

ARBITRATION (FOREIGN AWARDS AND AGREEMENTS) ACT.

New South Wales



ANNO VICESIMO SECUNDO

ELIZABETHÆ II REGINÆ

Act No. 36, 1973.

An Act to make provision with respect to the recognition and enforcement in the State of foreign arbitral awards and arbitration agreements; to amend the Administration of Justice Act, 1924, and the Foreign Judgments (Reciprocal Enforcement) Act, 1973, in certain respects; and for purposes connected therewith. [Assented to, 8th May, 1973.]

BE

Arbitration (Foreign Awards and Agreements).

BE it enacted by the Queen's Most Excellent Majesty, by No. 36, 1973 and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the "Arbitration (Foreign Awards and Agreements) Act, 1973".

2. This Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

3. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"arbitration" means arbitration under an arbitration agreement;

"arbitration agreement" means a written agreement that is signed by the parties, or is contained in an exchange of letters or telegrams by the parties, under which or under a clause of which the parties undertake to submit to arbitration (whether or not an arbitrator is named or designated in the agreement or clause) all or any present or future differences between them;

"award" means an arbitral award made on a reference to arbitration, and includes an interim award;

"Convention country" means a country other than Australia that is a Contracting State within the meaning of the Convention;

"enforce",

Arbitration (Foreign Awards and Agreements).

No. 36, 1973

“enforce”, in relation to an award, includes rely on the award by way of defence, set-off or counterclaim in any legal proceedings;

“foreign award” means an award arising out of differences between persons and made by an arbitrator or arbitrators appointed by those persons, or by a permanent arbitral body to which those persons have submitted, in a country, or part of a country, other than Australia;

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

(2) A reference in this Act to an arbitrator appointed under an arbitration agreement shall, unless a contrary intention appears from the agreement, be read as including a reference to an arbitrator appointed by name or designation in the agreement.

Foreign
arbitration
agreements.

4. (1) This section applies to an arbitration agreement that—

- (a) is governed by a law other than a law of the State or of another State or of a Territory of the Commonwealth;
- (b) expressly provides for arbitration in a Convention country; or
- (c) is made between parties one or more of whom was domiciled or ordinarily resident in a Convention country at the time when the agreement was made.

(2)

Arbitration (Foreign Awards and Agreements).

(2) If a party, or a person claiming through or under a party, to an arbitration agreement to which this section applies commences proceedings in a court against another party, or a person claiming through or under another party, to the arbitration agreement in respect of a matter agreed to be referred to arbitration under the agreement, a party to the proceedings may apply to the court to stay the proceedings.

(3) An application under subsection (2) for a stay of proceedings in the Supreme Court may only be made at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, and any application under that subsection for a stay of proceedings in any other court may only be made at any time after service of process and before taking any other steps in the proceedings.

(4) If the court hearing an application to stay proceedings under this section is satisfied that—

- (a) the arbitration agreement is an arbitration agreement to which this section applies;
- (b) the arbitration agreement is not null and void, inoperative or incapable of being performed; and
- (c) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration,

the court shall make an order staying the proceedings and referring the matter to arbitration.

(5) Where, pursuant to subsection (4), a court refers a matter to arbitration, the provisions of the Arbitration Act, 1902, so far as they are applicable and with the necessary adaptations, apply to and in relation to the arbitration as if that matter had been submitted to arbitration pursuant to a submission within the meaning of that Act.

Arbitration (Foreign Awards and Agreements).

No. 36, 1973

Recognition
of foreign
awards.**5.** (1) Subject to this Act, a foreign award—

- (a) is enforceable in the State in the same manner as an award on a submission within the meaning of the Arbitration Act, 1902, is enforceable under that Act; and
- (b) is, by virtue of this Act, binding for all purposes on the parties to the arbitration agreement under which it was made.

(2) A foreign award (being an award that is made in a country that is not a Convention country at the time when a person seeks to enforce the foreign award under this Act) is not enforceable under this Act in the State unless the person so seeking to enforce it under this Act is domiciled or ordinarily resident in a country that is a Convention country and that is entitled under Article XIV of the Convention to avail itself of the Convention against the Commonwealth in respect of such an award.

(3) For the purposes of subsection (2), in proceedings for the enforcement of a foreign award a certificate purporting to be signed by the Secretary to the Department of Foreign Affairs of the Commonwealth stating that a specified country is a Convention country and is entitled under Article XIV of the Convention to avail itself of the Convention against the Commonwealth in respect of a foreign award that is made in a country that is not a Convention country at a specified time is evidence of the matters so stated.

(4) Subject to subsection (5), the Supreme Court may refuse to enforce a foreign award only if it is established by a party to the proceedings to enforce the award that—

- (a) a party to the arbitration agreement in pursuance of which the award was made was under some legal incapacity;

(b)

Arbitration (Foreign Awards and Agreements).

- (b) the arbitration agreement was not valid under the law expressed in the agreement to be applicable to it or, where no law has been so expressed to be applicable, under the law of the country, or part thereof, where the award was made; No. 36, 1973
- (c) the applicant was not given proper notice of the appointment of the arbitrator by whom the award was made or of the arbitration proceedings in respect of which the award was made, 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 arbitration agreement, or contains a decision on a matter beyond the scope of the arbitration agreement;
- (e) the composition of the arbitral authority by which or by whom, or the arbitral procedure in respect of which, the award was made was not in accordance with the arbitration agreement or, where the agreement is silent on the composition of that authority or the arbitral procedure, was not in accordance with the law of the country, or part thereof, where the arbitration took place; or
- (f) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country, or part thereof, in which, or under the law of which, the award was made.

(5) Where a foreign award referred to in subsection (4) contains decisions on matters falling within the scope of the arbitration agreement in pursuance of which it was made and also matters not falling within the scope of the agreement, a decision in the award on a matter properly submitted to arbitration is, subject to this Act, enforceable to the extent to which the Supreme Court is satisfied that it can be separated from decisions in the award on matters beyond the scope of the arbitration agreement.

(6)

Arbitration (Foreign Awards and Agreements).

No. 36, 1973
 — (6) A foreign award is not enforceable if the Supreme Court is of the opinion that—

- (a) the difference between the parties to the award is not capable of settlement by arbitration under the laws of the State; or
- (b) the recognition and enforcement of the award would be contrary to public policy in the State.

(7) Where, in proceedings for the enforcement of a foreign award, a party to the award satisfies the Supreme Court that there is an application before a competent authority of the country or part of the country in which, or under the law of which, the award was made for the setting aside or suspension of the award, the Supreme Court—

- (a) may, if it considers it proper to do so, make an order adjourning the proceedings before it until after the expiration of such period as appears to the Supreme Court to be reasonably sufficient for that application to be dealt with by that competent authority or such further period as the Supreme Court, on application by that party made either before or after the expiration of the firstmentioned period, allows; and
- (b) on the application of the party seeking the enforcement of the award, may make the order for the adjournment of the proceedings conditional on the giving of such security by the party seeking the adjournment as the Supreme Court thinks fit.

Evidence
of foreign
award.

6. (1) The party seeking to enforce a foreign award shall produce to the Supreme Court—

- (a) the duly authenticated original award or a copy or photographic representation of such an original; and

(b)

Arbitration (Foreign Awards and Agreements).

(b) the original arbitration agreement under which the award purports to have been made or a copy or photographic representation of the original agreement. No. 36, 1973

(2) A copy or photographic representation of an original foreign award or arbitration agreement shall be certified as a true copy or photographic representation by the arbitrator or, if the award was made by a tribunal, by an officer of the tribunal.

(3) If a document or part of a document produced under subsection (1) is not written in the English language, a translation, in the English language, of the document or that part shall be produced with the document.

(4) The translation shall be verified in writing as a correct translation by an official or sworn translator of the country in which the award was made or by a diplomatic or consular agent of that country in Australia.

7. (1) Rules of court may be made under the Supreme Court Act, 1970, for carrying the purposes of this Act into effect. Rules.

(2) Nothing in subsection (1) limits the rule-making powers conferred by the Supreme Court Act, 1970.

8. (1) The Administration of Justice Act, 1924, is amended by omitting from the definition of "Judgment" in section 3 (1) the words "and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place". Amendment of Act No. 42, 1924. Sec. 3. (Interpretation.)

(2) The Foreign Judgments (Reciprocal Enforcement) Act, 1973, is amended by omitting from the definition of "judgment" in section 4 (1) the words "and includes an award in proceedings on an arbitration if the award has,

Amendment of Foreign Judgments (Reciprocal Enforcement) Act, 1973. Sec. 4. (Interpretation.)
in

Arbitration (Foreign Awards and Agreements).

No. 36, 1973 in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place”.

(3) The provisions of the Administration of Justice Act, 1924, shall continue to apply to and in respect of a judgment (within the meaning of that Act as in force immediately before the commencement of this Act) that was, before that commencement, registered in the Supreme Court under that Act, in all respects as if this section had not been enacted.

(4) If the date of commencement of this Act is later than the date of commencement of the Foreign Judgments (Reciprocal Enforcement) Act, 1973, the provisions of that Act shall continue to apply to and in respect of a judgment (within the meaning of that Act as in force immediately before the commencement of this Act) that was, before that commencement, registered in the Supreme Court under that Act, in all respects as if this section had not been enacted.

SCHEDULE.

Arbitration (Foreign Awards and Agreements).

SCHEDULE.

No. 36, 1973

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 extension 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.

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, 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

Arbitration (Foreign Awards and Agreements).

No. 36, 1973

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

Arbitration (Foreign Awards and Agreements).

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.

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

Arbitration (Foreign Awards and Agreements).

No. 36, 1973

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 specialized 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 extension 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

*Arbitration (Foreign Awards and Agreements).**Article XI*

No. 36, 1973

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;
- (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.

Arbitration (Foreign Awards and Agreements).

- No. 36, 1973** 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.

ELECTRICITY