ANNEX A

Responses to feedback received from the public consultation on proposed amendments to the International Arbitration Act and the new Foreign Limitation Periods Act

Background

1. On 21 October 2011, the Ministry of Law (MinLaw) released two public consultation papers dealing respectively with proposed amendments to the International Arbitration Act (IAA) and the proposed enactment of a Foreign Limitation Periods Act. A draft International Arbitration (Amendment) Bill (IA(A) Bill) and a draft Foreign Limitation Periods Bill (FLP Bill) were also released to seek views on the proposed amendments.

2. The public consultation closed on 21 November 2011, and MinLaw received feedback from various industry stakeholders, including arbitrators, practitioners in both local and offshore law firms, academics and the Singapore International Arbitration Centre (SIAC).

3. MinLaw has considered the feedback received and incorporated specific feedback into the present proposed amendments in the IA(A) Bill 2012 and the FLP Bill 2012. A copy of the Bills can be found, respectively, at **Annex B** and **Annex C**.

Feedback Received for the IA(A) Bill

4. The feedback received from the public consultation was mostly in favour of the proposed amendments in the IA(A) Bill. Most respondents supported the four proposed areas of reform, and a number submitted further improvements and suggestions to the provisions in the draft Bill.

5. The feedback which MinLaw has incorporated into the IA(A) Bill for the four proposed areas of reform is set out below.

Relaxation of the Writing Requirement

6. The original proposed amendment was to import the definition of an "arbitration agreement" set out in Option I of Article 7 of the UNCITRAL Model Law on International Commercial Arbitration 1985 as amended by the 2006 amendments (Model Law) into the IAA. This definition relaxes the writing requirement applicable to arbitration agreements.

7. Most respondents supported the adoption of the more relaxed writing requirement set out in Option I, but a few highlighted potential ambiguities and conflicts between the provisions of Article 7 of the Model Law and section 2 of the IAA which could arise if Option I was imported wholesale. In particular, apart from differences in language, the present section 2(3) of the current IAA, which sets out certain situations under which an arbitration agreement shall

be deemed to exist, was wider in scope than the similar provision in Article 7(5) of the Model Law. The cross-referencing between Article 7 of the Model Law and section 2 of the IAA was also found to be confusing.

8. To avoid any potential ambiguities and confusion, MinLaw has now spelt out the definition of arbitration agreement in full in a new section 2A of the IAA, which incorporates Option 1 as part of that definition. Given that section 2(3) is broader than Article 7(5) in scope, the former is retained in the new section 2A as sub-section (6) over Article 7(5).

9. As such, parties need only refer to the proposed new section 2A in the IAA for all the writing requirements for an arbitration agreement.

Review of Negative Jurisdictional Rulings

10. The majority of respondents supported the proposed amendment to allow review of negative jurisdictional rulings. However, a number of respondents gave feedback that the proposed new section 10 in the draft IAA Bill suggested that a review against a tribunal's negative jurisdictional ruling can only be brought if the tribunal decided the question of jurisdiction as a *preliminary question*. This was against the policy intent of allowing appeals against negative jurisdictional rulings to be made *at any stage of the arbitral proceedings*. Taking this feedback into account, MinLaw has revised the proposed new section 10 to clarify expressly that appeals can brought against negative jurisdictional rulings made by tribunals at any stage of the arbitral proceedings.

11. Feedback was also received that in permitting the court to make costs orders in cases where the court finds that the tribunal has no jurisdiction, the court should be able to make costs orders against *any* party and not just the *unsuccessful* party as stated in section 10(7) of the draft IAA Bill. The feedback was that court's discretion to make costs orders should be unfettered, as is the case under general law. MinLaw has adopted this feedback, and section 10(7) in the IAA Bill now permits the court to make costs orders against any party.

12. Notwithstanding the majority support for the amendment, a few respondents felt that the review of negative jurisdictional rulings should not be permitted as it will potentially deprive a party of its right of access to the court.

13. MinLaw has considered these views, but has, on balance, decided to retain the amendment in the IA(A) Bill. As highlighted in the Singapore Academy of Law's Law Reform Committee's Report on the Right to Judicial Review of Negative Jurisdictional Rulings (January 2011), to permit review of positive jurisdictional rulings but not negative jurisdictional rulings is both "unfair and inconsistent". One may also question if the right of access to the court is indeed denied in cases where the court overrules the tribunal and finds that the tribunal has jurisdiction - in such cases, the court *itself* has decided that the parties should be held bound by their arbitration agreement and have their

dispute settled by arbitration and not the court. Seen in another light, in reviews of both positive and negative jurisdictional rulings where the court finds that the tribunal *has* jurisdiction, the arbitration in both cases will continue on the basis that the court has found that the tribunal has jurisdiction. It would be unfair to say that in one case (where the appeal is against a tribunal's negative jurisdictional ruling) the parties have been denied access to the court but not the other (where the appeal is against a tribunal's positive jurisdictional ruling). Given these strong counter-arguments, which are supported by the majority of the respondents, MinLaw decided to retain the proposed amendment.

Arbitral Tribunal's Power to Award Interest

14. In relation to the arbitral tribunal's power to award interests, some respondents gave feedback that there may be some overlap and potentially confusing differences in language used between the proposed new section 20(1) of the IAA and the present section 12(5)(b) of the IAA. Taking into account these feedback, MinLaw has amended the language of section 20(1) to be consistent with the existing section 12(5)(b). Section 12(5)(b) has also now been amended to make reference to section 20(1).

Emergency Arbitrator Procedure

15. A few respondents highlighted that amending the definition of "arbitral tribunal" in the IAA to include emergency arbitrators may have the unintended consequence of allowing parties to appeal to the High Court against the ruling of an emergency arbitrator as to his jurisdiction, which would unnecessarily protract the emergency arbitrator proceedings and defeat the purpose of the emergency arbitrator procedure.

16. MinLaw's policy intention is to accord emergency arbitrators the same standing as any other arbitral tribunal and to ensure that orders made by such emergency arbitrators are equally enforceable. In accordance with treating emergency arbitrators on the same footing as other tribunals, any jurisdictional ruling made by an emergency arbitrator should rightly be appealable. However, new provisions have been introduced in the IA(A) Bill to clarify that any appeal to the High Court or Court of Appeal on a jurisdictional ruling (including one made by an emergency arbitrator) shall not operate as a stay of proceedings.

17. At SIAC Secretariat's suggestion, a drafting amendment has also been made to the broadened definition of "arbitral tribunal" to clarify that all emergency arbitrators including those appointed by an institution would be accorded the same status as any other arbitral tribunal.

18. Finally, a technical amendment has been made to the IA(A) Bill to clarify that interim orders made by arbitral tribunals in arbitrations outside Singapore (including those made by emergency arbitrators) may be enforced by

Singapore courts, following feedback that the proposed amendment to the definition of "arbitral tribunal" does not make this sufficiently clear.

Related Amendments to the Arbitration Act

19. The IA(A) Bill now also makes related amendments to the Arbitration Act (AA) (which applies to domestic arbitrations) to mirror the amendments to the IAA, where applicable. The AA has traditionally followed the amendments in the IAA, and feedback was received that most of the proposed amendments in the IA(A) Bill will also benefit domestic arbitrations under the AA. Given that the AA has always permitted a greater degree of curial supervision than the IAA, it will also be odd not to allow, for example, negative jurisdictional rulings for domestic arbitrations.

Feedback Received for the FLP Bill

20. Most respondents supported the FLP Bill with no further comments or suggestions.

21. However, a comment was received that the meaning of the proposed section 3(2) in the FLP Bill may not be clear. The FLP Bill now explains in detail the purpose and intent of section 3(2) in the Explanatory Statement.

Conclusion

22. MinLaw would like to thank all respondents who have provided invaluable feedback during the public consultation.

MINISTRY OF LAW
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