

BRIEF FOR THE HONOURABLE MINISTER OF JUSTICE

DELROY CHUCK FOR PRESENTATION OF THE

ARBITRATION BILL, 2016

IN THE HOUSE OF REPRESENTATIVES 10.1.16

Mr. Speaker, I am very pleased to present to the House of Representatives the **Arbitration Bill, 2016**. This Bill seeks to repeal the Arbitration Act 1900 and replace it with more modern legislation that is intended to provide an effective non-judicial mechanism for settling disputes between contracting parties.

The Arbitration Bill is based on the provisions of the Model Law published by the United Nations Commission on International Trade Law (UNCITRAL) and will operate in conjunction with the provisions of the Arbitration (Recognition and Enforcement of Foreign Awards) Act as well as the Investment Disputes Awards

(Enforcement) Act. With the passing of this Bill, Jamaica will join the large number of countries that have adopted the Model Law and as such, will benefit from the internationally agreed best practices that are disseminated and promoted by UNCITRAL on an on-going basis.

Mr. Speaker, the Government of Jamaica is committed to sustainable economic development for the country. Investors need to feel assured that they are conducting business in an economically stable environment. The legal risks inherent in transactional business ventures (particularly cross-border commercial arrangements) demand a settlement dispute mechanism that is expedient, cognizant of emerging trends and that operates at a highly modernized level.

Jamaica has been plodding along with an outdated arbitration regime, in which investors have found no confidence. Mr. Speaker, we must move towards the adoption of the UNCITRAL model law, which has been accepted in over 70 countries worldwide and over 100 jurisdictions. This model law is complemented by Jamaica's adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the **New York Convention**), which Jamaica ratified on the 10th of July, 2002.

I must add, Mr. Speaker, that international arbitration is chosen as the preferred dispute resolution process for cross border disputes because arbitration awards are enforceable under the New York Convention in more than 148 countries around the world. Judgments of local domestic courts are not as readily enforceable

and in many jurisdictions, the judgment of a court from another jurisdiction cannot be enforced without a 're-run' of the trial.

Mr. Speaker, there are several other benefits of arbitration. These include:

- (i) **The parties to the dispute usually agree on the arbitrator(s), so that the arbitrator(s) will be persons who both sides have trust and confidence to be impartial and fair.**

- (ii) **The dispute will normally be resolved much sooner, as a date for the arbitration can usually be obtained a lot faster than a court date. This would also contribute to a reduction of matters that go through the common court civil procedure process.**

As indicated to the House some time ago Mr. Speaker, we are already prepared for the advent of the new arbitration law. The

Mona International Centre for Arbitration and Mediation (MICAM) launched its operations on November 3, 2016. The launch of this centre will ensure that once the Bill is passed, there will already be an established and modernized venue to host arbitration disputes. MICAM will also be thereafter conducting several training programmes geared towards ensuring that Jamaica has a credible and well-trained cadre of arbitrators who will join the illustrious panel of arbitrators that already exist worldwide.

Mr. Speaker, arbitration can be a game changer in the settlement of commercial domestic disputes and a major source of foreign exchange earnings from the settlement of international trade disputes.

Mr. Speaker, following consultations with relevant stakeholders in the field of arbitration and the Attorney General's Chambers, the

Bill was drafted by the Chief Parliamentary Counsel and submitted to the Legislation Committee on October 19, 2016. On that occasion, the Committee approved the Bill for submission to the Houses of Parliament.

Mr. Speaker, I will now proceed to highlight and explain the main clauses of the Bill.

The short title of the Bill is noted as the Arbitration Act, 2016. It should also be noted, Mr. Speaker, that this Act will repeal the Arbitration Act of 1900.

Clause 2

This Clause indicates that the Act applies to domestic and international commercial arbitration, and notes that it is subject to any agreement in force between Jamaica and any other State.

Mr. Speaker, it is also clearly stated here that the Act shall not affect any other Act of Jamaica by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Act.

Clause 3

This Clause outlines certain definitions relevant to the arbitration process, and includes definitions of 'arbitration', 'award' and 'dispute'. Of particular importance, Mr. Speaker, are the definitions that distinguish 'domestic arbitration' from 'international arbitration'. Mr. Speaker, the former arises when there is a dispute that involves an individual who is a national of Jamaica or habitually resident in Jamaica; or a body corporate which is

incorporated in Jamaica; or an association or a body of individuals whose central management and control is exercised in Jamaica.

Mr. Speaker, international arbitration arises when, for example, the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States. It can also occur in several other instances, namely:

- (i) when there is an arbitration agreement that states the place of arbitration as somewhere outside the State in which the parties to the dispute have their places of business;
- (ii) where there is a place in which a substantial part of the obligations of the commercial relationship is to be performed;
- (iii) where there is a place with which the subject-matter of the dispute is most closely connected; or

(iv) the parties have expressly agreed that the subject- matter of the arbitration agreement relates to more than one country.

Mr. Speaker, for clarification, the Clause indicates that where a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement. It also goes further to state that where a party does not have a place of business, reference is to be made to the habitual residence.

There are also certain safeguards provided for in this Clause, Mr. Speaker. It stipulates that the Act will be interpreted and administered in accordance with certain principles, not the least of which is the provision that the Court shall not generally interfere in the arbitration of a dispute. Where the Court does interfere, it shall as far as possible, give due regard to the wishes of the parties and the provisions of the arbitration agreement. We see here, Mr.

Speaker, that the Bill aims to safeguard the interest of the parties as their wishes and intentions are paramount to the settlement of a dispute in this case.

Clause 4

This Clause refers to international and origin principles and the overarching need to promote uniformity in the application of the Act and the observance of good faith.

Clause 5

Mr. Speaker, this Clause outlines the objects of the Act. They are to:

- (i) facilitate domestic and international trade and commerce by encouraging the use of arbitration as a method of resolving disputes;

- (ii) facilitate and obtain the fair and speedy resolution of disputes by arbitration without unnecessary delay or expense;
- (iii) facilitate the use of arbitration agreements made in relation to domestic and international trade and commerce;
- (iv) facilitate the recognition and enforcement of arbitral awards made in relation to domestic and international trade and commerce; and
- (v) give effect to the UNCITRAL Model Law.

Mr. Speaker, this supports the Government's commitment to sustainable economic development, as the Bill seeks to provide a modern regulatory framework for the conduct of arbitration proceedings as a non-judicial mechanism for the settlement of commercial disputes. It is clear from the objects outlined in this

Clause, Mr. Speaker, that this will be mainly achieved by facilitating domestic and international trade and commerce by encouraging the use of arbitration as a method of resolving disputes. It will also firmly place Jamaica in the minds of local and international investors as a recognized seat of international commercial arbitration.

Clause 6

Mr. Speaker, this Clause addresses the delivery and receipt of written communications, but excludes communications which are the subject of court proceedings.

Clause 7

This Clause refers to a party to an arbitration dispute being deemed to have waived his right if he does not in a timely manner

raise an objection concerning non-compliance with the Act or the relevant arbitration agreement.

Clauses 8 and 9

Mr. Speaker, Clause 8 clearly indicates that the Court can only intervene in arbitration matters where the Act provides.

Clause 9 then goes on to stipulate the areas of the Act for which the Court's assistance would be required.

Clause 10

Mr. Speaker, this Clause outlines the form of an arbitration agreement and stipulates that the agreement must be in writing.

The Clause then goes on to define what will be considered as 'in writing'.

Clauses 11 and 12

These Clauses refer to a claim brought before the Court and the Court's handling of interim measures. It mainly indicates that the Court can refer a matter to arbitration upon a party's request, if there is a matter before it which is the subject of an arbitration agreement. The exception is where the Court deems that agreement to be null and void.

Clauses 13 through 18

Mr. Speaker, these Clauses contain provisions regarding the composition of the arbitral tribunal. It stipulates that parties to an arbitration dispute are free to appoint the number of arbitrators that they deem fit. However, where there is failure to appoint an arbitrator, the number of arbitrators is stated to be three (3).

The remaining provisions address the appointment of arbitrators, grounds for challenging an appointed arbitrator, the procedure to be followed when grounding a challenge, and the question of an arbitrator's inability or failure to perform.

Clauses 19 and 20

There are provisions outlined in these Clauses that address the arbitral tribunal's jurisdiction, and which outline the tribunal's ability to rule on its own jurisdiction. The provisions outlined here also address the possible interim measures and preliminary orders that the tribunal may make.

Clauses 21 through 30

Mr. Speaker, these Clauses contain provisions regarding the conduct of arbitral proceedings. The first stipulation is that parties to the dispute are to be treated equally. Provision is then made for

matters such as determination of rules of procedure, the place at which the proceedings should take place, the nature of submissions and statements, and determination regarding whether or not there will be oral hearings or an assessment of the matter based on submitted materials.

Clauses 31 through to 36

These Clauses, Mr. Speaker, address the matters of making the arbitral award and the manner in which the proceedings may be terminated. Provision is made for applicable rules concerning the merits of the dispute and the question as to settlement of the dispute during the proceedings. Provision is also made for the form and content of the award, which is required to be in written format.

Clause 37

Mr. Speaker, this Clause makes provision for challenging an arbitral award and applying to the Court to have it set aside. It outlines the grounds upon which the Court may set aside such an award, which includes the applicant not having had proper notice of the appointment of an arbitrator.

Clause 38 and 39

These Clauses, Mr. Speaker, concern the recognition and enforcement of arbitral awards. It contains provisions that address the grounds for refusing recognition or enforcement of an award. These include submission of proof that the relevant arbitration agreement was invalid in law.

Clause 40

Mr. Speaker, this Clause empowers the Minister of Justice to make regulations to give further effect to the Act.

Clause 41

Mr. Speaker, as this Act is constructed in accordance with the UNCITRAL Model Law, this Clause makes provision for the Minister to review the Act any time that the Model Law is amended. This will ensure that the provisions remain updated and in keeping with any changes made to the Model Law.

Clause 42

This is the transitional provision, Mr. Speaker. It states that the Act applies to an arbitration conducted pursuant to an arbitration agreement that was made before the coming into force of this Act.

The Schedule

Mr. Speaker, the remaining provisions of the Act outline the conditions for granting interim measures and making preliminary orders. These provisions also address the recognition and enforcement of interim measures.

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Mr. Speaker, this ends the clause by clause summary of the Bill before you. I now commend this Bill to the members of this House for their approval.