

Australia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards (New York Convention), which has been enacted into Australian domestic law in the International Arbitration Act 1974 (Cth). Accordingly, the provisions in the Act with respect to the recognition and enforcement of foreign arbitral awards substantially reflect the provisions of the New York Convention.

Foreign arbitral awards are presumed to be enforceable upon application to the appropriate court in any Australian State or Territory, or the Federal Court of Australia, unless one of the prescribed defences (being those outlined in Article V of the New York Convention) applies. A foreign arbitral award may then be enforced as if it were a judgment of the relevant court. Which court a potential applicant ought to commence proceedings in (whether the choice is between state jurisdictions or between a State Supreme Court and the Federal Court of Australia) will largely depend upon the circumstances of the case.

International Commercial Arbitration

International commercial arbitration in Australia is governed by the International Arbitration Act 1974 (Cth) (the Act). Section 16 of the Act provides that the UNCITRAL Model Law on International Commercial Arbitration (Model Law) is to have effect in Australia. The Act applies to international commercial arbitrations conducted in Australia. Both “international” and “commercial” have been broadly defined.



In relation to the enforcement of arbitral awards, Australia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards (New York Convention). The New York Convention is enacted in Australia in section 8 of the Act and is annexed to the Act as a schedule.

Application of Enforcement Provisions

When acceding to the New York Convention in 1975, Australia did not make any reservations under article 1(3), meaning that theoretically, Australian courts should recognise and enforce awards under the Convention regardless of whether the country in which an arbitral award was made is a signatory to the New York Convention. However, this is not the approach taken in the Act, and an arbitral award will only be recognised in Australia if the award was made in a New York Convention country (other than Australia).

Model Law

Articles 35 and 36 of the Model Law also provide a mechanism for the recognition and enforcement of arbitral awards; however, the mechanism under the New York Convention and section 8 of the Act is, almost exclusively, used in Australia. To the extent there is any inconsistency between the New York Convention and the Model Law in relation to the enforcement of an award, section 20 of the Act provides that the Convention will prevail.

Formalities Required for Enforcement

The formalities required to enforce an award under Australian law largely reflect the position under article IV of the New York Convention. A person seeking enforcement of a foreign arbitral award must:

- Produce an original or certified copy of the award.¹
- Produce an original or certified copy of arbitration agreement and.²
- Translate any document that is not in English.³

Enforcement of Arbitral Awards

The basic structure of section 8(1) of the Act is that foreign awards to which the Act applies are presumed to be enforceable in Australia, unless one of the defences outlined in sections 8(5) to 8(7) of the Act applies. In other words, once it is established that the New York Convention and section 8 of the Act apply to an award, an Australian court will grant leave to have the award enforced as a judgment of the court unless one of the defences is established by the defendant.

The prescribed defences to enforcement in the Act correspond to the grounds for refusing to enforce arbitral awards outlined in Article V of the New York Convention, and are as follows:

- A party was under some incapacity at the time the relevant arbitration agreement was made.
- The arbitration agreement was invalid.
- A party was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding.
- The award was made outside the jurisdiction of the arbitral tribunal.
- The composition of the tribunal or the arbitral procedure was not in accordance with the parties' arbitration agreement or the laws where the arbitration was conducted.
- The award has not yet become binding on the parties or has been set aside or suspended by a competent authority in the jurisdiction where the arbitration was conducted.
- The court asked to enforce the court finds that:
 - The dispute between the parties was not capable of settlement by arbitration under the laws in which it is sitting; or
 - To enforce the award would be contrary to public policy.

Australian courts are expressly permitted to adjourn enforcement proceedings (or part of the proceedings) under section 8(8) of the Act in circumstances where it is satisfied an application for the setting aside or suspension of the award has been made to a competent court in the jurisdiction where the award was made. However, the 2010 amendments to the Act inserted new provisions (sections 8(9) and (10)) which permit the court to order proceedings that have been adjourned under section 8(8) to be resumed and for costs to be awarded against the party seeking the adjournment in a number of situations. These provisions aim to prevent parties from frustrating the enforcement of awards through vexatious applications to set aside the award.

There was previously authority from the Supreme Court of Queensland suggesting that Australian courts had a residual discretion to refuse to grant enforcement of an arbitral award that otherwise qualified for recognition.⁴

This position has been overturned by amendments to the Act in 2010, which make it clear that no such residual discretion exists by providing that a court may only refuse to recognise and enforce awards if the prescribed circumstances in the Act exist.

Remedies Available to Enforce Arbitral Awards

Sections 8(2) and 8(3) relevantly provide that a foreign award may be enforced by a court of a State or Territory, or the Federal Court of Australia, as if the award were a judgment of that court. Effectively, this equates a foreign arbitral award with a judgment of the relevant court. The wide range of remedies available to parties seeking to enforce judgments will accordingly be available in the context of enforcing a foreign arbitral award. Such remedies include orders requiring:

- The debtor to pay the award on or before a certain date;
- The debtor to satisfy the debt by the payment of instalments at times set by the courts; and
- The seizure and sale of the debtor's property to satisfy the award.

Take Away Points

The key points to takeaway in relation to the enforcement of arbitral awards in Australia are as follows:

Australia is a signatory to the New York Convention, meaning the procedures regarding the recognition and enforcement of foreign arbitral awards in Australia substantially reflect the New York Convention.

Domestic Commercial Arbitration

Each Australian state and Territory (other than the Australian Capital Territory) has enacted uniform legislation governing the conduct of domestic arbitration in Australia (the Uniform Legislation).⁵ The Uniform Legislation applies to domestic commercial arbitrations where:

The places of business of the parties to the arbitration agreement is in Australia;

- The parties have agreed any disputes arisen between them are to be settled by arbitration; and
- It is not an arbitration to which the Model Law applies by reason of the Act.

Section 35 of the Uniform Legislation provides that an arbitral award is binding, and upon application to a Court of sufficient jurisdiction, will be enforceable irrespective of which State or Territory the award is made.

In order to apply for recognition of an award, the part relying on the award must supply an original or copy of the award. If the award is not in English, the court may also request the award be translated into English.

The grounds for refusing to recognise and enforce a domestic arbitral awards are substantially similar to those set out above in relation to international commercial arbitration in Australia.

Footnotes

Foreign arbitral awards are presumed to be enforceable, unless one of the prescribed defences to enforcement applies.

Australian courts do not have a residual discretion to refuse to enforce awards where the requirements for enforcement have been established.

Foreign arbitral awards may be enforced as if the award were a judgment of the enforcing court.

- 1 Sections 9(1)-(2) of the Act.
- 2 Sections 9(1)-(2) of the Act.
- 3 Section 9(3) of the Act.
- 4 **Resort Condominiums v Bolwell** (1993) 118 ALR 655.
- 5 **Commercial Arbitration Act 2010** (NSW); **Commercial Arbitration Act 2011** (Vic); **Commercial Arbitration Act 2012** (WA); **Commercial Arbitration Act 2011** (SA); **Commercial Arbitration (National Uniform Legislation) Act 2011** (NT); **Commercial Arbitration Act 2011** (Tas); **Commercial Arbitration Act 2013** (Qld).
- 6 [2016] WASC 193.
- 7 **Tomolugen Holdings Ltd v Silica Investors Ltd** [2015] SGA 57.
- 8 **Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tpk Ltd** [2013] EWHC 1240.
- 9 **Rinehart v Rinehart (No 3)** [2016] FCA 539.
- 10 [2016] WASC 193 [58]-[59].
- 11 [2016] WASC 193, [68] (Le Miere J).
- 12 [2016] WASC 193, [69] (Le Miere J)
- 13 [2016] WASC 193, [70] (Le Miere J).

Contacts



Cris Cureton

T +61 8 9429 7460
M +61 4 6601 6540
E cris.curetone@squirepb.com



Brendan Reilly

T +61 8 9429 7611
M +61 4 1910 3334
E brendan.reilly@squirepb.com



Avendra Singh

T + 61 2 8248 7810
M +61 4 1286 8537
E avendra.singh@squirepb.com



Greg Steinepreis

T + 61 8 9429 7505
M +61 4 1114 5615
E greg.steinepreis@squirepb.com



Melissa J. Koo

T +61 8 9429 7568
E melissa.koo@squirepb.com

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