

International Arbitration (Amendment) Bill

Bill No. /2011.

Read the first time on .

A BILL

intituled

An Act to amend the International Arbitration Act (Chapter 143A 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 2011 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 inserting, immediately after the words “permanent arbitral institution” in the definition of “arbitral tribunal”,
10 the words “and includes an emergency arbitrator appointed by the parties pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation”;

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

““arbitration agreement” means an agreement in writing referred to in Option I of Article 7 of the Model Law as amended by the United Nations Commission on International Trade Law on 7th
20 July 2006 and includes an agreement deemed or constituted under subsection (3) or (4);”;

(c) by deleting the definitions of “data messages” and “electronic communications”; and

(d) by inserting, immediately after the words “21st June 1985”
25 in the definition of “Model Law”, the words “(including Option I of Article 7 as amended by the Commission on 7th July 2006)”.

Repeal and re-enactment of section 10

3. Section 10 of the principal Act is repealed and the following
30 section substituted therefor:

“Appeal on ruling of jurisdiction

10.—(1) This section shall have effect notwithstanding Article 16(3) of the Model Law.

5 (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.

10 (3) The ruling of a plea on jurisdiction referred to in Article 16(3) of the Model Law shall be construed to include a ruling that the arbitral tribunal has no jurisdiction and accordingly Article 16(3) shall apply to such ruling as if it were a ruling that the tribunal has jurisdiction.

(4) An appeal from the decision of the High Court made under Article 16(3) of the Model Law shall lie to the Court of Appeal only with the leave of the High Court.

15 (5) There shall be no appeal against a refusal for grant of leave of the High Court.

(6) Where the High Court, or the Court of Appeal on appeal, decides that the arbitral tribunal has jurisdiction —

- 20 (a) the arbitral tribunal shall continue the arbitral proceedings and make an award; and
- (b) where any arbitrator is unable or unwilling to continue the arbitral proceedings, the mandate of that arbitrator shall terminate and a substitute arbitrator shall be appointed in accordance with Article 15 of the Model Law.

25 (7) In making a ruling or decision under this section that the arbitral tribunal has no jurisdiction, the arbitral tribunal, the High Court or the Court of Appeal (as the case may be) may make an award or order of costs of the proceedings, including the arbitral proceedings (as the case may be), against the

30 unsuccessful party.

(8) Where an award of costs is made by the arbitral tribunal under subsection (7), section 21 shall apply with the necessary modifications.”.

Repeal and re-enactment of section 20

4. Section 20 of the principal Act is repealed and the following section substituted therefor:

“Interest on awards

5 **20.—**(1) Subject to subsection (3), unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate, for any period ending not later than the
10 date of payment —

- (a) on money awarded by the arbitral tribunal in the arbitral proceedings;
- (b) on money claimed in, and outstanding at the commencement of, the arbitral proceedings but paid
15 before the award is made; or
- (c) on costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.

(2) Nothing in subsection (1) shall affect any other power of an arbitral tribunal to award interest.

20 (3) Where an award directs a sum to be paid, that sum shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.”.

Amendment of First Schedule

5. The First Schedule to the principal Act is amended —

- 25 (a) by deleting the Schedule heading and the words and substituting the following Schedule heading and the words:

“UNCITRAL MODEL LAW ON INTERNATIONAL
COMMERCIAL ARBITRATION

30 (As adopted by the United Nations Commission on International Trade Law on 21st June 1985 and Option I of Article 7 as amended by the Commission on 7th July 2006)”; and

- (b) by deleting Article 7 and substituting the following Article:

“Article 7. Definition and form of arbitration agreement

(Option I of Article 7 as amended by the Commission on 7th July 2006)

5 (1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

10 (2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

15 (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, 20 electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not 25 denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the 30 contract.”

Transitional provision

6.—(1) This Act shall apply to arbitration proceedings commenced on or after the appointed day but the parties may in writing agree that this Act shall apply to arbitration proceedings commenced 35 before the appointed day.

(2) Notwithstanding subsection (1), where the arbitration proceedings were commenced before the appointed day, the law

governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been enacted.

(3) For the purposes of this section, arbitration proceedings are to be taken as having commenced on the date of the receipt by the respondent of a request for the dispute to be referred to arbitration, or where the parties have agreed in writing that any other date is to be taken as the date of commencement of the arbitration proceedings, then on that date.

(4) For the purposes of this section, "appointed day" means the date of commencement of this Act.

EXPLANATORY STATEMENT

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

- (a) to incorporate Option I of Article 7 of the Model Law as amended by the United Nations Commission on International Trade Law on 7th July 2006 with regard to the definition of "arbitration agreement";
- (b) to permit appeal to the Courts on negative jurisdictional rulings made by arbitral tribunals;
- (c) to empower the Courts to make cost orders where the Court rules that an arbitral tribunal has no jurisdiction;
- (d) to expand an arbitral tribunal's powers to award interest; and
- (e) to clarify that orders and awards given by emergency arbitrators are enforceable by the courts.

Clause 1 relates to the short title and commencement.

Clause 2 amends the definition of "arbitral tribunal" in section 2(1) to include an emergency arbitrator. The objective is to clarify that orders and awards given by emergency arbitrators are enforceable by the courts. An emergency arbitrator is one appointed by the parties pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.

The clause also amends the definition of "arbitration agreement" by reference to the definition set out in Option I of Article 7 of the Model Law as amended by UNCITRAL on 7 July 2006 ("2006 Art 7 of the Model Law") and by deleting and substituting the existing Article 7 of the Model Law in the First Schedule

(see clause 5). Option I of Article 7 preserves the requirement that arbitration agreements be “in writing”, but redefines the requirement to include agreements concluded by any means (orally, by conduct or otherwise), as long as their content is recorded in any form. Several elements of the expanded definition of “arbitration agreement” in the 2006 Art 7 of the Model Law are currently incorporated in the Act within the definition of “arbitration agreement” in section 2(1) as well as its expanded meanings given in section 2(3) and (4). These provisions remain as supplementary provisions to 2006 Art 7 of the Model Law. Consequential amendments have also been made to delete the definitions of “data messages” and “electronic communications” and to amend the definition of “Model Law”.

Clause 3 repeals and re-enacts section 10 so as to consolidate in one section all the provisions on appeals on ruling on jurisdiction. The new section 10 expands the scope of Article 16(3) to include negative jurisdictional findings by the arbitral tribunal. The procedures prescribed in Article 16(3) flow accordingly as if it were a positive jurisdictional finding. Departures from the procedure prescribed in Article 16(3) are that an arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings and an appeal against both positive and negative jurisdictional findings lie to the High Court and with the leave of the High Court to the Court of Appeal. There is no appeal against a refusal for grant of leave. The new section 10(6) clarifies the effect of a positive jurisdictional ruling by the High Court or the Court of Appeal. The new section 10(7) and (8) empowers the arbitral tribunal and the Court to award costs against an unsuccessful party when it is ruled that the arbitral tribunal has no jurisdiction. The costs awarded include the costs of the arbitral proceedings in order to overcome the impediment that the arbitral tribunal has been determined to have no jurisdiction. These amendments take into account the views of the Law Reform Committee of the Singapore Academy of Law in its Report on the Right to Judicial Review of Negative Jurisdictional Rulings (January 2011).

Clause 4 repeals and re-enacts section 20 to clarify the scope of arbitral tribunals’ powers to grant post-award interest. The new section 20 confers upon an arbitral tribunal the discretion to vary the rate and timing of interest on arbitral awards. It also provides for the award of interest on costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.

Clause 5 deletes and substitutes Article 7 of the Model Law in the First Schedule with Option I of Article 7 of the Model Law as amended by UNCITRAL on 7 July 2006. See clause 2 above.

Clause 6 is a transitional provision to provide that the amendments introduced by this Bill will apply to arbitration proceedings commenced on or after the date that the amendments come into operation, but the parties may agree that the amendments apply to arbitration proceedings commenced before that date.

EXPENDITURE OF PUBLIC MONEY

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

Note: HD 1.1/WC/International Arbitration Am Bill 2011-6 (fb 3.10.11)