

**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 SKELETON
FOR APPEAL
AND
IN SUPPORT OF APPLICATION FOR PTA**

3 July 2025

Without Prejudice to State Immunity

(I) INTRODUCTION

1. The question for determination is whether, for the purpose of enforcement of two BIT awards, India has, by its ratification of the New York Convention 1958 (the “NYC”) on its own, and regardless of whether India agreed to arbitrate the disputes, submitted to the jurisdiction of the English Courts by “prior written agreement” within the meaning of s.2(2) of the State Immunity Act 1978 (the “SIA”) (**Judgment (“J”)/§§8-9**).
2. The Judge held that India has not submitted (Order dated 16 May 2025/§1). India’s position is that the Order should be upheld for the reasons given by the Judge, and for the further different or additional reasons that are identified in the Respondent’s Notice (“RN”). Alternatively, India seeks a minor variation of the Order, on which India seeks permission to appeal (**RN**, Section 6, §§6-8 and Sections 4, 5 and 8; and see **Section XI** below).

(II) THE JUDGMENT

3. In concluding that India has not submitted by “prior written agreement” under s.2(2) SIA (**J/§87**), the Judge, found as follows:
 - (1) State immunity is one of the fundamental principles of the legal order, which States are obliged to give effect to (**J/§§35-36, 74, 85**), citing *Hulley Enterprises v The Russian Federation* [2025] EWCA Civ 108 (“**Hulley**”), §§25-26).
 - (2) The Court of Appeal (“CA”) judgment in *Infrastructure Services SARL v The Kingdom of Spain* [2025] 1 Lloyd’s Rep 66 (“**Infrastructure**”), which concerned the ICSID Convention is not “*highly persuasive of the proper interpretation of Article III of the NYC*”, given that the CA itself identified material differences between the two treaties, and “*contemplated, though did not decide, a different result*” under the NYC (**J/§§43-49**).
 - (3) Under international law, waiver of state immunity by treaty, and under s.2(2) SIA, a “prior written agreement” must be “express” (**J/§§50-53**). This means that the express words used must amount, on their proper construction, to an “*unequivocal*” and “*clear and unmistakable*” agreement by the state to submit to the jurisdiction, even if the words “submit” and “waiver” are not used (**J/§§53, 82**, applying *Infrastructure*).
 - (4) Ratification of the NYC on its own is not a waiver of state immunity, in the USA (**J/§§55-59**), Canada (**J/§60**), or Germany (**J/§70(ii)**).
 - (5) Article III of the NYC preserves state immunity by its own terms due to the words “*in accordance with the rules of procedure of the territory where the award is relied upon*” (**J/§§63-74, 80**). That follows from the well-established principle of international law and English law that state immunity is a rule of procedure (**J/§§63-74, 80**).
 - (6) This view is also given “*substantial support*” by the commentaries (**J/§§69-72**).
 - (7) The *travaux* of the NYC show that it was not the intention of the drafters of the NYC to preclude the assertion of immunity in an enforcement action against a State (**J/§§76-77, 87**).
 - (8) The doubts expressed by the CA in *Infrastructure* as to whether the NYC contains a submission to jurisdiction are justified (**J/§§45-46, 78, 80**).

(9) In the broader commercial context, the market is capable of restricting state immunity where it may arise (J/§§83-85).

4. The Judge also made *obiter* remarks about three other points that had been argued, concerning: (1) whether the NYC only applies to States in relation to private law disputes; (2) the effect of the declaration that India made when it ratified the NYC; and (3) whether s.2(2) SIA applies at all, given that India ratified the NYC before the SIA came into force (J/§§34, 37, 89-105).

(III) THE ISSUES

5. After the Factual Background (Section IV) and the Legal Framework (Section V) have been outlined, the issues will be considered under the following headings:
 - (1) The test for a “prior written agreement” under s.2 SIA (Section VI)
 - (2) The principles of treaty interpretation (Section VII)
 - (3) Whether India has submitted by “prior written agreement” within the meaning of s.2(2) of the SIA (subject to Sections IX to XI below) (Section VIII)
 - (4) Whether the application of the NYC to States is limited to private law disputes (Section IX)
 - (5) India’s reservation (Section X)
 - (6) The s.23(3)(a) SIA point/Permission to Appeal (Section XI)

(IV) FACTUAL BACKGROUND

6. In brief: (1) on 29 June 2021, C1 to C3 obtained a “without notice” Enforcement Order from the English Courts; (2) on 5 May 2022, India applied to set aside the Enforcement Order on the basis of state immunity, and for that purpose, applied for a stay, pending determination of certain Dutch proceedings; (3) there is an ongoing dispute, for the purposes of the exception to immunity in s.9 SIA, as to whether India agreed to arbitrate (raising, *inter alia*, issues of illegality), which does not presently arise for determination (Sabharwal 1/§§74-116; J/§§8-9); (4) in November 2022, the Appellants were joined as alleged assignees, without prejudice *inter alia* to any argument “regarding the validity and effect” of the alleged assignments, which are disputed for the purposes of the s.9 SIA question (Order, 4 Nov 2022); (5) in January 2024, the Appellants raised the s.2 issue for the first time (see Watson 4/§§17-19).
7. The Appellants make various assertions that are irrelevant for present purposes: (1) that India knowingly failed to raise the illegality allegations in the BIT Arbitration (Appellants’ Skeleton Argument (“ASA”)/§10) (which is also disputed); (2) that the Indian Supreme Court Judgment “violate[d] due process and natural justice” (ASA/§10) (which India has addressed in detailed evidence (Singh 2/§§94-104), and which the Appellants are in any event precluded from raising, having accepted that no question of procedural fairness arises for the purpose of state immunity, see §75 of Judgment of Sir Nigel Teare dated 18 October 2024 and §6 of the Order of Sir Nigel Teare dated 23 October 2024); and (3) that there have been “extraordinary delays engendered by India’s position” (ASA/§11; cf. J/§75) (which is also disputed, as it was the Appellants’ choice to: (a) agree to put back

the procedural timetable pending developments in the Netherlands;¹ (b) in January 2024 to make an application for the hearing of certain preliminary issues, that was rejected by Sir Nigel Teare in October 2024; and (c) to pursue the s.2 SIA point).

(V) THE LEGAL FRAMEWORK

State Immunity Act 1978

8. The position at common law, prior to the SIA, was that state immunity was absolute; any waiver had to be declared in the face of the court; and waiver by prior agreement was not possible (e.g., *Kahan v Federation of Pakistan* [1951] 2 K.B. 1003; *Infrastructure*, §29). Further, an agreement to arbitrate was not a submission to the jurisdiction (*Duff Development Co. Ltd v Government of Kelantan*, [1924] AC 797; *Infrastructure*, §29).
9. The SIA entered into force in 1978. The relevant provisions of the SIA are as follows:
 - (1) The general rule, in s.1 of Part I of the SIA, is that a State is immune from the jurisdiction of the UK courts, except as provided in the SIA.
 - (2) The exceptions include s.2, “*Submission to jurisdiction*”, which, in a change from the common law position, provides for submission by “prior written agreement” (see s.2(2) SIA).
 - (3) The exceptions also include s.9, “*Arbitrations*”, which is conditional on establishing that the State has “*agreed in writing to submit a dispute which has arisen, or may arise, to arbitration*”.
 - (4) S.13(2) of the SIA confers certain “*procedural privileges*” on States, including that “*the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award . . .*” S.13(3) provides that s.13(2) does not “*prevent the giving of relief or the issue of any process with the written consent of the State concerned*”, that such consent “*may be contained in a prior agreement*”, but that a provision merely submitting to jurisdiction is not consent for these purposes.
 - (5) S.17(2) provides that in s.2(2) and s.13(3) “*references to an agreement include references to a treaty, convention or other international agreement*”.
 - (6) S.23(3)(a) provides that the immunity exception in s.2(2) does not apply to a “*prior agreement*” entered before the SIA came into force (see further **Section XI** below).
10. Part I of the SIA “*is a complete code*”, so that “[i]f the case does not fall within one of the exceptions to section 1, the state is immune” (*Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2019] AC 777, §39 per Lord Sumption JSC; applied in *Infrastructure*, §§33, 52, 57).

Overview of the Authorities

11. There have been at least eight cases (not including ICSID cases) in the English courts since 1978 where a State has claimed immunity in relation to the enforcement of arbitral awards. In four of them, the creditors invoked the exception to immunity in s.9 SIA, which the State disputed.² It was not argued in any of these cases that a

¹ Consent orders dated 13 July 2022; 28 February 2023; 25 November 2023, and 16 January 2024.

² Namely, *Soleh Boneh International v Uganda and National Housing Corp* [1993] 2 Lloyd’s Rep. 208; *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2007] QB 886, §§111-123; *LR Avionics Technologies Ltd v Nigeria* [2016] 4 WLR 120; *PAO*

State submits to the jurisdiction under s.2(2) SIA merely by becoming a party to the NYC (**J/§42**).³

12. In *Infrastructure*, which concerned Article 54 of the ICSID Convention, the CA observed that it is “by no means clear” that Article III of the NYC amounts to a “prior agreement” under s.2(2): “*The two provisions are not worded identically, article III referring to the award being enforced ‘in accordance with the rules of procedure of the territory where the award is relied upon’.* As state immunity is regarded as a procedural bar as a matter of international law, it may be that article III preserves state immunity on its own terms. Further, whereas the Convention is necessarily dealing with awards to which a contracting state is party, that is far from the case in relation to the New York Convention” (§102(i)).

(VI) THE CORRECT APPROACH TO S.2(2) OF THE SIA

13. The burden of proving that the case falls within one of the exceptions to s.1 SIA, and therefore of proving that India has submitted by “prior written agreement” within the meaning of s.2(2), is on the Appellants (*Hulley*, §18).

14. It is common ground that a “prior written agreement” under s.2(2) must be “express” (see **ASA/§15(a)**). The SIA reflects international law, under which a state’s waiver of immunity by treaty must always be express (see *Ex parte Pinochet Ugarte (No 3)*, [2000] 1 AC 147 (“**Pinochet**”), per Lord Goff at pp. 215 to 217D; *Infrastructure*, §§89, 92). Otherwise, “*there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied*” (*Pinochet*, pp. 216H to 217D, per Lord Goff). Three points arise.

15. First, the Appellants argue that an express agreement may be derived “*as a matter of necessary implication in elucidating the meaning of the express words used*”, and that “*the words “submit” or “waiver” are not required*” (**ASA/§15(b)**). India’s position is that an “express” agreement in a treaty cannot be deduced by a process of implication: (1) the Appellants’ approach is wrong in principle, and collapses the distinction between express terms and implied terms (Cameron Miles, *Implied Terms in Treaties*, AJIL Vol.119:1, 57, 96-98); (2) there is no support in the VCLT (or in any international judgment) for the proposition that an express agreement may be deduced by implication; (3) such an approach “*invite[s] precisely*” the chaos that Lord Goff warned about in *Pinochet* (Miles, 97-98); (4) respectfully, in this regard, *Infrastructure* (§§92-93), and the Judgment (**J/§§51-53**) are incorrect.⁴

16. Second, and in any event, on the approach taken by the Judge (applying *Infrastructure*), the Appellants must show that the express words used amount, on their proper construction, to an “*unequivocal*” and “*clear and unmistakable*” agreement by India to submit to the jurisdiction (**J/§§53, 82**). The Appellants neither challenge,

Tatneft v Ukraine [2018] 1 WLR 5947, §§25-37; *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria* [2024] EWHC 1503 (Comm); *Hulley Enterprises Ltd v Russia* [2025] EWCA Civ 108, §§27, 48; *General Dynamics United Kingdom Ltd v Libya* [2025] 4 WLR 34; and *JSC Dtek Krymenergo v Russian Federation* [2025] EWHC 1060 (Comm), §§155-156, judgment of 5 May 2025, issued after the Judgment. In the four cases that are underlined, there was a dispute as to the s.9 SIA exception to immunity.

³ In this regard, the Judgment recorded India’s submission, which was not disputed by the Appellants.

⁴ See **RN**, Section 6, §1.

nor acknowledge these requirements (see **ASA/§§12-17**). Nor do they seek to explain why their interpretation is “*unequivocal*” and “*clear and unmistakeable*”.

17. Third, on the Appellants’ own case (applying *Infrastructure*), the implications that they seek must be “*necessary*” (**ASA/§15(b)**). The Appellants do not show why the implications that they seek are “*necessary*”, as opposed to merely desirable for the Appellants.

(VII) THE PRINCIPLES OF TREATY INTERPRETATION

18. It is common ground that the NYC must be interpreted in accordance with the Vienna Convention on the Law of Treaties (the “**VCLT**”) (see **ASA/§18**; *Infrastructure*, §§69-70).⁵

19. Article 31 of the VCLT sets out the “*General rule of interpretation*”. Article 31(1) provides that “*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*”. Article 31(2) explains the meaning of “*context*” for these purposes. Article 31(3) provides *inter alia* that “*There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties*”.

20. Article 32 of the VCLT provides that “*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion*”: (1) to “*confirm*” the meaning resulting from the application of article 31; or (2) to “*determine*” the meaning, but only when the interpretation according to article 31 “*leaves the meaning ambiguous or obscure*” (Article 32(a)) or “*leads to a result which is manifestly absurd or unreasonable*” (Article 32(b)).

21. Further: (1) the “*General Rule of Interpretation*” in Article 31 must be applied “*in a single combined operation*” (*JTI Polska Sp Z.o.o. v Jakubowski* [2024] AC 621, §§26-27); (2) under Article 31(1), consideration of the “*object and purpose*” of a treaty may not be used to override its text (Gardiner, p. 211; Dorr, pp. 586-587, §57); (3) under Article 32 the travaux may be used to “*confirm*” the meaning, regardless of the conditions in Articles 32(a) and (b), and regardless of whether the travaux show a “*definite legislative intention*” (*JTI Polska*, §§29-32); (4) academic commentaries, even if not linked to the conclusion or implementation of the treaty, are admissible under Article 32 VCLT, and in any event, are often used by courts to assist them in treaty interpretation (Gardiner, pp. 401, 405; e.g. *Kabab-Ji SAL v Kout Food Group* [2022] 2 All ER 911 §30; *Basfar v Wong* [2023] AC 33, §§37, 94-96).⁶

22. The Appellants argue that the Judge did not interpret the NYC in accordance with the textual approach of the VCLT, and instead “*impermissibly searched for an “intention” of the drafters of the NYC*” (**ASA/§6(a)**). However, the Judge’s conclusion was based, fundamentally, on analysis of the terms of Article III, including the

⁵ Further, the VCLT reflects pre-existing customary international law and so may be applied to treaties concluded before the entry into force of the VCLT in 1980 (*JTI Polska Sp Z.o.o. v Jakubowski* [2024] AC 621, §23).

⁶ The Appellants’ contention that commentaries are only admissible under Article 32 “*insofar as they are able to show clearly the collective intention of those who drew up the treaty*” (**ASA/§28**, citing Gardiner, pp401-404, §4.5.3) is incorrect, and misreads Gardiner.

words “*in accordance with the rules of procedure of the territory where the award is relied upon*” (J/§§63-74, 77-80). Further, treaty interpretation is concerned with “intention”, as the Appellants themselves accept (ASA/§§21, 26, 28).

(VIII) WHETHER INDIA HAS SUBMITTED BY “PRIOR WRITTEN AGREEMENT” WITHIN THE MEANING OF S.2(2) SIA (SUBJECT TO SECTIONS IX TO XI BELOW)

23. For the following reasons, India has not submitted to the jurisdiction by “prior written agreement” under s.2(2) SIA.

(1) “. . . in accordance with the rules of procedure of the territory where the award is relied upon”

24. Article III preserves immunity by its own terms. That is because any obligation on any “Contracting State” is expressed to be only “*in accordance with the rules of procedure of the territory where the award is relied upon*”, which include the rules of State immunity. This was the analysis suggested by the CA in *Infrastructure* (§102), and was the conclusion reached by the Judge (J/§87).

25. First, “*there is no doubt as to the principle*” (J/§65), which is not in dispute:

- (1) Under international law it is well-established that the rules of state immunity are regarded as “procedural”. State immunity is immunity from jurisdiction, not immunity from liability: see J/§65, quoting the International Court of Justice (“ICJ”) in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Reports 99, §93, that “[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful” (emphasis added); also citing the ICJ in *Arrest Warrant of 1 April 2000 (Congo v Belgium)* [2002] ICJ Reports 3, §60.⁷
- (2) The English courts also regard immunity (as a matter of international law and English law) as procedural: see J/§66, referring to *Jones v Saudi Arabia* [2007] 1 AC 270, where the House of Lords approved and relied on the statement in Hazel Fox, *The Law of State Immunity* (2002), that “[s]tate immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law” (see §24, per Lord Bingham; §§44-49, per Lord Hoffmann).
- (3) The commentaries support the proposition that immunity is a rule of procedure that goes only to jurisdiction, see e.g., Fox, *The Law of State Immunity* (2002), p. 525; Fox and Webb, *The Law of State Immunity* (2015), p. 21; see also the commentaries cited in §26 below.

26. Second, as the Judge held, the academic commentaries “*provide substantial support*” for the view that the “*rules of procedure*” in Article III include the enforcing State’s law of State immunity, so that Article III preserves state immunity by its own terms (J/§§70-72):

⁷ Where, the ICJ stated: “*While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.*” (*ibid*, §60, emphasis added).

- (1) Professor James Crawford,⁸ has argued that the NYC does not waive state immunity and that it “*would be surprising*” if an “*uncontemplated inference*” from the NYC results in waiver of state immunity: “*Either the Convention is to be interpreted as not applying to arbitral awards to which a state is a party, or sovereign immunity is one of the “rules of procedure” under Article 3, conditioning local enforcement. The latter view may be the better one . . .*”⁹
- (2) Professor George Bermann,¹⁰ in relation to the words “*rules of procedure*” in Article III, says that “*Article III preserves sovereign immunity as a jurisdictional defense under national law, to the extent it exists*”. In support, Professor Bermann cites the decision of the German Federal Court of Justice, in *SchiedsVZ* 2006 44, which is considered below at §§46-47).¹¹
- (3) Professor Andrea Bjorklund,¹² says in relation to the “*rules of procedure*” wording of Article III, that “*municipal immunity laws have been treated as preliminary matters of procedure which claimants seeking to execute awards must overcome,*” citing (at fn. 42) an article by Hazel Fox,¹³ who makes the point that state immunity is a “*procedural plea*”, and considering (at pp. 220-222) examples of municipal state immunity laws. Professor Bjorklund also says it is “*clear . . . based on the negotiating history of the Convention that the delegates did not intend to preclude an immunity-based argument in enforcement actions against states*”.¹⁴
- (4) Andreas Börner,¹⁵ argues that State immunity is an example of a “*procedural issue*” under the NYC, which must be resolved in accordance with the domestic law of the country where the award is relied on, including any applicable rules of international law.¹⁶
- (5) Javier Olmedo,¹⁷ argues that “*The term ‘rules of procedure’ [in Article III] has been considered as embracing*

⁸ See “A Foreign State Immunities Act for Australia?” (1980) 8 *Australian Year Book of International Law* 71, at pp. 101-102, and fn. 42. Professor Crawford was Whewell Professor of International Law at the University of Cambridge, and a judge of the ICJ from 2015 until 2021.

⁹ The Appellants’ attempted reliance on the words “*unless a relevant exception applied*” in fn. 42 of Professor Crawford’s article is misplaced (**ASA/§72**): those words are written on the premise that state immunity is one of the rules of procedure under Article III, and therefore is a matter for the rules of the domestic court. The Appellants’ tentative suggestion that Professor Crawford was referring only to immunity from execution (**ASA/§72**), and not immunity from jurisdiction is also misplaced, reading pp. 101-102 as a whole.

¹⁰ In *Autonomous Versus Domestic Concepts under the New York Convention* (2021), Chapter 4, pp. 58, 74. Professor Bermann is the Walter Gerhorn Professor of law and the Director of the Center for International Commercial and Investment Arbitration Law at Columbia Law School.

¹¹ The Appellants’ criticism in relation to the *Schieds* case (**ASA/§73**) is addressed below at §§46-47. The Appellants’ further criticism of Professor Bermann, in essence for not adopting the Appellants’ narrow interpretation of the words “rules of procedure” (**ASA/§73**) is misplaced for all the reasons set out in Section VIII.

¹² Bjorklund, (2010) 21 *American Review of International Arbitration* 211, 218-219. Professor Bjorklund is “Full Professor”, “L. Yves Fortier Chair in International Arbitration and International Commercial law” at McGill University.

¹³ Fox, “State Immunity and the New York Convention”, in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, at pp. 829, 836-837.

¹⁴ See further §§41-43 below, also addressing the Appellants’ criticisms of Professor Bjorklund’s views (**ASA/§§61, 74**).

¹⁵ *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010). pp. 120-121, 126. Andreas Börner is currently a partner at Clyde & Co, based in Munich, Germany.

¹⁶ The Appellants’ contention that “[t]his does not address the question of whether the Opening Clause is capable of satisfying the state immunity rules in a particular jurisdiction” (**ASA/§§75, 76**) is misplaced: if Article III preserves state immunity for the domestic courts, then it cannot also an “unequivocal” and “unmistakable” waiver of state immunity.

¹⁷ *International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues* (2022), Ch. 12, pp. 340-341. Javier Olmedo is a Postdoctoral Researcher at the University of Luxembourg.

general principles of public international law that are part of the relevant domestic law, including sovereign immunity”, and agrees with the views of Professor Bjorkland and Andreas Börner.

27. The commentaries show that “*the terms of Article III have not been understood internationally as on their own signifying a state’s consent to the jurisdiction*” and recognise that “*state immunity continues to be applicable in the NYC scheme and does not suggest state immunity is waived by ratification of Article III*” (J/§§71-72).
28. Third, when interpreting the words “rules of procedure” in Article III, there is an obligation under Article 31(3)(c) of the VCLT to take account of “*any relevant rules of international law applicable in the relations between the parties*”, including developments of international law subsequent to the conclusion of the treaty (*Basfar*, §§66-67).¹⁸ These relevant rules include the principle that state immunity is a rule of “procedure”, that goes only to jurisdiction, not substance.¹⁹
29. Thus, in Article III, “*rules of procedure*” include state immunity, and the words “*in accordance with the rules of procedure of the territory where the award is relied upon*” preserve the rules of state immunity of the country where enforcement is sought. Further, or alternatively, state immunity is also “procedural” under English law.
30. The Appellants argue for a narrow interpretation of the words “rules of procedure”, which they say are “*confined to the specific body of rules . . . that are functionally necessary to facilitate and address the process of recognition and enforcement*” (ASA/§§43-44(a)), which in England means only CPR 62.17-CPR 62.19 and those rules required for “*dealing with the award debtor’s challenge under Articles V and/or VI*” (ASA/§48). However:
- (1) The Appellants do not answer the simple point that the words “*rules of procedure*” are part of an international treaty, and that as a matter of international law, state immunity is a question of procedure.
 - (2) The Appellants have not identified a single academic commentary which actually addresses the question of state immunity in the context of the NYC, and which supports their interpretation.
 - (3) The Appellants’ narrow construction is inconsistent with international and English practice as to the meaning of “*rules of procedure*”, even outside of the context of state immunity. It has been recognised that these words do or can provide the basis for, *inter alia*: (a) applying time limitation rules of the forum State (*Van den Berg, The 1958 New York Arbitration Convention*, pp. 240-241; *Born, International Commercial Arbitration*, §26.02; *Minister of Public Works of the Government of Kuwait v Sir Frederick Snow & Partners* [1983] WLR 818, 823-824); (b) applying rules for set-off of a claim against the award which is sought to be enforced (*Van den Berg*, pp. 240-241); (c) ordering the party seeking enforcement to pay security for costs

¹⁸ If and insofar as relevant, the characterisation of immunity under international law as a rule of procedure that goes to jurisdiction, not liability (and that can be waived) was established prior to and independently of the ICJ cases that are mentioned in §25 above, in 1958 (when the NYC was made), and/or in 1960 (when India ratified the NYC), and/or in 1975 (when the UK acceded to the NYC): see e.g., *Mighell v Sultan of Johore* [1894] 1 QB 149, 159-160; 160-161; 162-164; *Kahan v Federation of Pakistan* [1951] 2 KB 1003, 1010-1012; 1019-1021; *Empson v Smith* [1966] 1 QB 426, 428, 438A, 439B-C and F, describing diplomatic immunity as a “*procedural bar*”; and *Pinochet Ugarte* (No. 3) [2000] 1 AC 147, 200E, 201G, describing state immunity, as a matter of international law, as a “*procedural immunity*”.

¹⁹ The Judgment does not rely explicitly on Article 31(3)(c), although the point was argued at the hearing. If necessary, India has raised the point in its **RN** (see India’s **RN**, Section 6, §3(2)).

(*Diag Human SE v The Czech Republic* [2013] EWHC 3190 (Comm), §§13-17; Van den Berg, pp. 239-240); and (d) making final or unless orders, to impose sanctions including dismissal (*Diag Human*, §§13-17).

(4) Further:

(a) The reference to “*the*” rules of procedure does not mean that the reference is only to “a class of rules”, let alone the narrow class that the Appellants are proposing (*cf.* **ASA/§45**).

(b) The words “*of the territory where the award is relied upon*” do not preclude interpretation of the words “*rules of procedure*” in accordance with international law (*cf.* **ASA/§46**). State immunity is a kind of rule that comes within the phrase “rules of procedure”, in accordance with international law. The content and application of state immunity rules is a matter for domestic law.

(c) The words “*in accordance with*” do not assist the Appellants (*cf.* **ASA/§47**). These words are apt to include the narrow kinds of procedural rules that the Appellants contend for, together with other kinds of procedural rules, such as time limitation and state immunity.

(5) In *Kabab-Ji*, the Supreme Court did not seek to limit or even “*tailor*” the application of the CPR Rules to enforcement under the NYC (*cf.* **ASA/§48(b)**). The Court accepted in general terms that the CPR applies to the award debtors’ challenge, including as to the availability of summary judgment (§§80-83).

(6) Van den Berg does not support the Appellants’ case (*cf.* **ASA/§49**). Van den Berg’s support for the application of domestic time limitation rules and of set-off rules is inconsistent with the Appellants’ position that “*rules of procedure*” are confined to CPR 62.17-CPR 62.19 and those rules required for “*dealing with the award debtor’s challenge under Articles V and/or VI*”. Further, as noted by the Judge, Van den Berg (at p. 280) goes on to discuss immunity from jurisdiction (in the context of discussing the applicability of the NYC to States), and “*does not suggest that ratification of Article III amounts on its own to a waiver*”, but instead “*draws attention, for example, to cases in which an agreement to arbitrate*” is held to constitute waiver of immunity (**J/§69**).

(7) The contention that “*there is no textual indication that the consent to adjudicative jurisdiction contained in the Opening Clause is qualified by the “rules of procedure”*” (**ASA/§51**) is misconceived: (a) the Appellants overlook the need to interpret Article III in a “*single combined approach*”, rather than assuming that Article III contains a “consent”, and then looking for some qualification; (b) in any event, the Opening Clause, even taken on its own, does not contain the alleged “consent” (see §§31-36 below); (c) alternatively, Article III does contain words of qualification: if any “consent” in Article III is only “*in accordance with*” the domestic rules of state immunity, then Article III cannot be an “unequivocal” and “unmistakable” waiver of state immunity: the question of whether state immunity is a rule of procedure is not a mere “*arid point of taxonomy*”.

(8) The contention that classification of the words “*rules of procedure*” “*as a matter of domestic conflict of law rules promotes non-uniformity in the application of the NYC*”, because State immunity is “*classified as substantive in Australia*” (**ASA/§§31, 52**) is also misconceived:

- (a) The premise of the point is said to be that the object of the NYC is to promote “*a single, uniform set of rules*” (ASA/§31, citing *Kabab-Ji*, §32). However, in that case the Supreme Court considered that uniformity was desirable, rather than an absolute requirement, and proceeded to decide the case on first principles, in the absence of a clear consensus amongst national courts about the point in issue (§§31-32).
- (b) In any event, the Appellants overlook the Judge’s finding (and India’s primary case), which is that the words “*rules of procedure*” are to be classified in accordance with international law, not domestic law.
- (c) Further, even if the words are to be given a domestic classification, then: (i) under English law state immunity is procedural; (ii) the Appellants have provided only one example of a State where immunity is said to be substantive, out of 172 State parties²⁰ to the NYC; (iii) India does not accept that even in Australia state immunity is substantive, and will be pursuing that point on appeal to the High Court of Australia.²¹
- (9) The reference in Article III to “*the conditions laid down in the following Articles*” does not assist the Appellants (ASA/§§53-54). These words do not seek to limit the meaning of “*rules of procedure*”. Further:
- (a) India’s case does not involve imposing an additional “*substantive condition*” on enforcement (*cf.* ASA/§§38, 55). State immunity is a procedural rule that goes to jurisdiction, not to substance.
- (b) *IPCO (Nigeria) v NNPC* [2017] 1 WLR 970 did not concern the meaning of “*rules of procedure*”, let alone any question of state immunity (*cf.* ASA/§53). The Supreme Court merely held that Article V, which deals specifically with security, is a complete code in relation to the question of security.
- (c) In *Selevison Saudi Company v Bein Media Group LLC* [2021] Bus. L.R.1722 the conclusion that an award debtor could not rely on a Part 20 counterclaim was based on the CPR, not the NYC (see §29, *cf.* ASA/§53).
- (10) Under English law, a court has jurisdiction to order security for costs under CPR 25 in favour of an award debtor (see *Diag Human*, §§13-17) (*cf.* ASA/§§56-57). The Appellants’ case appears to be dependent *inter alia* on asking the Court to find that *Diag Human* was wrongly decided, which simply underlines the difficulties inherent in their narrow approach to “*rules of procedure*”.

(2) “Each Contracting State shall recognize arbitral awards as binding and enforce them . . .” (the “Opening Clause”)

31. The Opening Clause of Article III of the NYC, even if taken on its own, does not, as the Appellants contend, satisfy the requirements for consent under s.2(2) SIA (RN, Section 6, §3(1)).
32. First, the terms of the Opening Clause are directed only at the State where the award is relied upon. They do not impose any express obligation on States in their capacity as a party to an arbitral award, let alone refer to submission to the jurisdiction or waiver of immunity by such a State. Accordingly, the Opening Clause does not satisfy the requirement for an express “prior written agreement” under s.2(2) SIA: (1) an express agreement

²⁰ See https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxii-1&chapter=22&clang=en

²¹ See RN, Section 6, §3(10).

cannot be derived by a process of implication (see §15 above); (2) in any event, the Opening Clause does not contain an “*unequivocal*” and “*clear and unmistakable*” agreement by India to submit to the jurisdiction of the English Courts for the enforcement of arbitral awards made against India (see §16 above); (3) if implication is permissible, then there is no “*necessity*” for implication of the consent (see §17 above).

33. Second, the Appellants’ reliance on the judgment of the CA in *Infrastructure*, which concerned Article 54 of the ICSID Convention, is misplaced (ASA/§§7(a), 13-16, 36-37). There are material differences between the ICSID Convention and the NYC,²² such that the Opening Clause of Article III of the NYC cannot be said to contain an “*unequivocal*” and “*clear and unmistakable*” agreement by India to submit to the jurisdiction, or to provide the basis for the “*necessary implication*” of such an agreement:

- (1) The premise for the CA’s reading of Article 54(1) of the ICSID Convention was that by Article 54(1) “*each Contracting State has agreed with all other Contracting States that each will enforce ICSID awards, in the context that a Contracting State will necessarily be a party to each award*” (*Infrastructure*, §59, emphasis added). That essential context does not apply to the NYC, as the CA observed when expressing its doubts that Article III of the NYC contains a submission to jurisdiction (§102(i); §12 above).
- (2) The CA’s reading of Article 54(1) was also dependent on Article 53(1) of the ICSID Convention,²³ as interpreted by the High Court of Australia (“HCA”), i.e., as an obligation by Contracting States in their capacity as parties to an award to “*abide by and comply with the terms of the award*”, which the HCA described as “*the primary provision*”; and also as interpreted by the UK Supreme Court in *Micula v Romania* [2020] 1 W.L.R. 1033, §105, i.e., as an obligation by Contracting States in their capacity as parties to an award to comply with the award, that is “*owed to every other Contracting Party*” (see *Infrastructure*, §§76-79). The NYC does not contain an equivalent provision to Article 53.
- (3) Further, the CA’s reading of Article 54(1) relied on Article 55 of the ICSID Convention,²⁴ which “*envisages that states submit to adjudicative jurisdiction*” (J/§78) and “*makes plain that agreement does not extend to waiving immunity from execution*” (*Infrastructure*, §79).

34. Third, the judgment of the Federal Court of Australia in *CCDM Holdings LLC v The Republic of India (No 3)* [2023] FCA 1266 does not affect the position (see §§52-53 below; cf. ASA/§37). Further, in *Infrastructure* the CA doubted that Article III contains an agreement to submit to jurisdiction, despite being aware of the Federal Court of Australia’s judgment (§102(ii)). On appeal, the Full Federal Court of Australia did not express a concluded view as to the effect of the Opening Clause of Article III,²⁵ and in any event reversed the FCA’s

²² Quite apart from the existence of the “rules of procedure” wording in Article III (which is considered below).

²³ Article 53(1) of the ICSID Convention provides *inter alia* that: “*The award shall be binding on the parties . . . Each party shall abide by and comply with the terms of the award, except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*”

²⁴ Article 55 of the ICSID Convention provides that: “*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.*”

²⁵ The Full Federal Court said that “[t]here is much to be said in support of” the Judge’s view (§72), but did not conduct its own analysis of the Opening Clause, or express a final view.

conclusion, based on India’s reservation to the NYC (see *Republic of India v CCDM Holdings LLC & Ors* [2025] FCAFC 2, §72).

35. Fourth, the Appellants are not assisted by the alleged “*scheme, object and purpose of the NYC*”; and any “*consent*” in Article III is subject to the existence of a valid arbitration agreement (see §§38-39 below; *cf.* **ASA/§§30-36, 38**).

36. Fifth, the Appellants accept that Article III of the NYC does not preclude domestic law from imposing “*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*”, said to be because that “*is not a matter addressed . . . within the scheme or scope of the NYC and more particularly Article III*” (**ASA/§39**). It is difficult to reconcile that position with the Appellants’ contention that Article III contains an agreement to waive state immunity.

(3) Context: the Position of States under the NYC

37. The following matters are also inconsistent with the “unequivocal” and “unmistakable” consent that the Appellants seek to establish: (1) neither Article III, nor Article I (which describes the scope of the NYC), nor any other provision of the NYC say anything in terms about the application of the NYC to States in their capacity as parties to an award; (2) there is at least doubt as to the scope of its application in this regard (see further **Section IX** below); (3) it cannot be said that States “*will necessarily be a party*” to awards under the NYC (*Infrastructure*, §§59, 102(i)).

(4) Scheme, Object and Purpose of the NYC

38. The Appellants’ case relies significantly on what they describe as the “*Scheme, object and purpose of the NYC*” (**ASA/§§30-36, 38**). The Appellants’ contention that the object of the NYC was to promote a “*uniform set of rules*” (**ASA/§§31, 52**) is addressed above at §30(8).

39. The Appellants also contend that the NYC “*contains a pro-enforcement bias aimed at facilitating the enforcement of arbitral awards . . .*”, which is “*not dependent upon establishing the validity of the arbitration agreement*”, which is “*presumptively valid*”, validity “*being a matter for the award debtor to raise*” (**ASA/§§32-36**, citing *Rainstorm Pictures v Lombard-Knight* [2014] Bus LR 1196). However:

(1) It is an “*obviously fundamental*” requirement of the NYC that an award sought to be enforced or recognised was based on “*a valid and existing arbitration agreement*” (see NYC, Article II; Article III, providing for enforcement to be “*under the conditions in the following Articles*”; and Articles V(1)(a) and (c), providing for enforcement to be refused if there is no valid arbitration agreement; and *Dallah Real Estates & Tourism Holding Co v Pakistan* [2011] 1 AC 763 §68, per Lord Mance).

(2) Thus, the Appellants cannot rely on the alleged “*scheme*” or “*object and purpose*” of the NYC to infer that by Article III States have not only agreed to waive their immunity, but also that they have agreed to do so regardless of whether they agreed to arbitrate disputes the question. It is not the scheme or object and purpose

of the NYC to “*facilitate*” the enforcement of arbitral awards that were made without a valid, existing arbitration agreement.²⁶

- (3) Further, the premise of the Appellants’ case, the alleged “*mandatory obligation*” in Article III on the forum state to recognise and enforce arbitral awards (ASA/§36) is also misconceived. Any obligation in Article III, is expressly subject to the Article V provision for enforcement to be refused if there is no arbitration agreement. Where there is no arbitration agreement, the forum State has no obligation (or even a right) to recognise and enforce an award (*Dallah*, §§68-69, per Lord Mance; §127, per Lord Collins).
- (4) It is also incorrect to say that under the scheme of the NYC the arbitration agreement is “presumptively valid”. Certification of the arbitration agreement by the award creditor does not “*go to the validity of the arbitration agreement*”, because at that stage validity is “*irrelevant*” (*Rainstorm*, §§27-28, per Tomlinson LJ, relying on *Dardana Ltd v Yukos Oil* [2002] 1 All ER Comm 819, §§10-11).

(5) Relevant rules of international law applicable in the relations between the parties

40. Under Article 31(3)(c) of the VCLT, the interpretation of the NYC must take account of the international law rules that: (1) State immunity is procedural (see §25 above; (2) State immunity is a fundamental principle of the international legal order, which States are obliged to give effect to (*Jurisdictional Immunities (Germany v Italy)*), §56; and see §3(1) above; and (3) any waiver of immunity must be express (see §14 above).

(6) Supplementary Means: The Preparatory Work of the NYC

41. The relevant parts of the *travaux* of the NYC are summarised in the Appendix to this skeleton. In summary: (1) on 13 March 1953, the ICC produced a Preliminary Draft Convention; (2) on 28 March 1955 a committee (“**the Committee**”) that had been established by the UN Economic and Social Council (“**ECOSOC**”) published a Report and its own Draft Convention; (3) on 3 May 1956, after comments had been received on the draft, ECOSOC convened a Conference by Resolution 604; (4) the UN “Conference on International Commercial Arbitration” took place from 20 May to 10 June 1958, when the “Final Act” was signed.
42. The *travaux* “*confirm the meaning resulting from the application of article 31*” (as set out above). Alternatively, if (which is denied) the meaning resulting from the application of article 31 is “*ambiguous*”, the *travaux* “*determine*” that the meaning is as set out above. In particular, the *travaux* show that:
 - (1) The Committee stated in terms that the new convention would “*maintain generally recognized principles of justice and respect the sovereign rights of States*”, which includes state immunity²⁷ (**J/§76**).
 - (2) There is no suggestion in the *travaux* that the “*rules of procedure*” that are referenced in Article III of the NYC were intended to have some narrow meaning.²⁸
 - (3) There is no suggestion in the *travaux* of an intention to waive State immunity. It is “*clear . . . based on the*

²⁶ Indeed, the Appellants accepted this point in their skeleton argument before the Judge, where they stated that “*the object and purpose of the NYC was to consent to the binding nature of an agreement to arbitrate (Article II of the NYC) and fundamentally, the binding nature of the consequent award*”, before seeking to change their position in oral submissions (ASA/§73, emphasis added).

²⁷ See Committee’s 28 March 1955 Report, §14 (Annex 1). Under international law, immunity is a sovereign “*right*” of States (see *Jurisdictional Immunities (Germany v Italy)*, §56).

²⁸ The reference to “*rules of procedure of the territory of the territory where the award is relied upon*” appeared in an ICC Preliminary Draft Convention of 13 March 1953, and was maintained in the Committee Draft of 28 March 1955.

negotiating history of the Convention, that the delegates did not intend to preclude an immunity-based argument in enforcement actions against states” (citing the view of Professor Bjorklund),²⁹ and there is “*nothing . . . that suggests the contrary*” (J/§77).

43. The Appellants dispute that the Committee’s statement in §42(1) above included State immunity (ASA/§63), but do not address the point that under international law, immunity is a sovereign “*right*” of States (fn. 28 above). They also argue that “*state immunity was not discussed*” in the *travaux* (ASA/§§60-62). However, insofar as that is correct, the absence of discussion is itself supportive of India’s interpretation (particularly as waiver of state immunity is a matter of significance) and is admissible under Article 32 VCLT (*Pinochet*, pp. 219-220) to confirm the meaning of Article III, alternatively to determine the meaning.

(7) The Commentaries

44. In summary, the position in relation to the commentaries is as follows:

- (1) The only commentaries which specifically address the question of waiver of state immunity in the context of the NYC all support India’s interpretation (see §26 above; *cf.* ASA/§§71-76).
- (2) As regards other commentaries cited by the Appellants (*cf.* ASA/§§65-70): (a) none addresses state immunity; (b) Van den Berg is more supportive of India’s position than the Appellants’ (see §30(6) above); (c) it is unclear how the statement in Fouchard that “*the NYC does not determine the rules of jurisdiction and procedure*” is supposed to support the Appellants’ case; (d) Scherer is inconsistent with the Appellants’ case in that it recognises that under Article III, time limitation rules are “*rules of procedure*”, which may lead to dismissal of the claim (§14), and also that national courts apply their own *lex fori* to determine whether they have jurisdiction (§§14, 17); (e) the ICCA Guide is inconsistent with the Appellants’ case in that accepts that “*rules of procedure*” include time limitation rules and “*the availability of a set-off defence or counterclaim*” (p. 29); (f) the UNCITRAL Guide emphasizes the freedom of States to determine the content of “*rules of procedure*” for themselves (§§19, 24-25).

(8) The Foreign Authorities

45. The practice from other national courts support India’s position, with the sole exception being the first instance Australian judgment in *CCDM Holdings, LLC v India*, which has been overturned on appeal on the reservation point (see **Section X** below).³⁰

Germany

46. The case of *SchiedsVZ 2006 44* concerned an attempt to enforce a BIT award against Russia. The German Federal Court of Justice held (in the context of a provision in the BIT which stated that any award would be

²⁹ Bjorklund, *supra* note 13. Professor Bjorklund cites Hazel Fox, *State Immunity and the New York Convention*, pp. 829, 830-831, who makes the point that proposals to deal with state immunity “*in the context of the New York Convention, by revision of the Convention, or by inclusion in the UNCITRAL Model Law on Arbitration were not seriously entertained*”, as state immunity was “*part of a more general and complex problem, having an obviously political and public international law character*”, which is inconsistent that the notion that the NYC, as it stood, was intended to waive immunity in any event.

³⁰ For the purposes of treaty interpretation, foreign cases are obviously of importance, and are also a “*supplementary means of interpretation*” under Article 32 VCLT (see Mustill & Boyd (3rd ed.), *Commercial and Investor State Arbitration*, §§17.01-17.07).

“recognized and enforced” in accordance with the NYC) that the NYC “*does not contain any waiver of immunity*”, because immunity is included within the Article III reference “*to the domestic procedural law*” (§§21-28). The Federal Court of Justice is the highest court of civil and criminal jurisdiction in Germany, and is subject only to the German Constitutional Court.

47. The Appellants argue that this case was concerned with immunity from execution against assets, rather than immunity from jurisdiction (**ASA/§73**). However, they do not dispute the fundamental point, which is that under the German approach, immunity is regarded as being preserved by the words “*rule of procedure*” in Article III NYC.

USA

48. The US practice supports India’s position that a State does not waive immunity (or submit to jurisdiction) merely by becoming party to the NYC:

- (1) Under the 1976 Foreign Sovereign Immunities Act (the “**FSIA**”), a foreign State may waive its immunity “*either explicitly or by implication*” (s.28 U.S.C. §1605(a)(1), emphasis added). The FSIA also contains an arbitration exception from immunity (§1605(a)(6)).
- (2) The US District Court for the **District of Columbia** has held or observed in a number of decisions that, even under a test of waiver by “*implication*”, a foreign State does not waive immunity merely by becoming a party to the NYC. Instead, one condition to waiver is that the foreign State must also have agreed to arbitrate the disputes in question (see *NextEra Energy Glob. Holdings B.V. v. Spain* 656 F. Supp. 3d 201 (D.D.C. 2023);³¹ *Blasket Renewable Invs., LLC v. Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023);³² *Glob. Voice Grp. SA v. Guinea*, No. 22-cv-2100, 2025 U.S. Dist. LEXIS 28564 (D.D.C. 2025)³³). The US Court of Appeals for the **D.C. Circuit** has made similar observations (see *Creighton Ltd. v. Qatar* 181 F.3d 118 (D.C. Cir.1999);³⁴ *Process & Indus. Devs. Ltd. v. Nigeria*, 27 F.4th 771 (D.C. Cir. 2022)³⁵).³⁶
- (3) Decisions in the US Court of Appeals for the **Second Circuit** and in the Southern District of New York have also held that a foreign State does not waive immunity merely by becoming a party to the NYC; *inter alia*, the State must also have agreed to arbitrate the underlying disputes (see US Court of Appeal for the Second

³¹ In *NextEra*, the Court observed, in relation to awards under the NYC, that “*an agreement to arbitrate is still necessary for implied waiver of immunity*” (656 F. Supp. 3d at 210, n. 1). On the facts the court concluded that in any event the arbitration exception applied because there was a valid arbitration agreement (209-10).

³² In *Blasket*, the Court held that Spain had not waived immunity merely by becoming a party to the NYC, because “[*o*]ne prerequisite” to finding waiver is “*the existence of an agreement to arbitrate.*” (at 22).

³³ In *Global Voice*, the Court observed that the D.C. Circuit “*has never held in a published decision that a foreign state waives its sovereign immunity from suits seeking to enforce awards under the New York Convention (or similar conventions) solely by ratifying that convention*” and said explicitly “**no arbitration agreement, no waiver**” (42-45, emphasis added).

³⁴ In *Creighton*, the Court held that a foreign state could implicitly waive its immunity by becoming a party to the NYC, where it had “*agreed to arbitrate*” in the territory of a state that was also party to the NYC (at 122-23, 126).

³⁵ In *Process & Ind. Devs. Ltd.*, the Court characterised its earlier decision in *Tatneft v. Ukraine*, as “*holding that the waiver exception applies if the foreign sovereign is a party to the New York Convention and has agreed to arbitrate in a Convention state*” (774, emphasis added).

³⁶ In a joint appeal from the District Court decisions in *NextEra* and *Blasket*, the US Court of Appeals for the D.C. Circuit declined to determine the waiver issue because, it concluded, the arbitration exception applied in any event (see *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1100 (D.C. Cir. 2024)).

Circuit’s decision in *Seetransport v. Navimpex Centrala Navala* 989 F.2d 572 (2d. Cir. 1993);³⁷ and the US District Court for the Southern District of New York in *Preble-Rish Haiti, S.A. v. Haiti*, No. 22-cv-7503(PKC), 2023 U.S. Dist. LEXIS 112826 (S.D.N.Y. June 29, 2023)).³⁸

(4) The US Government’s position is that a State does not waive immunity merely by becoming a party to the NYC; that an agreement to arbitrate the disputes “*would be a necessary condition*” to find an implicit waiver in an NYC enforcement action; and that in such actions the US courts should rely on the FSIA arbitration exception, not the waiver exception.³⁹

(5) In the *Glob. Voice Grp.* case that is cited above, the Court summarised the position as “*no arbitration agreement, no waiver*” (J/§§55-59).

49. The Appellants do not dispute the fundamental point that in the US, ratification of the NYC is not a waiver of state immunity (ASA/§78). Instead, they point to an alleged “*structural difference*” in the US FSIA, compared to the UK SIA, which is immaterial for present purposes.

Canada

50. In Canada, the 1985 State Immunity Act provides that a State may waive immunity, by written agreement before the proceedings commence (s.4(2)(a)). There is no specific arbitration exception. In *Republic of India v CCDM Holdings LLC*, [2024] QCCA 1620 (Can. Que.), the Quebec Court of Appeal held that India had waived its immunity under s.4(2)(a) based on the Court’s finding that India had agreed to submit to arbitration,⁴⁰ taken together with its participation in the arbitration without reserving the right to claim immunity, and its ratification of the NYC (see §§68-88, esp. §§69, 80, 81 86). As the Judge observed, the Quebec Court of Appeal’s “*judgment is not based merely on India’s ratification of the NYC*” (J/§60).

51. Again, the Appellants do not dispute the point that in Canada the ratification of the NYC is on its own not a waiver of state immunity.

Australia

52. In Australia, the Foreign States Immunities Act 1985 contains an exception to immunity where a State submits to the jurisdiction (s.10(1)), which may occur “*by agreement*” (s.10(2)). There is an arbitration exception, but in more limited terms than s.9 SIA.

53. In *CCDM Holdings, LLC & Ors v India* [2023] FCA 1266, Jackman J held that Article III contains a waiver of

³⁷ In *Seetransport*, the premise of the Court’s finding of waiver was that Navimpex (which the court had determined was an “instrumentality or agency” of Romania), had agreed to arbitrate the disputes in question (see 989 F.2d at 578-79).

³⁸ In *Preble-Rish*, the Court found that both the implied waiver and the arbitration exceptions applied. As regards the former, it applied *Seetransport* and held that there had been an implied waiver, but only because, *inter alia*, the state had agreed to arbitrate the disputes in question (see 18-19).

³⁹ See February 2024 “Brief for the United States as *Amicus Curiae*” before the Court of Appeals in *NextEra*, pp. 19-25.

⁴⁰ In Canada, India has argued that, by reason of fraud and illegality, it did not agree to arbitrate the disputes. The Superior Court of Quebec rejected that argument in a judgment dated 23 December 2022 (*CC/Devas (Mauritius) Ltd. v. India*, [2022] QCCS 4785 (Can. Sup. Ct.)), §§145-48). The Quebec Court of Appeal dismissed India’s appeal in its December 2024 judgment. On 31 January 2025, India filed leave to appeal with the Supreme Court of Canada on the issue of jurisdictional immunity. In the English proceedings, the question of whether India agreed to arbitration remains in dispute, in the context of s.9 SIA.

state immunity. However, despite acknowledging that “*India has assembled a substantial body of commentary to the effect that the reference to ‘rules of procedure’ in Art III includes the forum State’s law of State immunity*” (§94), the Judge then declined to decide the rules of procedure point, on the basis that it is an “*arid point of taxonomy*” (§96). That reasoning is misconceived: if any consent in Article III is only “*in accordance with*” the domestic rules of state immunity, then Article III cannot at the same time contain an unequivocal waiver of state immunity. The Full Court of the Federal Court of Australia reversed Jackman J, based on the reservation point (see **Section X** below).

(9) The English Authorities

54. *Infrastructure* has been addressed above (see §§12, 33). The Appellants also rely on the judgment of the CA in *General Dynamics v Libya* [2025] EWCA Civ 134 (**ASA/§17**). However, that case did not concern the NYC (or s.2(2) SIA). It concerned an alleged “*prior agreement*” for the purposes of s.13(3) SIA that was said to arise from provisions in a contract between a State (Libya) and a company. The terms and context of the provisions in question were fundamentally different to the relevant terms and context of the NYC.⁴¹

(10) The Commercial Context

55. The Judge also found, looking at the “*broader commercial context*”, that the extent of waivers of state immunity “*is a matter of negotiation and relative bargaining power*”; that “*the market is capable of restricting state immunity where it may arise*”; and that a finding that ratification of the NYC is in itself a waiver of immunity could affect “*the delicate and currently controversial*” balance between “*investors and states in investment disputes*”, and would give too little weight to the fact that “. . . . *state immunity occupies an important place in international law and international relations*” (**J/§§83-85**).

56. The Appellants do not dispute any of this, other than to argue that these matters are not “*admissible context under Article 31 of the VCLT*” (**ASA/§84**). However, they may be taken into account as relevant circumstances in which the treaty is being interpreted (see *Basfar*, §§64-65).

(IX) WHETHER THE APPLICATION OF THE NYC TO STATES IS LIMITED TO PRIVATE LAW DISPUTES

57. Further or alternatively, India has not agreed to submit, because in Article I (which provides that the NYC applies to awards “*arising out of differences between persons, whether physical or legal*”) the term “*person, whether physical or legal*” only applies to States in relation to private law disputes (**RN**, Section 6, §4).

58. Under Article 31 VCLT, the text of Article I in relation to States is at least “*ambiguous*” in its application to States. The text “*does not give any direct hint from which it would be possible to infer that states are also capable of being parties to an arbitral agreement and subject of an arbitration award*”.⁴² The *travaux* of the NYC show

⁴¹ Also, *cf. Svenksa Petroleum Exploration AB v Lithuania* [2007] QB 86, §§60,124-128.

⁴² Capelli-Perciballi, (1978) 12(1) *International Lawyer* 197, 198. See also Crawford, *supra* fn.9 at 101. The ambiguity also arises from the “Final Act” mentioned in §58(5) below, which may be regarded as part of the context and/or the object and purpose of the NYC (see Gardiner, p. 86).

that the NYC was only intended to apply to States in relation to disputes under private law (see generally **Annex** hereto). In particular:

- (1) The NYC was not intended to cover disputes between States. In 1955, the Committee changed the name of the Convention to refer to “*Foreign*” awards, instead of “*International*” awards, to avoid any suggestion that inter-state arbitrations were covered.⁴³
- (2) In 1955, the Belgian representative proposed that the Convention “*should expressly provide that public enterprises and public utilities should be deemed to be legal persons . . . if their activities were governed by private law*” (emphasis added). However, the Committee rejected Belgium’s proposal as “*superfluous*” and decided that a “*reference in its report would suffice*”.⁴⁴
- (3) During 1955-1956, comments were received that, for the avoidance of doubt, the Convention should contain an express “private law” limitation in relation to awards involving States (see **Annex**, comments of Switzerland, Austria, and the Society of Comparative Legislators).
- (4) On 3 May 1956, ECOSOC Resolution 604 convened a Conference to conclude a convention on the recognition and enforcement of foreign arbitral awards, and to consider “*other possible measures*” for increasing the effectiveness of arbitration “*in the settlement of private law disputes*”.
- (5) The “Final Act” of the Conference stated that the purpose of the Convention was to “*increase the effectiveness of arbitration in the settlement of private law disputes*”. The Conference adopted a resolution, which repeated this description of the purpose of the Convention. 45 States participated in the Conference, all of which signed the Final Act.⁴⁵

59. That interpretation that the NYC only applies to States in private law disputes is supported by various commentaries, including Lionello Capelli-Perciballi, (1978) 12(1) *International Lawyer* 197 at 198-199.⁴⁶ The Appellants contend that the scope of the NYC covers all awards against States, without limitation (**ASA/§§40-42**). However, they do not analyse the text and *travaux* of the NYC. Instead, they rely on *Ecuador v Occidental Exploration and Production Co* [2006] QB 459, §§32-33, where the scope of the NYC was not in issue.

(X) INDIA’S RESERVATION

60. Further, or alternatively, India has not submitted because its ratification of the NYC was subject to the following declaration under Article I(3) of the NYC⁴⁷ (**RN**, Section 6, §5):

⁴³ United Nations Economic and Social Council, *Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. Doc. E/AC.42/4/Rev.1 (28 March 1955) (“**Drafting Committee Report**”), p. 5 §17. Thereafter, on 3 June 1958, the President of the Conference reaffirmed that there was no intention to cover disputes between States (see **Annex** hereto).

⁴⁴ Drafting Committee Report, p. 7 § 24.

⁴⁵ United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Twenty-fifth Meeting* (23 May 1958), UN Doc E/CONF.26/SR.25 (12 September 1958), p. 2.

⁴⁶ See also: (1) Bagner, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) 19 at 27; (2) Girsberger and Voser, *International Arbitration: Comparative and Swiss Perspectives* (4th ed., 2021) at §1689; (3) Sanders, *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (1959) 25(3) 100 at 103; and (4) A. Jan Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), p. 282.

⁴⁷ Article I(3) provides *inter alia* that a State may “. . . 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.”

“In accordance with Article I of the Convention, the Government of India declares that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India” (emphasis added).

61. Further, the VCLT provides *inter alia* as follows:

- (1) A “reservation” is defined as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State” (Article 2(1)(d)).
- (2) A reservation “expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides” (Article 20(1)).
- (3) A reservation: “(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State” (Article 21(1)).⁴⁸

62. Thus, in this case (as per the judgment of the Full Federal Court of Australia in *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2, §§59-75):

- (1) India’s declaration is a “reservation” (see VCLT, Article 2(1)(d));
- (2) India’s reservation is expressly authorised by Article I of the NYC and accordingly does not require any subsequent acceptance by the other contracting States (VCLT, Article 20(1); *India v CCDM* [2025], §62);
- (3) The effect of India’s reservation is to exclude or modify the provisions of the NYC, to the extent of India’s reservation, in India’s relations with all other State parties to the NYC, on a reciprocal basis (VCLT, Articles 21(1)(a) and (b); *India v CCDM* [2025], §§62-67; ILC’s “Guide to Practice on Reservations to Treaties”, Guideline 4.2.4 and Commentary, §§8 and 26-27).
- (4) Accordingly, any submission by India, could only have been for the enforcement of awards “*that determine differences arising out of a legal relationship that is considered as commercial under the law of India*” (*India v CCDM* [2025], §§70, 75).

63. The Appellants argue that India’s reservation is “unilateral” rather than “reciprocal”, because by Article I(3) of the NYC, a Contracting State can only 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, citing Van den Berg, pp. 51-54 (ASA/§§88-89). However, the general principle is that reservations are reciprocal (see VCLT, Article 21(1); ILC’s Guideline 4.2.4). There is nothing in the text of Article I(3) of the NYC, or in *Van den Berg*, or in the other material cited in ASA/§89 that justifies a territorial exception in this case.

⁴⁸ Articles 20 and 21 have customary international law status (see Corten and Klein, *The Vienna Convention on the Law of Treaties, A Commentary* (2011) pp. 489-564 (Article 20) and pp. 565-567 (Article 21)).

64. Thus, it is for the Appellants to establish that the BIT Awards are within the scope of India’s reservation. In this regard:
- (1) The Appellants have not advanced any case, or evidence as whether the BIT awards arise “*out of a legal relationship that is considered as commercial under the law of India*”. For that reason alone, they have failed to discharge their burden of proving the alleged “prior agreement” under s.2(2) SIA (see **J/§96**, stating “*there is some force in India’s contention that the Claimants have not advanced any case, or evidence as to whether the BIT awards arise ‘out of a legal relationship that is considered as commercial under the law of India’*”; see also *India v CCDM* [2025], §76).
 - (2) Alternatively, and without prejudice to the burden of proof, the Court should proceed on the basis of English law (see *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995, §§108-126).
 - (3) Under English law the BIT Awards do not “*determine differences arising out of a legal relationship that is considered as commercial*”.⁴⁹ The BIT is not considered under English law principles as being “commercial”. In particular: (a) a BIT creates rights and obligations between States on the level of public international law; (b) an investor’s rights to pursue claims under a BIT are rights granted under public international law and must be determined on principles of public international law; (c) any arbitration agreement between an investor and a state that may arise from a BIT is also governed by public international law (see *Republic of Ecuador v Occidental Exploration and Production Company* [2005] 2 Lloyd’s Rep 240, §§46, 61-63 (Commercial Court); [2006] QB 432 (Court of Appeal), §§19, 33; *India v CCDM* [2025], §81).
 - (4) Further or alternatively, (assuming for present purposes the findings of the Tribunal) the “*differences*” arose out of the annulment of the Antrix Agreement, which was a decision of the Indian Cabinet Committee on Security, taken for India’s “*national needs*”, and not based on any “commercial relationship” (see **J/§§15, 18**; *India v CCDM* [2025], §81; Jurisdiction and Merits Award, 25 July 2016, §§144-146, 268-290, 501(b)).
 - (5) The Appellants also rely on a textbook (**ASA/§90**, citing *Douglas*). However, that book does not consider the meaning of “commercial” under English law. Further, the book actually supports India’s position, in that it draws a distinction between “commercial”, on the one hand, and “public international”, on the other.
 - (6) The Appellants also seek to rely on the “MFN” provision in the BIT (**ASA/§91**). However, an MFN provision in a treaty does not, in general, incorporate dispute resolution provisions from another BIT (see *Plama v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, §223, in relation to a clause with similar narrow wording to the MFN clause in the BIT). Further, the attempt to invoke an MFN provision in order to circumvent a State’s reservation under the NYC, and to enforce an arbitration award is entirely novel (see further Mangan, *Substantive Protections: MFN in The Guide to Investment Treaty Protection and Enforcement*, GAR (2nd ed., 2023), pp. 8, 10, 11).⁵⁰

(XI) THE S.23(3)(A) POINT

⁴⁹ **ASA/§90** is wrong to say that India did not advance a case under English law.

⁵⁰ The Appellants’ characterisation of India’s position at first instance in Australia (**ASA/§92**) is disputed, and irrelevant.

65. Alternatively, India has not submitted by prior written agreement within s.2(2) SIA, because the alleged “agreement” could only have been entered before the SIA came into force, and s.23(3)(a) provides that s.2(2) does not apply to any such agreement (**RN**, Section 6, §§6-8 and Sections 4, 5 and 8).
66. S.23(3) provides that the immunity exception in s.2(2) does not apply to a “prior agreement” entered before the SIA came into force: “*Subject to subsection (4)*⁵¹ *below, Parts I and II of this Act 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, and (b) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement, entered into before that date*” (emphasis added).
67. The SIA came into force on **22 November 1978**: s. 23(5) of the SIA provides that: “*This Act shall come into force on such date as may be specified by an order made by the Lord Chancellor by statutory instrument*”; under “*The State Immunity Act (Commencement) Order 1978*” (S.I. 1978/1572), §2, the SIA came into force on 22 November 1978.
68. Thus, a “party relying on” s.2(2) “*must satisfy the relevant court*” that, *inter alia* “*the agreement was entered into on or after 22 November 1978*”, and if the party alleges a prior written agreement under s.2(2) by treaty, then “*the treaty etc. must have been entered into on or after 22 November 1978*” (Dickinson, *State Immunity, Selected Materials and Commentary*, (2004), §§4.019 , 4.020). In other words, the burden is on the Appellants to show that the alleged “*prior agreement*” was entered into on or after 22 November 1978.
69. The Appellants’ s.2.(2) case is based on alleged agreement between “*India and the UK*” (**ASA/§37**). India signed the NYC on 10 June 1958 and ratified it on 13 July 1960.⁵² Accordingly, under Article XII(2), the NYC entered into force for India “*on the ninetieth day*” thereafter, being **11 October 1960**.⁵³ The UK acceded to the NYC on 24 September 1975.⁵⁴ Accordingly, the NYC entered into force for the UK “*on the ninetieth day*” thereafter, being **23 December 1975**.⁵⁵
70. Thus: (1) the alleged “*prior written agreement*” could only have been entered before the SIA came into force (i.e., 23 December 1975 at the latest); (2) s. 2(2) SIA cannot apply to the alleged “*prior written agreement*” (see s.23(3)(a) SIA); (3) India is immune under s.1 SIA, subject only to the ongoing dispute in relation to the s.9 SIA exception. That is because Part I of the SIA “*is a complete code*” (see §10 above, citing *Benkharbouche*).
71. There is nothing unfair or surprising about that result. Under the common law, prior to the SIA, it was not possible to waive immunity by a prior agreement (see §8 above). It would be surprising if the SIA had the effect of

⁵¹ S.23(4) says that “*Section 12 above applies to any proceedings instituted after the coming into force of this Act.*” S.12 concerns service of process on States, and is not relevant for present purposes.

⁵² See United Nations website extract, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”)*, accessed on 2 July 2025 and available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

transforming an agreement to submit that was ineffective at the time that it was made into an effective submission.⁵⁶

72. The Appellants raised two points in response:

- (1) They relied on the statement in *Infrastructure* (§§11, 40-41) that in s.23(3), “the term ‘matters’ does not readily encompass treaties or legislation”. However, that case, concerned a materially different point, (and the Judge’s *obiter* comments to the contrary are, respectfully, mistaken **J/§101**):
 - (a) The Court in *Infrastructure* was considering whether as argued by the investors (not the State) (and regardless of whether there was an “agreement to submit”), the entirety of Part I of the SIA (including the general rule of immunity in s.1 SIA) could be disapplied generally on the basis that the enforcement proceedings in that case were “in respect of” the ICSID Convention, which was a “matter” for the purpose of the chapeau in s.23 SIA. The Court was not considering an argument by a State that the specific immunity exception in s.2(2) does not apply by reason of s.23(3)(a) SIA.
 - (b) A “prior agreement” within s.23(3)(a) must include an agreement contained in a treaty, given that s.17(2) SIA defines “agreement” to include “references to a treaty”. The Judge did not consider s.17(2).
 - (c) Further, in *Infrastructure*, the Court observed and accepted that a “prior agreement” to submit would be within the scope of s.23 SIA generally (§40).⁵⁷
- (2) The Appellants also argue that India’s consent under the NYC framework was a “standing and continuous” consent (**J/§§102-104**). However:
 - (a) There is no authority whatsoever for that novel proposition, which is based on a false analogy with BITs, which, unlike the NYC, make a “deliberate attempt” to confer the benefits of arbitration on private investors, by containing a “standing” offer to arbitrate that is in terms directed at investors (*Ecuador v Occidental Exploration and Production Company* [2006] QB 432, §32).
 - (b) Further, the argument is fundamentally inconsistent with the rest of the Appellants’ case, which is based on an alleged agreement between “India and the UK” (**ASA/§37**). What matters under s.23(3)(a) is when the alleged agreement was “entered”: any agreement between India and the UK can only have been entered prior to 22 November 1978 (see §§67-70 above). Alternatively, if the relevant “agreement” is India’s ratification of the NYC on its own, then that also could only have been “entered” prior to 22 November 1978.

⁵⁶ There is a suggestion in Dickinson, *State Immunity: Selected Materials and Commentary* (2004), §4.148 that the effect of s.23(3)(a) is that the effect of any purported submission will automatically fall to be determined by common law rules. However: (1) India’s position is that if s.2(2) does not apply, then the position is simply governed by the general rule of immunity in s.1 SIA (see §70 above); (2) the Appellants have not suggested otherwise, their position being simply that s.2(2) does apply; (3) the question before the Court 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”; (4) Dickinson does not cite any case directly concerning s.23(3)(a); and (5) without prejudice to (1) to (4), if it is argued that the common law rules apply, then any alleged agreement to submit would still be ineffective under the common law rules (see §8 above).

⁵⁷ The CA’s *obiter* comment in §40 that where there is a prior agreement to submit, then “proceedings relating to [it] would not attract immunity”: (1) overlooks the specific wording of s.23(3)(a) SIA, which governs the consequence of a “prior agreement” that is entered before the SIA came into force, i.e., that s.2(2) does not apply; and (2) in any event leave open the question of whether in any given case it can be said that “proceedings relate to” a “prior agreement”.

(c) It is irrelevant for the purposes of s.23(3)(a) that the proceedings “*came long after 1978*” (cf. **J/§102-104**), and it is respectfully suggested that the Judge erred in this respect.

Permission to Appeal

73. The s.23(3)(a) point applies even if (which India denies) India has otherwise consented or purported to consent under Article III to the English Courts recognising and enforcing the BIT awards. Thus, the point arises as an alternative position, and involves a minor variation to §1 of the Order dated 16 May 2025 (i.e., the deletion of the words “. . . and thereby has not consented under Article III to the English Court recognising and enforcing the Awards . . .”).⁵⁸

74. Accordingly, India seeks permission to appeal on this point (see **RN**, Sections 4 and 8; and Section 6, §§6 to 8), having regard to the test in CPR 52.6:

- (1) The appeal has at least a “*real prospect of success*”, for the reasons set out above in §§65-72 above.
- (2) Further or alternatively, there are “*compelling reasons*” for the appeal to be heard. The Judge did not give permission to the Appellants on the basis of “real prospect of success”, but only because there was a “compelling reason”, namely that “*the issue has implications for state immunity that is not limited to the dispute in question*” (Consequential Judgment dated 16 May 2025, §6). Accordingly, India should also have permission to appeal on the s.23(3)(a) point, which is: (a) an integral part of the s.2(2) question that is before the Court, and was argued in full before the Judge (**J/§§34, 37(6)**); and (b) is applicable to at least 49 out of the 172 State parties to the NYC, all of which became parties to the NYC before the SIA came into force.⁵⁹ In other words, the purpose of the appeal, as contemplated by the Judge, would be defeated if the s.23(3)(a) point is not determined as part of this appeal.
- (3) Further, if India is correct in the s.23(3)(a) argument, as set out in §§65-74 above, then the Appellants themselves cannot be entitled to the relief that they seek, i.e., a declaration stating that India has submitted to the jurisdiction of the English Court by prior written agreement within the meaning of s.2(2) of the SIA (see Appellants’ Notice, Section 9).

CONCLUSION

75. For the reasons set out above: (1) India should have permission to appeal as set out in §§65-74 above; (2) §1 of the Order dated 16 May 2025 should be upheld; (3) alternatively, §1 of the Order should be varied for the reasons set out in §§65-74 above. Further, India should have its costs of the appeal.

Sudhanshu Swaroop KC

Twenty Essex, 3 July 2025

⁵⁸ So that the Order reads: “*The answer to the Section 2 SIA Question is “no”. That is to say that 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 not 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.*” (**RN**, Section 8).

⁵⁹ See New York Convention website extract, *Contracting States*, accessed on 2 July 2025 and available at: <https://www.newyorkconvention.org/contracting-states/contracting-states>.

ANNEX: THE PREPARATORY WORKS OF THE NYC

DATE	EVENT
28 Oct 1953	ECOSOC circular which enclosed ICC Report and Preliminary Draft Convention. ⁶⁰
6 Apr 1954	ECOSOC Resolution 520 established “Committee on Enforcement of International Arbitral Awards” (the “ Committee ”), ⁶¹ with 8 States represented.
21 Jan 1955	Committee published comments received from Governments regarding the ICC Draft. ⁶²
Mar 1955	<p>Committee holds Meetings and publishes Report recommending draft Convention⁶³</p> <p>The Committee “concluded that it would be desirable to establish a new convention which while going further than the [1927] Geneva Convention in facilitating the enforcement of foreign arbitral awards, would <u>at the same time maintain generally recognized principles of justice and respect the sovereign rights of States</u>”.⁶⁴ (emphasis added)</p> <p>As regards the Title of the Draft Convention: The Committee rejected the expression “<i>International Arbitration Awards</i>” because “<i>the Draft Convention does not deal with arbitration between States . . .</i>”⁶⁵</p> <p>As regards Article I (and the relevant parties to arbitral awards):</p> <ul style="list-style-type: none"> -The Committee’s Draft Convention provided that it would apply to arbitral awards arising out of differences “<i>between persons, whether physical or legal</i>”. -In this regard: “<i>The Representative of Belgium had proposed that the article should expressly provide that <u>public enterprises and public utilities</u> should be deemed to be legal persons for purposes of this article if their activities were governed by private law. The Committee was of the opinion that such a provision would be superfluous . . .</i>”⁶⁶ (emphasis added) -During discussions of Belgium’s proposal: the United Kingdom representative said that “<i>the bodies to which the convention would apply should be clearly stated so that the Parties might know the exact extent of their obligations; <u>in particular it should be made clear whether semi-State agencies would be able to claim immunity</u></i>”;⁶⁷ India’s representative said he “<i>shared that view</i>”⁶⁸ (emphasis added) <p>As regards Article 1 and whether the draft should apply to “commercial disputes”:</p> <ul style="list-style-type: none"> -The Committee concluded that the law of some countries “<i>does not specifically differentiate between civil and commercial matters</i>” and so decided not to include a qualification, and also referred to the

⁶⁰ United Nations Economic and Social Council, *Statement submitted by the International Chamber of Commerce, a nongovernmental organization having consultative status in category A*, UN Doc E/C.2/373 (28 October 1953).

⁶¹ Drafting Committee Report, §§1-3.

⁶² United Nations Economic and Social Council, *Comments received from Governments regarding the Draft Convention on the Enforcement of International Arbitral Awards*, E/AC.42/1 (21 January 1955).

⁶³ Drafting Committee Report.

⁶⁴ *Ibid*, §14.

⁶⁵ *Ibid*, §17.

⁶⁶ *Ibid*, §24.

⁶⁷ United Nations Economic and Social Council, *Committee on the Enforcement of International Arbitral Awards: Summary Record of the Third Meeting*, UN Doc E/AC.42/SR.3 (23 March 1955), p. 4.

⁶⁸ *Ibid*.

	possibility that States could make declarations. ⁶⁹
20 May 1955	UN Secretary-General transmits Report and draft Convention to States. ⁷⁰
31 Jan 1956	<p>UN Secretary-General Report on the Recognition and Enforcement of Foreign Arbitral Awards⁷¹</p> <p>Notes that comments on the draft Convention had (so far) been received from 15 governments⁷² and 4 NGOs. These comments include the following:</p> <p>-Switzerland proposed that the title be changed to “<i>Convention on the Recognition and Enforcement of International Arbitral Awards in Private Law</i>”⁷³</p> <p>-Austria commented, in relation to Article 1: “<i>Since the term ‘legal persons’ includes States, the draft convention seems admittedly to cover arbitral awards made in their favour or against them in cases of disputes with subjects of private law</i>”.⁷⁴</p> <p>-The Society of Comparative Legislation suggested regarding the Title: “. . . it would be preferable to add to it the words “in private law” to “eliminate any possibility of confusion with “arbitration in public international law . . .”⁷⁵</p>
3 May 1956	<p>ECOSOC Resolution 604</p> <p>Convenes Conference; refers to “<i>the settlement of private law disputes</i>”.</p>
20 May to 10 Jun 1958	<p>United Nations Conference on “International Commercial Arbitration”</p> <p>-During the discussion of Article 1, Czechoslovakia referred to Austria’s earlier suggestions, and said, “<i>although . . . superfluous</i>” it would not object to an express provision to the effect that the Convention was also applicable in cases in which corporate bodies under public law, <u>in their capacity as entities having rights and duties under private law had entered into an arbitration agreement</u>”.⁷⁶</p> <p>-President reaffirmed that the Convention was not intended to apply to inter-State disputes.⁷⁷</p> <p>-A text as approved by the drafting committee on 9 June 1958 was produced.⁷⁸</p>
10 Jun 1958	<p>Final Act of the United Nations Conference on International Commercial Arbitration</p> <p>-Both the preamble and resolution indicate intention to apply to “<i>private law disputes</i>”.⁷⁹</p>

⁶⁹ Drafting Committee Report, §26.

⁷⁰ See United Nations Economic and Social Council, *Recognition and Enforcement of Foreign Arbitral Awards: Report by the Secretary-General*, UN Doc E/2822 (31 January 1956) (“**Secretary General Report**”), §1

⁷¹ Secretary General Report, Annex I.

⁷² Namely, Austria, Belgium, Brazil, China, Denmark, France, Federal Republic of Germany, India, Japan, Republic of Korea, Lebanon, Mexico, Philippines, Switzerland, and USSR.

⁷³ Secretary General Report, Annex I, pp. 8-9.

⁷⁴ Secretary General Report, Annex I, p. 11.

⁷⁵ Secretary General Report, Annex II p. 4; see also Annex II, p. 9.

⁷⁶ United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Seventh Meeting*, UN Doc E/CONF.26/SR.7 (12 September 1958), p. 3.

⁷⁷ United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Sixteenth Meeting*, UN Doc E/CONF.26/SR.16 (12 September 1958), p. 5.

⁷⁸ United Nations Economic and Social Council, *Text of the Convention as provisionally approved by the Drafting Committee on 9 June 1958*, UN Doc E/CONF.26/8 (9 June 1958).

⁷⁹ United Nations Economic and Social Council, *1958.06.10 - Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UN Doc E/CONF.26/8/Rev.1 (10 June 1958), §§1, 16.