

ARBITRATION (AMENDMENT) BILL, 2023

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ARBITRATION (AMENDMENT) BILL, 2023

A BILL FOR AN ACT TO AMEND THE ARBITRATION ACT, 2009

Enacted by the Parliament of The Bahamas

1. Short title.

This Act which amends the Arbitration Act (*No. 52 of 2009*) may be cited as the Arbitration (Amendment) Act, 2023.

2. Amendment of section 2 of the principal Act.

Section 2 of the principal Act is amended in subsection (1) —

- (a) in the definition of “arbitration agreement” —
 - (i) by the insertion, immediately after the word “disputes”, of the words, “including an administration question,”;
 - (ii) by the insertion, immediately after the words “clause in a contract”, of the words, “or a trust instrument,”;
- (b) by the insertion, in the appropriate alphabetical order, of the following —

“**administration question**” means any relief or question in relation to the administration, execution, or variation of, or exercise of any power in relation to a trust;

“**arbitral tribunal**” means a sole arbitrator, a panel of arbitrators, a permanent arbitral institution or an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation;

“**beneficiary**” includes an object of a power, whether or not ascertained or in existence and a charity;

“**party**” in relation to a trust, means any trustee, beneficiary or power holder of or under the trust, in their capacity as such;

“**person under a disability**” means a person eighteen years or older who is unable to manage his person or personal affairs because he suffers from —

- (a) mental deterioration or physical incapacity;
- (b) mental illness; or
- (c) developmental or intellectual disability;

“**power holder**” means a person holding a power in relation to a trust, including a power of appointment, consent, direction, revocation or variation, and includes a person in the position of a protector;

“**protector**” means a person who holds powers under a trust but who is not a trustee; acts independently of the trustees; monitors, oversees or controls the administration of the trust by the trustees;”.

3. Amendment of section 3 of the principal Act.

Section 3 of the Act is amended by the insertion immediately after paragraph (b) of the following new paragraph —

“(bb) in the case of a trust, the settlor shall be entitled to determine in the trust instrument, how disputes are resolved, subject only to such safeguards as are necessary in the public interest;”.

4. Amendment of section 4 of the principal Act.

Section 4 of the principal Act is repealed and replaced as follows—

“4. Application of Act.

This Act shall apply to any arbitration where the seat of arbitration is The Bahamas and where the International Commercial Arbitration Act, 2023 does not apply to that arbitration.”.

5. Repeal and replacement of section 5 of the principal Act.

Section 5 of the principal Act is repealed and replaced as follows —

“5. Mandatory and non-mandatory provisions.

- (1) The provisions specified in subsection (2) are mandatory and shall have effect notwithstanding any agreement to the contrary.
- (2) For the purposes of subsection (1), sections 9, 10, 11, 12, 13, 35, 37(1), 39, 40, 42, 43, 44, 48(2), 51, 54, 78, 82, 88, 94, 95, 96 as well as 90, 90 and 93 in so far as they relate to the aforementioned sections, are mandatory.

- (3) The provisions of this Act not specified in subsection (2) shall apply to an arbitration where the subsisting arbitration agreement provide for the matters contemplated by those provisions.”.

6. Repeal and replacement of section 7 of the principal Act.

Section 7 of the principal Act is repealed and replaced as follows —

“7. Separability of arbitration agreement.

- (1) Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement, whether or not in writing, shall not be regarded as invalid, non-existent or any factor because that other agreement is invalid, or did not come into existence or has become an effective, and it shall for that purpose being treated as a distinct agreement.
- (2) Nothing in subsection (1), section 41(1)(a), or any rule of law or construction treating an arbitration agreement separate from any agreement of which it is a part, shall apply in relation to a trust arbitration.”.

7. Amendment of section 9 of the principal Act.

Section 9 of the principal Act is amended by the insertion immediately after subsection (5) of the following new subsection —

- “(6) For the purposes of sections 9 and 10, **“legal proceedings”** includes an application or other reference to the court concerning an administration question which a trust instrument requires to be submitted to arbitration.”.

8. Amendment of section 12 of the principal Act.

Section 12 of the principal Act is amended by the insertion immediately after subsection (3) of the following new subsections —

- “(3A) A reference to “contemplation of the parties when they agreed the provision in question in subsection (3)(a) shall apply to a trust arbitration as if it were a reference to the contemplation of the settlor when establishing the trust or if the provision in question became a term of the trust in exercise of a power subsequent to the establishment of the trust, the contemplation of the person who exercised that power”.
- (3B) In any application or other reference to proceedings before the court referred to in subsection (3A), the court may stay the proceedings on its own volition unless all parties in relation to the trust affected

by the application are before it or are represented by persons before it.”.

9. Amendment of section 13 of the principal Act.

Section 13 of the principal Act is amended in subsection (1) by the insertion immediately after the words, “(Ch.83)”, of the word “shall”.

10. Amendment of section 18 of the principal Act.

Section 18 of the principal Act is amended by the insertion, immediately after the words “section 19”, of the words “and in the absence of any clause on confidentiality of information and the prohibition on the disclosure of such information,”.

11. Insertion of new section 19A into the principal Act.

The principal Act is amended by the insertion immediately after section 19 of the following new section —

“19A. Improper disclosure of confidential information.

- (1) Where a party knowingly and unlawfully discloses confidential information, that party is liable to a penalty in damages to be determined by the arbitral tribunal and payable to the other party or parties.
- (2) Where an arbitrator knowingly and unlawfully discloses confidential information —
 - (a) he shall not have the benefit of immunity under section 40 and is deemed to have acted in bad faith; and
 - (b) the parties may —
 - (i) seek to revoke the authority of the offending arbitrator in accordance with section 34 or 35 as the circumstances may require; and
 - (ii) retain and withhold any arbitral fees due to him in whole or in part.”.

12. Insertion of new section 47A into the principal Act.

The principal Act is amended by the insertion immediately after section 47 of the following new section —

“47A. Representation in a trust arbitration.

- (1) For the purposes of this section —
 - (a) subsections (2), (3), (6), and (7) shall, subject to the terms of the trust, apply to a trust arbitration;

- (b) subsections (4), (5) and (8) apply irrespective of the terms of the trust.
- (2) Without prejudice to section 49 of the Act, the tribunal has the same powers as the court to appoint one or more persons to represent the interests of any person, including a person unborn or unascertained, or class in a trust arbitration.
- (3) One or more persons may be appointed to represent the interests of any person, including a person unborn or unascertained, or class in a trust arbitration in accordance with the terms of the trust.
- (4) Where an appointment is made under subsection (2) or (3), any award made in the trust arbitration shall be binding on the person or class represented by the person or persons appointed.
- (5) A person under a disability may not —
 - (a) bring or make a claim in a trust arbitration except by his next friend;
 - (b) defend, make a counterclaim or intervene in a trust arbitration except by his guardian ad litem; or
 - (c) take any step in a trust arbitration except by his next friend or guardian ad litem, unless otherwise ordered by the tribunal.
- (6) The terms of a trust may provide for the appointment of a next friend or guardian ad litem, for the cessation of an appointment, and for the service of documents upon a person under a disability.
- (7) The tribunal may appoint a suitable person to be a next friend or guardian ad litem, may terminate an appointment, and may give directions for the service of documents upon a person under a disability.
- (8) Where an appointment is made under subsections (2), (3), (6) or (7) —
 - (a) the approval of the arbitral tribunal is required in relation to a settlement affecting the person or class represented or the person under a disability;
 - (b) the arbitral tribunal may approve a settlement where it is satisfied that the settlement is for the benefit of the person or class represented or the person under a disability.”.

13. Amendment of section 49 of the principal Act.

Section 49 of the principal Act is amended by the insertion immediately after subsection (6) of the following new subsection —

- “(7) The tribunal may, at any stage in a trust arbitration, exercise all the powers of the court in relation to the administration, execution or variation of, or the exercise of any power in relation to, a trust.”.

14. Amendment of section 70 of the principal Act.

Section 70 of the principal Act is amended in subsection (5) —

- (a) in paragraph (c), by the deletion of the full stop and substitution therefor of a semi colon; and
- (b) by the insertion immediately after paragraph (c) of the following new paragraph —
- “(d) to make any order in relation to the administration, execution or variation of, or the exercise of any power in relation to, a trust.”.

15. Amendment of section 83 of the principal Act.

Section 83 of the principal Act is amended by the insertion immediately after subsection (2) of the following new subsections —

- “(3) Subject to subsection (4), where a person is or has been a party to a trust arbitration in the capacity of trustee he shall be entitled to the costs of the arbitration out of the fund held by the trustee.
- (4) A trustee referred to in subsection (3) shall not be entitled to the costs of the arbitration where the tribunal finds that the trustee has, in substance, acted for his own benefit rather than for the benefit of the fund.”.

16. Amendment of section 85 of the principal Act.

Section 85 of the principal Act is amended in subsection (5) —

- (a) in paragraph (a), by the deletion of the words, “, and” and the substitution thereof of a semi colon;
- (b) in paragraph (b), by the deletion of the full stop and the substitution of a semi colon; and
- (c) by the insertion immediately after paragraph (b), of the following new paragraph —
- “(c) where a person is, or has been a party to a trust arbitration in the capacity of trustee, costs shall be presumed to have been unreasonably incurred if they were incurred contrary to the duty of the trustee.”.

17. Repeal and replacement of sections 89 and 90 of the principal Act.

Sections 89 and 90 of the principal Act are repealed and replaced as follows —

“89. Restriction on appeal of award.

The court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act.

90. Application for setting aside as exclusive recourse against arbitral award.

- (1) A party may seek recourse against an arbitral award by an application for setting aside in accordance with this section.
- (2) An arbitral award may be set aside by the court, in whole or in part, if —
 - (a) the party making the application furnishes proof that —
 - (i) a party to the arbitration agreement referred to in section 6 was under some incapacity;
 - (ii) the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of The Bahamas;
 - (iii) the party making the application was —
 - (A) not given proper notice of the appointment of an arbitrator or of the arbitral proceedings; or
 - (B) otherwise unable to present his case;
 - (iv) the award —
 - (A) deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or
 - (B) 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from

- which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
- (b) the Court finds that —
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of The Bahamas; or
 - (ii) the award is in conflict with the public policy of The Bahamas.
 - (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 79, from the date on which that request had been disposed of by the arbitral tribunal.
 - (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action that, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside.”.

18. Repeal of sections 91 and 92 of the principal Act.

The principal Act is amended by the repeal of sections 91 and 92.

19. Amendment of section 93 of the principal Act.

Section 93 of the principal Act is amended in subsection (1) by the deletion of the words “89,” and “or 91”.

20. Amendment of section 94 of the principal Act.

Section 94 of the principal Act is amended by the deletion of subsection (2) and the substitution of the following —

- “(2) A person referred to in subsection (1) has the same right as a party to the arbitral proceedings to challenge an award by an application under 90 to set aside the award.”.

21. Consequential amendments.

The Trustee Act (*Ch. 176*) is amended by the repeal of sections 91A, 91B, 91C and the Second Schedule thereto.

22. Transitional.

This Act shall not affect any trust arbitration commenced under the Trustee Act (*Ch. 176*) before the date of commencement of this Act and such arbitration shall continue without regard to this Act.

OBJECTS AND REASONS

This Bill seeks to amend Arbitration Act, 2009 (*No 42 of 2009*) to provide for the inclusion of provisions related to the resolution of trusts disputes through arbitration. The Bill expands and replaces the existing arbitration of trusts disputes provisions in The Trustee Act (*Ch. 176*) as effected by the Trustee (Amendment) Act, 2011 (*No. 54 of 2011*).

This Bill also amends Arbitration Act, 2009 (*No 42 of 2009*) to expand the interpretation section, clarify the scope of application, define mandatory and non-mandatory provisions, provide for the improper disclosure of confidential information and the provisions relating to challenge of the award and appeal of the award.