

Appeal Ref: []

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

Claim CL-2021-000253

B E T W E E N:

- (1) CC/DEVAS (MAURITIUS) LTD.
- (2) DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED
- (3) TELCOM DEVAS MAURITIUS LIMITED
- (4) CCDM HOLDINGS LLC
- (5) DEVAS EMPLOYEES FUND US LLC
- (6) TELCOM DEVAS LLC

The Appellants (being the 4th-6th Claimants)

-and-

THE REPUBLIC OF INDIA

Respondent

APPELLANTS' SKELETON ARGUMENT

5 June 2025

A INTRODUCTION

1. This Skeleton Argument is submitted on behalf of the Fourth to Sixth Claimants (**the Appellants**¹) in support of the Appellants' appeal against the Judgment dated 17 April 2025 (**the Judgment**) and Order dated 16 May 2025 (**the Order**) of Sir William Blair sitting as a Judge of the High Court (**the Judge**).² By the Order, permission to appeal was granted by the Judge.
2. This Appeal concerns a pure question of law arising under s.2 of the State Immunity Act 1978 (**the SIA**) that had been directed by Sir Nigel Teare (sitting as a Judge of the High Court) by Order of 23 October 2024 following a 1-day hearing (**the s.2 SIA Question**):

*“Whether, for the purposes of enforcement of (i) the award on jurisdiction and merits dated 25 July 2016, and (ii) the award on quantum dated 13 October 2020 (“**the Awards**”), India has submitted to the adjudicative jurisdiction of the English Courts by prior written agreement within the meaning of s.2(2) of the State Immunity Act 1978, by its ratification of the New York Convention 1958 and thereby (on the Fourth to Sixth Claimants’ case) its consent under Article III to the English Court recognising and enforcing the Awards.”*

3. The s.2 SIA Question thus turns on the proper interpretation of Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (**the NYC**) and whether it amounts to a submission to the adjudicative jurisdiction of the English Court for the purposes of s.2 of the SIA. This raises an important question of principle and practice under the NYC.
4. The Judge answered the s.2 SIA question in the negative on the basis that: (i) there is no indication that the drafters of the NYC *intended* to exclude state immunity defences in enforcement proceedings; (ii) Article III’s reference to “rules of procedure” preserves state immunity by its own terms; and, accordingly (iii) applying the test for submission under English law, the ratification of Article III of the NYC is not, on its own, a submission to the adjudicative jurisdiction of the English Court.³ In further support of his interpretation, the Judge placed reliance upon an alleged broader commercial context, the position under US law and the fact that another exception to state immunity (s.9 of the SIA) could apply

¹ The interests in the Awards of the 1st–3rd Claimants were assigned to the 4th–6th Claimants (being the Appellants). Hereinafter, references to “*the Appellants*” include references to the 4th–6th Appellants (unless stated otherwise).

² The Order was accompanied by the Judge’s judgment dated 16 May 2025 on matters consequential to the Judgment.

³ Judgment at [107].

if the award creditor establishes the validity of the arbitration agreement, which the Judge considered to be the applicable exception.⁴

5. The Appellants contend the Judge erred both in his approach to interpretation under the Vienna Convention on the Law of Treaties of 1969 (**the VCLT**) and in the interpretation he arrived at. This is addressed in **Section C** and briefly summarised now.
6. **First**, as to the approach to interpretation under the VCLT, it is submitted that:
 - (a) The Judge did not interpret Article III of the NYC in accordance with the mandatory principles prescribed by Article 31 of the VCLT i.e. textual interpretation in accordance with the object and purpose of the NYC and in a manner that promotes uniformity in the application of the NYC. The Judge instead impermissibly searched for an “intention” of the drafters of the NYC and found such an “intention” on the basis of material that neither supported that conclusion nor was capable of displacing textual interpretation under Article 31 of the VCLT.
 - (b) Further to (a), pursuant to Article 31 of the VCLT, the Judge should have but did not: (i) determine the meaning and scope of the terms “in accordance with” and “rules of procedure” used in Article III; (ii) have regard to the scheme of the NYC and whether it was consistent with that scheme to treat “in accordance with the rules of procedure” as including and/or preserving state immunity rules; (iii) have regard to the fact that not all Contracting States classify state immunity as procedural and the non-uniformity thereby engendered by his approach.
7. **Second**, as to the interpretation of Article III of the NYC, the Appellants’ case is that:
 - (a) The Opening Clause of Article III⁵ contains express consent on the part of Contracting States to the adjudicative jurisdiction of the courts of all other Contracting States (in this case the English Courts) to recognise and enforce NYC arbitral awards falling within its scope. This consent satisfies s.2 of the SIA applying the test for express consent elaborated upon in Court of Appeal’s decision in *Infrastructure Services Luxembourg SARL & Anr v Kingdom of Spain (and another)* [2025] 1 Lloyd’s Rep 66 (***Infrastructure Services***).

⁴ Judgment at [9], [55]-[59], [108].

⁵ “Each Contracting State shall recognize arbitral awards as binding and enforce them [...]”

- (b) The consent given by Contracting States in the Opening Clause of Article III to permit the enforcing court to recognise and enforce a NYC arbitral award is expressly not dependent upon the award creditor establishing the validity of the arbitration agreement. Rather, the arbitration agreement is presumptively valid with the award debtor having a right to challenge that under Article V, reflecting the well-established pro-enforcement bias under the NYC. By contrast, the Judge’s conclusion, that Article III of the NYC itself incorporates and preserves domestic state immunity rules such that in this jurisdiction state immunity is only waived if the validity of the arbitration agreement is established by the award creditor (within the meaning of s.9 of the SIA) is incompatible with the scheme of the NYC.
- (c) The “rules of procedure” referenced in Article III do not permit the application of any and all rules that domestic law classifies as procedural but are limited to those rules that are incidental to and facilitate recognition and enforcement under the NYC and comprising those rules introduced and/or applied to: (i) facilitate the award creditor to obtain recognition and enforcement and (ii) facilitate the determination of defences raised by the award debtor under Articles V and/or VI of the NYC, which includes defences concerning the validity of the arbitration agreement. Domestic state immunity rules fall outside the scope of such rules.
- (d) Irrespective of the scope of the rules of procedure, Article III has, by its terms no “preservation” function such that Article III itself is incapable of satisfying the requirements of consent imposed by domestic state immunity law.

B SUMMARY OF BACKGROUND

- 8. The two awards that are the subject of these proceedings (**the Awards**) were rendered against India in 2016 and 2020 in arbitral proceedings (**the BIT-1 Arbitration**) under the UNCITRAL Arbitration Rules (1976), pursuant to the India-Mauritius Bilateral Investment Treaty (1998) (**the BIT**) and seated in the Netherlands.⁶ By the Awards, India has been ordered to pay sums now exceeding EUR 195 million. India has not paid the amounts due and has demonstrated no intention of doing so.
- 9. On 30 April 2021, the Appellants applied for recognition and enforcement of the Awards under the NYC pursuant to the CPR 62.17-62.18, being the procedure implemented in

⁶ The background facts giving rise to the Awards are set out in the Judgment, [12]-[18].

this jurisdiction pursuant to Article III of the NYC. This gave rise to the Order of Mrs. Justice Cockerill dated 29 June 2021.

10. In response, on 5 May 2022, India invoked state immunity under s.1 of the SIA (**the SIA Application**) and contended that the arbitration agreement contained in the BIT was not valid and that therefore the s.9 exception to state immunity under the SIA did not apply. In this regard, India relies upon heavily disputed allegation that the legality requirements of the BIT were not met concerning the investment in question (**the Illegality Allegations**). The Illegality Allegations were not raised for determination in the BIT-1 Arbitration despite India being aware of them. Instead, the Illegality Allegations were advanced outside the arbitral process, in liquidation proceedings before the Indian Courts, which culminated in a judgment from the Indian Supreme Court dated 17 January 2022 (the “**ISCJ**”). A number of foreign courts in related proceedings, including the Singapore International Commercial Court,⁷ the Singapore Court of Appeal⁸ and the Hague Court of Appeal,⁹ have refused to recognize the ISCJ and/or its so-called ‘findings’ of illegality on the basis that doing so would violate due process and natural justice. India nevertheless seeks to rely on the ISCJ’s ‘findings’ as part of its SIA Application and in its remaining challenges to the Awards before the Dutch Courts, as the Courts of the seat.
11. Indeed, India has already had its challenges to the Awards (primarily based on the Illegality Allegations) rejected four times before the Dutch Courts, being the Courts of the seat.¹⁰ The remaining relevant proceedings being extraordinary means of recourse proceedings¹¹ are predicted to endure until (at least) early 2028 before all avenues of appeal are completed.¹² The Judge recognised the extraordinary delays engendered by India’s

⁷ *Deutsche Telekom AG v. Republic of India* [2023] SGHC(I) 7 at [123], [127] and [134].

⁸ *Deutsche Telekom AG v. Republic of India* [2023] SGCA(I) 10.

⁹ *Devas Multimedia America v Antrix Corporation*, Hague Court of Appeal, 17 December 2024, at [6.43]-[6.44].

¹⁰ See Judgment of the Hague District Court dated 14 November 2018; Judgment of the Hague Court of Appeal dated 16 February 2021; Judgment of the Supreme Court of the Netherlands dated 3 February 2023; Judgment of the Hague District Court dated 25 October 2023.

¹¹ By a judgment in these proceedings dated 18 October 2024 (**the Teare Judgment**), Sir Nigel Teare determined that only one of the outstanding proceedings before the Dutch Courts, by which India seeks the extraordinary remedy of revoking a prior decision of the Hague Court of Appeal (which had been upheld by the Dutch Supreme Court) (**Revocation 2**), could possibly serve a state immunity purpose in the SIA Stay Application: Teare Judgment at [49].

¹² Fifth Witness Statement of Douglas James Watson (**Watson-5**), ¶ 46.

position.¹³ Indeed, India anticipates a NYC phase after the present SIA phase, and it has reserved its position as to what its defences under a NYC phase might be.¹⁴

C THE s.2 SIA QUESTION

C1 STATUTORY CONSTRUCTION OF s.2(2) OF THE SIA

12. Section 2 of the SIA provides that a State may submit to the jurisdiction of the UK Courts by way of prior written agreement. Section 17(2) of the SIA provides that a prior written agreement includes a treaty.
13. The question of what is required to satisfy the consent requirement under s.2 of the SIA was recently and authoritatively considered by the Court of Appeal in *Infrastructure Services* in the context of Article 54(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (**the ICSID Convention**).
14. Article 54 of the ICSID Convention is drafted in terms that are similar though not identical to Article III of the NYC. This is no mere coincidence given that the relevant provisions of the NYC were firmly in mind of the ICSID drafters when it came to the drafting of equivalent provisions under the ICSID Convention.¹⁵
15. In concluding that Article 54(1) of the ICSID Convention constituted a prior written agreement satisfying s.2 of the SIA, the Court of Appeal held that for the purposes of s.2:¹⁶
 - (a) What is required is an express agreement (as opposed to an implied agreement) to submit to the jurisdiction (at [92]-[93]); and

¹³ Judgment at ¶ 75.

¹⁴ Witness Statement of Dipen Sabharwal QC (“**Sabharwal-1**”), ¶10.

¹⁵ During the drafting of the ICSID Convention, it was originally envisaged to place reliance on and cross-refer to the provisions of the NYC for recognition and enforcement purposes. Ultimately it was decided that ICSID would have its own internal review system rather than adopt Article V of the NYC. Nevertheless, consideration was given to the terms of the NYC including Articles III and IV in order to provide for enforcement “*along the lines of*” the NYC. As a result, 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.

¹⁶ The Court of Appeal applied the House of Lords decision in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (NO.3)* [2000] 1 AC 147 at pages 216-217; 267, 268 and the Supreme Court’s decision in *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at [59] and [128]-[129]. The Court of Appeal additionally endorsed the analysis of the High Court of Australia addressing the same issue between the same parties under s.10(2) of the Foreign States Immunities Act 1985 (Australia) in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (**Infrastructure Services (HCA)**) at [24]-[26].

- (b) In order for an agreement to be express, the words “submit” or “waiver” are not required if an expression of waiver is to be derived from the express terms used as a matter of necessary implication in elucidating the meaning of the express words used (at [92]-[93]).
16. Applying Article 31 of the VCLT to the ICSID Convention, the Court of Appeal further held that Article 54(1) satisfied the requirements of s.2 of the SIA because:
- (a) Each Contracting State had agreed with all other Contracting States to recognise and enforce ICSID Convention awards without qualification: i.e., the obligation extends to any award falling within the ICSID Convention, including awards against States (at [59] and [78]).
- (b) Each Contracting State had not only agreed to recognise and enforce ICSID Convention awards in its territory, but that awards falling within the ICSID Convention would be recognised and enforced in other Contracting States (at [79]).
- (c) The above straightforward reading was supported by the object and purpose of the ICSID Convention as specified in its preamble that mutual consent to arbitration constituted a binding agreement and that any arbitration award was to be complied with (at [80]).
17. The same approach was adopted and endorsed by the Court of Appeal in *General Dynamics United Kingdom Limited v The State of Libya* [2025] EWCA Civ 134 at [32]–[43], [48] and [58]–[64] in concluding that a contractual clause (providing that “[b]oth parties agree that the decision of the arbitral panel shall be final, binding and wholly enforceable”) satisfied s.13(3) of the SIA exception, which, like s.2 of the SIA, requires an express written agreement.

C2 ARTICLE III OF THE NYC SATISFIES S.2(2) OF THE SIA

C2.1 Principles of treaty interpretation

18. It is common ground that the principles of treaty interpretation contained in Articles 31 and 32 of the VCLT are to be applied to interpret Article III of the NYC to ascertain whether or not it constitutes an express agreement submitting to the court’s adjudicative jurisdiction for the purposes of s.2 of the SIA.
19. The rules of interpretation under the VCLT are well-established and should not be controversial. However, the Appellants elaborate upon them in detail given that they respectfully submit that the Judge fundamentally erred in his approach to interpretation of

Article III by (*inter alia*): (i) failing to apply the principles of interpretation specified by Article 31 of the VCLT (despite its mandatory application) and instead searching for the alleged intentions of the parties to the NYC; (ii) relying upon various materials and alleged broader commercial context that he considered to be relevant to that search for the intention of the parties, even though they either had no evidential role to play under the VCLT and/or did not detract from the interpretation arrived at pursuant to Article 31.

General Rule of Interpretation

20. Article 31 of the VCLT contains the general and primary rule of interpretation which is mandatorily to be applied (as designated by the use of the word “*shall*”) providing:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:...”

21. Article 31 thus mandatorily provides for a textual approach to interpretation meaning that the text must be presumed to be the authentic expression of the intention of the parties. Accordingly, interpretation is concerned with elucidating the meaning of the text not any alleged intention of the parties: *Dörr, Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary* (2nd Ed. 2018) (**Dörr**) at pages 579-580 (para 37) and page 628 (para 28); *GPF GP Sarl v Poland* [2018] 1 Lloyd’s Rep 410 (**GPF**) at [49]–[50] referring to the ICJ decision in *Libya v Chad (Territorial Dispute)* [1994] ICJ at [41].
22. Textual interpretation under Article 31 involves three separate principles that are combined into a unitary exercise. Those principles being: (i) interpretation in good faith; (ii) interpretation by reference to the ordinary meaning to be given to the words used; and (iii) determination of ordinary meaning not in the abstract but in the context of the treaty and in light of its object and purpose: *Dörr* at page 580 (para 38); *JTI Polska Sp Z.o.o. v Jakubowski* [2024] AC 621 at [26]-[27] and recently applied in *The Czech Republic v Diag Human SE and Josef Stava* [2025] EWCA Civ 588 at [153]-[154], [161]-[181].
23. Further: (i) as part of the context, the entire treaty, including its structure and scheme is to be taken into account: *Dörr* at pages 582-584 (paras 44-51); (ii) the object and purpose of the treaty is similarly to be ascertained from a reading of the whole treaty: *Dörr* at pages 584-587 (paras 52-58); (iii) good faith imports an element of reasonableness: *Dörr* at pages 587-588 (paras 59-60). See further *Gardiner, Treaty Interpretation* (2nd Ed. 2017) (**Gardiner**) at pages 168-171 (para 2.1).

24. Finally, interpretation under Article 31 does not involve a search for the intention of the parties, with such an attempt to search for a common intention being anathema to the approach to be adopted. Not only is it impermissible but is inexorably likely to be elusive because the Contracting States may well never have had a common intention only an agreement as to a form of words: *GPF* id. at [50].

Supplementary means of interpretation

25. Article 32 of the VCLT provides for discretionary recourse (as designated by the use of the word “*may*”) to supplementary means of interpretation in the circumstances specified:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

26. The distinction between primary and supplementary means of interpretation is based upon their proximity to the presumed intentions of the parties. Thus, the text is presumed to be the authentic expression of the parties’ intentions (not least because there may have been no discernible common intention save as to the text) whereas other material, such as preparatory works, are considered to be considerably less reliable and are usually seen as being incomplete and misleading and thereby by definition less authentic: *Dörr* at pages 617-618 (paras 2-3).
27. Supplementary means of interpretation under Article 32 are discretionary and only to be applied after the application of Article 31: *Dörr* at page 628 (para 29). The conditions for the exercise of discretion to apply supplementary means of interpretation are: (i) to confirm the meaning derived from applying Article 31; or (ii) to determine the meaning in circumstances where Article 31 leaves the meaning ambiguous or obscure or the outcome is manifestly absurd or unreasonable. *Dörr* at pages 628-632 (paras 30-39). Where there is no ambiguity, obscurity or absurdity, Article 32 can only be used to confirm the meaning derived from Article 31: *Infrastructure Services* at [82].
28. The categories of material to which the Court can have regard under Article 32 is not closed and includes *travaux* and other materials that bear upon the circumstances in which the treaty was concluded or otherwise assist in establishing the meaning of the treaty under consideration. This includes: (i) documents or facts sufficiently closely connected to the preparation of the treaty (*Dörr* at pages 620-627 (paras 10-27)); and (ii) commentaries

insofar as they are able to show clearly the collective intention of those who drew up the treaty (*Gardiner* at pages 401-404 (para 4.5.3)).

C2.2 Interpretation of Article III of the NYC

(a) Article III of the NYC

29. The Appellants will return to the scheme, object and purpose of the NYC below, but for present purposes the most immediately relevant provision of the NYC is Article III. For ease of reference, the Appellants adopt short-hand nomenclatures—indicated in bold below—for the different elements of Article III:

*“Each Contracting State shall recognize arbitral awards as binding and enforce them [**Opening Clause**] 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 [**Second Clause**]. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards [**Second Sentence**].”*

(b) Application of Article 31 of the VCLT to Article III of the NYC

i. Scheme, object and purpose of the NYC

30. It is submitted that the scheme, object and purpose of the NYC materially informs the textual interpretation of Article III.

31. **First**, as is well-established, the aim of the NYC was to establish a single, uniform set of rules governing the recognition and enforcement of international arbitration agreements and awards: *Kabab-Ji SAL (Lebanon) v Kout Food Group* [2022] 1 CLC 275 (Supreme Court) at [32]. As returned to below, this is to be borne in mind in considering whether (as the Judge held), “rules of procedure” includes those rules that are classified as a matter of English conflict of laws as procedural and therefore includes state immunity, even though some Contracting States do not classify state immunity as procedural.

32. **Second**, the NYC contains a pro-enforcement bias aimed at facilitating the enforcement of arbitral awards and thereby enhancing the effectiveness of the legal regime governing international commercial arbitration: *Rainstorm Pictures v Lombard-Knight* [2014] Bus LLR 1196 (CA) at [35]-[36].¹⁷

¹⁷ Referring (*inter alia*) to the *ICCA Guide to the International of the 1958 New York Convention: A Handbook for Judges* at page xi and *Van den Berg* at page 4.

33. This pro-enforcement bias of the NYC is achieved in a very specific way. In particular, as specified by Article IV, which cross-refers back to Article III (referring to the “*preceding article*”), recognition and enforcement by the award creditor is dependent only upon the production of the award and arbitration agreement (in suitably certified form), with recognition and enforcement expressly **not** dependent upon establishing the validity of the arbitration agreement, being a matter for the award debtor to raise. This is well-established: *Yukos v Dardana* [2002] CLC 1120 (CA) at [10]-[12]; *Rainstorm Pictures v Lombard-Knight* [2014] Bus LR 1196 (CA) at [27] referring to Van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation (Van den Berg)* at pages 250, 284 and 312. See to same effect *Born, International Commercial Arbitration, Vol. III* (3rd Ed. 2021) at 26.1[A][8] (pages [3708-3711]).
34. It is for the award debtor to raise any of the defences specified in Article V of the NYC and/or to apply to adjourn in favour of the courts of the seat pursuant to Article VI of the NYC. The defences that the award debtor can raise include issues of jurisdiction: Article V(1)(a) and V(1)(c), which address validity and scope of the arbitration agreement.
35. As developed below, it is inconsistent with the above scheme to interpret the NYC as seeking to incorporate and preserve state immunity rules, particularly the requirement (under s.9 of the SIA) that the award creditor must establish the validity of the arbitration agreement. Rather, the above scheme supports the opposite conclusion: that the NYC was not seeking to incorporate domestic state immunity rules.

ii. The meaning of the Opening Clause of Article III

36. By the terms of the Opening Clause of Article III, each Contracting State to the NYC has agreed with all other Contracting States as a matter of mandatory obligation (use of the word “shall”)¹⁸ to recognise and enforce any arbitral award falling within the scope of the NYC (as defined in Article 1(1)). Further, and as set out above, that consent is **expressly** not dependent upon the award creditor establishing a valid arbitration agreement, which is presumptively valid. It is submitted that two points follow.
37. **First**, India and the UK have agreed that courts of Contracting States, including the UK Courts, have adjudicative jurisdiction to recognise and enforce awards falling within the scope of the NYC. This necessarily requires and involves a submission to the jurisdiction in order for such recognition and enforcement to take place. In other words, the reasoning

¹⁸ See further *Van den Berg* at page 243.

in *Infrastructure Services* applies to the Opening Clause given that there is no material distinction in wording between the Opening Clause and Article 54(1) of the ICSID Convention (subject only to any derogation, limitation or dilution of the effect of the Opening Clause by reference to the Second Clause). This was also the interpretation of Article III adopted at first instance by the Federal Court of Australia in *CCDM Holdings, LLC v The Republic of India (No 3)* [2023] FCA 1266 at [43]. On appeal to the Full Federal Court, it endorsed the first instance decision as regards the interpretation of Article III (*The Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2 at [72]) but reversed the outcome on the (misconceived) basis that India’s commercial reservation applied (at [70]) (a point which is itself subject to appeal).

38. **Second**, to interpret the Second Clause of Article III as “preserving” domestic state immunity “according to its terms” (Judgment at [87] adopting the *obiter* observation of Lord Phillips *Infrastructure Services* at [102(i)]), whatever those terms might be, and therefore, in this jurisdiction, to require the establishment of the validity of the arbitration agreement (pursuant to s.9 of the SIA) is inconsistent with the scheme and terms of the NYC (as explained above). As has been established at Supreme Court level, “rules of procedure” cannot be interpreted to alter the substantive conditions imposed under the NYC: *IPCO (Nigeria) v NNPC* [2017] 1 WLR 970 at [41]-[43]. Yet, to treat domestic state immunity rules as being incorporated and preserved through the NYC would alter the scheme of the NYC and the balance it imposes as between award creditor and award debtor.
39. That is not to say that domestic law state immunity requirements could not impose specific requirements for a waiver of immunity including that the only route to waiver of immunity is by establishing the validity of the arbitration agreement. However, that is not a matter addressed or preserved within the scheme or scope of the NYC and more particularly Article III.

ii. The Opening Clause of Article III applies to the Awards

40. The scope of consent contained in the Opening Clause extends to the Awards in issue in these proceedings because they fulfil the requirements of the NYC. First, pursuant to Article I(1) of the NYC, the NYC applies without qualification in respect of: (i) any foreign-seated arbitral award (*vis-à-vis* the enforcing court); (ii) with respect to any difference (*i.e.* dispute) between persons “physical or legal” (*i.e.* any person or entity capable of suing or

being sued). The text of Article I(1) speaks for itself in terms of scope¹⁹ and this has been the repeated practice of the English and other courts.²⁰

41. Second, in *Republic of Ecuador v Occidental* [2006] QB 432 at [32]-[33], the Court of Appeal authoritatively determined that an arbitration agreement contained in a BIT satisfies the requirements of Article II of the NYC (of being an arbitration agreement in writing). It thereby satisfies the requirements for the application of the NYC under s.100(1) and (2) of the Arbitration Act 1996, which (i) defines a NYC award as one “made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention” and (ii) adopts the same meaning for the term “arbitration agreement” as is defined in Part 1 of the Act. The Judge made no determination on this point but expressed the view that he was persuaded by the Appellants’ position: Judgment at [93].
42. Given the terms of the Opening Clause of Article III and the scope of the NYC, it follows that the consent given therein necessarily and mandatorily applies to an award against a Contracting State. The Appellants accordingly and respectfully submit that Lord Phillips’ obiter observation in *Infrastructure Services* at [102(i)] that the consent in Article III may not be express or unmistakable should not be adopted because the consent extends to any and all awards fall within the scope of the NYC and necessarily includes awards against Contracting States themselves in their capacity as a party to an arbitration.

iii. The Second Clause of Article III

Summary of the Appellants’ case

43. The Second Clause of Article III does not derogate from or otherwise dilute or qualify the consent given by each Contracting State in the Opening Clause. Different language would have been used (rather than “in accordance” language) to achieve that function. Rather, the Second Clause provides for each Contracting State to introduce or apply specific rules of procedure for the purposes of recognition and enforcement of NYC awards.
44. In other words, the reference to “rules of procedure” in the Second Clause:

¹⁹ See further: *Fouchard, Gaillard, Goldman, On International Commercial Arbitration* (1999) (**Fouchard**), at page 966-967 (para 1668); *Van den Berg* at page 12.

²⁰ To the extent relevant, see further *Van den Berg* at pages 99 and 279; *CCDM Holdings, LLC & Ors v The Republic of India (No 3)* [2023] FCA 1266 at [86]–[93] (stating that there have been 30 occasions on which the NYC has been applied to investor state awards). See further Judgment at ¶ 93 (treating this as subsequent practice within the meaning of Article 31(3)(c) of the VCLT).

- (a) Is not open-ended but confined to the specific body of rules adopted for recognition and enforcement that the NYC denotes as “procedural rules” and that are functionally necessary to facilitate and address the process of recognition and enforcement. It therefore does not incorporate any and every rule of procedure of the relevant Contracting State, does not include state immunity rules, nor does it include all of the CPR Rules (such as the procedural powers to stay proceedings or to permit cross-claims or joinder, which do not fall within Article III). The Second Sentence of Article III confirms this to be the case.
- (b) Is not dependent upon whether a Contracting State classifies a particular rule as procedural or substantive which would lead to the non-uniform application of the NYC. Thus, state immunity rules that are classified as procedural in this jurisdiction but substantive in Australia (for example²¹) are not such rules. Rather, whether particular rules of procedure fall within Article III depends upon the function or purpose of the rules in question.
- (c) Does not in any event derogate from the consent given in the Opening Clause of Article III but is intended to facilitate the consent in the Opening Clause. In other words, irrespective of the scope of “rules of procedure” the question would remain whether the Opening Clause satisfies domestic state immunity requirements.

Textual analysis pursuant to Article 31 of the VCLT

- 45. **First**, the Second Clause refers “[t]he rules of procedure”, not “any” or “all” rules of procedure and therefore is referring to a class of rules.
- 46. **Second**, the Second Clause qualifies “rules of procedure” by identifying them to be “of the territory where the award is relied upon.” In other words, they are national law rules applied or introduced by the enforcing state. It is therefore respectfully submitted that Lord Justice Phillips’ obiter observation in *Infrastructure Services* at [102(i)], without hearing full argument (as recorded in terms), that Article III might be preserving state immunity as an international procedural bar (which the Judge in part adopted at [87]), is not correct.
- 47. **Third**, the subject matter of the “rules of procedure” referenced in the Second Clause is the recognition and enforcement addressed in the Opening Clause, linked by the term “in accordance with”. In “accordance with” means “pursuant to”. Article III is therefore directing each Contracting State to adopt or apply national rules of procedure that are

²¹ *CCDM Holdings, LLC & Ors v The Republic of India* (No 3) [2023] FCA 1266 at [94].

functionally required in the territory in question for the purposes of recognition and enforcement pursuant to the Opening Clause.

48. It follows that the relevant ambit of the rules of procedures that Contracting States may introduce and/or apply on the basis of Article III comprise:
- (a) Those rules required to enable an award creditor to obtain recognition and enforcement in accordance with Articles III and IV. In this jurisdiction, the relevant rules are to be found in CPR 62.17-CPR 62.19, which have been specifically enacted to give effect to the obligation contained in the Opening Clause of Article III in conjunction with Article IV;²² and
 - (b) Those rules required to regulate the process of dealing with an award debtor's challenge under Articles V and/or Article VI (for example CPR Rules relating to specific disclosure, summary judgment, witness evidence and so forth but not every CPR Rule as returned to below). However, it should be observed that even in the context of the CPR Rules, their application will be tailored to the purposes under the NYC, as the Supreme Court held in *Kabab-Ji SAL v Kout Food Group* [2022] 1 CLC 275 at [80]-[83].
49. This interpretation is supported by *Van den Berg* (at pages 236-240): (i) at pages 236-237 he states that there are three possibilities for regulating the procedure for enforcement of a NYC award (specific provisions, enforcement as for a foreign award in general, and enforcement as a domestic award); (ii) at page 239 he states that rules of procedure under Article III are confined to questions such as the form of the request and competent authority; (iii) at page 240 he states that Article III can be considered as the basis for the application of the law of procedure of the forum to those aspects **incidental** to enforcement that are not regulated by the NYC including attachment, discovery and the imposition of time limits.
50. Thus, "rules of procedure" does not extend to state immunity rules that do not serve such a NYC function.

²² CPR 62.17-CPR 62.19 are the equivalent to and similar in scope to the rules of procedure that have been implemented at CPR 62.21 for ICSID Awards as held in *Infrastructure Services* at [27]-[28]. The latter rules were implemented pursuant to Article 69 of the ICSID Convention which provides that each Contracting State shall take such legislative measures as may be necessary for making the provisions of the ICSID Convention effective: see *Schreuer* at page 1512 (para 143).

51. **Fourth**, irrespective of the scope of the “rules of procedure”, the Appellants submit that there is nothing in the language of Article III (whether the term “in accordance with” or anything else) which provides any textual indication that the consent to adjudicative jurisdiction contained in the Opening Clause is qualified by the “rules of procedure.” Different language would have been used to signal that the consent contained in the Opening Clause was qualified by and could not satisfy or otherwise derogate from particular matters (such as state immunity). This is why the Federal Court of Australia in *CCDM Holdings, LLC v The Republic of India (No 3)* [2023] FCA 1266 at [96] described the question of whether state immunity is a “rule of procedure” as an “arid point of taxonomy”. This is because the question of whether the Opening Clause satisfies domestic state immunity requirements still has to be answered.
52. **Fifth**, that the meaning of “rules of procedure” referenced in the Second Clause of Article III is to be classified according to function is reinforced by the fact that classification as a matter of domestic conflict of law rules promotes non-uniformity in the application of the NYC. State immunity, by way of example, is classified as substantive under Australian law²³ (unlike in this jurisdiction). This non-uniformity is inconsistent with the object and purpose of the NYC. This point reinforces the importance of interpreting “rules of procedure” on the basis that the rules in question are to serve the same function in each Contracting State and should be identifiable according to their function.
53. **Sixth**, there is an important limitation on what can be introduced by the enforcing State under “rules of procedure” in the Second Clause, referring to enforcement under “the conditions laid down in the following Articles”. The conditions are those specified in Articles IV, V and VI, providing for: (i) what documents are required in order to obtain recognition and enforcement (and the presumptive validity of the arbitration agreement); (ii) the grounds for refusing recognition and enforcement; and (iii) the circumstances in which an adjournment may be obtained and the circumstances in which security may be obtained. It is not permissible to introduce through “rules of procedure” rules that are incompatible with Articles IV-VI. See the Supreme Court decision in *IPCO (Nigeria) v NNPC* [2017] 1 WLR 970 at [40]-[43], where the Supreme Court held that Article V of the NYC was a **complete code** so far as the circumstances in which security could be granted, and therefore the CPR Rules on security were not to be applied through Article III because they were incompatible with Article V. Another illustration is that an award debtor cannot

²³ *CCDM Holdings, LLC & Ors v The Republic of India (No 3)* [2023] FCA 1266 at [94].

introduce into the enforcement process a CPR part 20 counterclaim: *Selevision Saudi Company v Bein Media Group LLC* [2021] EWHC 2802 at [29]. This would undermine the NYC and create a defence that does not exist under the NYC.

54. Thus, not all CPR Rules are incorporated within Article III and there are limits that need to be identified according to the purpose/function of the rules in question and whether they conflict with scheme of the NYC and the “conditions laid down in” Articles IV-VI of the NYC.
55. In similar vein, to treat a domestic state immunity rule that requires the award creditor to establish the validity of the arbitration agreement as being a matter incorporated within the NYC is inconsistent with the express terms of Articles III and IV of the NYC. Rather, as set out above, this point supports the Appellants’ interpretation that state immunity was not being addressed or preserved in Article III.
56. Further support for the above analysis and the fact that the rules of procedure are necessarily limited by reference to the “conditions laid down in” Articles IV-VI of the NYC is to be found in the Court of Appeal decision in *Gater Assets v Naftogaz* [2007] 2 CLC 567 (CA), which now needs to be considered in light of the Supreme Court decision in *IPCO (Nigeria) v NNPC* [2017] 1 WLR 970. The issue in *Gater* was whether an award debtor could apply for security for costs under CPR Part 25 in the context of an application for enforcement under the NYC. The application was rejected on the facts but there was an issue as to whether there was power to do so in respect of which the Court expressed tentative views without hearing full argument (as recorded in terms):
 - (a) Rix LJ expressed his “present view” that there was power to order security because of the fact that an arbitration claim seeking recognition and enforcement becomes assimilated to any Part 8 CPR claim. *Id.* at [75]. At the same time, he recognised that to impose such an order would be to run counter to the essential basis of the NYC and derogate from Article III’s requirement that enforcement be in accordance with Articles IV, V and VI: *id.* at [81].
 - (b) Moses LJ expressed the view that there was no such power (*id.* at [95]) for precisely the reasons given by Rix LJ at [81]: being that it would run counter to the scheme of the NYC.
57. Indeed, it is submitted that the analysis of Moses LJ must now be viewed as correct in light of the Supreme Court’s decision in *IPCO*. See further *Mustill & Boyd, Commercial and Investor State Arbitration* (3rd Ed 2024) at pages 709-710 (paras 17.276-17.277), which expresses that

view. It is respectfully submitted that the contrary view of Burton J in *Diag Human SE v Czech Republic* [2013] EWHC 3190 (Comm), pre *IPCO*, that there is power to award security for costs pursuant to Article III, and without receiving full argument on the point, is incorrect.²⁴

58. In conclusion, it is submitted that for the reasons given above, textual interpretation pursuant to Article 31 of the VCLT leaves no room for doubt that Article III was not seeking to preserve domestic state immunity rules according to their terms. Consequently, the consent given in the Opening Clause of Article III satisfies the requirements of s.2 of the SIA.

(c) Application of Article 32 of the VCLT to Article III of the NYC

59. There is nothing absurd or unreasonable with the above textual interpretation. On the contrary (and as Lord Justice Phillips recognised obiter in *Infrastructure Services* at [102(iii)]), if Article III contains a submission to jurisdiction by Contracting States, they can still raise the validity of the arbitration agreement as a defence under Article V of the NYC. In those circumstances, the only discretionary role of Article 32 of the VCLT is to confirm the meaning identified after applying Article 31.
60. The negotiating history does not provide any basis for departing from textual interpretation of Article III because state immunity was **not** discussed, contrary to the position adopted by the Judge (returned to below). Most of the relevant negotiating history to Article III is identified in *Van den Berg* at pages 234-236 and summarised there:
- (a) E/Conf.26/2 (6 March 1958), where the Secretary General of ECOSOC²⁵ in response to proposals of various Contracting States expressed the view that: (i) it was not practical to spell out in the text of the NYC the applicable enforcement procedures; (ii) a reference to a summary enforcement procedure might not be given identical meaning in countries with different procedural systems; and (iii) the procedure applicable to domestic awards might have elements that were time-consuming.

²⁴ The Respondent relied upon Burton J's judgment at first instance.

²⁵ A Committee established by the UN Economic and Social Council.

- (b) E/Conf.26/L.11 (23 May 1958), where the UK proposed that the rules of procedure should not be more complicated than those used for enforcement of any other award.
 - (c) E/Conf.26/SR.10 (12 Sept 1958), where Belgium proposed identical procedures for NYC and domestic awards (which was rejected).
 - (d) Summary Analysis of Record of the negotiations of the NYC, GW Haight at pages 29-32, referring to the above points and reinforcing the complete absence of any discussion regarding state immunity.
61. In other words, there is no basis, with respect, on which the Judge was able to conclude that it was “**clear**” from the negotiating history of the NYC that the delegates did not intend to preclude an immunity-based argument (Judgment at para [77]). This conclusion was not based on anything to be gleaned from the limited negotiating history of Article III (set out above) but based on the views expressed by *Andrea Bjorklund*, (2010) 21 *American Review of International Arbitration* 211 (*Bjorklund*) at pages 218-219. However, this assertion is based on no evidence, rather: (i) a reference to *Van den Berg* at pages 277-282, which makes no reference to the negotiating history (because that is already set out at pages 234-236) and simply notes that immunity from suit has been raised with varying degrees of success in cases under the NYC (Professor Van den Berg expresses no view on whether Article III is capable of satisfying the requirements of a domestic state immunity exception because that would have fallen outside of his expertise and the scope of his book); (ii) *Hazel Fox, State Immunity and the New York Convention* (Gaillard & Domenico Di Pietro 2008) at pages 829-832, which makes no reference to the negotiating history of the NYC and simply states that state immunity has not been the topic of discussion in the context of international commercial arbitration. Further at page 833, Lady Fox recognizes that a State acts in two capacities: one being as a party to an arbitration agreement, and the second by undertaking treaty obligations that its national courts will give recognition and enforcement to awards rendered in conformity with the NYC.
62. Indeed, nothing the Appellants assert is inconsistent with a State being able to raise an immunity plea, the question being only whether its treaty consent satisfies the exception to state immunity contained in the domestic legislation of this jurisdiction.
63. The only generic reference in the *travaux* that the Judge relied upon (Judgment at [76]) had nothing to do with Article III or state immunity. It was contained in the Report of ECOSOC E/2704/E/AC.42/4/Rev.1 (28 March 1955, three years before the NYC was

agreed), which stated at page 5 that it would be desirable to establish a new convention going further than the Geneva Convention of 1927 (supplanted by the NYC) in facilitating the enforcement of foreign arbitral awards at the same time as maintaining generally recognised principles of justice and respect the sovereign rights of States. There is no basis to conclude that this had anything to do with state immunity. It certainly provides no basis to depart from the text of Article III agreed three years later. Indeed, the draft text attached to that 1955 Report did not even have an equivalent of Article III.

(d) Academic views on the interpretation of Article III

64. The weight, if any, to be given to academic views on the interpretation of Article III will depend upon the extent to which they are views based on an interpretative analysis justified by Article 31 of the VCLT, as opposed to views expressed from a professed policy or other perspective. With respect, the Judge erred once again in his analysis of the academic views on the subject and the value to be ascribed to various assertions made by some academics (Judgment at [70]) with numerous academics taking a different view.
65. *Van den Berg* at pages 236-240, as analysed earlier, describes the rules of procedure as those incidental to recognition and enforcement.
66. *Fouchard, Gaillard & Goldman, International Commercial Arbitration* (1999) at page 967 (para 1671) states that the NYC does not determine the rules of jurisdiction and procedure under which an award must be recognized or enforced and identifies Article 1498 et seq. of the Civil Code as being the rules of procedure applied in France. Those provisions contain rules concerning the process of enforcement of an award: *Id.* at page 889 (para 1566).²⁶
67. *Born, International Commercial Arbitration, Vol. III* (3rd Ed. 2021) at page 3717 states that the rules of procedure in Article III are concerned only with purely procedural aspects of recognition proceedings (e.g. filing fees, time periods, legal representation etc).
68. *Scherer, New York Convention, Article III, Article by Article Commentary* (2nd Ed. 2019), pp 199-212 states that the rules of procedure “is generally construed in a narrow sense i.e., the *lex fori* is considered to govern only the practical procedural mechanics of recognition and enforcement” comprising: (i) the type of proceedings and manner in which they are conducted; (ii) the limitation period to bringing an action for enforcement; (iii) the authority that has jurisdiction to hear a claim; (iv) the provisional enforceability of a

²⁶ Articles 1498-1500 are the relevant provisions of the French Civil Code.

judgment granting recognition and appeals. The author opines that other issues, such as whether courts may award post-award interest, fall outside of Article III.

69. *ICCA's Guide to the Interpretation of the NYC* (2nd Ed. 2024) at page 68 states that the “rules of procedure” are limited to matters such as the form of the request and competent authority.
70. *The UNCITRAL Guide to the NYC* (2016) at page 85 (para 23) expresses the view that rules of procedure under Article III are to be interpreted narrowly, referring by way of example to the [Italian] Court of Cassation decision in *Privilegiata Fabbrica Maraschino* (15 January 1992) and the Ordinary Court of Naples in *Societa La Naviera Grancebaco* (1976) and that accordingly *lis pendens* principles from the Italian Code could not be applied by virtue of Article III.
71. As to the academic views relied upon by the Judge (Judgment at [70]), it is submitted that they do not provide any cogent basis for departing from the textual analysis set out above because they provide no textual justification for their position **to the extent** that they are dealing with adjudicative as opposed to execution jurisdiction (see below).
72. *Crawford, A Foreign State Immunities Act for Australia* (1980) 8 AYBIL 71 at page 102 footnote 42 expresses the view that sovereign immunity is one of the rules of procedure under Article III conditioning local enforcement. Professor Crawford goes on to say: “unless a relevant exception applied”, a clarification that was not addressed by the Judge. The context in which Professor Crawford makes this point appears to be that it cannot be right that the NYC provides for a waiver of immunity with respect to **execution** because he makes the point that the ICSID Convention (at Article 55) deliberately did not deal with this. Whether or not that is correct, it is not a question that arose for determination by the Judge (Judgment at [79]); it is also not germane to deciding the question of **adjudicative immunity**.
73. *Bermann, Chapter 4, Procedures for the Enforcement of New York Convention Awards* (2021) at page 74 expresses the view that although opinions differ, the prevailing view is that States do not by ratifying the NYC waive their sovereign immunity from suit. For this alleged prevailing view he cites one German Federal Court decision of 2006.²⁷ However, with respect, Professor Bermann has misunderstood the case in question: it was concerned with **execution** against assets, with the Federal Court holding that there was no waiver of

²⁷ German Federal Court of Justice, Schieds VZ 2006.

execution through the consent to recognition and enforcement under the NYC, referring to Article 55 of the ICSID Convention (concerned with execution) in further support of this. That is irrelevant to the point in issue. Further, at page 56, Professor Bermann recognizes that an alternative interpretation is that it is confined to the manner in which such actions are to proceed. His broader view is based on (i) the contention that anything that does not go to the merits of the enforcement action can fall within Article III and (ii) a binary distinction between “substance” and “procedure”. This approach is problematic: on Professor Bermann’s analysis, questions of *forum non conveniens* and set-off potentially fall within Article III of the NYC, which it is submitted is incompatible with the NYC for the reasons summarized above and gives rise to non-uniform application of the NYC.

74. *Andrea Bjorklund* at pages 218-219. This was addressed above in the context of the negotiating history of Article III. As set out there, Professor Bjorklund’s views are unsupported by the alleged negotiating history to which he refers. Further, she does not assert that the Opening Clause is incapable of satisfying the state immunity rules in a particular jurisdiction.
75. *Andreas Borner, Article III in Herbert Kronke et al (eds)* (Kluwer Law International, 2010) at page 127 states that domestic law governs whether enforcement proceedings can be commenced against a foreign state. This does not address the question of whether the Opening Clause is capable of satisfying the state immunity rules in a particular jurisdiction.
76. *Olmedo, Chapter 12: (Kluwer Law International, 2022)* at page 341 expresses the view that Article III embraces rules of state immunity based on the views of *Borner* and *Bjorklund* but again does not address the question of whether the Opening Clause is capable of satisfying the state immunity rules in a particular jurisdiction.

C2.3 Other matters relied upon by the Judge on the interpretation of Article III

77. The Appellants address the other remaining matters upon which the Judge relied in support of his interpretation of Article III, and in respect of which, it is submitted respectfully that the Judge fell into error.

(i) The reliance placed on US state immunity law: 28 USC § 1605(a)(1) and (6)

78. At [55]-[57] of the Judgment, the Judge placed reliance upon how state immunity is applied before the US Courts pursuant to 28 USC § 1605(a)(1) (waiver exception) and (6) (arbitration exception) and the fact that pursuant to those provisions US state immunity law requires the establishment of a valid arbitration agreement. The Judge viewed that as

being in practice the same way in which s.2 and s.9 of the SIA operate. This analogy was not correct. Section 2 and s.9 of the SIA are independent exceptions to state immunity that are not linked under the terms of the SIA; this was held in *Infrastructure Services* at [55], which the Judge did not refer to. By contrast, 28 USC § 1605(a)(1) and (6) are worded very differently to the SIA and are structurally different. In particular: (i) 28 USC § 1605(a)(1) provides for waiver of state immunity expressly or by implication; (ii) 28 USC § 1605(a)(6)(B) provides that in a case of an arbitration award governed by a treaty, then waiver of immunity is to be established through the establishment of the validity of the arbitration agreement; (iii) 28 USC § 1605(a)(6) provides that 28 USC § 1605(a)(1) (express or implied waiver) does not apply unless that waiver is otherwise established i.e. outside of the treaty (and thus making the two exceptions linked according to their terms).

79. In addition, the Appellants submit that the independence of the exceptions to state immunity contained in s.2 and s.9 of the SIA is reinforced by established principles of statutory construction (*Bennion, Bailey and Norbury on Statutory Interpretation*, 8th Ed. (2020) at [13.4]–[13.5]) of avoiding unjustifiable inconvenience and delay to legal proceedings or anomalous outcomes. Indeed, there are strong reasons of policy why, in the context of the NYC, s.2 should be the correct route to waiver of immunity. Jurisdictional points can be taken under the NYC and the NYC expressly caters for adjourning enforcement pending a decision of the courts of the seat (including on terms of security). There is, therefore, little sense in the Court having to repeat that exercise in the SIA phase by having to: (i) determine the validity of the arbitration agreement; and (ii) establish case management principles to equivalent effect to those under the NYC in order to manage the interrelationship between the courts of the seat and the enforcing court (but limited to jurisdiction thereby causing fragmentation). All of this adds a further layer of delay to the process of recognition and enforcement, as illustrated by the facts of this case, and also apparently does not cater for security as the price of any adjournment. See further *Hulley Enterprises v Russian Federation* [2021] 1 WLR 3429; *DTEK v Russian Federation* [2025] EWHC 1060 (Comm). It also adds a layer of complexity if further jurisdictional points are taken at the NYC stage that were not taken at the SIA stage leading to questions of abuse of process: *PAO Tatneft v Ukraine* [2021] 1 WLR 1123.
80. This supports the position of s.9 of the SIA being a backstop to address situations where the relevant contracting state is not party to the NYC (such as Libya) and therefore Article V of the NYC is not available. In 1978, at the time of enacting the SIA, there were less

than 60 parties to the NYC and therefore s.9 had at the time greater significance than it does now (when there are 172 parties).

(ii) The reliance placed Article 55 of the ICSID Convention

81. Article 55 of the ICSID Convention provides:

“Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”

82. The Judge relied upon Article 55 and the absence of an equivalent provision under the NYC as evidence that, unlike under the ICSID Convention, there was no intention to exclude immunity-based arguments under the NYC (Judgment at [78]). Respectfully, this provides no basis for derogating for textual interpretation under Article 31 of the VCLT and is not relevant evidence of intention under the NYC for the purposes of Article 32 of the VCLT.

83. Further, as *Schreuer* explains at pages 1517–1522 and in particular paras 10, 12 (and not addressed by the Judge), “the Convention does not provide for waiver of immunity, it does not grant or confirm immunity either. The statement in Article 55 is purely negative: Article 54 is not to be read as affecting the law on immunity from execution.” The negative effect of Article 55 is that even if the terms of Article 54 of the ICSID Convention, as a matter of domestic law, would otherwise be treated as waiving immunity from execution, it should not be so construed. If Article 55 were to be treated as relevant to the interpretation of Article 54 and whether it constituted express consent to adjudicative jurisdiction for the purposes of s.2 of the SIA, then it would in substance mean that “express consent” requires express reference to immunity. It would therefore reintroduce a requirement that language such as submission or waiver is required contrary to established principles.

(iii) The reliance placed on an alleged broader commercial context

84. In the Judgment at [83]-[85] the Judge referred to an alleged broader commercial context (not put to the parties) from which he inferred that where a party seeks a waiver of immunity from a state actor in their commercial dealings that is a matter of contractual bargaining power and it is not obvious why consent under the NYC should be treated as excluding immunity based arguments. This was not admissible context under Article 31 of the VCLT.

D INDIA’S COMMERCIAL RESERVATION UNDER THE NYC

85. Finally, the Appellants also briefly address a last-minute argument raised by the Respondent for the first time in its Skeleton Argument for the hearing before the Judge concerning the effect of India’s commercial reservation on its consent. The point was not raised in the context of the 1-day hearing before Sir Nigel Teare leading to his direction for the determination of the s.2 SIA Question on the basis that it was a pure point of law. The Judge also did not determine the point. The Appellants reserve the right to apply to respond further on this point given that it was not raised in advance of and did not form part of the s.2 SIA Question directed, and it remains for India to explain its case.
86. In sum, India argued before the Judge that India’s consent to English Court adjudicative jurisdiction under Article III was qualified by its commercial reservation pursuant to Article I(3) of the NYC. The pertinent part of Article I(3) of the NYC provides: “[A Contracting State] may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.” India has adopted that reservation, the UK has not.
87. This commercial reservation, which applies to the recognition and enforcement of awards in India (i.e., not extra-territorially) has no bearing on India’s consent to English adjudicative jurisdiction as a matter of basic textual interpretation of the NYC.
88. **First**, by its terms the reservation is **not** reciprocal in nature but unilateral. By Article I(3), a Contracting State can reserve the applicability of the NYC to the enforcement of awards in its **own** territory that, as a matter of its *own* national law, it considers to be commercial. See further *Van den Berg* at pp. 51–54. It therefore does not apply in this jurisdiction.
89. **Second**, a non-reciprocal reservation cannot somehow be converted into a reciprocal reservation pursuant to Article 21 of the VCLT as a matter of established principles of international law. See *United Nations, Report of International Law Commission*, 63rd Session at pp. 464–467, [4.2.5]; *Dorr*, Chapter 21 at pp. 345–346, [21]–[22].
90. **Third**, in any event, India did not foreshadow the point and did not apply to adduce Indian law on this issue. By default of any pleading of Indian law, English law applies to the meaning of the commercial reservation: *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995

at headnote (2) and [115]-[116].²⁸ There is no case to answer under English law (and none was advanced) which would treat an investment treaty award as falling within a commercial reservation. See further Douglas, *The International Law of Investment Claims* (2009) at page 118, [229], [230] (more generally, at pages 115–120); pages 116–118, [228]–[229]; *Republic of Ecuador v Occidental* [2006] QB 432 at [32]–[33] and [35].

91. **Fourth**, the BIT contains a most favoured nation (**MFN**) clause at Article 11 that permits the investor to take advantage of **any** international law obligation undertaken by India.²⁹ India has entered into a number of bilateral investment treaties which provide that a claim by an investor under the treaty arises under a commercial relationship for the purposes of Article I of the NYC, including with Belarus (Article 27.5); the Kyrgyz Republic (Article 27.5) and the UAE (Article 28.5), which the Appellants can rely upon.
92. India’s contrary position is not based on textual interpretation of the NYC but the Australian decision in *The Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2, which held that India’s commercial reservation applied in Australia and that as a matter of Australian law, investment treaty awards were not commercial. This decision is the subject of an appeal and is, with respect, legally erroneous. Indeed, at first instance India accepted that its commercial reservation did not apply in Australia.³⁰

E CONCLUSION

93. For the above reasons, the Court is requested to grant the appeal and to thereby answer the s.2 SIA Question in the affirmative.

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Dated 5 June 2025

²⁸ The Judge wrongly considered that the presumption of similarity was in issue though the Appellants’ submitted position was that the default rule applied. Judgment at [96].

²⁹ See *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 at [102]; *National Grid v Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 at [93].

³⁰ Hearing Transcript, Federal Court of Australia (Day 4), 28 September 2023, page 244; Hearing Transcript, Full Federal Court of Australia (Day 1), 23 May 2024, page 22.