

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Commercial Division**

**CLAIM NO. 00452 OF 2023**

**BETWEEN**

**CEM OKULLU'NUN YEMINLI BEYANI**

**Claimant**

**AND**

**(1) WEISER GLOBAL CAPITAL MARKETS LTD.  
(2) BENTLEY ROTHSCHILD CAPITAL 3 LIMITED  
(3) JAITEGH SINGH**

**Defendants**

**Before:** The Honourable Madam Justice Camille Darville Gomez

**Appearances:** Mr. Sean Moree, KC and Mrs. Erin Hill and Mrs. Peteche Mitchell with him  
for the Claimant

Mr. Philip McKenzie, KC, Miss Glenda Roker and Miss Lenthala Culmer for  
the First Defendant

Mr. Colin Jupp for the Third Defendant

**Hearing Date:** February 15, 2024

**JUDGMENT**

**Darville Gomez, J**

**Background**

- [1.] The instant action concerns a dispute in relation to a Master Loan Agreement (“MLA”) which is governed by the law of St. Kitts & Nevis. Additionally, section 8 of the MLA provided that any dispute arising out of or in relation to the MLA would be conducted by arbitration administered by The Arbitrator, Conflict Resolution Service in St. Kitts & Nevis in accordance with the UNCITRAL Arbitration Rules in force at the time when the Notice of Arbitration is submitted. Further, that the arbitration shall be conducted by one (1) arbitrator.
- [2.] The Third Defendant by a Notice of Application filed on July 14, 2023 sought inter alia:
- (i) the enforcement of the Order shall be stayed pending the outcome of Arbitration Proceedings in accordance with Section 8 of the Master Loan Agreement duly executed by the Claimant and the Second Defendant on or around the 18<sup>th</sup> April, 2019 (the “MLA”) pursuant to Part 9.8 of the Supreme Court Civil Procedure Rules (“SCCCPR”)

and section 4(2), 9(1) and 9(4) of the Arbitration Act 2009 and/or the inherent jurisdiction of the Court; (my emphasis added)

(ii) The Claim shall be stayed pending the outcome of Arbitration Proceedings in accordance with section 8 of the MLA pursuant to Part 9.8 of the SCCPR and sections 4(2)9(1)and 9(4) of the Arbitration Act 2009 and/or the inherent jurisdiction of the Court. (my emphasis added)

[3.] Counsel for the Defendants relied upon the Arbitration Act and Counsel for the Claimant has concluded that the International Commercial Arbitration Act, 2023 now applies since the repeal of section 4 of the Arbitration Act.

[4.] Therefore, the Court was invited to consider and determine as a preliminary issue by the parties, whether the Arbitration Act or the International Commercial Arbitration Act 2023 applies to the arbitration agreement in the MLA.

[5.] While the application was that of the Third Defendant, the First Defendant adopted the submissions of the Third Defendant.

[6.] I commence by setting out the areas that are undisputed between the parties:

(a) The Arbitration Act, 2009 section 4 and 9 reads as follows:

*4. (1) The provisions of this Act apply where the seat of the arbitration is in The Bahamas.*

*(2) The following sections apply even if the seat of the arbitration is outside The Bahamas or no seat has been designated or determined —*

*(a) sections 9 to 11;*

*(b) sections 65, 66;*

*(c) section 67; and*

*(d) section 88.*

*(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside The Bahamas or no seat has been designated or determined —*

*(a) section 54; and*

*(b) section 55;*

*but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside The Bahamas, or that when designated or determined the seat is likely to be outside The Bahamas, makes it inappropriate to do so.*

*(4) The court may exercise a power conferred by any provision of this Act not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where —*

*(a) no seat of the arbitration has been designated or determined; and*

*(b) by reason of a connection with The Bahamas the court is satisfied that it is appropriate to do so.*

*(5) Sections 7 and 8 apply where the law applicable to the arbitration agreement is the law of The Bahamas even if the seat of the arbitration is outside The Bahamas or has not been designated or determined.*

Section 9 (1) reads as follows:

*A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which is under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*

(b) The Arbitration (Amendment) Act, 2023 (the “AAA”) came into force on June 5, 2023 and amended portions of the Arbitration Act.

(c) The AAA repealed and replaced inter alia, section 4 of the Arbitration Act which now reads 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.*

(d) The International Commercial Arbitration Act, 2023 (the “ICA”) came into force on October 1, 2023;

(e) The Third Defendant’s application was filed on July 14, 2023.

[7.] Therefore, the issue in dispute is one of statutory interpretation that is, whether the Arbitration Act or the ICA would apply to the arbitration agreement in the MLA given the above.

**The Claimant’s position**

[8.] The Claimant referred to **Bennion, Bailey and Norbury on Statutory Interpretation Eighth Edition** where it stated as follows:

*“The position at common law is that ‘when an Act of Parliament is ‘repealed’ it must be considered (except as to transactions past and closed) as if it had never existed’. Anything purportedly done under a statutory provision after it has been repealed is a nullity.*

*The operation of the common law rule is now subject to a number of general statutory savings made by the Interpretation Acts, as well as being modified by any specific savings made by or under the repealing legislation.”*

[9.] The Claimant’s position is that since section 4 of the Arbitration Act has been repealed by the AAA, it now applies only to any arbitration that has passed the two stage test, viz., (i) where the seat of arbitration is The Bahamas and (ii) where the International Commercial Arbitration Act, 2023 does not apply to that arbitration. Therefore, he submitted that the ICA would now govern the purported arbitration agreement in the MLA and any relief sought in reliance on it.

[10.] Hence, the Claimant's position is that the arbitration agreement in the MLA no longer falls within section 4 of the AAA, rather, it now falls within the scope of the ICA. Accordingly, he submitted that all relief sought in the Third Defendant's Notice of Application pursuant to the Arbitration Act must be dismissed.

#### **The Third Defendant's position**

[11.] The Third Defendant disagreed that the provisions of the ICA apply to the arbitration agreement in the MLA because the ICA only came into force and operation on October 1, 2023 which was several months after the Notice of Application was filed.

[12.] Also, he submitted that as a result of sections 4 and 9 of the Arbitration Act which has mandatory language and which applies to the arbitration agreement in the MLA that the Court shall grant a stay of legal proceedings **unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.** (his emphasis added)

[13.] The Third Defendant admitted that the new section 4 of the Arbitration Act which was amended by the AAA applies in only two scenarios; (i) where the seat of arbitration is The Bahamas and (ii) where the ICA does not apply to that arbitration. However, he submitted that it was obvious that the ICA could not apply because it was not in existence at the date of the filing of his application.

[14.] He relied upon **Odgers Construction of Deeds and Statutes Fifth Edition** at pages 281 and 282 which cited the cases of **In Re Athlumney [1898] 2 Q.B.547** per Wright J at page 551 and **Lauri v Renad [1892] 3 Ch. 402** per Lindley LJ at page 421. The statements read as follows:

*"Perhaps no rule of construction is more firmly established than this retrospective operation is not to be given to a statute so as to impair an existing right or obligation..."*

*"It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary."*

[15.] He concluded that the language of section 4 of the AAA does not state that it is of retroactive effect or was to be applied retroactively. Therefore, he relied upon **Odgers** and **Lauri v Renad [1892] 3 Ch. 402** as authority that section of the AAA cannot be construed as having retroactive effect.

[16.] Accordingly, he submitted that neither section 4 of the AAA nor the ICA apply so as to prevent him from relying upon section 9 of the Arbitration Act for the purposes of staying the proceedings.

#### **Analysis and Disposition**

[17.] The effect of the amendment to the Arbitration Act is to limit its application to local arbitrations, or arbitrations in The Bahamas versus, the ICA which applies to international commercial arbitrations. However, previously the Arbitration Act applied to both until the passage of the AAA on June 5, 2023 and then the ICA on October 1, 2023.

[18.] The Interpretation and General Clauses Act, Chapter 2 (the “Interpretations Act”) at sections 19, 20 and 22 refer as follows:

“19. In an amending Act, the amended act may be referred to as the “principal Act” and this section shall apply mutatis mutandis to subsidiary legislation.

20. *Where a written law repeals in whole or in part any other written law, the repeal shall not*

*(a) revive anything not in force or existing at the time at which the repeal takes effect;*

*(b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;*

*(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;*

*(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or*

*(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed. (my emphasis added)*

22. *Where any written law repeals in whole or in part any other written law and substitutes other provisions therefor, the repealed written law shall remain in force until the substituted provisions come into operation. (my emphasis added)*

[19.] I commence with the date of the filing of the application by the Third Defendant on July 14, 2023. By that date the AAA which had the effect of repealing and replacing section 4 of the Arbitration Act had already come into force. Therefore, arbitrations that complied with the two stage test would be governed by the Arbitration Act. However, the two stage test in the AAA was as follows:

(i) where the seat of arbitration is The Bahamas; and

(ii) where the International Commercial Arbitration Act, 2023 does not apply to that arbitration.

[20.] An issue arises from the second part of the test because the ICA did not come into operation until over three months after the amendment to the Arbitration Act took effect.

[21.] Therefore, while section 4 had been repealed on June 5, 2023, the ICA did not come into operation until October 1, 2023. Thus, the break in time between June 5, 2023 and October 1, 2023 left a lacunae for arbitrations that did not comply with the new section 4 (as the arbitration agreement in this MLA did). The question then becomes, where do arbitrations that do not pass the two stage test fit between June 5, 2023 and September 30, 2023? That is between the passage of the AAA on June 5, 2023 and the coming into operation of the ICA on October 1, 2023.

[22.] I must consider as stated in **Bennion, Bailey and Norbury on Statutory Interpretation Eighth Edition** whether there is any specific savings made by or under the repealing legislation.

- [23.] A review of the AAA showed that there was none.
- [24.] Therefore, guidance must be had from the **Interpretations Act, section 22** which provides that the repealed written law shall remain in force until the substituted provisions come into operation.
- [25.] Additionally, I agree with the statement in **Odgers Construction of Deeds and Statutes Fifth Edition** that “*no rule of construction is more firmly established than this retrospective operation is not to be given to a statute so as to impair an existing right or obligation...*” which is supported by the authorities cited above namely, **In Re Athlumney [1898] 2 Q.B.547** and **Lauri v Renad [1892] 3 Ch. 402.**
- [26.] Therefore, I conclude that the provisions of the Arbitration Act despite the amendment in the AAA on June 5, 2023 remained in force until the ICA came into operation on October 1, 2023.
- [27.] As this was a preliminary issue to be determined, I make no order as to costs.

**Dated this 4<sup>th</sup> day of June, A. D., 2024**



**Camille Darville Gomez**  
**Justice**