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Discovery in Court and Document Production in International Commercial Arbitration—Singapore

By Michael Hwang* and Andrew Chin**

* Senior Counsel, barrister and chartered arbitrator, Singapore; Vice-Chairman, ICC International Court of Arbitration; Vice-President, ICCA.

** Associate, Chambers of Michael Hwang S.C., Singapore.

¹ First Schedule (Additional Powers of the High Court), § 12: 'Power before or after any proceedings are commenced to order discovery of facts or documents by any party to the proceedings or by any other person in such manner as may be prescribed by Rules of Court.'

² Order 24. For examples of statutory provisions on discovery in court, see Section 47 of the Banking Act, Section 34(1) of the Government Proceedings Act, and Sections 128 and 131 of the Evidence Act.

³ For more discussion on this subject, see J. Pinsler, *Civil Justice in Singapore: Developments in the Course of the 20th Century* (Butterworths, 2000), chapter 8.

⁴ The process of discovery in Singapore also includes a procedure known as 'interrogatories' (a process of cross-examination by written questions requiring written answers on oath before trial), but this paper will not deal with that procedure.

⁵ Rules of Court, Order 24, Rule 1(2) (emphasis added).

⁶ Rules of Court, Order 24, Rules 1(1) and 3.

⁷ Rules of Court, Order 24, Rule 9.

⁸ J. Pinsler (ed.), *Singapore Court Practice 2006* (LexisNexis, 2006) at para. 24/1/15.

A. Discovery in court proceedings

Singapore is a common law jurisdiction. In common law jurisdictions, the process of document production in court proceedings is known as 'discovery'.

The legal rules governing the process of discovery are primarily contained in the Supreme Court of Judicature Act¹ and the Rules of Court.² The purpose of an order for discovery is to enable a party to obtain information from the other party so as to effectively prepare its case for trial.³

Generally, there are three forms of discovery undertaken in court proceedings:⁴ (i) general discovery, (ii) specific discovery and (iii) pre-action discovery.

(i) General discovery

Under the Rules of Court, the court has the right to order discovery of documents or classes of documents which fall into the following categories:

- (a) the documents on which the party relies or will rely; and
- (b) the documents which *could* –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case.⁵

In order to meet the obligation of general discovery, the disclosing party has to furnish to the receiving party a list of documents within the categories listed above that are within the disclosing party's possession, custody or power.⁶ The receiving party has the right to demand inspection of any document contained in the list.⁷

It has been observed that the use of the word 'could' is of paramount significance, as it leads to a potentially wide obligation for parties to disclose documents in their possession, custody or power.⁸

(ii) Specific discovery

A party to court proceedings may apply to the court at any time for an order for discovery of documents or classes of documents in the other party's possession, custody or power that fall into the following categories:

- (a) a document on which the party relies or will rely;

- (b) a document which could –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case; and
- (c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case.⁹

The feature that distinguishes an order for specific discovery from an order for general discovery is the greater scope of the former, as it allows the discovery of documents that lead to a 'train of inquiry'. The concept of train of inquiry requires the disclosure of documents which can reasonably be assumed to contain information that may (and not must) directly or indirectly enable the applicant to advance his own case or adversely affect the case of his adversary.¹⁰

Hence, the Singapore courts take a strict approach when dealing with applications for specific discovery. It is not sufficient for a person applying for an order for specific discovery baldly to plead that there is potential for a train of inquiry; the applicant must show to the court's satisfaction that the train of inquiry would be likely to lead to relevant documents being unearthed.¹¹ In addition, as discovery tends to be intrusive, the court is not normally inclined to grant applications for specific discovery if an order for interrogatories would satisfy the applicant's need for evidence.¹²

(iii) Pre-action discovery

A person who is contemplating litigation against another person has a right to apply to the court for 'pre-action' discovery.¹³ This term has been defined by the courts as discovery prior to and for the purpose of commencing legal proceedings.¹⁴

In determining whether an application for pre-action discovery should be allowed, the court will ensure that the application is neither frivolous nor speculative, and that the applicant is not on a 'fishing expedition'. In the context of discovery, a fishing expedition has been judicially defined as the 'aimless trawling of an unlimited sea'.¹⁵ However, this does not mean that the court will look at the merits of the applicant's case to see whether the application for pre-action discovery is justified, since to do so would defeat the very object of pre-action discovery (which is to determine whether the applicant has a good cause of action¹⁶).

In addition, the applicant for an order for pre-action discovery must show that the order is necessary to dispose fairly of the case or save costs.¹⁷ Hence, it is not sufficient to plead that a particular document will be relevant to the case; the applicant must show that the disclosure of the document is necessary for proper disposal of the case.¹⁸

In *Kuab Kok Kim v. Ernst & Young*,¹⁹ the plaintiffs—minority shareholders who had been compelled to sell their shares at a price fixed by an accounting firm—were granted pre-action discovery of working papers used by the accounting firm to value the price of the shares that were to be sold to the majority shareholders, since this would allow the minority shareholders to determine whether they had a good cause of action in negligence against the accounting firm.

In *Stansfield Business International v. VCS Vardan*,²⁰ the court denied an application for pre-action discovery of documents which were already in the

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Rules of Court, Order 24, Rule 5(3).

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See the classic formulation of the concept of 'train of inquiry' by Brett LJ in *Compagnie financière et commerciale du Pacifique v. Peruvian Guano* (1882) 11 QBD 55, which has been applied in Singapore in *Standard Chartered Bank v. Ssangyong Cement* (Singapore) (Suit No. 1173 of 1991).

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Tan Chin Seng v. Raffles Town Club [2002] 3 SLR 345 at para. 35.

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XACCT Technologies Ltd v. Orient Telecommunications Network Pte Ltd [2004] SGHC 144. See *supra* note 4 for a brief description of the process of interrogatories.

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Rules of Court, Order 24, Rule 6.

14

Wob Hup (Pte) Ltd v. Lian Teck Construction Pte Ltd [2005] SGCA 26.

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Thyssen Hunnebeck Singapore Pte Ltd v. TTI Civil Engineering Pte Ltd [2003] 1 SLR 75 at para. 6.

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See *Kuab Kok Kim v. Ernst & Young* [1997] 1 SLR 169.

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Rules of Court, Order 24, Rule 7.

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Bayernische Hypo- und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd [2001] 4 SLR 39 at para. 37.

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[1997] 1 SLR 169.

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[1998] 1 SLR 641.

applicant's possession because the court found that the applicant was using its application for pre-action discovery to circumvent the common law rule prohibiting collateral use of documents already obtained by the applicant through the discovery process in earlier proceedings.

Privilege, an exception to discovery

If a particular document is privileged, a party cannot be compelled to disclose it in court. There are a variety of situations in which statutes and case law recognize documents as privileged. Some instances of privilege recognized under Singapore law include:

- (a) communications between a party to court proceedings and a third party for the purpose of litigation,²¹
- (b) communications between a party to court proceedings and the party's lawyers,²²
- (c) communications between spouses,²³
- (d) unpublished official records relating to affairs of State,²⁴
- (e) communications made to public officers in official confidence,²⁵
- (f) (possibly) documents disclosed in an arbitration involving one or all of the parties.²⁶

Where a privileged document has been accidentally disclosed in the process of discovery, the disclosing party can still maintain its privilege if it informs the receiving party of the error and its intention to claim privilege. If this is done, the receiving party will have to apply to the court for leave to use the privileged document.²⁷

Implied undertaking not to use documents disclosed for collateral purposes

There is a general principle at common law whereby a party that is entitled to discovery of documents may use the documents obtained only for the purposes of pursuing the specific court proceedings for which they were obtained. This general principle was first laid down by the English courts in the case of *Riddick v. Thames Board Mills*²⁸ and has subsequently been endorsed by the Singapore courts.²⁹

Serious sanctions exist for breach of this implied undertaking. The party in breach may be held liable for contempt of court and enjoined from using the documents disclosed for collateral purposes. It is immaterial that the party in breach may not be aware of the implied obligation, although this may affect the level of punishment imposed by the court.³⁰ If the party in breach commences a legal action in which it relies on the documents disclosed by the other party, the legal action could be struck out by the courts.³¹

Sanction for breach of an order for discovery

If a party fails to comply with an order for discovery, the court has the discretionary power to make any order it thinks just, including that of dismissing the plaintiff's action unless the party complies with the order for discovery by a set deadline,³² or

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Brink's Inc. v. Singapore Airlines
[1998] 2 SLR 657 and *The Patraikos*
No. 2 [2001] 4 SLR 308 illustrate this
form of privilege.

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Sections 128 and 131 of the Evidence
Act.

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Section 124 of the Evidence Act.

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Section 125 of the Evidence Act.

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Section 126 of the Evidence Act.

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See M. Hwang & M.L. Lee,
'Confidentiality Issues in Arbitration' in
Institutional Arbitration in Asia
(Singapore International Arbitration
Centre, 2005) 105.

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Rules of Court, Order 24, Rule 19.

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[1977] QB 881.

29

Reebok International v. Royal Corp
[1992] 2 SLR 136.

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See *Singapore Court Practice 2006*,
supra note 8 at para. 24/1/20.

31

Sim Leng Chua v. JE Manghardt [1987]
SLR 205.

32

Manilal & Sons v. Bhupendra KJ Shan
(*via JB International*) [1989] SLR
1182.

striking out the defence³³ with judgment to be entered accordingly. This is known as a 'peremptory order'.

The courts have held that, where an order for discovery is not complied with, the defaulting party's pleadings will be struck out only if the failure to comply would render a fair trial of the action impossible.³⁴ They have further held that a court retains the discretion to strike out the pleadings of a party that fails to comply, even if the defaulting party subsequently makes disclosure, otherwise 'every defaulter can quickly offer to make disclosure once his deception has been discovered'.³⁵

Where a party has failed to comply with an order for discovery, the defaulting party cannot subsequently rely on the documents that have not been disclosed unless it obtains leave of the court to do so.³⁶ This rule is based on common sense, fairness and equality, for the defaulting party would otherwise be taking advantage of its own wrong.³⁷

In addition to procedural sanctions, any party or person who fails to comply with an order for discovery may be made liable for committal, i.e. imprisonment.³⁸ Furthermore, if an order for discovery is served on a party through its solicitor and the solicitor fails to notify the client, the solicitor may also be liable for committal³⁹ and may be ordered to bear the costs of the proceedings personally.⁴⁰

B. Document production in international arbitrations

The International Arbitration Act gives the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') force of law in Singapore.⁴¹ Although the Model Law does not expressly mention document production,⁴² the International Arbitration Act enlarges the powers given under the Model Law by specifically empowering arbitral tribunals in Singapore to make orders or give directions for the production of documents and interrogatories.⁴³ Such orders or directions for document production made by arbitral tribunals may be enforced in the same way as court orders if the court grants leave to do so.⁴⁴ It follows that arbitral tribunals in Singapore are empowered to give orders or make directions for document production in the same manner that a court would for full common law style discovery.⁴⁵ In addition, the International Arbitration Act gives parties to an arbitration the right to apply to the court for a writ to compel a witness to attend and to produce documents (known as a *subpoena duces tecum*).⁴⁶ These provisions in the International Arbitration Act serve to translate the powers of a court into an arbitral context in accordance with Singapore's common law tradition. However, while the intention was clearly to give arbitral tribunals virtually all the powers of a court, the International Arbitration Act does not mandate arbitral tribunals to behave exactly like a court in ordering document production.

It is difficult to say what characterizes arbitral practice relating to document disclosure in Singapore, because foreign arbitrators are frequently involved in international arbitrations conducted in Singapore. For the purpose of this paper, the authors conducted an informal survey of 15 local arbitrators to determine what kind of orders for document production they make. They were asked:

(a) Do you order production of documents in accordance with the discovery practice of the Singapore High Court?

³³ *The Dong Min* [1984–1985] SLR 706.

³⁴ *SMS Pte Ltd v. Power & Energy Pte Ltd* [1996] 1 SLR 767.

³⁵ *Tan Kok Ing v. Ang Boon Bik* [2002] SGHC 215 at para. 36.

³⁶ Rules of Court, Order 24, Rule 16(5).

³⁷ See *Singapore Court Practice 2006*, *supra* note 8 at para. 24/16/3.

³⁸ Rules of Court, Order 24, Rule 16(1) and (2).

³⁹ Rules of Court, Order 24, Rule 16(4).

⁴⁰ See *Myers v. Elman* [1940] AC 282.

⁴¹ Section 3(1) of the International Arbitration Act states: 'Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.' The Model Law is appended to the International Arbitration Act as the First Schedule. A few statutory modifications have been made to the Model Law, mainly to make its operation more effective in Singapore.

⁴² Article 19(2) of the Model Law simply provides that the arbitral tribunal can conduct the arbitration in such manner as it considers appropriate.

⁴³ International Arbitration Act, Section 12(1)(b).

⁴⁴ International Arbitration Act, section 12(1)(b), read in conjunction with Section 12(6).

⁴⁵ This power to order and give directions for discovery and interrogatories is repeated in Rule 25(h) and (i) of the International Rules of the Singapore International Arbitration Centre ('SIAC Rules').

⁴⁶ International Arbitration Act, Section 13(1).

(b) If you do not order document production in accordance with the discovery practice of the Singapore High Court, what standard do you apply in determining applications for document production?

The survey showed that older arbitrators in Singapore (who were more used to the practices of the Singapore High Court) tended to follow court practice in determining applications for document production, while younger arbitrators (who had more exposure to international arbitration) would rely more on the wishes of the parties and look to the IBA Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules') for guidance when determining applications for document production.

In practice, therefore, a good number of Singaporean arbitrators would:

- (a) initially only order disclosure of all documents on which each party wishes to rely;⁴⁷ and
- (b) at a later stage, consider applications by either party for disclosure and production of specific documents or classes of documents.

At this later stage, Singaporean arbitrators may choose to rely on the test for discovery of documents used in court proceedings, or apply a more restrictive standard and possibly have regard to international standards as reflected in the IBA Rules.

The attitude of the younger arbitrators may have been influenced by local arbitration literature, which has favoured a more restrictive regime of document production over common law style discovery.

In the arbitration volume of *Halsbury's Laws of Singapore*, the author discourages the use of the Rules of Court as the procedural rules for international arbitrations.⁴⁸ In particular, he takes the view that orders for document production which allow full disclosure of documents should be avoided in arbitration. In support of his proposal, he points out that US courts apply the 'strict necessity' criterion to determine requests for orders for document production in arbitration.⁴⁹

The authors of a leading article on the disclosure of documents in international arbitrations in Singapore⁵⁰ discourage the use of common law style discovery procedures when dealing with applications for document production in international arbitrations for the following reasons:

- (a) Arbitrations conducted in Singapore are mostly international arbitrations. Hence, arbitral tribunals sitting in Singapore should be wary of the sensitivities of parties and their lawyers who have been exposed to a different legal culture.
- (b) A more flexible arbitration regime, catering to the sensitivities of parties and their lawyers who have been exposed to different legal traditions, should be encouraged, so as to ensure that Singapore remains the arbitration centre of choice for international arbitrations.
- (c) A multifaceted approach to orders for document production in international arbitrations should be encouraged, with the IBA Rules as a primary source of guidance. This is because the IBA Rules were drafted with the objective of offering a compromise between civil law and common law legal traditions.
- (d) The authors suggest a non-exhaustive list of factors that arbitral tribunals in Singapore may consider when dealing with applications for document production orders:

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Rule 18.6 of the SIAC Rules (2d ed.) requires copies of all essential documents (or lists of documents if they are voluminous) to be attached to the Statement of Case, Statement of Defence and any other statements that may be required of the parties.

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L. Boo, 'Arbitration' in *Halsbury's Laws of Singapore*, vol. 2 (2003 reissue) at footnote 5 to para. 20-073.

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Ibid. at para. 20-078.

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C.T. Tan & J. Choong, 'Disclosure of Documents in Singapore International Arbitrations: Time for a Reassessment' (2005) 1 *Asian International Arbitration Journal* 49.

- (i) *the parties and their lawyers*: consideration should be given to the kinds of orders for document production to which the parties and their lawyers are accustomed;
- (ii) *the amount in dispute*: the greater the amount in dispute, the greater the justification for more extensive orders for document production;
- (iii) *the nature of the issues in dispute*: factual disputes may justify more extensive orders for document production than disputes over points of law;
- (iv) *volume and type of documents*: the easier it is for parties to make disclosure, the more justification there will be for extensive orders for document production;
- (v) *other factors*: these include, but are not limited to:
- i. the extent to which the documents are relevant to the dispute;
 - ii. whether or not there are other means of obtaining the requisite information without resorting to an order for document production; and
 - iii. whether the order for document production has been sought vexatiously.

It appears very likely that arbitral tribunals in Singapore may move towards a more restrictive form of document production because of the heavy involvement of foreign lawyers in international arbitrations in Singapore. Foreign arbitrators from a wide range of countries sit in arbitrations conducted under the auspices of the Singapore International Arbitration Centre ('SIAC') or other institutions and in *ad hoc* arbitrations. Many international arbitrations in Singapore are conducted by the local offices of foreign law firms more familiar with the IBA Rules than with the Rules of Court. Singapore has had the benefit of lectures and seminars given by leading foreign arbitration practitioners. From time to time Singapore is host to international conferences on arbitration, such as the IBA's Arbitration Day in February 2006 and conferences organized by SIAC in conjunction with international institutions like UNCITRAL and ICC. All of these activities have helped to make the Singaporean arbitration community more aware of prevailing international standards and practices in arbitration, including document production.

An interesting issue arises over the way in which arbitral tribunals deal with the failure to comply with orders for document production. The International Arbitration Act allows an arbitral tribunal to award any relief that could be awarded by the High Court if the dispute were heard in civil proceedings before the High Court.⁵¹ As the High Court has the power to make peremptory orders in the event of non-compliance with orders for discovery,⁵² does it follow that arbitral tribunals are allowed to issue peremptory orders for non-compliance with orders for document production?

There is doubt as to whether peremptory orders can be made by an arbitral tribunal in the same way as by the High Court. This is because the Model Law and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') require that each party be given a full opportunity to present its case.⁵³ However, the English Arbitration Act 1996 allows arbitral tribunals to make peremptory orders for failure to comply with orders for document production, and a breach of such orders may result in the arbitral tribunal forbidding the defaulting party to rely on the material or allegation covered by the order for document production.⁵⁴ In some cases, this may be tantamount to striking out the defaulting party's case if the material or allegation in question is

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International Arbitration Act,
Section 12(5)(a).

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See pp. 35–36 above.

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Model Law, Article 18; New York
Convention, Article V(1)(b).

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English Arbitration Act 1996,
Section 41(7).

one of the key pillars of that party's case. As it is hard to imagine that the English legislature would have allowed arbitral tribunals to grant peremptory orders if this were in breach of the Model Law and the New York Convention, it could be argued that there would be no breach of the Model Law or the New York Convention if an arbitral tribunal acting in Singapore under the International Arbitration Act were to make a peremptory order.

Relationship between discovery in court proceedings and arbitration

In *Myanma Yaung Chi Oo Co Ltd v. Win Win Nu (Myanma Yaung)*,⁵⁵ the defendant exhibited in one of its witness affidavits certain documents that had been disclosed in an arbitration between the plaintiff and a third party. The plaintiff applied to strike out those exhibits, contending that they were disclosed in breach of an implied confidentiality obligation preventing parties to arbitration from disclosing documents obtained in the course of an arbitration. The defendant argued that it was reasonably necessary for the protection of her legitimate interest to exhibit the documents, as those documents would show that the court proceedings were brought in abuse of process.

The court was presented with contrasting positions under Australian and English law as to whether an implied duty of confidentiality existed in arbitration. There is no implied duty of confidentiality under Australian law, whereas there is under English law subject to certain exceptions. The court preferred the English view and held that there was an implied duty of confidentiality imposed on parties to an arbitration, subject to certain exceptions.⁵⁶ On the facts, the court held that, as none of the exceptions to the implied duty of confidentiality applied, the court allowed the plaintiff's striking out application.⁵⁷

Although *Myanma Yaung* was chiefly about whether an implied duty of confidentiality exists between parties to an arbitration, the case is potentially relevant to document production in arbitration. Since a non-party to an arbitration would have been allowed to disclose documents obtained in the course of that arbitration if one of the exceptions to the implied duty of confidentiality had applied, would it follow as a matter of logic that, if the non-party to the arbitration did not have possession of the documents in the arbitration, it could have applied for an order for disclosure of documents obtained in the course of that arbitration, so long as the exceptions to the implied duty of confidentiality had been made out?

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[2003] 2 SLR 547.

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The exceptions to confidentiality recognized by the court in *Myanma Yaung* are: (i) consent of the parties, express or implied; (ii) order of court; (iii) leave of court; and (iv) when reasonably necessary for the protection of the legitimate interests of an arbitrating party.

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For more on the subject of confidentiality in arbitration, see M. Hwang & L.M. Ling, *supra* note 26, and M. Hwang & M.L. Lee, 'Confidentiality in Arbitration – The Criteria Adopted by Institutions' *Singapore Institute of Arbitrators Newsletter* (July 2005).

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[2005] SGCA 26.

In *Wob Hup (Pte) Ltd v. Lian Teck Construction Pte Ltd (Wob Hup)*,⁵⁸ the Court of Appeal was confronted with the question of whether orders for discovery can be made by a court when there was an arbitration agreement between the parties. The applicant in this case applied for a pre-action discovery order on the grounds that the arbitration agreement did not cover the dispute that might become the subject of court proceedings. Alternatively, the applicant argued that the court had the power to grant a discovery order to assist a party to an arbitration agreement to decide whether to commence arbitration proceedings ('pre-arbitral discovery'). The other party resisted the application on the grounds that the arbitration agreement was universal in its scope and the courts therefore did not have the power to deal with the application for pre-action discovery. It also argued that the court did not have the power to grant pre-arbitral discovery, as this was not provided for by statute or common law.

The Court of Appeal held that, based on the facts of the case, as the applicant had clearly stated that it wished to proceed by way of court proceedings, this was an application for pre-action discovery, and not pre-arbitral discovery. Hence, the Court of Appeal made no ruling on whether the court had the power to grant pre-arbitral discovery. Nevertheless, the Court of Appeal observed that, save in certain instances, applications for pre-arbitral discovery should be dealt with by arbitral tribunals and not by the courts, in order to be consistent with the spirit and scheme of arbitration.⁵⁹ However, the Court of Appeal did not give examples of what those 'certain instances' were.

An eminent local scholar on civil procedure, Professor Jeffrey Pinsler, has expressed the view that the Singapore courts do not have the power under statute or common law to grant pre-arbitral discovery.⁶⁰ Moreover, he takes the view that pre-arbitral discovery should not be encouraged:

If arbitration is the dispute resolution mechanism chosen and agreed to by the parties as the preferred alternative to court proceedings, an application to invoke the court process in order to obtain discovery would be improper in the absence of agreed terms to this effect. The respondent to such an application might well complain that he is being unjustly deprived of the benefits which form the basis of his agreement to arbitrate. Court proceedings would involve increased expenditure, delays arising from this initial application and possible appeals, the risk of adverse publicity in a more public forum, formality and complexity in adjudication compared to the relatively relaxed atmosphere of an arbitration. Such outcomes would also be contrary to the spirit of the arbitral process which is intended to operate independently of the courts.⁶¹

C. General comparisons between discovery in court and document production in international arbitration

There is no doubt that the discovery regime for court proceedings is more extensive than the document production regime for international arbitrations. Apart from this, it is difficult to make a detailed comparison between the two regimes because orders for document production made in the context of international arbitrations are based on *ad hoc* determinations by the respective arbitral tribunals which are not recorded for public viewing.

Some general observations may nevertheless be made:

(i) There is a larger body of decisions relating to discovery in court proceedings than document production in arbitration. The lack of decisions on document production in international arbitrations means that lawyers will find it difficult to advise their clients on the potential commercial risks arising from disclosure of confidential documents in international arbitrations.

(ii) It appears that Singapore courts take care to ensure that the jurisdiction of arbitral tribunals sitting in Singapore is respected. If a matter arising before or during an arbitration can be more effectively dealt with by an arbitral tribunal than the courts, the courts are prepared to defer consideration of the matter to the arbitral tribunal.⁶²

(iii) While privileged communications are protected from disclosure during the discovery process, it is unclear how far the concept of privilege applies to document production in international arbitration, and it is beyond the scope of this paper to explore this question.⁶³

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See para. 36 of the Court of Appeal judgment in *Wob Hup*: 'Like the trial judge, we were of the view that the appellants' arguments cast some doubt on whether the court has the power under the Rules and/or its inherent jurisdiction to order pre-arbitral discovery... Nevertheless, it appeared to us that any matter submitted to arbitration should, in general, and certainly wherever possible, be dealt with by the arbitral tribunal. To invoke the assistance of the courts prior to the commencement of arbitral proceedings may, in certain instances, appear to run contrary to the spirit and scheme of arbitration.'

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J. Pinsler, 'Is Discovery Available Prior to the Commencement of Arbitration Proceedings?' [2005] *Singapore Journal of Legal Studies* 64.

61

Ibid. at 75.

62

See the *Wob Hup* case discussed above.

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See N. Gallagher, 'Legal Privilege in International Arbitration' [2003] *Int.A.L.R.* 45.

(iv) The issue of confidentiality in an arbitration and discovery in court proceedings are closely intertwined⁶⁴ If one of the exceptions to confidentiality in an arbitration is found to apply to a party to court proceedings,⁶⁵ the opposing party may apply for an order for discovery of the documents used in that arbitration, since these documents are within the possession, custody or power of the party. In this regard, the question arises as to whether an arbitral tribunal can issue a document production order compelling a party that participated in a prior arbitration to disclose documents from that prior arbitration if one of the exceptions to confidentiality in arbitration is upheld against that party. Since the International Arbitration Act empowers an arbitral tribunal sitting in Singapore to grant orders for document production in the same manner as a court would grant a discovery order, it could be argued that an arbitral tribunal has the power to order the production of documents used in a prior arbitration, so long as the exceptions to the implied duty of confidentiality have been satisfied.⁶⁶

(v) Breaches of orders for document production in arbitration are subject to less severe sanctions than in court proceedings. For instance, committal is not one of the available sanctions in such cases; and a solicitor acting for a party in an arbitration faces no sanction if he fails to inform his client of the latter's obligations under an order for document production, as an arbitral tribunal has no power to punish the solicitor. On the other hand, Section 12(6) of the International Arbitration Act allows applications to be made to the courts for judicial enforcement of an order for document production made by an arbitral tribunal. The question remains as to whether an arbitral tribunal can grant a peremptory order in the event of a breach of an order for document production. Furthermore, the fact that the document production regime in arbitration is more limited than the discovery regime in court proceedings leads one to surmise that the sanctions for breaches of orders for discovery in court proceedings are unlikely to apply to breaches of orders for document production in arbitration.

(vi) Although the International Arbitration Act grants wide powers to an arbitral tribunal to grant orders for document production in the same manner as a court would conduct common law style discovery, it appears that the practice of arbitrators may be shifting towards a more restrictive regime of document production.

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See the *Myanma Yaung* case discussed above.

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See *supra* notes 56 and 57.

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See the discussion on *Myanma Yaung*, p. 39 above.