INTERNATIONAL ARBITRATION (AMENDMENT) BILL
MINISTRY OF LAW'S RESPONSES TO PUBLIC FEEDBACK RECEIVED

Section	Feedback received	Ministry of Law's response
2(4) Definition of an arbitration agreement	It was suggested that section 2(4) should be not be limited to the context of "bills of lading". It was suggested that the reference to "bills of lading" be replaced with that to a "contract": *"A reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement provided that the reference is such as to make that arbitration clause a part of the contract" (Emphasis Added)*	The suggested amendment is contained in Art 7(2) of the Model Law. Section 2(1) in of the International Arbitration Act (IAA) defines an "arbitration agreement" by reference to Article 7 of the Model Law. The section 2(1) definition goes further to include an agreement "deemed or constituted" under subsection (4). As a bill of lading is not the contract of carriage but evidence of the contract (Lush J in Crooks v Allan [1879] 5QBB 38), it was necessary to expressly provide for arbitration agreements in bills of lading.
	The Ministry of Law received feedback that the extended definition of an arbitration agreement should apply to both the IAA and the Arbitration Act (AA). The Ministry of Law was also queried on whether the extended definition of an "arbitration agreement" applies to the definition of an "arbitration agreement" for the purposes of enforcing a foreign award under Part III of the IAA.	The omission of any amendment to the definition under Part III of the IAA is deliberate, as Part III deals with awards not made in Singapore but are to be enforced in Singapore. Hence for Part III, we are looking at the operation of the New York Convention / NYC (which does not have a modernised definition of an arbitration agreement) and not our IAA. The Explanatory Statement to the Bill has been amended to further clarify this point. The relevant amendments have also been made

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		to ensure that the definition of an arbitration agreement should apply to both the IAA and the AA.
12 Arbitral - Ordered Interim Measures	It was recommended that our IAA should adopt Articles 17A, H & I of the UNCITRAL Model Law (as amended in 2006). This would provide guidance on the availability of curial support to arbitral tribunal-ordered interim measures. It would also allow interim measures issued by an arbitral tribunal to be enforceable in Singapore as interim orders are currently excluded from being awards under section 2 of the IAA and hence there is no judicial recourse against interim measure.	Although section 2 of the IAA provides that interim orders are excluded from being awards, section 12(6) and (7) of the IAA provides expressly for the enforcement of interim measures ordered by a tribunal seated in Singapore. It was not then intended to refer to interim orders made by a foreign arbitral tribunal. This was affirmed by the Singapore Court of Appeal in Swift Fortune [2006] SGCA 42 when the Court of Appeal held at paragraph 59 that section 12(7) was not intended to apply to foreign arbitrations. The Ministry of Law notes the views for adoption of Art 17 – 17I of the Model Law. At present, the majority of industry experts consulted weighed in against such adoption. The Ministry may reconsider this at a later juncture and will keep this issue under review.

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12A(2) Scope of orders	We received feedback that the range of orders which the court can make should <u>not</u> include orders for discovery, interrogatories and security of costs. This is because these deal with procedural matters which are for the tribunal to decide, since they relate to the conduct of arbitration.	The Ministry of Law agrees with the feedback and the Bill has been amended accordingly.
	It was suggested that we clarify whether the power to order the "giving of evidence by affidavit" [section 12(1)(c)] is intended to also refer to "the taking of evidence of witnesses [UK section 44(2)(a)]. This is because the former expression describes a method of giving evidence, rather than the court's power to secure the attendance of a witness at an arbitration in Singapore or to order that evidence be taken from a witness for an arbitration with a foreign seat, which is a different thing.	In relation to the point on "giving of evidence by affidavit", it should be pointed out that the amendments are not intended to compel the attendance of witness. Instead, this power is provided for under section 13 of the IAA.
	It was suggested that in the interests of party autonomy, this section might begin with the words "*unless otherwise agreed by the parties*" as found in section 44(1) of the UK Arbitration	Section 12A is intended to be a default provision providing for curial *assistance* which parties should not be able to contract out of.

Section	Feedback received	Ministry of Law's response
	Act.	
12A(3) "Inappropriate test"	We received feedback that section 12A(3), which gives the court the discretion to refuse to make an interim order if it considers it inappropriate to do so (the "inappropriate test"), is ambiguous and should be further refined. This is because the section as drafted is too vague and does not clearly define or limit the involvement of the court. In particular, they suggest that the following guidelines should be included in section 12A(3): (i) whether the order would offend the principle of comity; (ii) whether the High Court or Judge, thereof has personal jurisdiction over the respondent to the application for the order; and (iii) whether the applicant has a justiciable cause of action against the respondent under the laws of Singapore.	The principle of comity at (i) is a fundamental principle which the courts would adhere to without the need for it to be expressly enunciated in the legislation. As for (ii) whether the issue is justiciable before a Singapore court is not intended to be a pre-requisite for the grant of the interim order because: (i) the discretion allowed to the Courts, guided by principles already established through case law, is a sufficient safeguard; (ii) introducing an extra element is likely to open the door to further litigation as what is mean by "justiciable" is not entirely clear. The intention was to create a provision which is wider than the House of Lords' decision in Channel Tunnel [1993] AC 334 that the English court has power to grant Mareva injunctions in aid of foreign court or arbitral proceedings if the substantive claim was justiciable in an English court.

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12A(4)	It was recommended that the words "*for the purposes of preserving evidence or assets*" be deleted from section 12A(4). This is because these words have caused some confusion in England, in particular, the meaning of the word "assets". The English Court of Appeal confirmed in the case of Cetelem [2005] that a contractual claim is a right or chose in action and is an "asset" for the purposes of section 44(3) of the English Act (upon which our section 12A(4) is modelled). However, this is not the most obvious reading of the word, "assets".	The Ministry of Law found this comment useful, but did not consider it necessary to delete the suggested words. Instead, we have clarified in the Explanatory Statement to the Bill that a wide meaning of the term "assets" be adopted to include choses in action and rights under a contract (as decided by the English Court of Appeal in Cetelem).
12A(6) Court to act only where tribunal has no power or is unable to act	The Ministry of Law received feedback that the proposed section 12A(6) of the IAA may still leave a lacuna, as there may be instances where the arbitral tribunal has the power to act (in which case the High Court cannot make an interim order) and yet the order made by the tribunal is not enforceable. This would be so in the case of an interim measure issued by an arbitral tribunal pursuant to Article 17H of the 2006 Model Law.	As a result of this feedback, the Ministry of Law amended the Explanatory Statement to clarify that section 12A(6) would cover the scenario where the foreign tribunal has power to make an interim order, but that order cannot otherwise be enforced in Singapore apart from an application made under section 12A. This is because the wording of section 12A(6) is in *pari materia* with the equivalent UK provision (section 44(5)) in the 1996 Arbitration Act. Prof Rob Merkin and Louis Flannery, in their commentary (Informa, 2008) on the UK 1996 Act, are of the view that

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		the words are sufficiently wide to cover not only the scenario where the arbitral tribunal is unable to act because it has not yet been fully constituted, but also where any order it makes is ineffective because it cannot be enforced or because third parties are involved.
12A(7) Automatic Lapsing of Court Order	The Ministry of Law received feedback that there may be genuine different interpretations as to when the tribunal's order causes the court order to lapse. Therefore, instead of an automatic lapsing, the court should have the opportunity to consider the tribunal's order and decide if the court's order should be treated as discharged. In other words, we should adopt a provision that is similar to UK section 44(6). It was also suggested that at the minimum, parties be allowed the freedom to decide whether to give power to the tribunal to revisit the interim orders of the court.	These issues were previously considered in the drafting of the amendments. Section 12A(7) was drafted to reduce this uncertainty by making the court order lapse only upon the tribunal's order which expressly relates to the whole or part of the court order. We also chose not to follow the UK Section 44(6) as our policy intent was to give primacy to the arbitral tribunal. It is also intended that the tribunal would not be able to override the decision of a court to which the tribunal itself has no power to make (for example, orders involving the rights of 3rd parties). In such situations, the natural thing for parties to do is to go back to the courts and there is nothing in section 12A(7) which prevents them from so doing. As the suggestion to allow parties to opt out of

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		this clause, the policy intention is for section 12A to be a default provision providing for curial *assistance* which parties should not be able to contract out of. Furthermore, allowing parties the right to opt of section 12A would also give rise to satellite litigation on whether parties have indeed exercised their rights to opt out. In any event, section 15 of the IAA gives a party the right to opt out of the entire IAA.
19C Authentication of awards	It was suggested the proposed provisions make clear that the authentication by the designated entities is not mandatory and is not the sole means of authentication.	Section 19C(4)(a) makes clear that the process of authentication, as provided under section 19C(4)(a), is optional: *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 organization.* This has also been further clarified in the Explanatory Statement.

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Adoption of Article 7 (2006 Model Law) Writing Requirement	It was suggested that we consider adopting the new Article 7 of the 2006 Model Law, as this would also addressed the "signature problem" raised by Prakash J in the Aloe Vera [2006] decision. In that case, she addressed an argument that Article 7 (1985 Model Law) required the arbitration agreement to be in a document signed by the parties. This signature requirement is not in Article II(1) of the NYC. Since Prakash J decided that the definition of the NYC applies in the present case, she did not have to decide what would have been the case had Article 7 (1985) been applicable. The amendments to Article 7 of the Model Law in 2006 recognised the signature problem, and have removed it.	The issue of adopting Article 7 of the 2006 Model Law was previously considered and rejected. The majority of the arbitrators consulted were not in favour of adopting the new Article 7 since it allows for an arbitration agreement to be concluded orally. In respect of *Aloe Vera,* whilst Prakash J left it open whether section 2 (read with the original Article 7) requires an arbitration agreement to be contained in a document signed by parties, she doubted that in all cases the parties' signatures are required to constitute an agreement. We do not think that the case introduces any confusion over signatures.
Disagreement with section 12A	It was queried how these amendments would benefit Singapore since the arbitration is not held in Singapore. Instead, section 12A may result in increased litigation where the decisions refusing interim orders are challenged. Considerable time and resources would be wasted to clarify the ambit of operation of this provision, when in fact, after such a	We take note of this view. This is the minority view. The majority of the arbitration community consulted was of the view that this amendment is a positive step for Singapore. The Monetary Authority of Singapore (MAS) was also consulted on whether this amendment would affect Singapore's wealth management sector and MAS has no objections to the amendments.

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	determination is made, the matter would have nothing more to do with the Singapore court. It was also felt that section 12A would be a disincentive for parties to park their funds in Singapore.	
Measures to curb or control costs in arbitration proceedings	It was suggested that there is a need to introduce some legislative provisions to curb or control costs in arbitration proceedings.	We do not see the need for this at this time. Neither did the majority of the arbitration community consulted. The Ministry of Law will keep this issue under review.