

**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)**

BETWEEN:

- (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

**RESPONDENT'S SUPPLEMENTARY SKELETON
FOR APPEAL**

14 November 2025

Without Prejudice to State Immunity

(I) INTRODUCTION

1. The purpose of this Supplementary Skeleton is to respond to the Appellants' Supplementary Skeleton dated 8 August 2025 ("ASSA") (for which the Court gave permission on 20 August 2025), only in relation to the issue of s.23(3) of the State Immunity Act 1978 (the "SIA").

(II) SECTION 23(3) SIA

2. India argues that it has not submitted by "*prior written agreement*" under the exception to immunity in s.2(2) SIA because, *inter alia*, the alleged agreement in this case could only have been entered before the SIA came into force; and s.23(3)(a) SIA provides expressly that s.2(2) does not apply to any such agreement (see Respondent's Skeleton Argument for Appeal ("RSA")/§§65-74; Respondent's Notice ("RN")/Section 6, §§6-8; Sections 4, 5 and 8). India's application for permission to cross-appeal on this point was granted on 7 August 2025.
3. The Appellants make three points in response.

(1) Application of s.23(3) SIA to Treaties

4. The Appellants argue that s.23(3) SIA does not apply to treaties (ASSA/§§5(a), 6-22). That is incorrect. The relevant provisions of the SIA are as follows:
 - (1) Section 2(2), which concerns an exception to the general rule of immunity from jurisdiction under s.1 SIA, where the State agrees to submit, provides that: "*A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; . . .*"
 - (2) Section 13(3), which concerns an exception to the procedural privileges of a State under s.13, where the State has provided "*written consent*", provides that any such consent "*may be contained in a prior agreement*".
 - (3) Section 17(2), which is headed "Interpretation of Part I" provides that: "*In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.*"
 - (4) Section 23(3), which provides that: "*. . . Parts I and II do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular- (a) sections 2(2) and 13(3) do not apply to any prior agreement, . . . entered into before that date.*"
5. Thus:
 - (1) An "agreement" to submit within s.2(2) (or written consent under s.13(3)) can be by treaty, convention or other international agreement;
 - (2) The words "*any prior agreement*" in s.23(3)(a) mean any prior agreement that could otherwise be a submission within s.2(2) SIA (or that could otherwise be written consent under s.13(3)); therefore
 - (3) The words "*any prior agreement*" in s.23(3)(a) include a prior agreement by treaty, convention or other

international agreement.

6. Accordingly, as academic commentators have recognised, if a party alleges a prior written agreement under s.2(2) by treaty, then by reason of s.23(3)(a), “*the treaty etc must have been entered into on or after 22 November 1978*” (Dickinson,¹ Lindsay R and Loonam J, *State Immunity, Selected Materials and Commentary*, (2004), (“**Dickinson**”), §§4.019, 4.020, emphasis added).
7. The Appellants’ arguments to the contrary should be rejected.
8. First, they argue that s.23 “*is concerned with a sub-set of agreements falling with the definition applicable to ss.2(2) and 13(3) and does not extend to treaties*”, relying on the words “*In sections 2(2) and 13(3) above . . .*” in s.17(2) (ASSA/§§6-7). However, the effect of s.17(2) is that an “agreement” within s.2(2) includes an agreement by treaty, and therefore, that an “agreement” within s.23(3)(a) must also include an agreement by treaty. If s.23 was limited to “*a sub-set of agreements*”, then it would have said so.
9. Secondly, the Appellants point to other alleged “features” of the drafting of s.23(3) (ASSA/§§9-13):
 - (1) They say that “*s.23(3)(a) uses the word “agreement” independently of ss.2(2) and 13(2)*” (ASSA/§10). However, in s.23(3)(a) the word “agreement” does not appear “independently”; it appears in the phrase “*sections 2(2) and 13(3) do not apply to any prior agreement . . .*” In that phrase, “agreement” means any agreement that could otherwise have been a prior agreement within s.2(2) or s.13(3).
 - (2) They rely on the words “*entered into*” in s.23(3)(a) and argue that it is “*a strained and artificial construction*” to apply those words to a treaty, as opposed to a contract (ASSA/§§11-12). However, there is nothing “*strained or artificial*” about saying that a State “*enters into*” a treaty, see for example: Article VII(1) of the New York Convention;² Article 102(1) of the United Nations Charter;³ and s.1(2) of the European Communities Act 1972 (now repealed).⁴ Further, the omission of the words “*entered into*” from s.2(2) and s.13(3) is of no significance, as those additional words are unnecessary in those provisions.⁵

¹ Professor Andrew Dickinson is a Professor of Law at the University of Oxford.

² Stating that: “*The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States . . .*” (emphasis added).

³ Referring to: “*Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter . . .*” (emphasis added).

⁴ Referring to: “. . . any other treaty entered into by any of the Communities, with or without any of the member States, or entered into as a treaty ancillary to any of the Treaties, by the United Kingdom” (emphasis added).

⁵ Furthermore, contrary to ASSA/§11, *Al-Masarir v Kingdom of Saudi Arabia* does not establish any presumption that an omission such as this must be presumed to be “deliberate”.

(3) They rely on the words “. . . *Parts I and II do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act*” in the chapeau of s.23(3) and the judgment in *Infrastructure Services* as to the meaning of the word “matters” (ASSA/§13). However, this argument conflates two issues, namely the application of s.23(3)(a) on one hand, and the meaning of the word “matters” in the chapeau of s.23(3) on the other (see §§15-20 below). Furthermore, *Infrastructure Services* did not concern the application of s.23(3)(a) (see §13 below).

10. Thirdly, they argue that ss.16(1) and 16(3) SIA exclude from the application of the SIA certain enactments which pre-date the entry into the force of the SIA (namely, the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968, and the Nuclear Installations Act 1965), such that if “s.23 had the effect of disapplying the SIA in respect of such enactments, then s.16 would have been unnecessary”, contrary to the presumption that “the legislature does nothing in vain” (ASSA/§§14-15). However:

(1) India’s case is that, by reason of s.23(3)(a) SIA, the exception to immunity in s.2(2) does not apply to any “prior agreement” (including an agreement by treaty) that was entered before the SIA came into force. It does not follow automatically from that case that s.23 has “the effect of disapplying the SIA” in respect of the enactments identified in ss.16(1) and (3) SIA.

(2) In any event, ss.16(1) and (3) serve the important function of clarifying expressly the relationship between the SIA and other immunity regimes in the Diplomatic Privileges Act 1964 and the Consular Relations Act 1964; and between the SIA and proceedings to which s.17(6) of the Nuclear Installations Act 1965 applies.

11. Fourthly, they argue that on India’s case, “the application of ss.2(2) and 13(3) of the SIA would be dependent upon when a particular Contracting State ratifies or accedes to the treaty in question”, resulting in the “non-uniform application of the SIA” (ASSA/§16). However, there is nothing surprising in the result that the application of ss.2(2) and 13(3) of the SIA depends upon whether the State entered the relevant agreement (including any agreement by treaty) before or after the SIA came into force.

12. Fifthly, they rely on the rule in *Pepper v Hart* to argue that in the debates that led to s.23(3), the concern was to exclude from the SIA “contracts negotiated between States and private law parties entered into prior to the date of the SIA”, and that international treaties “did not fall within the expressed concern” (ASSA/§§17-18). However:

(1) In general, it will be “very rare” that the application of *Pepper v Hart*, has the result of altering the ordinary meaning of a statute. The rule gives rise to particular difficulties, given *inter alia* that “Parliament as an abstraction cannot have a state of mind like an individual” (*Flora v Wakom (Heathrow) Ltd* [2007] 1 WLR 482, §§12-13).

(2) Parliamentary material is admissible to construe a statute only where: (a) the provision is ambiguous or obscure, or the literal meaning would lead to absurdity; (b) the statement as to the meaning of the provision

was made by “*the Minister or other promoter of the Bill*”; and (c) the statement “*clearly*” discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words (*ibid*) (*Pepper v Hart* [1993] AC 593, 634C-E).

- (3) In this case, the construction that the words “*any prior agreement*” in s.23(3)(a) include a prior agreement by treaty, convention or other international agreement is not ambiguous (in the sense that the provision is genuinely open to two possible constructions: see *Bennion, Bailey and Norbury on Statutory Interpretation* (“*Bennion*”), §24.11) or obscure, and does not lead to absurdity. Accordingly, parliamentary material is inadmissible.
- (4) Further, the Appellants have not identified any statement by “*the Minister or other promoter of the Bill.*” Neither the Appellants’ reference to Baroness Elles,⁶ nor their reference to the Solicitor-General (ASSA/§§17-18) is said to, or appear to, meet that criterion.
- (5) In any event, the debates do not show (“*clearly*”, or at all) that the concerns underlying s.23(3) related only to contracts between States and private parties, and not to agreements by treaty. The concern that was raised by Baroness Elles and the Solicitor-General was about retrospectivity in general; neither of them showed any intention (let alone a clear intention) to exclude agreements by treaty from the scope of s.23(3)(a) (see Baroness Elles at Hansard, HL Deb 28 June 1978 vol 394, cc 322-324; and the Solicitor General at HC Deb 5 July 1978 vol 953, cc 618).

13. Sixthly, they argue that the Court of Appeal in *Infrastructure Services* “*held*” that “*S.23(3)(a) SIA does not apply to treaties*” (ASSA/§§5(a), 13, 21). However:

- (1) In *Infrastructure*, the application of s.23(3)(a) did not arise and was not determined. Instead, the question was whether, as argued by the investors (not the State), and regardless of whether there was an “*agreement to submit*”, Part I of the SIA (including the general rule of immunity in s.1 SIA) could be disapplied entirely on the basis that the enforcement proceedings were “*in respect of*” the ICSID Convention, which was a “*matter*” for the purpose of the chapeau in s.23 SIA.⁷ In that context, the Court held that “*the phrase “matters” cannot be stretched to refer to the Convention . . .*”, and that if the intention had been to exclude a particular treaty from the SIA, then that “*would have been done expressly in section 16*” (*Infrastructure*, §§11, 40).
- (2) The Appellants assert that the point in sub-paragraph (1) above is “*a distinction without a difference*” (ASSA/§21). The Appellants do not explain this assertion, and fail to recognise that in *Infrastructure* the question of s.23(3)(a) simply was not before the Court as it is in this case.

⁶ Baroness Elles was a member of the (Conservative) Opposition in the House of Lords: see

https://en.wikipedia.org/wiki/Diana_Elles,_Baroness_Elles.

⁷ See also RSA/§72(1)(a).

14. Seventhly, they say that the views expressed in Dickinson (see §6 above) were reached without any analysis and therefore do “*not advance India’s position*” (ASSA/§22). However, the views in Dickinson were based on ss.2(2), 17(2) and 23(3)(a) of the SIA (see Dickinson, §§4-019 to 4-020; and fns. 151 and 164). It may be inferred that the authors of Dickinson considered the position to be so obvious in the light of those provisions that no further analysis was required.

(2) The Relevance of “Matters” in s.23(3)

15. The Appellants argue in the alternative that if “*treaties (and therefore the NYC) fall within the scope of s.23(3)(a)*”, then “*for the purposes of s.23(3)(a) the relevant “matter” is the rendering of the Awards*”, which was “*many decades post the enactment of the SIA*” (ASSA/§23).

16. However, this argument conflates s.23(3)(a), which does not make any reference to the concept of “Matters”, with the chapeau of s.23(3).

17. If treaties such as the NYC are within s.23(3)(a), then it follows that the alleged agreement by India to submit to the jurisdiction of the English courts by ratification of the NYC could only be a “*prior agreement*” that was entered into before the date of the coming into force of the SIA for the purposes of s.23(3)(a). Accordingly, the exception to immunity in s.2(2) SIA cannot apply and the position is then governed by the general rule of immunity in s.1 SIA. That analysis is supported by the following matters:

(1) The language of s.23(3)(a) is straightforward: “*(a) sections 2(2) and 13(3) do not apply to any prior agreement, . . . entered into before [the date of the coming into force of the SIA]*”. S.23(3)(a) disapplies the exception to immunity in s.2(2), but says nothing about disapplying the general rule of immunity in s.1 SIA.

(2) Further, as a matter of statutory construction, where an alleged “*prior agreement*” to submit under s.2(2) SIA was entered into before the date of coming into force of the SIA, the specific words of s.23(3)(a) govern the position and override the general words of the chapeau of s.23(3) (see *Bennion*, Section 21.4; *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605, 627B-H, explaining the rule as representing “*simple common sense and ordinary usage*”; *Secretary of State for the Home Department v JM (Zimbabwe)* [2018] 1 W.L.R. 2329, §§25, 73-74, applying the rule in the context of the words “*in particular*”). The Appellants’ approach would effectively render s.23(3)(a) otiose.

(3) Furthermore, Part I of the SIA “*is a complete code*” (see *Benkharbouche*, §39; RSA/§70).

(4) That position is also consistent with the common law, which pre-dated the SIA, under which a prior agreement to waive immunity was ineffective (see further §§25-26 below).

18. Alternatively, assuming that the alleged agreement by India to submit by ratification of the NYC is a “*prior agreement*” that was entered before the date of coming into force of the SIA for the purposes of s.23(3)(a), then:

(1) The exception to immunity in s.2(2) SIA cannot apply, and there is a second, separate question as to “*whether in the circumstances section 23 operates to exclude also the operation of section 1 of the Act.*” That depends upon whether the proceedings are “*in respect of matters that occurred*” before the date of coming in the force of the SIA for the purposes of the chapeau to s.23(3) (see *Sengupta v Republic of India* [1983] I.C.R. 221, 224).⁸

(2) On the Appellants’ case, for the purposes of the chapeau to s.23(3), the proceedings are “*in respect of*” the Awards, which were made well after the SIA came into force (ASSA/§§23-26). Accordingly, assuming the Appellants’ own case, the chapeau of s.23(3) cannot exclude the general rule of immunity in s.1 SIA, which continues to apply.

19. The Appellants’ novel argument that ratification of the NYC is a “*standing consent*” to recognition and enforcement that is “*analogous to the standing consent in an investment treaty to arbitrate a class of potential disputes*” (see ASSA/§§24-27) does not assist them (see RSA/§72(2)). In any event, this argument is said to support the proposition that, for the purposes of the chapeau of s.23(3) the proceedings are “*in respect of*” the Awards: this would mean that the general rule of immunity in s.1 continues to apply (see §18 above).

20. Further, there is nothing “*inconsistent*” or “*incoherent*” about India’s position on s.2 SIA, compared to its position on s.9 SIA (cf. ASSA/§28). In this case, for the purposes of s.2, the alleged agreement to submit pre-dates the SIA, and accordingly the position is governed by s.23(3)(a). However, for the purposes of s.9 SIA, the alleged agreement to arbitrate does not pre-date the SIA, and accordingly the question of s.23(3)(b) does not arise.

(3) The Common Law Position

21. The Appellants argue in the further alternative that if s.23(3)(a) applies, then Parts I and II of the SIA would be disapplied, and “*the question of whether Article III constitutes a waiver of [immunity from] adjudicative jurisdiction would have to be determined by the common law*”, relying on *Sengupta v India* (ASSA/§§29-30).

22. However, if s.23(3)(a) is engaged in this case, then the result is that the exception to immunity in s.2(2) SIA does not apply and the position is governed by the general rule of immunity in s.1 SIA (see §17 above). That is so even if the position is governed by *Sengupta*, assuming the Appellants’ own case (see §18 above).

⁸ In *Sengupta* the claim was under an employment contract that had been made in 1975, before the SIA came into force. Accordingly, the Court had to consider the application of s.23(3)(b), which provides *inter alia* that the immunity exception for employment contracts in s.4 SIA does “*not apply to any . . . contract*” entered before the date of coming into force of the SIA. In that context, the Court proceeded to consider the relationship between s.23(3)(b) and the chapeau of s.23(3).

23. Alternatively, (and without prejudice to India’s position that the question before the Court only concerns whether 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*”, see **RSA/fn.56**), if the common law does apply to the question of whether Article III constitutes a waiver of immunity from adjudicative jurisdiction, then the position is as follows.
24. First, the relevant question is what was the common law regarding waiver of state immunity, at the time of the alleged waiver, *i.e.*, prior to the SIA coming into force in 1978 (see *I Congresso Del Partido* [1983] 1 AC 244, 257C, 260A; *cf.* the Appellants’ unsupported assertion that the common law “*today*” is to be applied (**ASSA/§31**)).
25. Secondly, under the common law at the time of the alleged waiver (which on the Appellants’ case was when India ratified the NYC in 1960, alternatively when the UK acceded in 1975), waiver by prior agreement was not possible (see *Kahan v Federation of Pakistan* [1951] 2 K.B. 1003, 1012-1017, 1019-1021; *Duff Development Co. Ltd v Government of Kelantan* [1924] AC 797, 809-810, 821, 828-830; *Mighell v Sultan of Johore* [1894] 1 QB 149, 159-160, 160-161, 162-164;⁹ see also *Infrastructure*, §29).
26. Thirdly, the *obiter* comments of Lord Collins in *NML Capital v Argentina* [2011] 2 AC 495 at §§121-125 should not be adopted, and in any event do not materially affect the position for present purposes (*cf.* **ASSA/§32**):
- (1) As regards the substance of Lord Collins’ comments, which rely on the article “Waiver of Immunity” by Dr EJ Cohn (1958) 34 BYIL 260:
- (a) In *Duff*, the speeches of Viscount Cave, Lord Dunedin and Lord Sumner constituted the majority, based “*in the clearest possible terms*” on the view that an agreement by a foreign sovereign to submit to the jurisdiction of the court does not suffice to give the court jurisdiction (see analysis of those speeches in *Kahan* at pp.1014-1017, per Jenkins LJ, and pp.1020-1021 per Birkett LJ; *cf.* *NML*, §125, Cohn pp.268, 271).
- (b) Those speeches were not merely *obiter* (*cf.* **ASSA/§32(i)**; *NML*, §125, Cohn pp. 266-268). Only one judge, Viscount Finlay (pp.816-820), based his decision on the different ground that a submission to arbitration or to jurisdiction did not extend to execution.¹⁰
- (c) Further, those speeches did not overlook “*the fact that submission in the face of the court was not the*

⁹ All three cases are cited because the Appellants are disputing the established understanding of the common law.

¹⁰ Cohn asserts that “*All arguments which go beyond*” the point decided by Viscount Finlay “*must be taken to be mere obiter dicta*” (p.268). However, it is unclear why that should be so, given that none of the majority judges (*i.e.*, Viscount Cave, Lord Dunedin and Lord Sumner) relied on that point.

only form of valid submission since the introduction in 1920 in RSC Ord 11, r2A (reversing the effect of *British Wagon Co Ltd v Gray* [1896] 1 QB 35) of a rule that the English court would have jurisdiction to entertain an action where there was a contractual submission.” (cf. ASSA/§32(ii); NML, §125, Cohn, pp.263, 268). None of the judges in *Duff* or in *Kahan* based their decision on *British Wagon*, and accordingly the alleged reversal of *British Wagon* is irrelevant.¹¹ Lord Sumner referred to *British Wagon* in passing, but based his decision, that an agreement by a foreign sovereign to submit is ineffective, on a particular “rule of the common law . . . which gives or creates a foreign sovereign’s immunity” (p.829).

- (2) In any event, *Kahan v Federation of Pakistan* represents the common law as it stood prior to the SIA, i.e., that a prior agreement to waive state immunity was ineffective. Dr Cohn’s article accepts as much, concluding that the Court of Appeal’s “decision” in *Kahan* would have to be “reverse[d]” by the House of Lords (at p.273).
- (3) The rule that waiver had to be declared in the face of the court was not “peculiar and unjustified” (cf. ASSA/§32(iii)). But, in any event, what matters for present purposes is that the rule represented the common law as it stood prior to the SIA.
- (4) Further, the decision in *Kahan* was not *per incuriam* (cf. ASSA/§32). The doctrine of *per incuriam* applies only where: (a) another division of the Court of Appeal has reached a decision in the absence of knowledge of a decision binding upon it or a statute; and (b) had the court had this material, it *must* have reached a contrary decision (see *Desnousse v Newham London Borough Council* [2006] QB 831, §71). Those requirements are not satisfied in this case (and the Appellants have not sought to explain otherwise).

27. Fourthly, the current position under international law as to whether a State is able to waive its state immunity is irrelevant (cf. ASSA/§33). What matters for present purposes is the common law regarding waiver of state immunity at the time of the alleged waiver (see §24 above).

28. Fifthly, even if the present common law position was relevant, then that position is governed by binding House of Lords and Court of Appeal authority (see §§25 and 26 above).

Sudhanshu Swaroop KC

Twenty Essex,

14 November 2025

¹¹ Further, *British Wagon* only stood for the proposition that a contractual submission to jurisdiction was ineffective, where the particular submission is specifically prohibited by the rules of procedure, not that agreements to submit were ineffective generally (see *British Wagon*, p. 37; *Montgomery Jones & C v Liebenthal & Co* [1898] 1 QB 487, 492 per AL Smith LJ, 493 per Chitty LJ, and 494 per Collins LJ).