustively set out in Art V of the NYC – none of which India suggests applies here.
 - b. Consistently with the approach in the NYC, English courts have applied only these exceptions for the refusal to recognise and enforce an NYC award. However, the first instance Judgment strays outside the scope of the NYC by introducing an additional exception to enforcement by concentrating on the use of “rules of procedure” at the start of Article III. Properly construed, those words refer to the procedural steps necessary to secure the recognition of an NYC award (part of the adjudicative process prior to execution, the ICSID equivalent of which is discussed in [87] of Infrastructure) and do not on their own or read in context involve the creation of a further substantive exception to recognition and enforcement separate to those exhaustively contained in Article V. The drafters of the NYC set out a precise and comprehensive list of those exceptions in Article V. It is implausible to suggest that they would have created an eighth exception, in a different provision, by reference to “rules of procedure”. The Judge failed to consider this beyond noting that there was no academic support that his interpretation would “open the floodgates” ([74] of the Judgment).

- c. The Judge’s approach is inconsistent with the complete scheme of the NYC and fails to consider that the effect of such an interpretation is to subvert the ethos and purpose of the NYC. As the US Second Circuit noted in Parsons & Whittemore Overseas Co Inc v Société Générale 508 F 2d 969 (1974) at 973 (quoted with approval in the UKPC case of Cukurova Holding v Sonera [2015] 2 All E.R. 1061 [34]) the NYC “*clearly shifted the burden of proof... and limited his defences to seven set forth in Article V*”.
14. The contextual factors on which the Supreme Court relied in Infrastructure are of equal application to the NYC. These included that obligations under the relevant treaty:
- a. are mutual and reciprocal (at [102]) and require a waiver of state immunity to operate effectively (at [105]), as to both of which see further **Section B(iii)** below;
 - b. sit within an overall treaty scheme whose ‘object and purpose’ is the enforcement of awards, subject to limited defences (at [106]-[118]); as to which see above;⁵ and
 - c. apply equally as between private individuals and States (at [103]).

(iii) Mutuality and Reciprocity

15. An important feature of the Supreme Court’s judgment in Infrastructure is the focus on mutuality and reciprocity: obligations under the ICSID Convention are “*on a mutual and reciprocal basis*” such that “*recognition and enforcement proceedings will in all, or in almost all, cases, involve the courts of one contracting state exercising adjudicative jurisdiction over another contracting state*” and the relevant system “*must achieve that result in all cases, not just in some cases*” – see at [92]. For that reason, a contracting ICSID state could not simultaneously agree that it “*shall*” enforce ICSID Awards rendered against it but simultaneously claim state immunity protection under domestic law so as to subvert that State’s obligations under the ICSID Convention. Submission under Article 54(1) of the ICSID Convention is on a reciprocal basis; such reciprocal operation being clear from the meaning of the express words – see at [89]; [93]-[94].

16. The same considerations apply in the NYC context, because:

⁵ In any event this appeal relates to adjudicative immunity rather than enforcement immunity at the Article V stage – see Judgment at [11] and Appeal Skeleton at [71].

- a. The mutuality of the obligations contracting states under the NYC is more than clear: “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them”⁶ and “[e]ach Contracting State shall recognize an agreement in writing [to arbitrate disputes]”⁷ (emphasis added). The absence of reciprocity is one of the permitted exceptions to the application of the NYC, where invoked by States that are signatory to it.⁸
- b. Numerous BITs do not incorporate the ICSID Convention at all and instead incorporate the UNCITRAL or SCC Rules (including over 75 BITs to which India is a party, because India is not a signatory to the ICSID Convention). The effect of the Judgment in this case, read with the Supreme Court’s judgment in Infrastructure, would create a lacuna for a very significant number of BITs, directly contrary to the intention of mutual recognition and enforcement of NYC awards under those BITs absent one of the seven limited defences being proven. The workability of those BITs would be seriously undermined if the adjudicative jurisdiction of the courts in States party to the NYC was unavailable with respect to the recognition of awards arising out of those treaties, as India contends. A significant portion of global Investor-State disputes are resolved by NYC arbitration. In 2025 alone, ICSID administered 15 non-ICSID Treaty cases (*i.e.* cases that stood to be enforced under the NYC), and had administered 185 in the past 10 years.⁹ The PCA supervised 75 active Investor-State cases in 2024 alone,¹⁰ while the SCC registered 37 Investor-State Disputes in the period 2017-May 2025¹¹ – all of which will result in arbitral awards that will fall to be recognised and enforced under the NYC (absent a settlement).

(iv) Articles 54 and 55 of the ICSID Convention

17. The Supreme Court’s view of Article 55 of the ICSID Convention (which it described as a “clarificatory saving for immunity”) was that it was consistent with – rather than determinative of – the conclusion that Article 54 amounted to waiver/consent under section 2(2) SIA, because of the distinction between recognition (Article 54) and execution

⁶ Subject only to the provisos of being “in accordance with the rules of procedure of the territory”, and “under the conditions” of the subsequent articles of the NYC.

⁷ Article II(1) NYC.

⁸ Article I(3) NYC.

⁹ The ICSID Caseload H2 2025, ICSID.

¹⁰ PCA Annual Report 2024.

¹¹ Arbitrating for Peace: Stockholm, SCC Arbitration Institute, and ISDS, May 2025, SCC.

(in which state immunity objections are preserved by Article 55) – see at [88]. The absence of an equivalent to Article 55 here does not determine this appeal either way, because:

- a. The focus is on the meaning of the language of section 2(2) SIA 1978 and Article III NYC.¹²
- b. There is an equivalent distinction between adjudicative immunity and enforcement immunity in this case, and the absence of a negative saving provision for the latter does not dictate the meaning of the former. In short, India’s immunity with respect to execution of any recognised award shall be preserved (e.g. section 13(2) SIA 1978). The waiver of immunity under section 2(2) SIA 1978 relates only to the adjudication of recognition issues.

18. Moreover, the Supreme Court made no equivalent observation, to that of Phillips LJ, *obiter*, in the Court of Appeal in Infrastructure at [102(i)], that the conclusion on Article 54 of the ICSID Convention would not necessarily result in the same conclusion on Article III NYC on the basis of a difference in language.

(v) Article 32 VCLT – supplementary means of interpretation

19. Much like the negotiating history of the NYC addressed at Appeal Skeleton [60] et seq, the Supreme Court in Infrastructure held that “*nothing in the travaux préparatoires directly addresses the waiver of adjudicative immunity*” [126], and “*at the time the Convention was drafted there were few exceptions to immunity from execution*” [129].

20. Likewise, the Supreme Court was clear that judgments in other jurisdictions should be given weight only to the extent that a “*uniform interpretation*” can be discerned from those authorities, holding that there was such consensus in the case of the ICSID Convention – at [134]. There is no such uniform interpretation of Article III NYC in favour of India’s position, but there are authorities in support of the Appellants’ position on which the Judge did not focus:

¹² And Article III NYC shares several features of the language of Article 54 ICSID, even if there are differences: each set out a positive obligation (“*shall*”) to recognise awards “*as binding*”. The ICSID provisions were “*patterned in part*” from the NYC and “*similar*” in language. See *Schill, et al, Schreuer’s Commentary on the ICSID Convention*, Vol. II, 3rd Ed. (2022) (Schreuer) at pages 1473-1474 (paras 4, 8) and *History of the ICSID Convention*, Vol.1 page 246; Vol.2 pages 65, 272, 425-426, 429-430, 521-522, 575, 671, 885, 886, 888, 894, 1018.

- a. The Judge relied in this regard on the approach in the United States and the Appellants continue to rely on those authorities, in particular Preble-Rish.¹³ There is no uniform interpretation of the NYC that emerges from an analysis of the US authorities and those US authorities relied on by the Judge concerned the proper interpretation of US state immunity law, which is structurally distinct from English state immunity law for the reasons set out at [78] of the Appeal Skeleton.
- b. Without prejudice to that point, the international authorities (including US authorities) support the Appellants' position that Article III NYC may as a matter of general principle amount to a waiver of domestic state immunity; see:
 - i. Seetransport v Navimpex 989 F. 2d 572 (2d. Cir 1993), in which the Second Circuit held that "*when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory States*" (pg 9).
 - ii. Creighton v Qatar 181 F.3d 118 (D.C. Cir 1999), which affirmed that where a sovereign signs the NYC, it waives state immunity (pp. 6-7).
 - iii. Tatneft v Ukraine USCA Case #18-7057 (D.C. Cir. 2018), which reconfirms that the signing of the NYC waived state immunity.¹⁴

C. Conclusion

21. For all of the above reasons and those set out in the Appeal Skeleton, and in light of the Supreme Court's approach in Infrastructure, the appeal should be allowed.

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¹³ Respondent's Skeleton [48].

¹⁴ The Court held that "*In Creighton, we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states. 181 F.3d at 123. Because Ukraine and the United States have both signed the Convention, Ukraine falls within the waiver exception as Creighton construed it.*"