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IS DISCOVERY AVAILABLE PRIOR TO THE COMMENCEMENT OF ARBITRATION PROCEEDINGS?

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Discovery before action is a relatively recent development in Singapore and other common law countries and is now well established. However, case law has yet to determine whether a party to an arbitration agreement is entitled to discovery prior to arbitration. This issue raises various questions concerning the nature of arbitration, the scope of arbitration legislation and the *Rules of Court*, and the extent of the court's inherent powers.

I. INTRODUCTION

In jurisdictions which confer the right of discovery prior to the commencement of a court action, the question arises as to whether a party to an arbitration agreement should have a similar entitlement to the disclosure of information in advance of arbitration. There has yet to be a reported case from a leading arbitration jurisdiction which decides this issue. Although this article concerns the position in Singapore, it may be relevant in an international context to the extent that corresponding or similar laws apply in another jurisdiction. In Singapore, Order 24, rule 6 of the *Rules of Court*[1] ('*RC*') expressly provides for discovery before the initiation of legal proceedings subject to the fulfilment of various conditions.[2] The scope of this rule will be examined to determine whether it can be relied on in the sphere of arbitration. It is also well-established that the court has an inherent power to make procedural orders in the interest of justice. Whether such a power may be exercised in respect of pre-arbitration discovery will be considered. Ideally, all procedural powers governing a dispute which the contracting parties have agreed to submit to arbitration should be expressed by the governing legislation—the *Arbitration Act*[3] ('*AA*') and *International Arbitration Act*[4] ('*IAA*'). The matter of whether these statutes enable discovery prior to arbitration will be addressed.

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1 2004 Rev. Ed. Sing., r. 5 [*RC*].

2 See Part II below.

3 Cap. 10, 2002 Rev. Ed. Sing. [*AA*].

4 Cap. 143A, 2002 Rev. Ed. Sing. [*IAA*].

II. Does Order 24 Rule 6 *RC* Apply?

This rule provides that an application for discovery may be made before the commencement of proceedings[5] and supported by an affidavit, which must:

> (a) … state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court;
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> (b) … specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.[6]

It would seem that this rule does not apply to an application for discovery prior to arbitration. The power to order discovery is vested in the courts pursuant to paragraph 12 of the First Schedule to the *Supreme Court of Judicature Act*[7] ('*SCJA*'). This paragraph states:

> 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.

As the *SCJA* concerns the courts, the term "proceedings" in paragraph 12 should be construed to mean proceedings in court. Paragraph 12 provides that the power is to be exercised in accordance with the *RC*. Order 24, rule 6 has a well-defined scope which does not appear to encompass discovery in anticipation of arbitration. Order 24, rule 6(1) is limited to "discovery of documents before the commencement of proceedings". The word "proceedings" requires interpretation in the context of paragraph 12 of the First Schedule to the *SCJA*. Rule 6(3)(a) provides in respect of the affidavit in support of an application pursuant to rule 6(1) that it must state whether 'the person against whom the order is sought is likely to be party to the subsequent proceedings in court'. In *Lian Teck Construction Pte. Ltd. v. Woh Hup (Pte.) Ltd. and Others*[8] ('*Lian Teck Construction*'), the plaintiff appeared to have argued[9] that this wording justifies an application for discovery in anticipation of arbitration proceedings because rule 6(3)(a) contemplates that the subsequent proceedings may not be in court. Although the court did not respond to this specific argument, it is the author's view that the words in rule 6(3)(a) should not be interpreted in this manner for reasons already given in this paragraph. Furthermore, rule 6(3)(a) contemplates that the person required to give discovery may not be a party in the court proceedings. For example, an application is made pursuant to rule 6(5) against a person (*X*) to disclose a document which reveals the identity of a person (*Y*) against

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5 Order 24, r. 6(1). The rule also enables a party to apply for discovery against a non-party in the course of proceedings (O. 26, r. 6(2)). Order 26A contains similar provisions in the context of interrogatories.

6 *RC*, Order 24, r. 6(3).

7 Cap. 322, 1999 Rev. Ed. Sing.

8 [2005] 1 S.L.R. 266 [*Lian Teck Construction*].

9 *Ibid*. at para. 17.

whom the applicant wishes to bring suit. As *X* would have no role in the substantive proceedings by the applicant against *Y*, rule 6(3)(a) requires the applicant to state in his affidavit that *X* is not likely to be a party in the court proceedings.

As the *AA* and *IAA* and their respective Orders 69 and 69A of the *RC* regulate procedural rights and reliefs in arbitration, these are the appropriate sources to be considered for the purpose of determining the availability of discovery before the commencement of arbitration. If, as will be seen,[10] the arbitration legislation does not make express provision for discovery in advance of the arbitration, it should not be for the courts to apply a rule (*i.e.*, Order 24, rule 6) which gives no indication that it is to operate outside the context of legal proceedings in court. It might be contended that as the purpose of pre-arbitration discovery is to determine whether there is a cause of action to be pursued and would not affect the outcome of the arbitration, therefore the process may be governed by rules other than those found in the arbitration legislation. There are weaknesses in this argument. As the evidence obtained in advance of the arbitration would be crucial to the issues to be adjudicated in the course of arbitration, discovery would most certainly affect the conduct of the proceedings. Furthermore, the issue of whether a party has a right of action against another party pursuant to their arbitration agreement is obviously within the scope of the arbitration legislation.

III. May the Court Exercise Its Inherent Power?

In *Lian Teck Construction*,[11] the assistant registrar "was of the view that the inherent jurisdiction of the court could not be ousted by an arbitration clause or agreement"[12] and granted the plaintiffs discovery of certain documents prior to the contemplated arbitration proceedings. On appeal, the court was able to decide the case without resolving this question because it determined that the plaintiff was only entitled to disclosure of the documents ordered below if he intended to commence court proceedings against the defendants.[13]

It is submitted that if the court had been required to consider whether or not to exercise its inherent power to order pre-arbitration discovery, it would have declined to do so. The leading authority on the scope of inherent power is the Court of Appeal's judgment in *Wee Soon Kim Anthony v. Law Society of Singapore (No. 3)*[14] ('*Wee Soon Kim*'). In a previous article,[15] I formulated the following propositions (based on that case) concerning the court's exercise of its inherent power:

1. Order 92, rule 4 refers to the inherent jurisdiction of the court. It provides that the court may make orders which are necessary to "prevent injustice" or "prevent an abuse of the process of court".[16]

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10 See Part IV below.

11 *Supra* note 8.

12 As observed by the High Court, *ibid.* at para. 25.

13 The court stated that "… there was no necessity to decide whether Singapore courts have the jurisdiction to order pre-arbitration discovery", *ibid.* at para. 26.

14 [2001] 4 S.L.R. 25 [*Wee Soon Kim*]. Most recently affirmed by the Court of Appeal in *Samsung Corp. v. Chinese Chamber Realty Pte. Ltd. & Ors* [2004] 1 S.L.R. 382 at para. 15.

15 Jeffrey Pinsler, "Inherent Jurisdiction Re–visited: An Expanding Doctrine" (2002) 14 Sing. Ac. L.J. 1.

16 *Wee Soon Kim, supra* note 14 at para. 21.

2. The exercise of the court's inherent jurisdiction is not limited to a strict sense of "injustice". For example, the jurisdiction may be exercised to prevent or avoid a situation of "serious hardship or difficulty or danger".[17] The court must be flexible and not bind itself to "rigid criteria or tests".[18]
3. As long as the court acts "judiciously"[19] or in a "just and equitable"[20] manner, it does not have to limit the circumstances in which it can exercise its jurisdiction.[21]
4. An essential consideration is the "need" of the party concerned.[22]
5. However, this need must be of a sufficient degree to justify the exercise of the court's inherent jurisdiction. It will not be exercised merely to satisfy the party's interest or desire.[23] In *Wee Soon Kim*, the Court of Appeal stated that the need was not of "such a gravity" that the court should invoke its inherent jurisdiction.[24]
6. Such a need does not arise if there is a procedural mechanism (whether provided by statute or the *RC*) in place which effectively governs the circumstances.[25]
7. The court may consider its own needs as, for example, whether it would be able to deliberate more effectively if it were to exercise its inherent jurisdiction.[26]
8. The court should not exercise its inherent jurisdiction merely because to do so would not cause prejudice to the other party.[27]
9. However, the issue of whether prejudice would be suffered by one party or the other as a result of the court's decision to exercise, or refrain from exercising, its inherent jurisdiction, is a consideration to be taken into account.[28]
10. There must be "reasonably strong or compelling reasons" why the court should exercise its inherent jurisdiction.[29]

In the context of discovery prior to arbitration, the applicant should be required to show, *inter alia*, that he has a sufficient "need" (beyond mere "interest or desire")[30] and that this (and other factors) establish that there is a "reasonably strong or compelling" basis for judicial intervention.[31] It is questionable whether a person can be said to have a real "need" (in the context of the Court of Appeal's definition of the

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17 *Ibid*. at paras. 23-24.
18 *Ibid*. at para. 27.
19 *Ibid*.
20 *Ibid*.
21 *Ibid*. at para. 26.
22 The court referred to this as "an essential touchstone": *ibid*. at para. 27. The court pointed out, however, that it did not intend to be "exhaustive" about the criteria.
23 The position in *Wee Soon Kim*, *ibid*. at para. 29.
24 *Ibid*. at para. 29.
25 In *Wee Soon Kim*, this was Part VII of the *Legal Profession Act* (Cap. 161, 2001 Rev. Ed. Sing.), which "sets out an elaborate scheme on how a complaint against a solicitor should be dealt with": *ibid*. at para. 28.
26 In *Wee Soon Kim*, the Court of Appeal did not conclude that the joinder of the solicitors would have assisted the court. This was because all necessary documents were before the court.
27 *Ibid*. at para. 30.
28 *Ibid*.
29 *Ibid*.
30 See propositions 4 and 5 above.
31 See proposition 10 above.

term in *Wee Soon Kim*) to obtain discovery in anticipation of arbitration even though such discovery might be necessary in accordance with Order 24 rule 7.[32] This rule concerns necessity in respect of the substantive issues of the action whereas need in the context of the court's inherent power involves the more fundamental question of whether the court should, in the first place, involve itself in circumstances apparently ungoverned by statute or the *RC*. The inconvenience and delay which the applicant might have to experience in commencing arbitration proceedings before he makes his application for discovery would probably not constitute compelling reasons for the exercise of the court's inherent power in most cases. He would have to incur costs in commencing arbitration proceedings but this would also be a consequence of making an application for discovery in court proceedings. As for the delay in obtaining discovery, this may not be serious if the arbitrator is persuaded to give the appropriate directions immediately after the commencement of the arbitration. In the unlikely event that there is prejudice in these circumstances, this is a consideration which may be taken into account.[33]

Furthermore, the condition that there must be "reasonably strong or compelling reasons"[34] before a court will exercise its inherent power may not be met if there is a statutory mechanism which caters to the circumstances. In *Wee Soon Kim*, the Court of Appeal determined[35] that the applicants had not established a sufficient need for the exercise of inherent jurisdiction and that this was underlined by the existence of a comprehensive statutory scheme of procedure provided by the *Legal Profession Act*.[36] Similarly, it might be contended that as the *AA* and the *IAA* include provisions governing discovery, the court should determine the issue of pre-arbitration discovery according to these statutes. Indeed, Article 5 of the *Model Law*[37] (which applies to international arbitrations by virtue of section 3, *IAA*) provides that a court may only intervene in accordance with its provisions.[38] The arbitration legislation is considered in the following paragraphs.

IV. Position Under the Legislation

A. *Arbitration Act*

The *AA* does not expressly provide for discovery before arbitration proceedings. Indeed, as the following provisions show, the legislation contemplates that discovery would take place in the course of arbitration. Section 28(1) of the *AA* states: "The

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[32] Order 24, r. 7 provides that the court may "… if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[33] See proposition 9 above.

[34] See proposition 10 above.

[35] *Supra* note 14 at para. 28-29.

[36] Cap. 161, 2001 Rev. Ed. Sing. See also *supra* note 13 at para. 11.

[37] *IAA*, First Schedule. For cases in which the court has considered the exercise of its inherent power in the face of a statutory scheme, see *Samsung Corp. v. Chinese Chamber Realty Pte. Ltd. & Ors* [2003] 3 S.L.R. 656 (reversed on appeal but the point concerning inherent jurisdiction was left alone); *Tan Kok Ing v. Tan Swee Meng & Ors* [2003] 1 S.L.R. 657; *Four Pillars Enterprises Co. Ltd. v. Beiersdorf Aktiengesellschaft* [1999] 1 S.L.R. 737; *Chia Ah Sim v. Ronny Chong & Co.* [1993] 2 S.L.R. 564.

[38] *Model Law*, art. 5 is considered under "*International Arbitration Act*" below after note 56.

parties may agree on the powers which may be exercised by the arbitral tribunal for the purposes of and in relation to the arbitration proceedings." There is an assumption here that the parties' agreement applies to pending arbitration proceedings.[39] Section 28(2) of the *AA* goes on to provide for the general powers of the arbitrators:

> Without prejudice to the powers conferred on the arbitral tribunal by the parties under subsection (1), the tribunal shall have powers to make orders or give directions to any party for—
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> (a) security for costs;
> (b) discovery of documents and interrogatories;
> (c) giving of evidence by affidavit;
> (d) a party or witness to be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation;
> (e) the preservation and interim custody of any evidence for the purposes of the proceedings;
> (f) 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; and
> (g) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute.

The court's role in arbitration proceedings is spelt out in section 31:

> (1) The Court shall have the following powers for the purpose of and in relation to an arbitration to which this Act applies:
> (a) the same power to make orders in respect of any of the matters set out in section 28 as it has for the purpose of and in relation to an action or matter in the Court;
> (b) securing the amount in dispute;
> (c) 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
> (d) an interim injunction or any other interim measure.
> (2) …
> (3) The Court, in exercising any power under this section, shall have regard to —
> (a) any application made before the arbitral tribunal; or
> (b) any order made by the arbitral tribunal, in respect of the same issue.

The following propositions may be made regarding sections 28(2) and 31 of the *AA*. As section 28(2) confers powers on the arbitral tribunal, the power to order to discovery may only be made once that tribunal is properly constituted after the commencement of arbitration proceedings. Section 31 is described by its heading as "Court's powers exercisable in support of arbitration proceedings". A literal interpretation requires that arbitration proceedings are already afoot, otherwise, there would be nothing to support. As section 31(1)(a) empowers the court to exercise the "same" powers of the arbitral tribunal pursuant to section 28(2)(a)-(g) (including discovery, which is provided for in sub-para (b)), it may be reasonably contended

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[39] *IAA*, s. 15A(6) enables the parties to decide on "… the means by which a matter may be decided".

that the court is not entitled to grant any such orders prior to the commencement of the arbitration. Support for this proposition may be found in *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey*,[40] where GP Selvam J. referred to section 12 of the *IAA* (which substantially corresponds to section 28(2) of the *AA*), and stated: "These are limited procedural powers which can only be exercised during the arbitration …."

There is an English authority which suggests that a broader view might be taken. In *Channel Tunnel Group Ltd. & Anor v. Balfour Beatty Construction Ltd. & Ors*,[41] ('*Channel Tunnel Group*') the plaintiff commenced an action in the High Court for the purpose of obtaining an injunction against the defendant. There was an agreement between the parties to refer disputes to arbitration and arbitration proceedings had yet to be commenced. The Court of Appeal stayed the court proceedings and held that it had no jurisdiction to grant an injunction because the place of arbitration was in Brussels, not England. Staughton L.J., in delivering the judgment of the Court of Appeal, observed that if the arbitration had been wholly domestic, the court could have granted an injunction prior to the commencement of the arbitration pursuant to section 12(6)(h) of the English *Arbitration Act 1950* ('*EAA*').[42] The House of Lords[43] did not disturb this interpretation of section 12(6)(h) but determined that an injunction could be granted pursuant to section 37 of the *Supreme Court Act 1981* on the basis of justice and convenience. It decided an injunction should not be granted in the circumstances of the case. Therefore, *Channel Tunnel Group* stands for the proposition that, quite apart from the *AA*, the court has a general jurisdiction to grant an injunction if it is just and convenient to do so. It would normally be fair to do so where a plaintiff's action has been stayed and it is necessary to protect the plaintiff's rights by preventing the defendant from continuing with its allegedly wrongful activity until the dispute can be formally arbitrated. It is submitted that a Singapore court faced with similar circumstances would, quite apart from the *AA*, be able to grant an injunction pursuant to section 4(10) of the *Civil Law Act*.[44]

Although not identically framed, section 28(2) of the *AA* shares much of the substance of section 12(6) of the *EAA* including the power to order discovery (section 12(6)(b)). Therefore, the argument could be made that if an English court is empowered to grant an injunction prior to arbitration in a domestic arbitration pursuant to section 12(6)(h),[45] it should also be able to order discovery in advance of arbitration proceedings pursuant to section 12(6)(b). It could then be contended that discovery might be ordered prior to arbitration proceedings in Singapore pursuant to section 28(2)(b) of the *AA*. However, the courts may be reluctant to endorse this argument for the following reasons. Firstly, Staughton L.J. made his observation concerning section 12(6) of the *EAA* two years after the deletion of paragraph (b) of section 12(6) of that statute—the paragraph providing for "discovery of documents

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40 [2001] 1 S.L.R. 624 at para. 35 [*Tan Poh Leng*].

41 [1992] 1 Q.B. 656. I am very grateful to Vinod Coomaraswamy S.C. for bringing this case to my attention in the course of the Supreme Court Working Party's deliberations.

42 14 Geo. 6. This Act has since been repealed.

43 [1993] A.C. 334.

44 Cap. 43, 1999 Rev. Ed. Sing.

45 This provision empowers the court to grant an interim injunction or appoint a receiver. There is no direct equivalent of this provision in s. 28(2) of the *AA*.

and interrogatories".[46] Secondly, English pre-action discovery (governed by Order 24 rule 7A of the *Rules of the Supreme Court*) had always been limited to cases involving personal injuries and, therefore, was rarely (if ever) the subject of arbitration. Thirdly, there may be a basis for distinguishing between the provisions in the *AA* which govern injunctive relief and discovery. The reason is that there is a fundamental difference between the purpose of an injunction which preserves the substantive rights of a party until the dispute can be formally adjudicated (and is, therefore, not concerned with the main action), and discovery which is directly linked to the presentation of the evidence in the main action. A basic principle of arbitration is that it is a separate and independent dispute mechanism. The court is involved in supporting the arbitration but does not, as a general rule, interfere in matters which arise in the arbitration proceedings such as the procedure for the disclosure of evidence. An injunction granted by the court to preserve a party's rights until arbitration does not interfere with this principle. However, as discovery affects the conduct of the arbitration (whether discovery occurs prior to or after the commencement of the arbitration),[47] a court should only make an order for pre-arbitration discovery where the terms of the *AA* expressly permit this.

It is arguable that the principle just discussed is embodied in the *AA*. Section 31(1)(a) of the *AA* refers to the matters set out in section 28. Section 28 concerns the powers of an arbitral tribunal in the course of an arbitration (including discovery: section 28(2)(b)). Unless the reference by section 31(1)(a) to section 28 is to avoid the inconvenience of having to repeat the powers in section 31(1)(a), an interpretation could be proffered to the effect that these powers (including discovery: section 28(2)(b)) can only be exercised by the court in the same context as an arbitral tribunal pursuant to section 28, *i.e.* in the course of, not before, arbitration. It would follow from this argument that there is a distinction between section 31(1)(a) powers (limited to the course of arbitration proceedings) and the powers mentioned in section 31(1)(b), (c) and (d) (various types of injunctive relief) which can be exercised by the court in advance of arbitration. It is also pertinent to point out that this arrangement does not correlate to that of section 12 of the *EAA*.[48]

Section 6(1) of the *AA* may throw further light on this issue. It states:

> Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

This provision requires the party applying for a stay to enter an appearance to a writ[49] or originating summons (where this originating process requires an appearance).[50] As the mode of application for discovery before action pursuant to Order 24, rule 6

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46 The High Court's power to order discovery was repealed by s. 103 of the *Courts and Legal Services Act* (U.K.), 1990, c.41.

47 See text accompanying note 8 above.

48 *Supra* note 42. The structure of the provisions is different.

49 *RC*, Order 12, r. 1.

50 *RC*, Order 12, r. 9(1).

is an originating summons which does not require an appearance,[51] the scope of section 6 appears to be limited to originating processes which initiate the substantive action and, consequentially, excludes pre-action discovery. As section 6 concerns the stay of substantive proceedings as opposed to pre-action applications, it does not apply to the latter. In these circumstances, the party opposing the pre-action application for discovery would not apply for a stay but would challenge the application in court.[52] The point may be made that as section 6 is intended to stay substantive proceedings in court, an application for discovery prior to the commencement of those proceedings is permitted by the statute. However, the success of this argument would depend on establishing that the statute contemplates discovery before arbitration in the first place. If there is no such contemplation, section 6 does not have to concern itself with what happens before arbitration.

B. *International Arbitration Act*

Like the *AA*, the *IAA* does not contain an express provision for discovery in advance of arbitration. Section 12(1) of the *IAA* sets out the general powers of the arbitral tribunal:

> Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for—
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> (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.

As for the court, its role is defined by section 12(7):

> The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.

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[51] See *RC*, O. 24, r. 6(1), O. 12, r. 9(2) and Form 7. Even an appearance *gratis* (*i.e.*, before the originating process is served) can only be made after the writ or originating summons (requiring an appearance) is issued (O. 10, r. 1(3) and r. 5).

[52] As was the case in *Lian Teck Construction*, *supra* note 8 and accompanying text.

The words "in relation to an arbitration to which this Part applies" in section 12(7) suggest that the High Court may exercise its powers once arbitration proceedings are on foot.[53] This is reinforced by the phrase "any of the matters set out in subsection (1)" (because that subsection is concerned with pending arbitration proceedings) and by the other sub-paragraphs in section 12 which refer to "any party"[54] and "arbitral proceedings"[55] and "course of arbitration".[56] The *Model Law*, which applies by virtue of section 3 of the *IAA*, consists of relevant provisions in this respect. Article 9 (entitled "Arbitration agreement and interim measures by court") states: "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure." Clearly, this clause enables a court to grant relief prior to the commencement of an arbitration. However, the word "protection" indicates injunctive or other relief which protect a litigant's rights rather than ordinary discovery orders. It also seems that any inherent power that a court might have to order pre-arbitration discovery is excluded by Article 5 (entitled "Extent of court intervention"), which states: "In matters governed by this Law, no court shall intervene except where so provided in this Law." Although Article 19 (entitled "Determination of rules of procedure") provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings", this does not seem to extend to pre-arbitration procedures such as discovery. Article 21 (entitled "Commencement of arbitral proceedings") declares that arbitral proceedings are deemed to commence "on the date on which a request for that dispute to be referred to arbitration is received by the respondent" unless the parties have agreed otherwise. Therefore, it is conceivable that an application for discovery to the court may be permitted if the parties have agreed that arbitral proceedings are to commence at a time prior to that application. As the arbitration has commenced in these circumstances, the application for discovery would be in the context of a pending arbitration and section 12(7) of the *IAA*, which empowers the court to grant discovery "for the purpose of and in relation to an arbitration …," would apply.

As in the case of section 6(1) of the *AA*,[57] section 6 of the *IAA* indicates that discovery prior to arbitration is not contemplated:

> Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

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53 *I.e*. "this Part" does not apply in the absence of a pending arbitration.

54 See *e.g. IAA*, s. 12(5)b(i).

55 See *e.g. IAA*, s. 12(5)(b)(ii).

56 See *e.g. IAA* s. 12(6). In *Tan Poh Leng, supra* note 40 at para. 35, GP Selvam J. said of the powers enumerated in s. 12(1) that they "… can only be exercised during the arbitration …."

57 See main text above after note 48.

An application for a stay may only be made after the applicant has entered an appearance.[58] As he is not obliged to enter an appearance in response to an application for discovery pursuant to Order 24, rule 6—the originating summons and relevant form do not require an appearance[59]—it seems that section 6 is not intended to apply to a pre-action application for discovery.[60]

V. Conclusion

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.

One of the primary objectives of pre-action discovery in court proceedings is to encourage the amicable resolution of the dispute or one or more of its issues. This is not only in the interest of the parties but also serves the due administration of justice in the sense that judicial time is properly allocated to litigants whose disputes need to be adjudicated. The public interest in maximizing the use of the court's resources does not have the same force in the context of an arbitration which is a matter of private arrangement. Accordingly, it might be contended (in the context of the interest of the administration of justice) that the justification for discovery before arbitration is not as compelling as it is for discovery in anticipation of court proceedings. While the availability of pre-action discovery may be just as useful to a party in court as it is to a party to an arbitration agreement, the contractual nature of this dispute mechanism surely places the obligation on the parties to make necessary provision in their agreement for discovery before the commencement of the arbitration. If they fail to do this, at least there is a real possibility of discovery shortly, if not immediately, after the commencement of the arbitration.[61]

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58 An appearance is required in respect of a writ (see O. 12, r. 1) and an originating summons which carries this obligation (O. 12, r. 9(1)).

59 *Supra* note 51.

60 See also the main text from note 50 concerning a consideration of the very similar wording of s. 6 of the *AA*.

61 Where early discovery could fairly dispose of the dispute and/or minimise costs.

POSTSCRIPT

Since the completion of this article, the Court of Appeal has ruled on an appeal by the defendant in *Lian Teck Construction*,[62] in which the High Court had granted discovery to the plaintiff. Although the Court of Appeal's judgment concerned the same issue before the High Court—whether a party to an arbitration agreement can obtain discovery prior to the commencement of court proceedings[63]—it made the following observation about discovery prior to the commencement of arbitration proceedings:

> [I]t 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.[64]

The purport of this comment is that if the parties intend to proceed to arbitration, an application for discovery would have to be made to the arbitrator(s); not to a court in advance of the arbitration. The phrases "in general and certainly wherever possible" and "in certain instances" indicate that this is a general rather than absolute rule, and that exceptional circumstances (as yet undefined) may justify court involvement prior to the arbitration.

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62 Which is considered in the main text from note 8. The case on appeal is *Woh Hup (Pte.) Ltd. & Ors v Lian Teck Construction Pte. Ltd.* [2005] SGCA 26.

63 *Ibid.* at para. 26.

64 *Ibid.* at para. 36.