



Case in Brief:

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What is the implication of becoming a Contracting State to the New York Convention?

A recent decision in the Federal Court of Australia, *CCDM Holdings, LLC v Republic of India (No 3)*,¹ has explored some of the intricacies of the New York Convention. The case provides an interesting analysis of state immunity and whether government action can be described as a commercial transaction.

¹ *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266.

Background

Investors from Mauritius had commenced arbitration proceedings against the Indian state for alleged expropriation without compensation for those investments. The investors brought the proceedings under the bilateral investment treaty (**BIT**) signed between India and Mauritius in 1998. The BIT granted certain rights for investors as well as mechanisms for dispute resolution.

The arbitral tribunal rendered an award in favour of the investors. The investors then applied to the Federal Court of Australia to have the award recognised and enforced. This decision concerned an interlocutory application by India to have the award set aside.



Did signatories to the New York Convention waive their sovereign immunity?

India's central argument was that the Australian courts could neither recognise nor enforce the award as India had sovereign immunity. Section 9 of the *Foreign States Immunities Act 1985* (Cth) (the **Act**) provides for state immunity from the jurisdiction of Australia's courts. However, as pointed out by the investors, this was subject to section 10(2) which stipulates that a foreign state can waive that immunity.

The Court looked at whether India had waived its state immunity. Much of this depended on an interpretation of the New York Convention, a multi-lateral agreement designed to ease the process of recognising and enforcing arbitral awards. India acknowledged that they had signed the New York Convention but that in doing so they had not waived their immunity.

India's argument rested on the

presupposition that:

- a. compared to the language used in the International Convention on the Settlement of Investment Disputes (**ICSID**), it is not clear that the New York Convention intended the parties to waive their sovereign immunity; and
- b. if signing the New York Convention does waive immunity, then that only exists so far as arbitral awards concern commercial matters, as per section 11 of the Act.

Further to (b), India argued that the Government decision to start winding up the investment did not constitute a commercial matter.

The Court did not agree with India's core argument that immunity had not been waived. The inherent nature of the New York Convention meant that states would be involved in the process of recognising and enforcing awards. India had signed the New York Convention. While that would amount to an implicit waiver

of immunity, that is all that is required in Australian case law.² The Court found India's status as a Contracting State to the New York Convention to be a *clear and unmistakable submission by agreement within the meaning of s 10(2) of the FSI Act*.

On the two subpoints, the Court held that:

- a. it is irrelevant to the interpretation of the New York Convention that ICSID expresses the waiver in an explicit way; and
- b. section 11 would not apply.

Regarding section 11, the Court agreed with India that the actions of the Government could not be considered a commercial transaction. The decision of the Indian Cabinet, an act of *executive policy-making*, cannot be compared *with the activities of commercial parties or the entry into, or performance of, commercial transactions*.

The Court dismissed India's interlocutory application.

² Citing *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor* [2023] HCA 11. See pp 34–37 of [ReSolution issue 36](#).