

International Arbitration (Amendment) Bill

Bill No. 20/2009.

Read the first time on 14th September 2009.

A BILL

i n t i t u l e d

An Act to amend the International Arbitration Act (Chapter 143A of the 2002 Revised Edition) and to make related amendments to the Arbitration Act (Chapter 10 of the 2002 Revised Edition).

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the International Arbitration (Amendment) Act 2009 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

5 Amendment of section 2

2. Section 2(1) of the International Arbitration Act (referred to in this Act as the principal Act) is amended —

(a) by deleting the definition of “arbitration agreement” and substituting the following definition:

10 ““arbitration agreement” means an agreement in writing referred to in Article 7 of the Model Law and includes —

(a) an agreement made by electronic communications if the information contained therein is accessible so as to be useable for subsequent reference; and

15 (b) an agreement deemed or constituted under subsection (3) or (4);”;

(b) by inserting, immediately after the definition of “award”, the following definitions:

20 ““data messages” means information generated, sent, received, or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

25 ““electronic communications” means any communication that the parties make by means of data messages;”.

Amendment of section 12

3. Section 12 of the principal Act is amended by deleting subsection (7).

New section 12A

30 4. The principal Act is amended by inserting, immediately after section 12, the following section:

“Court-ordered interim measures

12A.—(1) This section shall apply in relation to an arbitration —

(a) to which this Part applies; and

(b) irrespective of whether the place of arbitration is in the territory of Singapore.

(2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(c) to (i) as it has for the purpose of and in relation to an action or a matter in the court.

(3) The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order.

(4) If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets.

(5) If the case is not one of urgency, the High Court or a Judge thereof shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.

(6) In every case, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(7) An order made by the High Court or a Judge thereof under subsection (2) shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order under subsection (2).”

New section 19C

5. The principal Act is amended by inserting, immediately after section 19B, the following section:

“Authentication of awards and arbitration agreements

5 **19C.**—(1) For the purposes of the enforcement of an award in any Convention country, the Minister may by order appoint such persons holding office in such arbitral institution or other organisation as the Minister may specify in the order, to authenticate any award or arbitration agreement or to certify copies thereof.

10 (2) Any person appointed under subsection (1) —

 (a) shall comply with any condition imposed by the Minister; and

 (b) shall not, without the written consent of the parties, directly or indirectly disclose any matter, including the identity of any party to the award or arbitration agreement, to any third party.

 (3) An award or arbitration agreement or a copy thereof duly authenticated or certified by a person appointed under subsection (1) shall be deemed to have been authenticated or certified by a competent authority in Singapore for the purposes of enforcement in any Convention country.

 (4) For the avoidance of doubt, nothing in this section shall —

 (a) prevent any person from authenticating any award or arbitration agreement or certifying copies thereof in any other manner or method or by any other person, institution or organisation; or

 (b) affect the right of a person to challenge or appeal against any award by any available arbitral process of appeal or review, or in accordance with the provisions of this Act and the Model Law.

 (5) In this section, “Convention country” has the same meaning as in section 27(1).”

Repeal of section 32

6. Section 32 of the principal Act is repealed.

Amendment of Second Schedule

7. Article II of the Second Schedule to the principal Act is amended by inserting, immediately after the word “Article,” in paragraph 3, the word “shall,”.

5 **Related amendments to Arbitration Act**

8. The Arbitration Act (Cap. 10) is amended —

(a) by deleting the definition of “arbitration agreement” in section 2(1) and substituting the following definition:

10 ““arbitration agreement” means an arbitration agreement referred to in section 4 and includes an agreement made by electronic communications if the information contained therein is accessible so as to be useable for subsequent reference;”;

15 (b) by inserting, immediately after the definition of “court” in section 2(1), the following definitions:

20 ““data messages” means information generated, sent, received, or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

““electronic communications” means any communication that the parties make by means of data messages;”;

(c) by deleting subsection (2) of section 31 and substituting the following subsection:

25 “(2) An order made by the Court under this section shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of that order of the Court.”; and

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(d) by inserting, immediately after section 59, the following section:

“Authentication of awards and arbitration agreements

59A.—(1) For the purposes of the enforcement of an award in any Convention country, the Minister may by order appoint

such persons holding office in such arbitral institution or other organisation as the Minister may specify in the order, to authenticate any award or arbitration agreement or to certify copies thereof.

- 5 (2) Any person appointed under subsection (1) —
- (a) shall comply with any condition imposed by the Minister; and
 - (b) shall not, without the written consent of the parties, directly or indirectly disclose any matter, including the identity of any party to the award or arbitration agreement, to any third party.
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- (3) An award or arbitration agreement or a copy thereof duly authenticated or certified by a person appointed under subsection (1) shall be deemed to have been authenticated or certified by a competent authority in Singapore for the purposes of enforcement in any Convention country.
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- (4) For the avoidance of doubt, nothing in this section shall —
- (a) prevent any person from authenticating any award or arbitration agreement or certifying copies thereof in any other manner or method or by any other person, institution or organisation; or
 - (b) affect the right of a person to challenge or appeal against any award by any available arbitral process of appeal or review, or in accordance with the provisions of this Act.
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- (5) In this section, “Convention country” has the same meaning as in section 27(1) of the International Arbitration Act (Cap. 143A).”.

30 **Saving and transitional provision**

9. Where an application has been made to the High Court or a Judge thereof for any order or direction under section 12(7) of the principal Act before the date of commencement of the International Arbitration (Amendment) Act 2009, the principal Act shall continue to apply to that application as if sections 3 and 4 had not been enacted.

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EXPLANATORY STATEMENT

This Bill seeks to amend the International Arbitration Act (Cap. 143A) for the following purposes:

- (a) to update the definition of “arbitration agreement” in Part II by expressly including arbitration agreements made by electronic communications;
- (b) to provide expressly for the powers of the High Court to make certain orders in support of international arbitration;
- (c) to empower the Minister to appoint any person holding office in an arbitral institution or other organisation to authenticate “made in Singapore” arbitration awards and arbitration agreements, and certify copies thereof, for the purposes of enforcement of awards in countries which are Contracting States to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; and
- (d) to provide for other amendments of a technical nature.

The Bill also makes the following related amendments to the Arbitration Act (Cap. 10):

- (a) to update the definition of “arbitration agreement” by expressly including arbitration agreements made by electronic communications;
- (b) to empower the Minister to appoint any person holding office in an arbitral institution or other organisation to authenticate “made in Singapore” arbitration awards and arbitration agreements, and certify copies thereof, for the purposes of enforcement of awards in countries which are Contracting States to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; and
- (c) to provide for other amendments so as to promote consistency with the language used in the International Arbitration Act.

Clause 1 relates to the short title and commencement.

Clause 2 amends section 2(1) by re-defining “arbitration agreement” to clarify that an arbitration agreement can be made by electronic communications. The clause also inserts in section 2(1) definitions of “data messages” and “electronic communications” as defined in Option I of Article 7 of the Model Law on International Commercial Arbitration, as amended by the United Nations Commission on International Trade Law (UNCITRAL) in 2006.

The new definition of “arbitration agreement” will apply only in relation to Part II of the Act. There is no corresponding amendment to the definition of “arbitration agreement” under Part III of the Act, which relates to recognition and enforcement of foreign awards in countries which are Contracting States to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Clause 3 amends section 12 by deleting subsection (7). The subsection will be transferred to the new section 12A (with modifications).

The Singapore Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 decided that a Singapore court has no statutory power under the Act to grant interim orders or relief to assist arbitration abroad. Accordingly, clause 4 inserts a new section 12A to enable the High Court or a Judge thereof to grant interim orders in aid of arbitrations held outside Singapore in certain circumstances, in line with the new Article 17J of the Model Law on International Commercial Arbitration, which was inserted by the United Nations Commission on International Trade Law (UNCITRAL) in 2006.

The new section 12A will provide expressly for the power of the High Court (or a Judge thereof) to order interim measures in aid of an international arbitration, irrespective of whether the place of arbitration is in Singapore. The High Court will have the same power of making an order in respect of any of the matters set out in section 12(1)(c) to (i) as it has for the purpose of or in relation to an action or a matter in the court. The High Court will be empowered to make such order whether or not it relates to a matter that is justiciable before a Singapore court.

However, under the new section 12A(6), the High Court may only exercise these powers if the arbitral tribunal or arbitral institution has no power to act or is unable temporarily to act effectively. One scenario that is intended to be covered by the new section 12A(6) is where the foreign arbitral tribunal has power to make an interim order but that order cannot otherwise be enforced in Singapore apart from an application made under the new section 12A.

Further, if the case is one of urgency, the High Court may make such orders under the new section 12A as it thinks necessary for the purpose of preserving evidence or assets, upon an application by a party or proposed party to the arbitral proceedings. It is intended that a wide meaning of the term “assets” be adopted to include choses in action and rights under a contract. If the case is not one of urgency, the High Court will make an order under the new section 12A only if the application to the High Court has been made with the permission of the arbitral tribunal or with the agreement in writing of the other parties to the arbitral proceedings.

The High Court may refuse to exercise its power under the new section 12A if it considers it inappropriate to do so by virtue of the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined.

The order of the High Court under the new section 12A will (automatically) cease to have effect in whole or in part (as the case may be) if the arbitral tribunal or arbitral institution makes an order which expressly relates to the whole or part of the order of the High Court.

Clause 5 inserts a new section 19C which empowers the Minister to appoint any person holding office in an arbitral institution or other organisation to authenticate any award or arbitration agreement or to certify copies thereof for the purposes of the enforcement of an award in a country which is a Contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (Convention country). Article IV of the New York Convention requires the supply of duly authenticated awards and agreements or duly certified copies thereof for the purposes of recognition and enforcement of awards in any Convention country.

Authentication of awards and arbitration agreements, and certification of copies thereof, by a person appointed under the new section 19C is not mandatory and not the sole means of authentication and certification for the purposes of enforcement of awards in any Convention country. For the avoidance of doubt, the new section 19C(4)(a) provides that nothing in the section will prevent any person from authenticating any award or arbitration agreement or certifying copies thereof in any other manner or method or by any other person, institution or organisation.

Any person appointed by the Minister under the new section 19C must comply with any condition imposed by the Minister and must not without the written consent of the parties disclose any matter including the identity of any party to the award or arbitration agreement to any third party. An award or arbitration agreement or a copy thereof that is duly authenticated or certified by a person appointed under the new section 19C is deemed to have been authenticated or certified by a competent authority in Singapore for the purposes of enforcement of an award in any Convention country.

Clause 6 repeals section 32. This will obviate the need for the Minister to make and from time to time amend an order (which requires publication in the *Gazette*) to list the States that are the Convention countries, or to issue any certificate specifying that a State is a Convention country. The list of the Convention countries is published on the official Internet website of the United Nations Commission on International Trade Law (UNCITRAL).

Clause 7 makes a technical amendment to the Second Schedule which sets out the English text of the New York Convention, by inserting the word “shall,” immediately after the word “Article,” in paragraph 3 of Article II.

Clause 8 makes related amendments to section 2(1) of the Arbitration Act (Cap. 10) to re-define “arbitration agreement” to clarify that an arbitration agreement can be made by electronic communications and to insert definitions of “data messages” and “electronic communications”. The clause also makes a related amendment to section 31(2) of the Arbitration Act for consistency with the language of the new section 12A(7) of the International Arbitration Act. The clause further inserts a new section 59A to provide for the appointment of any person holding office in an arbitral institution or other organisation to authenticate awards or arbitration agreements or certify copies thereof for the purposes of enforcement of awards in any Convention country.

Clause 9 inserts a saving and transitional provision to provide that where an application has been made to the High Court for assistance under section 12(7) before the date of commencement of the International Arbitration (Amendment) Act 2009 (commencement date), that application will continue to be dealt with by the High Court as if section 12 had not been amended and the new section 12A had not been inserted. If however the application is made to the High Court after the commencement date, the new section 12A will apply even though the arbitration may have commenced before the commencement date.

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.
