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TRUSTEE (AMENDMENT) ACT, 2011

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No. 54 of 2011

TRUSTEE (AMENDMENT) ACT, 2011

AN ACT TO AMEND THE TRUSTEE ACT TO STRENGTHEN THE EXISTING LAW AS IT RELATES TO THE ADMINISTRATION OF TRUSTS AND OTHER MATTERS RELATED THERETO

Date of Assent - 30th December, 2011

Enacted by the Parliament of The Bahamas

1. Short title and commencement.

(1) This Act, which amends the Trustee Act,[1] may be cited as the Trustee (Amendment) Act, 2011.

(2) This Act shall come into operation on a date to be appointed by the Minister by notice published in the Gazette.

2. Amendment of section 2 of the principal Act.

Section 2 of the principal act is amended by the insertion immediately after the definition of "authorised investments" of the following new definition —

" **"company"** includes a body corporate or any other legal person whether or not it is a body of persons;".

3. Amendment of section 3 of the principal Act.

Subsection (3) of section 3 of the principal Act is amended as follows —

(a) by the insertion immediately after the words "and subject to its other terms, a power" of the words "by whomever exercisable";

(b) by the insertion immediately before the full-stop of the words "and a power to extend the perpetuity period prescribed in the trust instrument for any period not exceeding one hundred and fifty years calculated from the date of the trust instrument".

[1]Ch. 176

4. Amendment of section 4 of the principal Act.

Subsection (5) of section 4 of the principal Act is amended by the deletion of the words ", on or after" appearing immediately before the words "the commencement of this Act".

5. Amendment of section 6 of the principal Act.

Subsection (3) of section 6 of the principal Act is amended —

(a) by the insertion of the words "person appointed as" immediately before the words "investment adviser"; and

(b) by the deletion of the word "named".

6. Amendment of section 21 of the principal Act.

Subsection (2) of section 21 of the principal Act is repealed and replaced as follows —

"(2) Subject to any contrary intention expressed in the trust instrument, the power to mortgage or charge conferred by subsection (1) maybe exercisable for the purpose of borrowing money in order to invest.".

7. Amendment of section 27 of the principal Act.

Section 27 of the principal Act is amended by the insertion immediately after subsection (4) of the following new subsections —

"(5) The Trustees may in their absolute discretion determine to produce financial statements in respect of the trust property.

(6) Any costs reasonably and properly incurred by the trustees in connection with the production of such financial statements are to be at the expense of the trust property.".

8. Amendment of section 31 of the principal Act.

Section 31 of the principal Act is repealed and replaced as follows—

"**31. Power to delegate trusts.**

Subject to any contrary intention expressed in the trust instrument and notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney or any other written instrument, delegate to any person in or outside The Bahamas the execution or exercise of all or any trust, powers and discretions vested in him as such trustee either alone or jointly with any other person.".

9. Amendment of section 38 of the principal Act.

Paragraph (a) of the proviso to subsection (1) of section 38 of the principal Act is amended by the deletion of the words "in amount one-half" and the substitution therefor of the words "the amount".

10. Amendment of section 44 of the principal Act.

Paragraph (c) of the section 44 of the principal Act is repealed and replaced as follows —

"(c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed or to fill up the original number of trustees where two or more trustees were originally appointed; and".

11. Amendment of section 71 of the principal Act.

Section 71 of the principal Act is amended by the insertion immediately after subsection (3) of the following new subsection —

"(4) Without derogating from the generality of anything hereinbefore contained in this Act, the court shall have jurisdiction to extend the perpetuity period prescribed in the trust instrument for any period not exceeding one hundred and fifty years calculated from the date of the trust instrument.".

12. Insertion of a new section 79A into the principal Act.

The principal Act is amended by the insertion immediately after section 79, of the following new section —

"79A. Jurisdiction of the court.

(1) The Court has jurisdiction to hear and determine any claim concerning a trust where —

(a) the governing law of the trust is the law of The Bahamas;

(b) a trustee of the trust is ordinarily resident, incorporated or registered in The Bahamas;

(c) any of the trust property is situate in The Bahamas (but only in respect of that property);

(d) the administration of the trust is carried on in The Bahamas;

(e) the Court is otherwise the natural forum for the litigation; or

(f) the trust instrument confers jurisdiction on the Court (but only to the extent of the jurisdiction so conferred).

(2) Subsection (1) shall apply —

(a) to claims against persons whether within or outside the territorial jurisdiction of the Court; and

(b) in addition to any other circumstance in which the Court has jurisdiction.

(3) In this section, "claim" includes any application or other reference that may be made to the Court under this Act, the Purpose Trusts Act[2] and the Perpetuities Act[3].".

13. Insertion of a new section 81A into the principal Act.

The principal Act is amended by the insertion, immediately after section 81, of the following new section —

"81A. Directed trusts.

(1) This section applies where a trust instrument provides —

(a) that (in addition to any other conditions or restrictions) an investment power shall be exercised by the trustees as and when directed by another person (referred to in this section as the "power holder") and, in the absence of a direction, shall not be exercised; and

(b) that this section shall apply to the investment power.

(2) Where this section applies, the trustees shall not be liable for any loss arising by virtue or in consequence of the trustees —

(a) acting in accordance with a direction;

(b) upon receipt of a direction failing to do anything other than acting in accordance with the direction; or

(c) failing to do anything in the absence of a direction,

and no duty shall be owed by the trustees giving rise to any such liability.

(3) Subsection (2) shall not apply to anything done or not done contrary to an order of the court.

(4) In this section, "investment power" means any power vested in the trustees relating to the management or investment of the trust property or any part of the trust property and without prejudice to the generality of the foregoing includes any power to —

(a) acquire or borrow property;

(b) alienate or lend trust property;

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[2]Ch. 176A
[3]Ch. 114

(c) engage or appoint custodians, investment advisers and investment managers and to terminate their appointments;

(d) exercise any right or power attaching to any trust property (including any power to vote or pass resolutions as a member of a company, a holder of any security in a company or a partner of a partnership); and

(e) delegate any of these powers.

(5) In subsection (2) —

(a) subject to paragraph (b), a "direction" means a direction to the trustees to exercise the investment power—

(i) which is in the form provided for in the trust instrument; and

(ii) which the trustees believe has been given by the power holder (or, where the power holder comprises two or more persons, by such one or more of them as the trust instrument provides);

(b) a direction as defined in paragraph (a) shall not be a direction for the purposes of subsection (2) where it is shown that, at the time the direction was acted upon, the trustees had actual knowledge (without being required to make any enquiry or investigation) that the direction had been given dishonestly.".

14. Amendment of section 83 of the principal Act.

Section 83 of the principal Act is amended —

(a) in subsection (8) —

(i) by the insertion of the words "(but subject, nonetheless, to subsection (11))" immediately after the words "this section"; and

(ii) by the deletion of the words "trustees shall not" and the replacement of the words "no person shall"; and

(b) by the insertion immediately after subsection (10) of the following new subsection —

"(11) This section shall apply if and so far only as a contrary intention is not expressed in the trust instrument and shall have effect subject to the terms of that instrument.".

15. Amendment of section 86 of the principal Act.

Section 86 of the principal Act is amended by the insertion immediately after subsection (2) of the following new subsection —

"(3) This section shall not apply to an arrangement made under section 70.".

16. Amendment of section 87 of the principal Act.

Section 87 of the principal Act is amended by the insertion immediately after subsection (2) of the following new subsection —

"(3) This section shall not apply to an arrangement made under section 70.".

17. Insertion of new section 87A into the principal Act.

The principal Act is amended by the insertion immediately after section 87 of the following new section —

"87A. Termination of interest of beneficiary upon trust being challenged.

(1) The terms of a trust may provide that the interest of a beneficiary shall terminate (or may be terminated in exercise of a power in that regard) upon —

(a) the validity of the trust being challenged, in whole or in part, in any court within or outside The Bahamas; or

(b) any action being taken to assist, promote or encourage a challenge.

(2) Subsection (1) applies whether or not the challenge or action—

(a) is brought or taken by the beneficiary; or

(b) is brought or taken in good faith or with reasonable cause.

(3) Unless otherwise provided in the trust instrument, no rule of law or equity giving relief against forfeiture shall apply to a provision referred to in subsection (1).

(4) In this section —

(a) in relation to a beneficiary who is the object of a power or whose interest arises by virtue of his membership of a class, the termination of his interest includes his ceasing to be an object of the power or a member of the class;

(b) the "validity of the trust" includes the validity of any disposition of property to be held upon the trusts of the trust and any question whether any settlor of the trust intended to create a trust on the terms of the trust instrument.".

18. Insertion of new sections 91A, 91B and 91C into the principal Act.

The principal Act is amended by the insertion immediately after section 91 of the following new sections —

"91A. Arbitration of trust disputes.

(1) The object of this section is to enable any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument.

(2) Where a written trust instrument provides that any dispute or administration question arising between any of the parties in relation to the trust shall be submitted to arbitration ("a trust arbitration"), that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.

(3) The Arbitration Act[4] shall apply to a trust arbitration in accordance with the provisions of the Second Schedule to this Act.

(4) The Minister may by order amend the *Second Schedule*.

91B. Powers of the arbitral tribunal.

(1) This section shall apply except to the extent otherwise provided in the trust instrument.

(2) The arbitral tribunal (hereinafter referred to as "the tribunal") may, in addition to all other powers of the tribunal, at any stage in a trust arbitration, exercise all the powers of the Court (whether arising by statute (including this Act), under the inherent jurisdiction of the Court or otherwise) in relation to the administration, execution or variation of a trust or the exercise of any power arising under a trust.

(3) Without prejudice to subsection (2), and to any provisions made pursuant to subsection (4), the tribunal has the same powers 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 as the court has under Order 15 rule 14 of the Rules of the Supreme Court[5] in relation to proceedings before the court.

(4) The terms of a trust may provide for the appointment of one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration.

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[4]No. 42 of 2009.
[5]Sub. Leg. Vol. II, Ch. 53-p. 3.

(5) Where an appointment is made under subsection (3) or (4) —

(a) the approval of the tribunal is required in relation to a settlement affecting the person or class represented;

(b) the tribunal may approve a settlement where it is satisfied that the settlement is for the benefit of the person or class represented;

(c) any award given in the trust arbitration shall be binding on the person or class represented by the person or persons appointed.

(6) 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.

(7) 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.

(8) Subject to subsection (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.

(9) Where a next friend or guardian *ad litem* has been appointed under subsection (7) or subsection (8), no settlement affecting the person under a disability shall be valid, without the approval of the tribunal.

(10) Notwithstanding subsection (1), subsections (5), (6) and (9) shall apply irrespective of any provision in the trust instrument.

(11) The Minister may make regulations to extend or clarify the powers of the tribunal in relation to trust arbitrations.

91C. Interpretation for sections 91A, 91B and the Second Schedule.

For the purposes of sections 91A, 91B and the Second Schedule —

"administration question" means any relief or question in respect of which an action, application or other reference to the court could, subject to section 91A and the Arbitration Act[6], be

[6]No. 42 of 2009.

brought or made under Order 74 of the Rules of the Supreme Court[7] under this Act or under the Purpose Trusts Act;

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

"dispute" includes a difference;

"power holder" means any person holding a power in relation to a trust (including any power of appointment, consent, direction, revocation or variation, and any power to appoint or remove trustees or power holders) and includes a person in the position of a protector;

"the parties in relation to the trust" means any trustee, beneficiary or power holder of or under the trust, in their capacity as such.".

19. Amendment of Schedule to the principal Act.

The Schedule to the principal Act is amended —

(a) in paragraph 4 —

(i) by the deletion of the full stop appearing immediately after subparagraph (u) and the substitution of a semi-colon; and

(ii) by the insertion immediately after subparagraph (v) of the following new subparagraphs —

"(w) notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney or any other written instrument, delegate to any person in or outside The Bahamas the execution or exercise of all or any trusts, powers and discretions vested in him as such trustee either alone or jointly with any other person.

(x) power to insure —

(i) a trustee may insure against loss or damage, whether by fire or otherwise, any insurable property, and against any risks or liability against which it would be prudent for a person to insure if he were acting for himself;

(ii) the insurance may be for any amount provided that together with the amount of any insurance already on foot, the total shall not exceed the insurable value or liability;

[7]Sub. Leg. Vol. II, Ch. 53-p. 3.

(iii) the premiums may be paid by the trustees out of any moneys subject to the trust but in the accounts of the trustee shall be charged first against the income of the property concerned and secondly against the income of any other property subject to the same trust, to the extent of the income available without obtaining the consent of any person who may be entitled wholly or partly to the income.";

(b) by the repeal and replacement of paragraph 8 as follows —

"**Trustee not bound to interfere with company management.**

8.(1) The Trustees shall not be under any duty nor shall they be bound to interfere in the business of any company in which this settlement is interested and in particular —

(a) the Trustees shall not be under any duty to exercise any control the Trustees may have over or to interfere in or become involved in the administration, management or conduct of the business or affairs of any company in which this instrument is or may be interested although this Settlement holds the whole or a majority of the shares carrying the control of the company and without prejudice to the generality of the foregoing the Trustees shall not be under any duty to exercise any voting powers or rights of representation or intervention conferred on the Trustees by any of the shares in respect of such company;

(b) the Trustees shall leave the administration, management and conduct of the business and affairs of such company to the directors, officers and other persons authorized to take part in the administration, management or conduct thereof and the Trustees shall not be under any duty to supervise such directors, officers or other persons or to otherwise intervene in the administration, management or conduct of the business or affairs of such company aforementioned so long as the Trustees do not have actual knowledge of any dishonesty relating to such business and affairs on the part of any such person;

(c) the Trustees shall assume at all times that the administration, management and conduct of the business and affairs of such company are being carried on competently, honestly, diligently and in the best interests of the Trustees in their capacity as shareholders or howsoever they are interested therein and the Trustees shall assume until such time as they have actual knowledge to the contrary that persons appearing

to be or who act as the directors, officers and other persons authorized to take part in the aforesaid administration, management and conduct are duly appointed and authorized and so that the Trustees shall not be under any duty at any time to take any steps at all to ascertain whether or not the assumptions contained in this sub-clause are correct.

(2) Without prejudice to the generality of the foregoing, the Trustees shall not be under any duty —

(a) to exercise any rights or powers (whether available to them as shareholders, debenture, holders or otherwise) enabling them to appoint or elect or to remove a director, officer or other person authorized to take part in the administration, management or conduct of the business or affairs of such company and in particular shall not be under any duty to take any steps to see that any trustee or any officer or nominee of the Trustees becomes a director or other officer of such company;

(b) to exercise any power to require the payment of a dividend or other distribution or profit and whether of an income or capital nature.

(3) No Beneficiary shall be entitled in any way whatsoever to compel, control or forbid the exercise in any particular manner of any powers, discretions or privileges (including any voting rights) conferred on the Trustees by reason of any shares or other rights of whatsoever nature in or over such company.

(4) The Trustees shall not be liable in any way whatsoever for any loss to such company or the Trust Fund or the income thereof arising from any act or omission of the directors, officers or other persons taking part (whether or not authorized) in the administration, management and conduct of the business or affairs of such company (whether or not any such act or omission by any such foregoing persons shall be dishonest, fraudulent, negligent or otherwise).

(5) Without prejudice to the generality of the foregoing, the Trustees shall not be rendered responsible in any way whatsoever for any default or other act or omission by the directors, officers or other persons referred to in paragraph (4) hereof by any express notice or intimation of such default or other act or omission and the Trustees shall not be obliged or required to make and enforce any claim in respect of such a default or other act or omission and no person who is or who may become entitled hereunder shall be entitled to compel the making of such a claim but the Trustees may be required to lend their names for the purpose

of proceedings brought by a Beneficiary in respect of any such default, act or omission upon being given a full and sufficient indemnity against all costs and expenses of such proceedings.";

(c) by the repeal and replacement of paragraph (10) as follows —

" **Incapacitation of Settlor or Beneficiary.**

10.(1) If the Settlor becomes incapacitated then the rights or powers (if any) reserved to him shall during his incapacitation be exercisable by the Protector (if appointed) or by any other person designated by the trust instrument or appointed for that purpose by the Court declaring or confirming him to be incapacitated.

(2) If a Beneficiary shall become incapacitated then the Trustees may during his incapacitation apply income or capital of the Trust Fund for his benefit by paying the same to a court appointed guardian receiver or other such person and without being liable to see to the due and proper application thereof by such person.

(3) For the purpose of this paragraph a person shall be deemed to be incapacitated if declared to be of unsound mind by a court of competent jurisdiction or if declared by two qualified examining physicians to be of unsound mind or physically impaired so as to be unable to act responsibly prudently or effectively and shall be deemed to remain incapacitated until declared otherwise by such court or such physicians.

(4) The Trustees may declare in writing a person to be incapacitated during any period in which the Trustees are of the opinion that such person is unable freely to exercise his rights or powers or to fulfil his duties or obligations hereunder because of duress or undue influence brought to bear on such person by any other person or persons but the Trustees shall not be under any duty to make any inquiries as to whether any person is suffering from duress or undue influence and in any case the Trustees shall not be under any duty to make any declaration as aforementioned.

(5) This paragraph shall apply if and so far only as a contrary intention is not expressed in the trust instrument and shall have effect subject to the terms of that instrument.".

20. Insertion of new Second Schedule into the principal Act.

The principal Act is amended —

(a) by the renaming of the *Schedule* as the *First Schedule*; and

(b) by the insertion immediately after the *First Schedule* of the following new Schedule —

"SECOND SCHEDULE

(section 91A)

APPLICATION OF THE ARBITRATION ACT[8]

The Arbitration Act[9] shall apply and be construed with respect to a trust arbitration, as stated hereunder —

1. The Arbitration Act shall apply and be construed with respect to a trust arbitration, as stated hereunder.

2. In the Arbitration Act, "dispute" includes an administration question.

3. Section 3(b) of the Arbitration Act[10] shall apply as if it read —

   "(b) the settlor should be free to determine (by provision in the trust instrument) how, in relation to a trust, disputes are resolved, subject only to such safeguards as are necessary in the public interest;".

4. Other than in sections 42, 43, 73 and Part XII, where in the Arbitration Act[11] reference is made to a matter agreed between the parties to an arbitration agreement (including a matter which may be authorised, chosen, conferred, designated, nominated or vested by the parties) that matter shall (except where no effective provision is made) be determined as provided in the trust instrument.

5. Neither section 7 of the Arbitration Act[12] nor any rule of law or construction treating an arbitration agreement separate to any agreement of which it is a part shall apply in relation to a trust arbitration.

6. The term "legal proceedings"in sections 9 and 10 of the Arbitration Act[13] includes an application or other reference to the court concerning an administration question which the trust instrument requires to be submitted to arbitration and a stay of that application or other reference may be sought by any of the parties in relation to the trust, whether or not a party to that application or other reference.

7. In any application or other reference to the Court referred to in paragraph 6, 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.

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[8]No. 42 of 2009.
[9]No. 42 of 2009.
[10]No. 42 of 2009.
[11]No. 42 of 2009.
[12]No. 42 of 2009.
[13]No. 42 of 2009.

8. The reference to "contemplation of the parties"in section 12(3)(a) of the Arbitration Act[14] shall apply as if it were a reference to the "contemplation of the settlor".

9. Section 83 of the Arbitration Act[15] shall apply as if it included the following subsection —

> "(3) Where a person is or has been a party to a trust arbitration in the capacity of trustee he shall, unless the tribunal otherwise orders, be entitled to the costs of the arbitration, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee; and the tribunal may otherwise order only on the ground that the trustee has in substance acted for his own benefit rather than for the benefit of the fund.".

10. Section 85(5) of the Arbitration Act[16] shall apply as if it included the following paragraph —

> "(c) Where a person is or has been a party to a trust arbitration in the capacity of trustee and is entitled to be paid his costs out of the fund held by the trustee any doubt as to whether costs were reasonably incurred shall be resolved in favour of the trustee. Costs shall be presumed to have been unreasonably incurred if they were incurred contrary to the duty of the trustee.".

11. For the purposes of enforcing an arbitral award under section 88 of the Arbitration Act[17] —

> (a) section 91A shall have effect for the purposes of section 5 and 6 of the Arbitration (Foreign Arbitral Awards) Act, 2009[18] as it does for the purposes of the Arbitration Act[19];
>
> (b) section 6(2)(a) of the Arbitration (Foreign Arbitral Awards) Act, 2009 which provides for the refusal of enforcement of an arbitral award against an incapacitated person) shall apply subject to the provisions of section 91B;
>
> (c) section 6(2)(d) of the Arbitration (Foreign Arbitral Awards) Act, 2009[20] which provides for the refusal of enforcement of an arbitral award that deals with a difference not contemplated by or not falling within the terms of the submission to arbitration), the term "difference" includes an administration question.

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[14]No. 42 of 2009.
[15]No. 42 of 2009.
[16]No. 42 of 2009.
[17]No. 42 of 2009.
[18]No. 43 of 2009.
[19]No. 42 of 2009.
[20]No. 43 of 2009.