THE LAW SOCIETY OF SINGAPORE

The Law Society of Singapore
28 Maxwell Road #01-03
Maxwell Chambers Suites S(069120)

t: +65 6538 2500 f: +65 6533 5700
www.lawsociety.org.sg

**Sender's Fax: 6533 5700**

**Sender's DID: 6530 0251**

**Sender's Email: represent@lawsoc.org.sg**

**Our Ref: LS/RLR/Gen/2019/IAA/GG/jt/lf**

**21 August 2019**

**Legal Industry Division**
**Ministry of Law**
**100 High Street, #08-02**
**The Treasury**
**Singapore 179434**

**BY EMAIL AND POST**
**(gloria_lim@mlaw.gov.sg and MLAW_IAA_Consultation@mlaw.gov.sg)**

**Attention: Gloria Lim**
**Director, Legal Industry Division**

Dear Gloria,

**THE LAW SOCIETY OF SINGAPORE'S MEMBERS' CONSOLIDATED FEEDBACK – PUBLIC CONSULTATION ON THE PROPOSED AMENDMENTS TO THE INTERNATIONAL ARBITRATION ACT**

1. We refer to the Ministry of Law's ("the Ministry") call for feedback on the proposed amendments to the International Arbitration Act ("IAA") and for your email dated dated 26 June 2019 inviting the Law Society of Singapore to submit its feedback.

2. Please find enclosed, a table setting out our members' consolidated feedback, primarily originating from the Society's Alternative Dispute Resolution Committee, in response to the proposed amendments to the IAA, for the Ministry's consideration.

3. In gist, the members' feedback to the proposed amendments are as follows:

   (a) **Introduce a default mode of appointment of arbitrators in multi-party situations** – There is support for this proposed amendment in situations of multi-party arbitrations and/or ad hoc arbitrations;

   (b) **Allow parties to, by agreement, request the arbitrator(s) to decide on jurisdiction at the preliminary stage** – This means that the arbitral tribunal will not be able to rule on a question of jurisdiction as a preliminary issue unless parties agree. However, it is not unusual that only one party will object to the arbitral tribunal's jurisdiction. This proposed amendment may therefore result in unwittingly curbing the arbitral tribunal's powers, and/or causing delay to the arbitration proceedings;

   (c) **Recognise that an arbitral tribunal and the High Court has powers to enforce obligations of confidentiality in an arbitration** – There is support for this proposed amendment, in particular, as regards consolidated or concurrent arbitral proceedings;

   (d) **Allow a party to the arbitral proceedings to appeal to the High Court on a question of law arising out of an award made in the proceedings, provided**

**parties have agreed to opt in to this mechanism** – This proposed amendment respects party autonomy and helps to build a body of law needed for commercial disputes. As such, parties are more likely to choose Singapore as the seat of arbitration;

(e) **Proposal to allow parties to agree to waive or limit the annulment grounds under the Model Law and IAA** – More information and/or a detailed proposal is requested before more detailed comments can be proferred; and

(f) **Proposal to provide that the Court shall have power to order costs in certain arbitral proceedings** – There is support for this proposal in that it is pragmatic and important in arbitral proceedings.

4. Please feel free to reach out to our Ms Genie Sugene Gan, Director and Head of Department, Representation and Law Reform, should you require clarifications.

5. The Law Society sincerely hopes that our members' views will be taken into consideration. We remain available to engage in further discussion and dialogue with the Ministry in this regard as considered appropriate.

6. Thank you.

Yours faithfully,

Mr Gregory Vijayendran, SC
President, The Law Society of Singapore

(Enclosure)

# CONSOLIDATED FEEDBACK ON THE INTERNATIONAL ARBITRATION ACT ("IAA")

Final copy updated 21 August 2019

| No. | Topic | Feedback | Reference |
|---|---|---|---|
| 1 | **Introduce a default mode of appointment of arbitrators in multi-party situations** | This is a sensible amendment as there are situations where there are more than 2 parties to an arbitration. In that scenario, parties can agree, or the agreed institutional rules can provide, for how this should be resolved (see for example the ICC rules). However, it would be helpful to provide for this explicitly in the IAA where the agreed institutional rules do not provide for such a scenario. This would also be helpful for ad hoc arbitrations.<br><br>However, the proposed language differs from the language in Section 9A:<br>(i) In Section 9A, the word "**notwithstanding** Article 11(3)..." is used. In the proposed Section 9B, the word "**despite** Article 11(3)..." is used.<br>(ii) In Section 9A, the word "**shall**..." is used. In the proposed Section 9B, the word "**must**" is used.<br>(iii) Suggest that instead of the word "**Despite**" for Section 9B(1), we should use the word "**Notwithstanding**". | New Section 9B |
| 2 | **Allow parties to, by agreement, request the arbitrator or arbitrators to decide on jurisdiction at the preliminary stage** | Currently, the arbitral tribunal already has the power to rule on a plea that it has no jurisdiction as a preliminary issue.<br><br>The impact of this proposed amendment is that the arbitral tribunal will <u>not</u> be able to rule on a question of jurisdiction as a preliminary issue <u>unless</u> parties agree.<br><br>It is unlikely that both parties will agree that the question of jurisdiction should be heard as a preliminary issue, as it will usually be the case that only one party will object to the tribunal's jurisdiction.<br><br>As the Act is currently drafted, the arbitral tribunal may decide on the issue as to when it will decide on the issue of jurisdiction. The tribunal's discretion is tempered by the need to ensure that the arbitration is conducted efficiently, etc.<br><br>This proposed amendment may actually result in unwittingly curbing the Tribunal's powers, and cause delay to the arbitration proceedings. It could ironically militate against a preliminary ruling on jurisdiction because of deference to party autonomy. | Proposed amendment to Section 10 |

| | | | |
|---|---|---|---|
| 3. | **Recognise that an arbitral tribunal and the High Court has powers to enforce obligations of confidentiality in an arbitration** | This is helpful.<br><br>The Tribunal should also be given powers to rule on any issues relating to confidentiality. This is true particularly for consolidated or concurrent arbitral proceedings. In such scenarios, parties are sometimes able to hide behind the duties of confidentiality to avoid disclosure of documents in another set of related arbitration proceedings.<br><br>This issue will not arise in court proceedings, but is manifestly unfair to the party who is not able to rely on such document on the basis of confidentiality<br><br>Accordingly, suggest to insert the words "**and ruling on**" after the word "**enforcing**". | Proposed amendment to section 12 |
| 4. | **Allow a party to the arbitral proceedings to appeal to the High Court on a question of law arising out of an award made in the proceedings, provided parties have agreed to opt in to this mechanism** | This distinguishes the Singapore International Arbitration Act from the 1996 Arbitration Act in England & Wales. Some parties opt England & Wales as the seat of the arbitration precisely because the right to appeal is available to them.<br><br>It would be helpful to allow parties to have a right to appeal to the High Court in respect of questions of law, as this would provide parties with some comfort that they can choose Singapore as the seat of the arbitration, and yet have the right to appeal on questions of law.<br><br>This respects party autonomy.<br><br>In so far as the text mirrors the text of the Arbitration Act, save that it is only available as an opt-in, there are no comments on the proposed text of the new section 24A.<br>==========<br><br>Agree with the recommendation that appeals against arbitration awards in Singapore on questions of law should be allowed, based on an "opt in" regime. This helps to build a body of law that is needed for commercial disputes.<br><br>An appeal on a "question of law" seems to only be an appeal on a question of Singapore law or of "public international law" (see page 41 of the draft report, proposed section XX.(6)). However, in our experience, many commercial arbitrations (with the seat in Singapore) are based on English law. The proposed legislation seems to be that parties who have made this choice would not have a right of appeal on a question of English law, i.e. their right of appeal would be | New section 24A |

| | | | |
|---|---|---|---|
| | | restricted only to questions of public international law. Will the IAA be able to provide for appeals on foreign law? This would also help boost the profile of the SICC. | |
| 5. | **Proposal to allow parties to agree to waive or limit the annulment grounds under the Model Law and the IAA** | • The reason provided for this proposal is to avoid situations where the courts at the seat and at the place of enforcement reach conflicting decisions on the same grounds. It is also proposed that such an agreement can only be made after the award has been rendered.<br>• Section 24(b) of the IAA allows the setting aside of an award if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.<br>• Article 34(2)(a) of the Model Law mirrors Article V of the New York Convention.<br>o It is unclear why a party would want to agree to limit or waive its right to set aside an award for breach of rules of natural justice, or refuse enforcement, after the award has been rendered.<br>o The proposal does not state whether the agreement to limit or waive is in respect of only one jurisdiction (the seat or the place of enforcement).<br>More information and detailed proposal will be required before more comments can be provided. | Propose to give parties the option to limit or waive by agreement, the annulment grounds set forth in Section 24(b) of the IAA and Article 34(2)(a), but may not limit or waive by agreement, the annulment grounds in Section 24(a) and Article 34(2)(b). Such an agreement can only be made after the award has been rendered. |
| 6. | **Proposal to provide that the Court shall have power to order costs in certain arbitral proceedings** | This is a pragmatic and important proposal. There should be amendments to empower the court to make such an order. | Whether legislative amendments should be introduced to empower the court to make an order providing for costs of the arbitration following a successful application under section 24 of the IAA or article 34(2) of the Model Law to set aside an award, whether wholly or in part. Similarly, whether a corresponding amendment should be made to the Arbitration Act for domestic arbitrations. |