

CHAPTER II

ACCESSION TO THE CONVENTION

Accession Procedure

2.01 The Convention is open for accession by any state which is a member of the United Nations or is a member of any specialized agency of the United Nations or is a party to the Statute of the International Court of Justice or any other state to which an invitation has been addressed by the U.N. General Assembly. Accession is effected by an instrument of accession deposited with the U.N. Secretary General (Article IX). The Convention takes effect with respect to a newly adhering state on the ninetieth day after the deposit of the appropriate instrument (Article XII.2).

2.02 Any state, either by declaration at the time of accession, or by notice to the U.N. Secretary General any time thereafter, may extend the Convention to any territory for whose international relations it is responsible. The same ninety day rule normally applies with respect to the date of operation of such extensions (Article X). There is duty upon states to "consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories", although the consent of the Governments of such territories may be insisted upon "where necessary for constitutional reasons" (Article X.3).

2.03 Where a state seeking to adhere is a federal or non-unitary state, the Convention recognises that it may not be within the legislative competence of the federal authority to give complete effect to the Convention. Where that is possible, the obligation to do so is imposed (Article XI(a)). Insofar as it is not because implementation of all or some articles of the Convention falls within the legislative competence of constituent unit authorities, the federal Government is required "to bring such articles with a favourable recommendation" to the notice of the appropriate unit authorities as soon as possible (Article XI(b)). Federal states may be asked, through the U.N. Secretary-General, to supply a statement showing the legislative or other action taken in the federation and its units on any particular provision of the Convention (Article XI(c)).

Reservations

2.04 The Convention makes explicit provision for states to make reservations to the Convention on two matters only. There are strong indications from the Final Act of the Conference that reservations on other matters were not to be permissible but the Convention itself is not explicit. Reservations may only be made at the time of adherence or when an extension is made to a dependent territory (Article I.3). Each reservation must take the form of a declaration and be registered with the U.N. Secretary-General, who for his part must notify all actual or potential Parties (Article XV).

2.05 A reservation may be entered on the following matters:

- (i) limiting the Convention, "on the basis of reciprocity", to the recognition and enforcement of awards made only in the territory of another Contracting State (Article I.3).

The exact meaning of this provision is not totally clear. Its apparent purpose is to permit states to confine the Convention scheme to awards made in other Contracting States, thereby excluding both awards made in non-Contracting States and awards, made in the reserving state itself but not considered by it to be domestic. These exclusions would otherwise be within the purview of Article I.1.

2.06 State practice in this matter is not without its difficulties. Australia clearly felt that unlimited benefits to non-Contracting States were not acceptable but, rather than exclude all awards made therein entirely, that limited categories of such awards should be permitted. This course of action was conceived as possible without the necessity for making a reservation. Accordingly the Arbitration (Foreign Awards and Agreements) Act, 1974, section 8(4) prescribed those awards involving non-Contracting States which would be recognised. Ghana has adopted a similar approach (Arbitration Act, 1961,s.36). This unilateral action seems justifiable only on the arguable basis that the Convention left the question of applicability to non-Contracting States to be determined by each adherent. Certain non Commonwealth states have dealt with this problem by adding a further clause to a reservation under Article I.3 imposing limitations upon the application of the Convention to non-Contracting State awards.

2.07 The United Kingdom, as have a number of other Commonwealth States (see para. 2.13 below), entered a reservation in the terms of Article I.3, although this was done in the case of the United Kingdom some five years after the original accession. Thus for a period of time, the Arbitration Act, 1975, section 7(1), confined the scheme to awards made in Contracting States, although no reservation to that effect had been made under Article I.3. The subsequent declaration of the reservation appears to have brought the United Kingdom's international obligation into line with its legislative restriction.

2.08 In the light of this practice, it may be suggested that the reservation will be necessary where a state has reached a clear decision to exclude from the Convention all awards made in non-Contracting States and all awards made in the state itself which are not considered under its law to be domestic awards. (The latter would normally be enforceable under Article I.1 - see para 1.23(iii)) . In many Commonwealth states, the latter reason will probably not arise under municipal law. Where, however, a state wishes to apply the Convention scheme to only certain categories of awards made in non-Contracting States, it seems safer, despite Australian and Ghanaian practice, to enter a reservation which excludes all such awards but to extend the benefits of implementing legislation to the desired categories of non-Contracting State awards. One approach (that adopted by Ghana, by virtue of the Arbitration Act, s.36 and probably available to India, by the Foreign Awards (Recognition and Enforcement) Acts 1961, s.2) is to apply the scheme to non-Contracting states designated by legislative instrument on the basis of reciprocity. A case can be made for saying that, in the absence of any reservation, a Contracting State undertakes, by Articles I.1 and III, to recognise and enforce all awards which have been made outside its territory.

2.09 It is, however, far from clear what the express reference in Article I.3 to reciprocity was designed to achieve in this context. It may be no more than a restatement of Article XIV considerations, preventing a Contracting State from obtaining benefits under the Convention from other such states in excess of its own commitments. This is consistent with the interpretation put on by Botswana (see the Recognition and Enforcement of Foreign Arbitral Awards Act, 1971, s.3(3)). The better view, however, seems to be that it was merely intended to reiterate that states using this reservation would be doing so in order to confine the scheme's benefits and obligations to other Contracting States.

2.10 One further application of this reservation has been suggested. It could be used to confine the Convention to those arbitral agreements which will give rise to an award which is made in another Contracting State. Even if this interpretation is

sustainable (see para.1.19(iii) above), no State has yet availed itself of the opportunity: it is arguable that this result can also be achieved through implementing legislation without resort to a precise reservation.

2.11 It appears, therefore, that a State prior to adhesion should determine -

- (a) whether it wishes to restrict the Convention by excluding altogether those awards made in non-Contracting States;
- (b) whether it wishes to exclude any awards which might be made in that State but which under its law would not be treated as domestic awards;
- (c) whether it wishes to preserve the power to apply the Convention to limited categories of awards made in non-Contracting States;
- (d) whether it wishes the Convention to apply generally to awards made elsewhere, both in Contracting States or non-Contracting States and to non-domestic awards made in its own State (if such a distinction is made or desired under its own law).

2.12 In the first three circumstances, a reservation appears to be necessary. It seems probable for most common law jurisdictions that the circumstances referred to in (b) will not arise frequently. A reservation will, however, not be needed for the cases mentioned in (d).

2.13 Of Commonwealth states parties to the Convention, Botswana, India, Nigeria, Tanzania, Trinidad and Tobago and the United Kingdom have made reservations in terms relying upon Article I.3. The form of the reservation might be:

"[The Contracting State] in accordance with Article I, paragraph 3 of the Convention, declares on the basis of reciprocity that it will apply the Convention to the recognition and enforcement of only those awards which are made in the territory of another Contracting State."

- (ii) limiting the Convention "to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law" of the declarant (Article I.3).

2.14 This reservation which appears to have effect both in relation to agreements and awards is intended principally for those states which have enacted separate codes for civil law and commercial law. The effect of the reservation would be to exclude awards made, for example, in respect of general tort claims and disputes arising out of non-commercial contracts (e.g. K.E. Corpn. v. S. De Traction 52 A.I.R. 1965 Bom. 114: technical assistance contract). This exemption is less easy to define where matters are dependent on common law or statutory provisions in systems which do not operate easily worked distinctions between civil and commercial law. In systems where no generally used definitions exist, serious difficulties may be experienced in proving that a particular relationship is commercial under the law of the particular system (see Indian Organic Chemicals Ltd v. Chemtex Fibres Inc. 65 A.I.R. 1978 Bom. 108)

2.15 This reservation does not depend upon any element of reciprocity but it is possible that a state which does not adopt this reservation may, by virtue of Article XIV, be able to refuse recognition to a non-commercial award made in a state which has entered this reservation.

2.16 It appears therefore that a State before adhesion should determine whether the definitions used by its existing law enable this distinction to be made and whether the exclusion of non-commercial matters is consistent with that law and is desired.

2.17 Of the Commonwealth states parties to the Convention, Botswana, India, Nigeria and Trinidad and Tobago have entered this reservation. The form of the reservation might be:

"[The Contracting State], in accordance with Article I, paragraph 3 of the Convention, declares 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 Contracting State]."

Legislative provisions

2.18 Legislation will be necessary to give effect to the Convention in most Commonwealth states. In exceptional cases, such as that of Cyprus, the Convention may be self-executing. It is, however, arguable that even in those states the Convention gives rise to a number of ambiguities which should properly be resolved by municipal legislation in the interests of certainty. Of those Commonwealth states which are parties to the Convention, four, Nigeria, Sri Lanka, Tanzania and Trinidad and Tobago, have no implementing statutes. It may be doubted whether in these states, the Convention has any effective application.

2.19 A draft Bill, drawing in its principal particulars from the Australian Arbitration (Foreign Awards and Agreements) Act, 1974 and the United Kingdom Arbitration Act, 1975, follows. A detailed commentary accompanies the text of the draft Bill. There are, however, certain matters of principle which merit prior examination.

(i) Definition of "agreement".

2.20. It has been pointed out above (para 1.19(iv)) that as drafted the Convention appears capable of applying to all written arbitration agreements (dealing with the specified kinds of differences) whether having a foreign law connection or not. It is apparent from state practice that such a broad application is not required, indeed was probably not intended.

2.21 It follows, therefore, that legislation should make clear -

- (a) whether it is intended to apply the Convention even in respect of purely domestic arbitration agreements, thereby precluding national courts from exercising any discretion on the matter of staying or referring the dispute in question to arbitration; or
- (b) whether some restriction is necessary to preserve that traditional judicial power in respect of disputes covered by domestic agreements; and
- (c) if so, how to designate which agreements are to be treated as "domestic".

2.22 Certain Commonwealth states, notably Botswana, Ghana and India, have not explicitly limited the Convention's broad-reaching meaning of the term "agreement", although Botswana has excluded the agreement recognition provisions in Article II.1 from those given force of law there (Recognition and Enforcement of Foreign Arbitral Awards Act, 1971-49, s.4). But Ghana has explicitly excluded agreements governed by the law of that state (Arbitration Act, 1961, s.35) and arguably a similar conclusion may be reached under Indian Legislation (Foreign Awards (Recognition and Enforcement) Act, 1961, s.9)

2.23 Only Australia and the United Kingdom in the Commonwealth have chosen the alternative, although each has adopted a different approach to the question of what are "domestic" agreements.

2.24 The Australian legislation has set out to prescribe the agreements which are caught by the legislation, thereby by implication treating those excluded as "domestic". Section 7(1) of the Australian Act reads -

"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 [other than Australia];
 - (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 [of Australia] 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 [other than Australia] or part of [such] a Convention country or the Government of a territory of [such] 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 [other than Australia],
- this section applies to the agreement".

2.25 This provision is partly occasioned by the special needs of the federal state in seeking to exclude intra-Australian agreements. But it also seeks to confine the benefits of the scheme normally to such international arbitral agreements as have connections with Contracting States. Within these limits, however, a number of connecting factors are permitted. On the other hand, paragraph (b) goes even further by bringing in agreements where arbitral procedure is governed by the law of a non-Contracting State if one of the parties is connected with Australia by domicile or ordinary residence.

2.26 The United Kingdom adopts an even more convoluted approach. Whilst section 1(2) applies to arbitration agreements which are not "domestic" and section 1(4) provides a definition of a "domestic agreement", the definition is set out in negative terms. For such an agreement is one -

"which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither -

- (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom, and
- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom

is a party at the time the proceedings are commenced."

2.27 This provision contemplates that agreements connected with non-Contracting States as well as Contracting States are capable of being recognised. In this respect, the 1975 Act is much wider in its application than the Australian statute. It also contemplates that agreements may be within the Convention, notwithstanding that arbitration may be required to take place in the United Kingdom, if one party to it is connected by nationality or habitual residence with another foreign state, whether a Contracting State or not.

2.28 A third common law state which has wrestled with the same problem and has arrived at yet a third solution is the United States:

"An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states" (9 U.S.C. §202).

2.29 This somewhat imprecise formulation, though unlikely to commend itself to Commonwealth states, is further evidence that differing criteria may be employed to determine the appropriate foreign elements which bring the agreement into the sphere of the Convention.

2.30 It is clear, however, that the exact formulation of those elements is a matter for decision by each adhering State. Existing legislation on staying proceedings in favour of domestic arbitration may already prescribe those elements. Since the Convention does not draw the distinction between foreign and domestic agreements, it does not indicate what connecting factors should be used. But it may be thought that the United Kingdom approach, in not drawing any distinction between Contracting States and non-Contracting States in relation to those agreements which will be non-domestic comes closer to the aims of the Convention in this respect than does the Australian. Accordingly the draft contains provisions which follow the United Kingdom solution.

(ii) Definition of "award"

2.31 There are two questions which require resolution in this respect. First, does the scheme apply only in respect of awards made under an agreement which is capable of being recognised under Article II? The Botswana and Ghana statutes make no provision which resolves this question. On the other hand, legislation in Australia and India explicitly and the United Kingdom, more indirectly, achieves this effect. For

reasons given above (para.1.23(iv) above), this appears to be the intention of the framers of the Convention and this construction is followed in the model Bill.

2.32 The second question concerns the extent to which awards connected with non-Contracting States should be included. This is related to the question of reservations under Article I.3 (see paras.2.05-2.13 above).

2.33 Where a reservation has been made in the terms suggested in paragraph 2.13, implementing legislation may provide -

- (i) that only awards made in another Contracting State will be within the scheme (Botswana, India and the United Kingdom); and
- (ii) that awards made in the legislating state but not considered as "domestic" under its law will not be within the scheme; or
- (iii) that awards made in another Contracting State and certain prescribed categories of award made in non-Contracting States (cp. Australia) or made in designated non-Contracting States (cp. Ghana) are covered by the statute.

2.34 As the one most commonly required in past Commonwealth practice, option (i) has been included in the model Bill which, in clause 2(1), defines "Convention award" in these terms. In the case referred to in (ii), it will be necessary to define what awards are not considered as "domestic". Thus the Ghana Arbitration Act, 1961, s.36 prescribes those "awards made in the Republic in pursuance of an arbitration agreement not governed

by the law of the Republic". On the other hand, the Indian Foreign Awards (Recognition and Enforcement) Act, 1961, s.9 excludes "any award made on an arbitration agreement governed by the law of India", which, insofar as it extends to awards made in other Contracting States, seems to conflict with the Convention (see para.1.23(iii)). As suggested earlier, domestic law may be such that provisions on these lines are not called for. This possibility has not been included in the model Bill or in the variants set out in paragraphs 2.36 and 2.39 below but it can be accommodated by an appropriate extension in terms analagous to those in the Ghana Act.

2.35 If case (iii) applies, it will be necessary to prescribe the extent to which awards in non-Contracting States will be included. Thus the Arbitration (Foreign Awards and Agreements) Act, 1974, section 8(4) (Australia) provides -

"Where -

- (a) at any time, a person seeks the enforcement of a foreign award [i.e. one made in a country outside Australia]; and
- (b) the country in which the award was made is not, at any time, a Convention country,

the enforcement provisions 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".

What connecting factors to adopt in this respect is a matter for decision by any state adopting this course of action.

2.36 If an approach on these lines is sought and provisions similar to those used in Australia are desired, the model Bill will require the following alterations:

(a) deletion of the definition of "Convention award" from clause 2(1);

(b) deletion of all references to "Convention award" in the Bill and the substitution of "arbitral award" wherever the former term appears;

(c) addition of the following further sub-clause at the commencement of clause 4:

"(1) Enforcement may be sought by virtue of this Act of

(a) any arbitral award made, in pursuance of an arbitration agreement, in the territory of a Convention State; and

(b) any arbitral award made in pursuance of an arbitration agreement in the territory of a state which, at the time the proceedings to enforce the award were commenced, was not a Convention State if the person seeking to enforce the award was, at that time, domiciled or habitually resident in [] or in a Convention State.";

(d) renumbering of sub-clauses (1) and (2) of clause 4 and in cross references in clause 2(2) and the present clause 4(2);

(e) the addition, in clause 8(1) after "award" in line 1, of the words "referred to in section 4".

2.37 As an alternative to that described in the previous paragraph, the Ghanaian approach (see para.2.08 above) may commend itself. This permits the extension of the Convention scheme to awards made in such non-Contracting States as are, from time to time, designated by subordinate legislation on the

basis of reciprocity, executively determined. An appropriately extended definition of "Convention award" will be required in this instance with provisions authorising the making of the necessary subordinate legislation.

2.38 Where no reservation has been made the implementing legislation should provide that awards whether made in Contracting or non-Contracting States are covered by the statute.

2.39 If this approach is sought, the model Bill will require the substitution for the present definition of "Convention award" of the following -

"Convention award" means an arbitral award made, in pursuance of an arbitration agreement, in the territory of any state other than []:".

ANNEX

DRAFT ARBITRATION (NEW YORK CONVENTION AWARDS AND AGREEMENTS) ACT, 198-

An Act to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on 10th June, 1958.

BE IT ENACTED etc.

- | | | |
|----------------|------|--|
| Short title | 1. | This Act may be cited as the Arbitration (New York Convention Awards and Agreements) Act, 198-. |
| Interpretation | 2(1) | <p>For the purposes of this Act, the expression -</p> <p>"agreement in writing" has the same meaning as in the Convention;</p> <p>"arbitral award" has the same meaning as in the Convention;</p> <p>["arbitral award" means an arbitral award in relation to differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law of [] and includes awards made by arbitrators appointed for individual cases or made by permanent arbitral bodies to which the parties have submitted;]</p> <p>"arbitration agreement" means an agreement in writing of the kind referred to in paragraph 1 of Article II of the Convention;</p> <p>"Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on 10th June, 1958, a copy of the English text of which is set out in the Schedule;</p> <p>"Convention award" means an arbitral award made, in pursuance of an arbitration agreement, in the territory of a Convention State;</p> <p>"Convention State" means a state (other than []) which is a Contracting State within the meaning of the Convention or a territory for whose international relations a Contracting State is responsible and, to which the Convention has been extended by a declaration of that Contracting State under Article X of the Convention.</p> |
| Schedule | (2) | For the purposes of this Act, other than section 4(1), a reference to the expression "enforcement" in relation to an arbitral award shall be construed as including a reference to recognition of the award as binding for all purposes on the parties by virtue of section 4(2). |
| | (3) | For the purposes of this Act, a body corporate shall be taken to be habitually resident in a state if it is incorporated in that state or if its central management and control is exercised there. |

References to "[]" should be replaced by a reference to the state adapting this draft for its own use. References to paragraphs in these notes are to the paragraphs of the Commentary. This draft assumes that the legislating state has modern Interpretation legislation.

Short title

Interpretation

This alternative definition will be necessary for those states which make a reservation restricting this scheme to commercial matters.

See para.2.33 This definition follows upon the form of reservation most frequently used by Commonwealth states. In other cases, an alternative definition may be necessary, see paras. 2.34ff.

This definition will be necessary for purposes of the last definition. See further clause 7.

- (2) It is assumed that explicit reference to cognate expressions is made unnecessary by appropriate provisions in the Interpretation legislation.
- (3) This explanation is necessary in relation to cl.3(1) and reflects the common law.

Arbitration Agreements

Enforcement of
non-domestic
arbitration
agreements

- 3(1) This section applies in relation to every arbitration agreement arbitration-
- (a) which provides, expressly or by implication for arbitration in any state other than []; or
 - (b) to which there is, at the time the legal proceedings under subsection (2) are commenced, at least one party who is a national of, or habitually resident in, any state other than [].
- (2) Where-
- (a) any party to an arbitration agreement to which this section applies institutes any legal proceedings in any court in [] against any other party to the agreement; and
 - (b) the proceedings involve the determination of a dispute between the parties in respect of any matter which is required, in pursuance of the agreement, to be referred to, and which is capable of settlement by, arbitration, any party to the agreement may, at any time after [the institution of proceedings] and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
- (3) Subject to subsection (4), the court to which an application has been made in accordance with subsection (2) shall make an order which, upon such conditions or terms (if any) as it thinks fit, stays the proceedings or, as the case may be, so much of the proceedings as involves the determination of the dispute and which refers the parties to arbitration in respect of the dispute in accordance with the arbitration agreement.
- (4) A court shall not make an order under subsection (3) if it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

Enforcement of
non-domestic
arbitration
agreements.

- 3(1) The formulation of this subsection depends upon the conclusions reached on the policy considerations described at paras 2.20-2.30. The draft in fact incorporates the United Kingdom approach for reasons set out in those paragraphs but a more positive formulation has been adopted, following that used in The Arbitration (Foreign Awards) Act, 1976-No 1. (Bermuda), s.2(2).
- (2) This draft makes clear that the court must be satisfied that the proceedings involve not merely a matter which is capable of settlement by arbitration (cp.Art.II) but the determination of a dispute in respect of such a matter. It follows the United Kingdom Act in this respect. It seems consistent with the aims of the Convention that court proceedings should be stayed in favour of arbitration where there is a dispute for the arbitrator to decide but it must be doubted whether it was intended that the courts would be excluded from proceedings involving matters covered by an agreement in respect of which there is no dispute, eg., where liability has been admitted and provision exists for liquidated damages: see Nova (Jersey) Knit Ltd. v. Kammgaarn Spinnerei GmbH [1977] 1 W.L.R. 713; The Fuohsan Maru [1978] 2 All E.R. 254. It is also implicit that the court may decide whether the matter is capable of arbitral settlement (see para. 1.19(v)). As drafted, the applicant will be put to the proof of that issue. The draft leaves each state to indicate the time after which an application may be made: "[institution of the proceedings]". As "appearance" which is used in the United Kingdom legislation has technical connotations, that formulation has not been used to indicate when a court is "seized of an action" (Art.II.3). But it does follow a longstanding U.K. formulation to indicate when an application to stay can no longer be made. This seems more explicit than the Australian provision (section 7(2)) which merely refers to "pending" proceedings. (Contrast Flakt Australia Ltd. v. Wilkins & Davis Construction Co.Ltd. (1979) 2 N.S.W.L.R. 243 with Roussel-Uclaf v. G.D. Searle & Co.Ltd. [1978] 1 Lloyd's Rep. 226 and Eagle Star Insurance Co.Ltd. v. Yuval Insurance Co.Ltd. [1978] 1 Lloyd's Rep.357).
- (3) This provision, in addition to establishing the obligation to order a stay, makes clear that the order may be subjected to conditions - a power which is lacking under the U.K. Act and has been the subject of judicial comment in the Rena K [1979] 1 All E.R. 397, at p.412; The Fuohsan Maru, above, at pp 264 and 266. But the conditions could not frustrate the mandatory nature of the duty created by the Convention to refer to arbitration.
- (4) This restates the requirements of the Convention, Article II.3. It will be for the court or a party other than the applicant to raise these issues. (Paczy v.Haendler Natermann GmbH [1980] 1 Lloyd's Rep.302). It will be for the court to determine by what law these issues are to be determined: see para.1.19(vi)(d).

- (5) Where a court makes an order under subsection (3), it may, for the purpose of preserving the rights of parties, make such [interim] [interlocutory] or supplementary orders as it thinks fit in relation to any property which is the subject of the dispute to which the order under subsection (3) relates.
- (6) For the purposes of subsections (2),(3), and (5) a reference to a party includes a reference to any person claiming through or under a party.
- (7) Section [4(1)] of the [Arbitration Act, 1950] does not apply to an arbitration agreement to which this section applies.

Arbitral awards

Recognition and enforcement of Convention awards

- 4(1) Subject to this Act, a Convention award may be enforced in a court in [] either by action or in the same manner as an award of an arbitrator made in [] is enforceable under [section of the Arbitration statute].

- (2) Any Convention award which is enforceable under subsection (1) shall be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in [].

Evidence

- 5(1) In any proceedings in which a person seeks to enforce a Convention award by virtue of this Act, he shall produce to the court-
 - (a) the duly authenticated original award or a duly certified copy of it; and
 - (b) the original arbitration agreement under which the award purports to have been made, or a duly certified copy of it; and
 - (c) where the award or agreement is in a foreign language, a translation of it in the [] language, duly certified as a correct translation by a sworn translator or by an official or by a diplomatic or consular agent in [] of the country in which the award was made.

- (5) This provision, founded upon the Australian statute (section 7(3)), is not based upon explicit Convention provisions but seems consistent with it. The absence of such a power under the U.K. Act was the subject of judicial comment in The Rena K, above, at p.413.
- (6) This provision draws upon both the Australian and U.K. statutes and is consistent with the Convention, although the latter is silent on this matter.
- (7) Following the Arbitration Act, 1975, s.7(2), this subsection makes clear that the discretionary staying provisions found in many Commonwealth Acts (equivalent to the U.K. statute in parenthesis) does not apply to non-domestic agreements. Local references to be substituted. The provision will not be required if no equivalent provisions exist.

Recognition and enforcement of Convention awards

- 4(1) This provision sets out the most commonly used formula for indicating the means open for enforcement of foreign awards. Reference to the equivalent of section 26 of the Arbitration Act, 1950 (UK) which is widely adopted in the Commonwealth would, for example, be required here. Different formulations may, however, be currently employed in some municipal legislation and these should be adopted for this purpose.
- (2) This spells out what meaning is to be given to "recognise" in Article III of the Convention. See also cl.2(2) above.

Evidence

- 5(1) These requirements follow in almost every respect the terms of the Convention, Article IV. It is made clear which diplomatic or consular agents are referred to. It will be for the receiving court to determine whether a person is a "sworn translator" or "official" capable of "duly" certifying translations.

Refusal of
enforcement

- (2) 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.
- 6(1) In any proceedings in which the enforcement of a Convention award is sought by virtue of this Act, the party against whom the enforcement is sought may request that the enforcement be refused, and the enforcement in any of the cases mentioned in sub-sections (2) and (4) may be refused but not otherwise.
- (2) A court so requested may refuse enforcement of a Convention award if the person against whom enforcement is sought proves to the satisfaction of the court that-
- (a) 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 ; or
 - (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made; or
 - (c) he 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; or
 - (d) subject to subsection (3), 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 the matter beyond the scope of the submission to arbitration; or
 - (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 arbitral award 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.
- (3) When a Convention award referred to in subsection (2)(d) contains decisions on matters not submitted to arbitration but those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted.

Refusal of
enforcement

- (2) This provision, following the Australian section 9(5), makes clear that the applicant is not put to the proof of any documents he produces, unless these are challenged by another party. This is consistent with the Convention, see paras 1.21 and 1.25.
- 6 This section reproduces the essential requirements of Articles V and VI of the Convention.
- 6(1) This subsection makes clear that the initiative to have enforcement refused lies with the person against whom it is sought: he may seek this only on the grounds prescribed in the section.
- (2) This subsection makes clear that the burden of proving the existence of certain grounds lies upon the person resisting enforcement and that the decision to refuse is discretionary.
- (a) this paragraph makes clear that the incapacity may be of one party only and, like the U.K. provision (section 5(2)(a)), it may be of any party to the agreement and that the relevant time is the making of the agreement.
- (b) this paragraph follows the United Kingdom Act (s.5(2)(b)) in reproducing the Convention rather than the Australian Act which adds a gloss to the Convention (cp.s.8(5)(b)).
- (c) this substantially is a restatement of the Convention requirement (Article V.1(b)).
- (d) this is a restatement of the Convention requirement (Article V.1(c)). The proviso in the latter is translated to a separate subsection (3).
- (e) this is a restatement of the Convention requirement (Article V.1(d)).
- (f) this is substantially a restatement of the Convention requirement (Article V.1(e)). It makes clear that the parties referred to are the parties to the award rather than the parties to the agreement.
- (3) This restates the proviso to Article V.1(c) of the Convention.

(4) In any proceedings in which the enforcement of a Convention award is sought by virtue of this Act, 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 law of [];
or

(b) enforcement of the award would be contrary to the public policy of [].

(5) Where, in any proceedings in which the enforcement of a Convention award is sought by virtue of this Act, the court is satisfied that an application for the setting aside or for the 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, as the case may be, so much of the proceedings as relates to the award and may, on the application of the party seeking to enforce the award, order the other party to give suitable security.

Miscellaneous

Convention States

7(1) Where the [] by Order declares that any state specified in the Order is a Convention State, the Order, while in force, is conclusive evidence of that fact.

(2) For the purposes of this Act, a certificate signed by the [] stating that a state specified in the certificate but not specified in any Order made under subsection (1) which is in force is, or was at a time specified in the certificate, a Convention State is, upon mere production, prima facie evidence of that fact.

Enforcement of awards under other provisions of law

8(1) Where a Convention award would, but for this section, also be a foreign award within the meaning of the [Geneva Protocol and Convention legislation], that [legislation] does not apply to it.

(2) Except as provided in subsection (1), nothing in this Act affects the right of any person to enforce an arbitral award otherwise than as is provided for in this Act.

(3) Where an arbitral award is both enforceable under this Act and registrable as a judgment under the [Foreign Judgments (Reciprocal Enforcement) Act, 1933], proceedings to enforce the award under this Act may be entertained notwithstanding the provisions of section [6] of the [Foreign Judgments (Reciprocal Enforcement) Act, 1933].

(4) This sets out the grounds for refusal which the Court is entitled to introduce in proprio motu. It essentially follows Article V.2 of the Convention and in particular indicates the law by which these matters are to be determined. The U.K. legislation (s.5(3)) is silent in this respect, presumably leaving the courts to determine the matter.

(5) This follows the Australian model's restatement (section 8(8)) of Article VI of the Convention. This differs only in requiring the court to be satisfied about the fulfilment of the requirements and in allowing the adjournment etc., to be used only in respect of those parts of the proceedings which relate to a Convention award. This is consistent with the Convention.

Convention
States

7(1) This subsection permits the appropriate authority (to be designated in the parenthesised place) to publish an authoritative list of Convention States.

(2) In the event that the current list referred to in (1) is not up to date, this procedure is principally designed to enable the appropriate authority (to be designated in the parenthesised place) to issue a certificate, which will be prima facie evidence that a state is a Convention State.

Enforcement of
awards under other
provisions of law

8(1) This provision is necessary for those states still operating the Geneva and Protocol scheme: see Article VIII.2. Appropriate references to local legislation are to be inserted.

(2) This provision maintains existing methods of enforcing awards not covered by this Bill.

(3) This provision is designed to avoid an apparent restriction upon the operation of the New York Scheme between Commonwealth countries in consequence of the requirements of provisions equivalent to section 6 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (U.K.). See para.1.31. It will not be necessary for countries without such a provision. Local references must be substituted.

Application of the Act 9(1) The application of this Act extends to arbitration agreements and arbitral awards made before the date of commencement of this Act.

(2) This Act binds the [State].

Repeals 10 The following provisions of the [Arbitration Act, 1950] are hereby repealed, that is to say -

- (a) section [4(2)];
- (b) the proviso to section [28]
- (c) in section [30], the words "(except the provisions of subsection (2) of section [4] (hereof)"; and
- (d) in section [31(2)], the words "subsection (2) of section [4]".

Commencement 11(1) Sections 1,2 and 11 shall come into operation on the day on which this Act receives the [Assent].

(2) The remaining provisions of this Act shall come into operation on such date as the [] may by Order appoint.

SCHEDULE

section 2(1)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

- Application of the Act
- 9(1) This is intended to make clear that the new scheme can be used in respect of agreements and awards which have been made before the commencement of this Act. This appears to be the intention of the Convention, see para. 1.13. But express provisions seems essential. See Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyds Rep.223, at 238: Government of Kuwait v. Sir Frederick Snow & Partners (1981,Q.B.D.(U.K.))
- (2) It is made clear that the Act can be invoked in respect of awards and agreements to which the State is party. This is the intent of the Convention. The appropriate local formulae will be necessary.
- Repeals
- 10 Those states which maintain the Geneva Protocol legislation may wish, as the U.K. has, to repeal the implementing legislation on stay of legal proceedings. For these provisions have been displaced by Article II of the New York Convention and clause 2 of this Bill.
- Appropriate substitutions will be required for the local equivalent to the U.K. provisions set out in the parentheses.
- Commencement
- 11 The appropriate commencement formula will be used here. It may be necessary in view of the time-lag between legislation and accession.

SCHEDULE

Insert English language text.

TABLE OF DERIVATIONS

The principal sources for the Bill are the Arbitration (Foreign Awards and Agreements) Act, 1974, No.136 of the Commonwealth of Australia, and the Arbitration Act, 1975, c.3 of the United Kingdom. Reference is also made to the Foreign Awards (Recognition and Enforcement) Act, 1961, No.45 of India, as amended by Act No. 47 of 1973.

<u>Draft</u>	<u>Convention</u>	<u>Australia Act</u>	<u>U.K.Act</u>	<u>India Act</u>
cl.1	-	cp.s.1	-	-
cl.2(1)				
"agreement in writing"	Art.II.2	s.3(1)	cp.s.7(1)	-
"arbitral award"	Art.II	s.3(1)	-	-
["arbitral award"]	Art.I	-	-	cp.s.2
"Convention"	-	s.3(1)	s.7(1)	-
"Convention award"	Art.I.1.&3	cp.s.8(4)	s.7(1)	cp.s.2
"Convention State"	-	cp.s.3(1)	-	-
cl.2(2)	-	s.3(2)	cp.s.3(2)	-
2(3)	-	cp.s.3(3)	cp.s.1(4)	-
cl.3(1)	Art II	[cp.s.7(1)]	cp.s.1(4)	-
(2)	Art II.1	cp.s.7(2)	cp.s.1(1)	cp.1973-47,s.2
(3)	<u>ibid</u>	<u>ibid</u>	<u>ibid</u>	<u>ibid</u>
(4)	Art II.3	s.7(5)	<u>ibid</u>	<u>ibid</u>
(5)	-	s.7(3)	-	-
(6)	-	s.7(4)	<u>ibid</u>	<u>ibid</u>
(7)	-	-	cp.s.1(2)	-
cl.4(1)	Art III	cp.s.8(2)	s.3(1)	s.4(1)
(2)	<u>ibid</u>	cp.s.8(1)	s.3(2)	s.4(2)
cl.5(1)	Art IV	cp.s.9(1)-(4)	cp.s.4	cp.s.8
(2)	<u>ibid</u>	s.9(5)	-	-
cl.6(1)	Art.V.1.	cp.s.8(5)	cp.s.5(2)	cp.s.7(1)
(2)(a)	Art V.1(a)	s.8(5)(c)	cp.s.5(2)(a)	cp.s.7(1)(a)(i)
(2)(b)	<u>ibid</u>	cp.s.8(5)(b)	s.5(2)(b)	<u>ibid</u>
(2)(c)	Art V.1(b)	s.8(5)(c)	s.5(2)(c)	s.7(1)(a)(ii)
(2)(d)	Art V.1(c)	s.8(5)(d)	s.5(2)(d)	cp.s.7(1)(a)(iii)
(2)(e)	Art V.1(d)	s.8(5)(e)	cp.s.5(2)(e)	s.7(1)(a)(iv)
(2)(f)	Art V.1(e)	cp.a.8(5)(f)	cp.s.5(2)(f)	s.7(1)(a)(v)
(3)	Art.V.1(c)	s.8(6)	cp.s.5(4)	s.7(1)(a)(iii)
(4)	Art.V.2.	s.8(7)	cp.s.5(3)	s.7(1)(b)
(5)	Art VI.	s.8(8)	cp.s.5(5)	cp.s.7(2)
cl.7(1)	-	-	s.7(2)	-
(2)	-	s.10(1)	-	-
cl.8(1)	cp.Art.VII.2	-	cp.s.2	cp.s.10
(2)	Art.VII.1	cp.s.12(2)	cp.s.6	cp.s.9(a)
(3)	-	-	-	-
cl.9(1)	-	cp.s.14	-	-
(2)	-	cp.s.6	-	-
cl.10	-	-	s.8(2)	-
cl.11	-	cp.s.2	s.8(3)	-