

[AS REPORTED FROM THE STATUTES REVISION COMMITTEE]

*House of Representatives, 22 July 1982.*

Words struck out are shown in italics within bold round brackets, or with black rule at beginning and after last line; words inserted are shown in roman underlined with a double rule, or with double rule before first line and after last line.

*Hon. Mr McLay*

## ARBITRATION (FOREIGN AGREEMENTS AND AWARDS)

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### A BILL INTITULED

#### **An Act to implement an international Convention on the recognition and enforcement of foreign arbitral awards**

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

**1. Short Title and commencement**—(1) This Act may be cited as the Arbitration (Foreign Agreements and Awards) Act 1982.

(2) This Act shall come into force on the 1st day of January 1983.

No. 10—2

**2. Interpretation**—In this Act, unless the context otherwise requires,—

“Arbitration agreement” means an agreement in writing of the kind to which Article II *((1))* of the Convention relates: 5

“Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted at New York by the United Nations Conference on International Commercial Arbitration on the 10th day of June 1958, a copy of the English 10 text of which is set out in the Schedule to this Act:

“Convention award” means an arbitral award to which the Convention applies made pursuant to an arbitration agreement in a country (other than New Zealand) which is a party to the Convention. 15

**3. Act to bind the Crown**—(1) Subject to subsection (2) of this section, this Act shall bind the Crown.

(2) Nothing in this Act shall make a Convention award enforceable against the Crown in a manner in which a judgment would not be enforceable against the Crown. 20

Cf. 1979, No. 39, s. 3

**4. Power of Court to stay Court proceedings in respect of matters subject to an arbitration agreement**—(1) If any party to an arbitration agreement to which this section applies (or any person claiming through or under that 25 person) commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that 30 arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings. 35

(2) The Court may, in addition to any order made under subsection (1) of this section, make such other orders in relation to any property which is or may be the subject-matter of the dispute between the parties to the arbitration agreement as it thinks fit. 40

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such conditions as the Court thinks fit.

- (4) This section applies to every arbitration agreement—  
(a) Which provides, expressly or by implication, for arbitration in any country other than New Zealand;  
(or)

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- (b) Under which one of the parties is at the time the legal proceedings are commenced, domiciled or ordinarily resident in a country other than New Zealand.

- 10 (5) Section 5 of the Arbitration Act 1908 shall not apply to any arbitration agreement to which this section applies.

**5. Enforcement of foreign arbitral awards**—(1) Subject to this Act, a Convention award shall be enforceable in New Zealand either by action or in the same manner as an award  
15 under the Arbitration Act 1908.

(2) Any Convention award which would be enforceable under 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 persons by way of  
20 defence, set off, or otherwise in any legal proceedings in New Zealand, and any references in this Act to enforcing a Convention award shall be construed as including references to relying on an award.

Cf. 1933, No. 4, s. 5

25 **6. Evidence**—(1) The party seeking to enforce a Convention award shall produce to the Court—

- (a) The duly authenticated original award or a duly certified copy thereof; and  
(b) The original arbitration agreement or a duly certified  
30 copy thereof.

(2) Where the Convention award or arbitration agreement is in a foreign language, the party seeking to enforce it shall also produce a translation of it in the English language certified as a correct translation by an official or sworn  
35 translator, or by a diplomatic or consular agent of the country in which it was made, or in such other manner as the Court may require.

(3) Any document produced under subsection (1) or subsection (2) of this section shall, in the absence of evidence  
40 to the contrary, be conclusive evidence of the document which it purports to be or the matters to which it relates, as the case may be.

**7. Refusal of enforcement**—(1) Subject to subsections (2) and (3) of this section, a Convention award shall not be enforceable pursuant to this Act if the person against whom it is sought to enforce it proves that:

- (a) A party to the arbitration agreement under which the Convention award was made, was, under the law applicable to that party, under some incapacity at the time the arbitration agreement was made; or
  - (b) The arbitration agreement was not valid under the law to which the parties have subjected it or, if the arbitration agreement is not expressed to be subject to the law of any country, under the law of the country where the Convention award was made; or
  - (c) The party against whom it is sought to enforce the Convention award 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 those proceedings; or
  - (d) Subject to subsection (4) of this section, the Convention award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or contains a decision on a matter beyond the scope of the submission; or
  - (e) The composition or appointment of the arbitral authority, or the arbitration procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, the law of the country where the arbitration took place; or
  - (f) The Convention award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the country in which, or under the law of which, the award was made.
- (2) The Court may refuse to enforce a Convention award—
- (a) If it relates to a matter that may not lawfully be referred to arbitration under the law of New Zealand; or
  - (b) If the enforcement of the award would be contrary to public policy.
- (3) Where pursuant to this Act it is sought to enforce a Convention award and the Court is satisfied that an application to set aside or suspend that award has been made to a competent authority of the country in which, or under the law of which, it was made, the Court may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce that Convention award, order the other party to give security.

(4) Where a Convention award to which paragraph (d) of subsection (1) of this section applies contains a decision on a matter not contemplated by, or falling within the terms of the submission to arbitration or beyond the scope of the submission which can be severed from a decision on a matter properly contemplated by and within the terms and scope of the submission, the Convention award may be enforced in respect of that latter decision.

**8. Enforcement of Convention awards under other enactments**—Nothing in this Act shall affect the right of any person to the enforcement of a Convention award otherwise than pursuant to this Act.

**9. Reciprocal Enforcement of Judgments Act 1934 not to affect enforcement under this Act**—Nothing in section 8 or section 10 of the Reciprocal Enforcement of Judgments Act 1934 shall affect the enforcement of a Convention award pursuant to this Act.

**10. Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 not to apply to Convention awards enforceable under this Act**—Nothing in the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 shall apply to the enforcement of a Convention award.

**11. Application of Act**—This Act shall apply in respect of any arbitration agreement or Convention award whether made before or after the commencement of this Act.

**12. Orders in Council and certificates declaring countries to be parties to Convention**—(1) The Governor-General may from time to time, by Order in Council, declare any country specified in the order to be a party to the Convention and any order while it remains in force shall be conclusive evidence that the country specified in the order is a party to the Convention.

(2) The Secretary of Foreign Affairs or a Deputy Secretary of Foreign Affairs may from time to time certify in writing that any country, not being a country specified in any Order in Council made under subsection (1) of this section, is or was at the time specified in the certificate a party to the Convention and may at any time revoke such a certificate and

any certificate shall in the absence of evidence to the contrary be conclusive evidence that the country specified in the certificate is, or was at the time specified, a party to the Convention.

*New*

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**12A. Convention awards to be unenforceable in New Zealand if no reciprocity**—(1) If the Governor-General is satisfied that the treatment in respect of recognition and enforcement accorded by the courts of any country which is a party to the Convention to an award made in arbitration proceedings in New Zealand is substantially less favourable than that accorded by the courts in New Zealand to a Convention award made in that country, the Governor-General may, by Order in Council, direct that no Convention award made in that country shall be enforceable pursuant to this Act.

(2) Where an order has been made under subsection (1) of this section, no proceedings shall be commenced or continued in any Court in New Zealand to enforce, pursuant to this Act, a Convention award made in a country to which the order applies.

**13. Repeal**—Section 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 is hereby repealed.

SCHEDULE

Section 2

ENGLISH TEXT

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, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

*Article III*

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

SCHEDULE—*continued**Article IV*

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

(a) The duly authenticated original award or a duly certified copy thereof;

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

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

*Article V*

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

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.



SCHEDULE—*continued*

*Article VI*

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

*Article VII*

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

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

*Article VIII*

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any 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.

**SCHEDULE—*continued***

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

*Article XI*

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

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

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

*Article XII*

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

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

*Article XIII*

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

**SCHEDULE—*continued***

*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.