REVIEW OF THE INTERNATIONAL ARBITRATION ACT
Proposals for Public Consultation

1. The International Arbitration Act ("**IAA**") provides the legislative basis for Singapore's international arbitration regime. The Ministry of Law ("**MinLaw**") has, as part of its ongoing review of the arbitration regime in Singapore, received and considered suggestions for potential amendments to the IAA from the arbitration community.

2. MinLaw is consequently considering the introduction of various amendments, which are set out in the draft International Arbitration (Amendment) Bill ("**the Draft Bill**") attached to this consultation paper. MinLaw seeks your views in respect of these draft provisions.

(A) AMENDMENTS IN THE DRAFT BILL

(I) Requirement that arbitration agreements be in writing

3. The IAA, as currently drafted, adopts the 1985 Model Law version of the form and definition of an arbitration agreement, which requires that an arbitration agreement be "in writing".

4. However, amendments were made to the Model Law in 2006 (the "**2006 Amendments**") which departed from the strict requirement that an arbitration agreement must be in writing and provided 2 alternative approaches:

   (a) Option 1 ("Hybrid Approach") – This option 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.

   (b) Option 2 ("Abolition Approach") – This option removes the writing requirement in its entirety. In other words, an arbitration agreement will be enforceable even if it was made orally and without any of its terms being documented (i.e. full orality).

5. MinLaw's intention is to adopt Option 1. The abolition of a strict requirement that arbitration agreements be made in written form accords more closely with commercial reality, since even high value contracts are often concluded orally. Further, it would ensure that our international arbitration regime remains progressive, particularly as other jurisdictions have already moved in this direction.

6. MinLaw seeks views on this approach. The draft provisions may be found at ss. 2(b)-(d) of the Draft Bill accompanying this consultation paper.

(II) Negative jurisdictional rulings

7. MinLaw has considered whether to amend the IAA to confer our courts with jurisdiction to judicially review negative jurisdictional rulings made by arbitral

tribunals (i.e. rulings by the tribunal that it has no jurisdiction to hear the dispute).

8. This area of law has recently been the subject of a report by the Law Reform Committee, which expressed the view that negative jurisdictional rulings should, like positive jurisdictional rulings, be subject to judicial review for the following reasons:

   (a) To disallow judicial review in negative jurisdictional ruling cases shuts out parties' agreed form of dispute resolution (i.e. arbitration) and undermines the essence of what they agreed to avoid (i.e. litigation in national courts).

   (b) It is inconsistent to deny judicial review of negative jurisdictional rulings, when judicial review of positive jurisdictional rulings is permitted. Injustice can just as easily arise in cases where a tribunal makes an erroneous negative jurisdictional ruling.

   (c) Potential claimants may favour a seat where judicial review of negative jurisdictional rulings is possible.

9. For these reasons, MinLaw proposes to amend the IAA to allow for negative jurisdictional ruling. This would deviate from the Model Law position taken by the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, which has interpreted Article 16(3) of the Model Law to allow appeals only in respect of tribunals' positive rulings on jurisdiction (i.e. rulings by the tribunal that it has the jurisdiction to hear the dispute).

10. On a related note, MinLaw also intends to insert a provision in the IAA to empower a court to make costs orders in cases where the arbitral tribunal determines that it has jurisdiction, but the court upon review finds otherwise. Under the law as it currently stands, the court would have power to make an order for costs in respect of the proceedings before it, but not for costs incurred in the arbitral proceedings. Parties would consequently be caught in the Catch-22 situation of having to return before and seek costs from the very tribunal that the court has found to be without jurisdiction.

11. MinLaw seeks views on these proposals, and the draft provisions, which may be found at section 3 of the Draft Bill.

(III) Tribunal's powers to award interest

12. A further area of amendment relates to tribunals' powers to award interest. MinLaw intends to clarify the scope of tribunals' powers to grant post-award interest. In this regard, MinLaw intends to expressly prescribe the powers of the tribunal to grant simple or compound interest on monies claimed in arbitrations, as well as costs.

13. MinLaw seeks your views on this approach. The draft provision, which is based on section 79 of the Hong Kong Arbitration Ordinance 2010, may be found at section 4 of the Draft Bill.

(IV) The "emergency arbitrator" procedure

14. In July 2010, the Singapore International Arbitration Centre ("**SIAC**") amended its rules to include a procedure for the appointment of an "emergency arbitrator". This procedure was aimed at providing an avenue for parties to obtain urgent interim relief prior to the constitution of the full tribunal, and without having to seek relief before the national courts.

15. A party seeking urgent interim relief prior to the constitution of the tribunal may make an application for emergency relief concurrently with, or following, the filing of the notice of arbitration. The party seeking relief is required to notify the Registrar of the SIAC and all other parties in writing of the application (and its nature), and the reasons supporting the application; this requirement therefore precludes the possibility of applying for *ex parte* relief.

16. However, both the legal status of emergency arbitrators and the enforceability of the interim orders issued by such arbitrators are unclear. In this connection, MinLaw proposes to amend the IAA to provide express legislative support for the "emergency arbitrator" procedure (for any arbitral institution which has similar provisions, and not limited to the SIAC). The amendments would make it clear that any orders issued by such emergency arbitrators would be enforceable.

17. MinLaw seeks views on this approach, and the draft provision in question may be found at ss. 2(a) of the Draft Bill.

(B) OTHER PROPOSALS

18. Apart from the provisions set out in the Draft Bill, MinLaw is also considering other amendments to the international arbitration regime, and seeks views in this respect.

(I) Chapter IV A of the Model Law

19. The 2006 Amendments to the Model Law also introduced interim and preliminary orders, which empower arbitral tribunals to grant interim relief in appropriate cases. This includes provisions which allow interim relief to be granted on an ex-parte basis. In this regard, it should be noted that section 12 of the IAA, as currently drafted, allows arbitral tribunals in international arbitrations to make interim orders; arguably, a tribunal could grant ex-parte orders under the current regime, given the absence of an express statutory prohibition.

20. A comparison of the 2006 Model Law and our current IAA positions is set out for ease of reference:

Current position under IAA (Section 12)	Position under 2006 Model Law (Chapter IV A)
An arbitral tribunal has powers to make orders or give directions to any party for: (a) security for costs; (b) discovery of documents and interrogatories; (c) giving of evidence by affidavit; (d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute; (e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute; (f) the preservation and interim custody of any evidence for the purposes of the proceedings; (g) securing the amount in dispute; (h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and (i) an interim injunction or any other interim measure.	An arbitral tribunal has the power to make (inter partes or ex parte) orders to any party to: (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.

21. The new provisions for ex parte relief in the 2006 Model Law have attracted significant international controversy; various commentators are concerned that empowering tribunals to grant ex-parte interim relief is inconsistent with the fundamentally consensual nature of the arbitral process.[1]

[1] The *travaux preparatoires* of the UNCITRAL Working Groups highlighted that, as a result of strong objections raised by various member states, the provisions currently contained in Chapter IV A of the Model Law are widely regarded as a compromise text. This was also the view adopted by several of the respondents to MinLaw's closed consultation on this issue.

22. While the draft Bill does not contain these amendments, MinLaw still welcomes views on whether these amendments would be appropriate in the Singapore context.

(II) Waiver of right to set aside awards

23. MinLaw is considering whether the IAA should be amended to allow parties, by agreement, to waive their right to set aside arbitration awards, thereby precluding any appeal to the courts. Such waiver has been introduced in Article 1522 of the new French Arbitration Act, which provides that "*parties may, at any time, expressly waive their right to bring an action to set aside*". This provision was enacted to bring finality to disputes between parties by preventing any action to set aside.

24. Although such an agreement not to set aside would bring finality, such a provision might be used to shut the door on appeals in meritorious cases. This is of particular concern where such a clause is used in cases where there is an inequality of bargaining power, such as in standard form agreements involving consumers or less commercially savvy parties.

25. While the draft Bill does not contain these amendments, MinLaw still welcomes views on whether these amendments would be appropriate in the Singapore context.

(III) Limitation periods

26. Section 8A of the IAA provides that the Limitation Act shall apply to arbitration proceedings as it applies to proceedings before any court. A common issue encountered in the context of dispute resolution proceedings, including arbitration, is the question of which country's limitation laws ought to apply when the defence of time bar is raised.

27. MinLaw is, at present, considering clarifying the position by expressly providing (by way of a separate Bill, known as the Foreign Limitation Periods Bill), that the limitation period in any claim be governed by the same law as the substantive law governing the claim. MinLaw is, at present, conducting a separate consultation with respect to the Foreign Limitation Periods Bill.

28. Whilst such reform is not restricted to arbitration, it would have a significant effect on arbitration practice. As such, MinLaw seeks your views on the proposed reform to limitation periods.

(IV) Third party funding

29. There is a general prohibition in Singapore against providing funding to third parties in order to conduct litigation, as contained in the common law doctrine of champerty. This restriction has expressly been extended to arbitration: see the Singapore Court of Appeal decision of in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another* [2007] 1 SLR(R) 989.

30. Other jurisdictions, including the UK, Australia, and the US have moved away from the doctrine of champerty.[2] The reasons for this are concisely summarized by Lord Jackson in his report entitled *Civil Litigation Costs: Final Report* as follows:

(a) Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third party funding promotes access to justice.

(b) Although a successful claimant with third party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all.

(c) The use of third party funding (unlike the use of conditional fee agreements ("**CFAs**")) does not impose additional financial burdens upon opposing parties.

(d) Third party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable.

(e) Third party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties.

31. In light of these considerations, third party funding for litigation and arbitration is now allowed in the UK, as well as other jurisdictions. It is not regulated in most jurisdictions.

32. While the draft Bill does not contain these amendments, MinLaw welcomes views on whether third party funding would be appropriate in the context of international arbitration.

33. Such a carve-out to allow third party funding for arbitration would carry the following safeguards to minimize potential abuse:

(a) *Restricting third party funding by category, value of claim and eligibility of sponsor* – These restrictions intend a policy to limit third party funding to high value commercial arbitrations:

(i) **Exclusion of domestic practice areas:** We recommend exclusion of family law, constitutional and administrative law, criminal law, professional negligence and personal injury work;

(ii) **A threshold value of claim**, of S$1 million (subject to change by gazetting) which would prevent third party funders from "farming" claims i.e. providing funds indiscriminately to low value claims and seeking profits by way of recovery from as many sources as possible. The imposition of a minimum claim sum will help to ensure that

[2] In the UK, the common law rule on champerty has not been abolished by statute, but it is recognized that it is not against public policy for a third party to fund litigation.

funders assess the merits of each case carefully before agreeing to provide funding.

(iii) **Limiting eligibility to third party fund**. Third party funders should be entities with at least S$5 million in paid up capital (or equivalent sum in another currency, depending on whether the funder is based locally or overseas). Law firms will be excluded.

(b) *Allowing adverse costs/security for costs orders against funders* – This will ensure that defendants are not prejudiced by a lack of recourse in claims brought by funded parties. This may also be coupled with a requirement that third party funders maintain a minimum capital requirement, so that they are able to pay costs awarded against them.

(c) *Requiring parties to disclose funding agreements* – This will enable transparency and ensure that the court is aware of any potential policy issues which may arise from the circumstances of each individual case. It will also enable the court to make the appropriate orders against funders where necessary.

(C) CONCLUSION

34. MinLaw would like to seek your views and feedback on the proposed areas of review and the Draft Bill.

35. Replies should reach MinLaw by 21 November 2011.