

## ARBITRATION CLAUSES (PROTOCOL) AND THE ARBITRATION (FOREIGN AWARDS) BILL.

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### EXPLANATORY MEMORANDUM.

As recited in the Preamble to this Bill, the Dominion of New Zealand is a party both to "The Protocol on Arbitration Clauses" and to "The Convention on the Execution of Foreign Arbitral Awards" (the terms of which are respectively set out in the First and Second Schedules).

In order that full effect could be given in the United Kingdom to the said protocol and convention, the Imperial Parliament has passed the Arbitration Clauses (Protocol) Act, 1924, and the Arbitration (Foreign Awards) Act, 1930, and it is thought advisable that similar legislation should be passed in New Zealand.

The protocol and the convention are complementary to each other. The protocol came into force on the 28th July, 1924, in accordance with the provisions of Article 6 thereof (that is, when two ratifications by contracting States had been deposited with the Secretary-General of the League of Nations), and the convention of 1930 relates back to that date (see section 1 of the Imperial Act of 1930 referred to above, and clause 4 (1) of the present Bill).

The protocol is concerned with the recognition by the Courts exercising jurisdiction in the territory of a contracting State of the validity in commercial contracts of agreements to the effect that disputes arising out of such contracts shall be submitted to arbitration.

The convention deals with the enforcement by the Courts exercising jurisdiction in the territory of a contracting State of awards made in the territories of other contracting States.

In all material respects the present Bill follows the corresponding legislation that has been enacted in England for the purpose of giving effect to the protocol and convention respectively.

*Right Hon. Mr. Forbes.*

## ARBITRATION CLAUSES (PROTOCOL) AND THE ARBITRATION (FOREIGN AWARDS).

Title.	ANALYSIS.	
Preamble.		
1. Short Title.		PART II.
		ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.
	PART I.	4. Application of Part II.
	PROTOCOL ON ARBITRATION CLAUSES.	5. Effect of foreign awards.
	2. Interpretation.	6. Conditions for enforcement of foreign awards.
	3. Stay of Court proceedings in respect of matters to be referred to arbitration under commercial agreements.	7. Evidence.
		8. Meaning of "final award".
		9. Saving. Schedules.

### A BILL INTITULED

- AN ACT to give Effect in New Zealand (1) to a Protocol Title.  
on Arbitration Clauses signed on behalf of His Majesty  
at a Meeting of the Assembly of the League of Nations  
5 held on the Twenty-fourth day of September, Nineteen  
hundred and twenty-three; and (2) to a Convention  
on the Execution of Foreign Arbitral Awards signed  
on behalf of His Majesty on the Twenty-sixth day of  
September, Nineteen hundred and twenty-seven.
- 10 WHEREAS the protocol on arbitration clauses (the Preamble.  
terms of which are set forth in the *First* Schedule hereto)  
was signed at Geneva on behalf of His Majesty at a meeting  
of the Assembly of the League of Nations held on the  
twenty-fourth day of September, nineteen hundred and  
15 twenty-three, and was ratified by His Majesty in respect  
of the Dominion of New Zealand on the ninth day of

2 *Arbitration Clauses (Protocol) and the Arbitration  
(Foreign Awards)*

June, nineteen hundred and twenty-six: And whereas the convention on the execution of foreign arbitral awards (the terms of which are set forth in the *Second* Schedule hereto) was signed at Geneva on behalf of His Majesty on the twenty-sixth day of September, nineteen hundred and twenty-seven, and was ratified by His Majesty in respect of the Dominion of New Zealand on the twenty-eighth day of July, nineteen hundred and thirty: And whereas in order that the said protocol and convention respectively should have full effect in New Zealand it is expedient that provision be made as hereinafter appearing:

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

Short Title.

1. (1) This Act may be cited as the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act, 1933.

See Reprint of Statutes, Vol. I, pp. 345 et seq.

(2) This Act shall be read together with and deemed part of the Arbitration Act, 1908 (hereinafter referred to as the principal Act).

PART I.

PROTOCOL ON ARBITRATION CLAUSES.

Interpretation.

2. In this Part of this Act the expression “the said protocol” means the protocol the terms of which are set forth in the *First* Schedule hereto.

Stay of Court proceedings in respect of matters to be referred to arbitration under commercial agreements. Cf. 14 & 15 Geo. V, c. 39, s. 1; 20 Geo. V, c. 15, s. 8

3. Notwithstanding anything in the principal Act, if any party to a submission made in pursuance of an agreement to which the said protocol applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

PART II.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

4. (1) This Part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty-four,—

Application of Part II.  
20 Geo. V, c. 15,  
s. 1

(a) In pursuance of an agreement for arbitration to which the protocol set out in the *First* Schedule to this Act applies; and

10 (b) Between persons of whom one is subject to the jurisdiction of some one of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, has by Order in Council made under section one of the Arbitration (Foreign Awards) Act, 1930 (Imperial),  
15 declared to be parties to the said Convention, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and

20 (c) In one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, has by Order in Council made under the *last-mentioned* section declared to be territories to which the said convention applies;

and an award to which this Part of this Act applies is  
25 in this Part referred to as "a foreign award".

(2) The variation or revocation by His Majesty, pursuant to the authority conferred by subsection two of section one of the Arbitration (Foreign Awards) Act, 1930 (Imperial), of an Order in Council under that  
30 section shall operate in New Zealand as if it were made in respect of the Dominion of New Zealand.

5. (1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in New Zealand either by action or under the provisions of section thirteen  
35 of the principal Act.

Effect of foreign awards.  
20 Geo. V, c. 15,  
s. 2

(2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those  
40 persons by way of defence, set off, or otherwise in any legal proceedings in New Zealand, and any references in

4 *Arbitration Clauses (Protocol) and the Arbitration  
(Foreign Awards)*

Conditions for  
enforcement of  
foreign awards.  
20 Geo. V, c. 15,  
s. 3

this Part of this Act to enforcing a foreign award shall be construed as including references to relying on an award.

6. (1) In order that a foreign award may be enforceable under this Part of this Act it must have—

- (a) Been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed ; 5
- (b) Been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties ; 10
- (c) Been made in conformity with the law governing the arbitration procedure ;
- (d) Become final in the country in which it was made ;
- (e) Been in respect of a matter which may lawfully be referred to arbitration under the law of New Zealand : 15

and the enforcement thereof must not be contrary to the public policy or the law of New Zealand.

(2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part of this Act if the Court dealing with the case is satisfied that— 20

- (a) The award has been annulled in the country in which it was made ; or
- (b) The party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented ; or 25
- (c) The award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration : 30

Provided that, if the award does not deal with all the questions referred, the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit. 35

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b), and (c) of subsection *one* of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection *two* of this section, entitling him 40

to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable  
5 that party to take the necessary steps to have the award annulled by the competent tribunal.

7. (1) The party seeking to enforce a foreign award must produce—

Evidence.  
20 Geo. V, c. 15,  
s. 4

- 10 (a) The original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made; and  
(b) Evidence proving that the award has become final; and  
15 (c) Such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b), and (c) of subsection *one* of the *last foregoing* section are satisfied.

20 (2) In any case where any document required to be produced under subsection *one* of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in  
25 such other manner as may be sufficient according to the law of New Zealand.

(3) Subject to the provisions of this section, rules of Court may be made in accordance with the Judicature Act, 1908, with respect to the evidence which must be  
30 furnished by a party seeking to enforce an award under this Part of this Act.

8. For the purposes of this Part of this Act an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in  
35 the country in which it was made.

Meaning of  
"final award".  
20 Geo. V, c. 15,  
s. 5

9. Nothing in this Part of this Act shall—

Saving.  
20 Geo. V, c. 15,  
s. 6

- 40 (a) Prejudice any rights which any person would have had of enforcing in New Zealand any award or of availing himself in New Zealand of any award if this Part of this Act had not been enacted; or  
(b) Apply to any award made on an arbitration agreement governed by the law of New Zealand.

6 *Arbitration Clauses (Protocol) and the Arbitration  
(Foreign Awards)*

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Schedules.

SCHEDULES.

FIRST SCHEDULE.

PROTOCOL ON ARBITRATION CLAUSES.

THE undersigned, being duly authorized, declare that they accept on behalf of the countries which they represent, the following provisions :—

1. Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement, whether referring to present or future differences, which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.

*Arbitration Clauses (Protocol) and the Arbitration 7*  
*(Foreign Awards)*

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6. The present protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present protocol does not include any or all of the under-mentioned territories—that is to say, their colonies, overseas possessions or territories, protectorates, or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

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SECOND SCHEDULE.

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS.

*Article 1.*

IN the territories of any High Contracting Party to which the present convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary—

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto :
- (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon :



8 *Arbitration Clauses (Protocol) and the Arbitration  
(Foreign Awards)*

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- (c) That the award has been made by the arbitral tribunal provided for in the submission to arbitration, or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure :
- (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending :
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

*Article 2.*

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied—

- (a) That the award has been annulled in the country in which it was made :
- (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case ; or that, being under a legal incapacity, he was not properly represented :
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

*Article 3.*

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

*Article 4.*

The party relying upon an award or claiming its enforcement must supply, in particular :—

- (1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made :

*Arbitration Clauses (Protocol) and the Arbitration* 9  
*(Foreign Awards)*

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(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made :

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

*Article 5.*

The provisions of the above articles shall not deprive any interested party of the right of availing 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.

*Article 6.*

The present convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

*Article 7.*

The present convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those members of the League of Nations and non-member States on whose behalf the protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

*Article 8.*

The present convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

*Article 9.*

The present convention may be denounced on behalf of any member of the League or non-member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

10 *Arbitration Clauses (Protocol) and the Arbitration  
(Foreign Awards)*

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The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it, and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present convention.

*Article 10.*

The present convention does not apply to the colonies, protectorates, or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this convention to one or more of such colonies, protectorates, or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the convention for all or any of the colonies, protectorates, or territories referred to above. Article 9 hereof applies to such denunciation.

*Article 11.*

A certified copy of the present convention shall be transmitted by the Secretary-General of the League of Nations to every member of the League of Nations and to every non-member State which signs the same.