

Sovereign Immunity as a Defense for Enforcement of Arbitration Awards in the English Courts: The ICSID Convention Versus the New York Convention

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Recent English case law has created two tracks for enforcement of investor/state awards, depending on whether the award arises under the ICSID Convention or the New York Convention.

Under the State Immunity Act 1978, a foreign state is immune from UK-court jurisdiction subject to certain exceptions, such as where the state has submitted to the jurisdiction by way of a “prior written agreement.” Whether a treaty amounts to such a prior agreement is a matter of interpretation.

In *Spain v. Infrastructure Services Luxembourg Sarl*, the UK Supreme Court unanimously dismissed appeals by Spain and Zimbabwe against the enforcement of ICSID awards, holding that Article 54(1) of the ICSID Convention—which requires contracting states to recognize and enforce ICSID awards—is a “clear and unequivocal expression of the state’s consent to the exercise of jurisdiction” and therefore a waiver of sovereign immunity from adjudication in proceedings for recognition and enforcement.

Conversely, in *Devas (Mauritius) Limited v. India*, the UK Court of Appeal held that India’s ratification of the New York Convention was not a waiver of immunity. Despite similar wording in Article III of the New York Convention to that in Article 54(1) of the ICSID Convention, the court distinguished the two treaties on grounds of:

- Text—Article III of the New York Convention contains a qualifier that awards are binding and enforceable “in accordance with the rules of procedure of the territory,” which the ICSID Convention does not; and
- Structure—the ICSID Convention exists to secure investment and protect investors, while the New York Convention applies to awards generally and not just those involving states.

The Court of Appeal concluded that state immunity falls squarely within the “rules of procedure” of a state, so Article III of the New York Convention preserves rather than displaces immunity.

The upshot: ICSID award holders now have a clearer route to enforcement in the United Kingdom, while New York Convention award holders must still separately prove a state's written agreement to arbitrate. This gives real enforcement weight to an investor's choice of arbitration forum when a treaty offers both ICSID and non-ICSID options, requiring careful upfront assessment of enforceable assets and likely enforcement venue.

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