

ARBITRATION (FOREIGN AWARDS AND AGREEMENTS) ACT 1974

No. 136 of 1974

An Act to approve Accession by Australia to a Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to give effect to that Convention, and for related purposes.

BE IT ENACTED by the Queen, the Senate and the House of Representatives of Australia, as follows:—

1. This Act may be cited as the *Arbitration (Foreign Awards and Agreements) Act 1974*.¹ Short title.

2. (1) Sections 1, 2, 3 and 4 shall come into operation on the day on which this Act receives the Royal Assent.¹ Commencement.

(2) The remaining provisions of this Act shall come into operation on a date to be fixed by Proclamation, being a date not earlier than the date on which the Convention enters into force for Australia.

3. (1) In this Act, unless the contrary intention appears—

“agreement in writing” has the same meaning as in the Convention;

“arbitral award” has the same meaning as in the Convention;

“arbitration agreement” means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention;

“Australia” includes the Territories other than Papua New Guinea;

“Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in the Schedule;

“Convention country” means a country (other than Australia) that is a Contracting State within the meaning of the Convention;

“court” means any court in Australia, including a court of a State or Territory;

“foreign award” means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

Interpretation.

(2) In this Act, where the context so admits, “enforcement”, in relation to a foreign award, includes the recognition of the award as binding for any purpose, and “enforce” and “enforced” have corresponding meanings.

(3) For the purposes of this Act, a body corporate shall be taken to be ordinarily resident in a country if, and only if, it is incorporated or has its principal place of business in that country.

Accession to
Convention.

4. Approval is given to accession by Australia to the Convention without any declaration under sub-article 3 of Article I but with a declaration under Article X that the Convention shall extend to all the external Territories other than Papua New Guinea.

Territories.

5. This Act extends to every external Territory other than Papua New Guinea.

Crown to be
bound.

6. This Act binds the Crown in right of Australia or of a State.

Enforcement
of foreign
arbitration
agreements.

7. (1) Where—

- (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
- (b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
- (c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or
- (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country,

this section applies to the agreement.

(2) Subject to this Act, where—

- (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
- (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration,

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under sub-section (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

(4) For the purposes of sub-sections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) A court shall not make an order under sub-section (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

8. (1) Subject to this Act, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made. Recognition
of foreign
awards.

(2) Subject to this Act, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.

(3) Subject to this Act and without limiting the operation of sub-section (2), if a Court by the name of the Superior Court of Australia is established by an Act, a foreign award may, on or after the date on which that Court commences to exercise its jurisdiction, be enforced, by leave of that Court, as if the award were a judgment of that Court.

(4) Where—

(a) at any time, a person seeks the enforcement of a foreign award by virtue of this Act; and

(b) the country in which the award was made is not, at that time, a Convention country,

sub-sections (1), (2) and (3) do not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

(5) Subject to sub-section (6), in any proceedings in which the enforcement of a foreign award by virtue of this Act is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that—

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him, under some incapacity at the time when the agreement was made;

- (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
- (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
- (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(6) Where an award to which paragraph (5) (d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Act is sought, the court may refuse to enforce the award if it finds that—

- (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
- (b) to enforce the award would be contrary to public policy.

(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Act is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

9. (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Act, he shall produce to the court—

Evidence of awards and arbitration agreements.

- (a) the duly authenticated original award or a duly certified copy; and
- (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of sub-section (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if—

- (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
- (b) it has been otherwise authenticated or certified to the satisfaction of the court.

(3) If a document or part of a document produced under sub-section (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.

(4) For the purposes of sub-section (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.

(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates.

10. (1) For the purposes of this Act, a certificate purporting to be signed by the Secretary to the Department of Foreign Affairs and stating that a country specified in the certificate is, or was at a time so specified, a Convention country is, upon mere production, receivable in any proceedings as *prima facie* evidence of that fact.

Evidence relating to Convention.

(2) For the purposes of this Act, a copy of the *Gazette* containing a Proclamation fixing a date under sub-section 2 (2) is, upon mere production, receivable in any proceedings as *prima facie* evidence of—

- (a) the fact that Australia has acceded to the Convention in accordance with section 4; and
- (b) the fact that the Convention entered into force for Australia on or before the date so fixed.

11. Nothing in this Act affects the operation of section 9 of the *Sea-Carriage of Goods Act 1924-1973*.

This Act subject to Sea-Carriage of Goods Act.

Effect of this
Act on other
laws.

12. (1) This Act applies to the exclusion of any provisions made by a law of a State or Territory other than Papua New Guinea with respect to the recognition of arbitration agreements and the enforcement of foreign awards, being provisions that operate in whole or in part by reference to the Convention.

(2) Except as provided in sub-section (1), nothing in this Act affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of this Act.

Judiciary
Act.

13. A matter arising under this Act, including a question of interpretation of the Convention for the purposes of this Act, shall, for the purposes of section 38 of the *Judiciary Act* 1903-1973, be deemed not to be a matter arising directly under a treaty.

Application
of Act.

14. The application of this Act extends to agreements and awards made before the date fixed under sub-section 2 (2), including agreements and awards made before the day referred to in sub-section 2 (1).

SCHEDULE

Section 3

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extensions under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

SCHEDULE—continued

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

SCHEDULE—continued

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extensions shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

SCHEDULE—continued

- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

NOTE

1. Act No. 136, 1974; assented to 9 December 1974.