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# DISCOVERY BEFORE ARBITRATION—WHEN AND WHY?

*Equinox Offshore Accommodation Ltd. v. Richshore Marine Supplies Pte. Ltd.*[1]

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In a recent decision of an Assistant Registrar, it was held for the first time that Singapore courts do not have the power to order 'pre-arbitral' discovery. This note considers: (a) the extent to which this conclusion is open to challenge and is desirable; and (b) whether the present approach of characterising a discovery request as either 'pre-arbitral' or 'pre-action' is satisfactory. It is suggested that rather than relying on labels, the broad question as to when a court-ordered discovery may be granted in favour of a party who is bound by an arbitration agreement may be answered by adopting a more functional approach: (a) asking whether the causes of action in respect of which discovery is sought falls within the scope of the arbitration clause; (b) frankly recognising that even where the answer is in the affirmative, there may be limited occasions on which the court should grant discovery; and (c) holding that the courts have the inherent jurisdiction to grant discovery requests in these limited circumstances.

## I. THE CASE

The defendant, Richshore Marine Supplies Pte. Ltd., had been appointed the plaintiff's sole and exclusive agent in Singapore to purchase certain goods. In return, the defendant was entitled to payment, based on a percentage mark-up on the price of the goods purchased on the plaintiff's behalf. Naturally, the defendant was obliged to keep proper and accurate accounts and records of the purchases made and to permit the plaintiff to inspect those accounts and records. In addition, the parties had agreed to arbitrate their disputes in Singapore under the Arbitration Rules of the Singapore International Arbitration Centre. Suspecting that the defendant had overcharged the plaintiff in respect of the goods purchased on its behalf, the plaintiff sought discovery of the accounts and records under Order 24, rule 6(1) of the *Rules of Court*[2].[3]

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1 [2010] SGHC 122 [*Equinox*].

2 2006 Rev. Ed. Sing., r. 5 [*RC*].

3 The plaintiff also sought to present an alternative relief—inspection of the accounts and records pursuant to its contractual rights. The Assistant Registrar quite rightly held that the alternative relief sought was misconceived. If the defendant refused to turn over the accounts and records in breach of its contractual obligations, the proper forum to resolve this would be in arbitration as it would surely constitute a dispute falling within the arbitration agreement. This comment focuses only on the pre-arbitral discovery sought.

Applying the distinction drawn in previous cases between pre-action discovery and pre-arbitral discovery requests, the Assistant Registrar held that the plaintiff's discovery request was a pre-arbitral discovery request. He further held that the courts do not have the power to grant such pre-arbitral discovery orders. There is, first, no statutory basis for such power under either Order 24, rule 6(1) of the *RC*, which regulates the power of the court to order discovery before the commencement of proceedings, or the *International Arbitration Act*[4]. Second, the courts do not possess the inherent jurisdiction to order pre-arbitral discovery. This is because the inherent jurisdiction of the court is not usually invoked in situations already governed by a detailed legislative regime. In this regard, the Assistant Registrar found it significant that the *IAA* does not expressly provide for pre-arbitral discovery orders by the courts, and that the *IAA* had been amended recently to remove the power of the courts to order discovery in relation to arbitration proceedings already afoot.

This comment considers two aspects of the Assistant Registrar's decision: the characterisation of a discovery request as being either pre-arbitral or pre-action, as well as the extent to which the courts may and perhaps should have the power to grant 'pre-arbitral' discovery.

## II. The Characterisation Issue

*Equinox* follows on the heels of the Court of Appeal's decision in *Navigator Investment Services Ltd. v. Acclaim Insurance Brokers Pte. Ltd.*[5]. In that case, the court drew a distinction between pre-action discovery (in respect of which courts have the power to grant discovery) and pre-arbitral discovery (in respect of which courts may not have the power to grant discovery).[6] That distinction was explained in *Woh Hup (Pte.) Ltd. v. Lian Teck Construction Pte. Ltd.*[7] along the following lines:

> We are of the view that the term 'pre-arbitral discovery' should be restricted to discovery sought before the commencement of arbitral proceedings *per se*. Thus, any discovery prior to and for the purpose of commencing legal proceedings, including that sought by a party to an arbitration agreement, should still be termed 'pre-action discovery'.[8]

At first glance, the distinction proposed in *Woh Hup* appears sufficiently easy to apply. Where discovery is sought to support causes of action in *court*, the fact that the party seeking the discovery may also be party to an arbitration agreement is irrelevant. Where, for example, a party to an arbitration agreement may potentially have claims which are not subject to the arbitration agreement or where it may have claims against third parties who are not bound by the arbitration agreement, it is indisputably appropriate that the courts may order discovery. On the other hand,

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

5 [2010] 1 S.L.R.(R.) 25 (C.A.) [*Navigator Investment*].

6 The point was not decided but the answer was suggested in *obiter* at para. 64, where the arguments in Jeffrey Pinsler, "Is Discovery Available Prior to the Commencement of Arbitration Proceedings" [2005] Sing. J.L.S. 64 [Pinsler, "Discovery"] were cited.

7 [2005] SGCA 26 [*Woh Hup*].

8 *Ibid.* at para. 21.

discovery requests prior to and for the purpose of the commencement of arbitration proceedings can only constitute pre-arbitral discovery requests.

But the distinction between pre-arbitral and pre-action discovery becomes more illusive once *Navigator Investment* is taken into account. In that case, the Court of Appeal suggested another valid reason[9] for permitting a party to seek discovery even though it may be a party to an arbitration agreement. This is the need for a potential claimant to ascertain whether it has a viable cause of action against the respondent, especially since the rules of the arbitral tribunal do not provide for any practical solution to allow a putative claimant to obtain discovery at a stage when it is still in the dark about the possible causes of action it might have and is therefore unable to file a statement of case.[10] Thus, discovery may be sought to ascertain a viable cause of action even when the potential claimant is a party to an arbitration agreement and is likely to use (and intends to use) the information discovered to file his statement of case in arbitration. It is unclear why such a discovery request should be characterised as 'pre-action' rather than 'pre-arbitral'.[11] Does every case where a potential claimant seeks discovery in order to determine whether there are legitimate causes of action against the respondent fall within the 'pre-action' discovery category; if not, what is the fulcrum on which the cases turn? This is the grey area vulnerable to semantic manipulation: when a potential claimant is a party to an arbitration agreement, how do we tell whether discovery is being sought "before the commencement of arbitral proceedings *per se*" or whether discovery is being sought "prior to and for the purpose of commencing legal proceedings"?[12]

The difficulty in applying this distinction was apparent in *Equinox*, where affidavits were filed by the plaintiff stating precisely what the Court of Appeal in *Navigator Investment* had said was a valid reason for granting discovery, that is, that discovery of the defendant's accounts and records of purchases would enable it to determine whether there were legitimate causes of action against the defendant for overcharging in breach of the agreement.[13] Yet, the Assistant Registrar dismissed the discovery request. He held that the distinction between pre-action and pre-arbitral discovery lay in the intention of the potential claimant. If the discovery was sought pursuant to an intention to commence proceedings in court, this would be an application for pre-action discovery. If, on the other hand, a party sought discovery with the intention of pursuing the possible cause of action in arbitration, that would be an

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[9] *Supra* note 5 at para. 57. The standard appears to have been pitched somewhat higher in just the preceding paragraph where the Court of Appeal cited *Woh Hup* for the proposition that where an arbitration clause is or is very likely to be operative, the plaintiff may legitimately apply for pre-action discovery only in exceptional circumstances. It is not clear that this is what *Woh Hup* stands for—the word "exceptional" does not appear in the latter judgment.

[10] *Ibid*. Other situations in which the court might justifiably be called upon to order discovery in favour of a party who might possibly be a party to an arbitration agreement are discussed in Mathew Oommen & Tan Charis, "The Use of Pre-Action Discovery to Aid Arbitration?—A Practitioner's Perspective" (2010) 6(2) Asian International Arbitration Journal 186.

[11] In also implicitly endorsing Professor Pinsler's view that the Singapore courts have no power to grant pre-arbitral discovery (see *supra* note 6), there is little doubt that the Court of Appeal regarded a request for discovery in order to ascertain whether the potential claimant had viable causes of action in arbitration as 'pre-action'.

[12] *Woh Hup*, *supra* note 7 at para. 21.

[13] *Supra* note 1 at paras. 9 and 10.

application for pre-arbitral discovery.[14] Turning to the evidence, the Assistant Registrar pointed to the affidavits filed by the plaintiff, which stated that if the discovery should yield a legitimate cause of action that fell within the scope of the arbitration clause, it would commence arbitration accordingly. The Assistant Registrar held that this exposed the plaintiff's intention to seek discovery in order to enable it to ascertain whether it had a cause of action to pursue in arbitration. Thus, although the discovery request was couched as being pre-action, it was in truth a pre-arbitral discovery request.

The conclusion is probably correct but the reasoning is not entirely convincing. As a matter of evidence, it is arguable whether the affidavits should have been interpreted in the way they were. All that the plaintiff said was that *if* the discovery revealed causes of action falling within the scope of the arbitration clause, arbitration proceedings will be commenced. The logical corollary to this (which perhaps might have been stated more clearly in the affidavits) is that if the discovery revealed causes of action falling outside the scope of the arbitration clause, proceedings will then have to be taken in court.[15] In such a situation, it is not obvious that the discovery request should be deferred to an arbitral tribunal. Indeed, it is not clear how a potential claimant could advance his putative claim any further. An attempt to commence arbitration proceedings will be met by the objection that courts are only obliged to stay proceedings in favour of arbitration if it can be shown that the dispute falls within the scope of the arbitration agreement.[16] If, by virtue of his being unable to seek discovery, a claimant is unable to identify the claims he has, arbitration proceedings may never be commenced. This is precisely why the Court of Appeal in *Navigator Investment* observed that such a case—where a potential claimant was unable to file its statement of case without the aid of a court-ordered discovery—was a valid reason for granting discovery. Even if the respondent could be prevented from raising this objection (after all, in objecting to the court-ordered discovery, it would have submitted that the entire case ought to go before the arbitral tribunal), it is still an inordinate waste of time and expense for parties to head to arbitration only to discover that the causes of action need to be pursued in court. On the other hand, an order for discovery in such circumstances would be limited to the purpose for which discovery is sought, and any potential interference in the actual conduct of the arbitration is minimal.

As a matter of principle, the intention-based test is also at odds with *Navigator Investment*, which (it would seem) endorsed the possibility of claimants seeking court-ordered discovery for the purpose of filing their statement of case in arbitration. One needs no clearer evidence of an intention to pursue, in arbitration, the possible causes of action revealed by the discovery granted. In addition, hanging the characterisation of the discovery request on the intention of the parties is not

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[14] *Supra* note 1 at para. 8.

[15] On the facts of this case, however, it should be obvious that the plaintiff's affidavits on this point were entirely fictional. It is quite obvious that the plaintiff knew it was pursuing a breach of the agreement which would inevitably have fallen within the unlimited scope of the arbitration agreement. The Assistant Registrar probably recognised this, which explains his conclusion. Nevertheless, we are here concerned with what the court should do if it were true that discovery is necessary to determine if the claim falls within the scope of the arbitration clause.

[16] Section 6 of the *IAA*; interpreted in *Tjong Very Sumito and others v. Antig Investments Pte. Ltd.* [2009] 4 S.L.R.(R.) 732 at para. 22 (C.A.).

particularly helpful. It is susceptible to manipulation. All that this will encourage is plaintiffs claiming in their affidavits that they intend to pursue the action in court or, as in *Equinox*, fudge the issue by claiming that they will proceed in court or to arbitration depending on what the discovery yields. The court then has to parse the affidavits for clues as to what the 'true' intention of the potential claimant is.

The distinction between 'pre-arbitral' discovery and 'pre-action' discovery masks what the courts are really trying to do—discern those discovery requests that should fall within the competence of an arbitral tribunal and those that do not. The answer to this dilemma should be simpler. On first principle, courts deciding which cases should be allocated to arbitration and which they continue to have jurisdiction over do so by determining whether the particular dispute falls within the scope of the arbitration clause. It should follow that, in general, whether a discovery request ought to be deferred to an arbitral tribunal ought to depend on whether the putative claim[17] in respect of which discovery is sought falls within the scope of the arbitration clause. If it does not, there is clearly no reason to deny discovery.[18] If it does, then subject to the discussion below, the discovery request should in general be denied.[19] Applying this approach to the facts in *Equinox*, discovery was sought to ascertain whether there had been overcharging, which would have constituted a breach of the parties' agreement. The arbitration clause provided that "any dispute" arising out of or in connection with the agreement would be referred to arbitration. Post *Fiona Trust*[20], there is little room to contend that the arbitration clause would not have encompassed the putative claim that the discovery request sought to verify. Accordingly, the discovery request should have been (as it was) denied. It is suggested that this approach is less challenging to apply in practice. It is also conceptually more appealing; it does away with the need to characterise the discovery request in the manner proposed by previous cases, which is potentially confusing and lends itself to semantic squabbling.

Three further situations may arise. First, to the extent that discovery might support parallel actions both in arbitration and in court,[21] discovery should be granted on the basis that it would support the likely proceedings in court. Second, if discovery is truly necessary to determine whether there is a claim in arbitration,[22] this should be allowed for the reasons discussed. Third, and perhaps the most difficult, is the

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[17] Applications for pre-action discovery have to specify, as a matter of course, the substance of the claim against the potential defendant, including the potential causes of action: *Kuah Kok Kim and others v. Ernst & Young* [1996] 3 S.L.R.(R.) 485 at paras. 31 and 34 (C.A.). In many cases, this should allow the court to determine whether the potential claim falls within the scope of the arbitration clause.

[18] Discovery against potential defendants not party to the arbitration agreement or against third parties would also be appropriate cases for discovery to be granted.

[19] Although not explicit, this appears to have been the approach of Mr Justice Coulson in *Travelers Insurance Company Ltd. v. Countrywide Surveyors Ltd.* [2010] EWHC 2455 (TCC) [*Travelers Insurance*]. He first decided that the putative claim (of fraud) would fall within the scope of the arbitration agreement, and then proceeded to decide that in such a case, he had no power to order discovery.

[20] *Fiona Trust & Holding Corporation v. Privalov* [2007] UKHL 40.

[21] For example, in a personal injury case, the discovery of the same facts might lead to claims for breach of an employment contract (which might be covered by the arbitration agreement) as well as in tort (which might not be covered by the arbitration agreement).

[22] For example, if the arbitration agreement in *Equinox* had limited arbitration claims to a certain quantum, it would probably have been necessary for a discovery order to ascertain the extent of the overcharging, if any.

hypothetical question raised in *Navigator Investment*—that of the putative claimant in arbitration who is still in the dark as to the possible causes of action it may have, but where it is clear that whatever the precise causes of action there may be, they would fall within the arbitration agreement. Whatever label is assigned to it, it is better to openly recognise such a request as being, in substance, for the purpose of commencing a claim in arbitration.[23] If it is agreed that there is a need for the courts to grant such requests, the question is whether they have the power to do so.

## III. Basis for the Court's Power to Order 'Pre-Arbitral' Discovery

### A. *Any Statutory Basis?*

The Assistant Registrar held that the courts do not have the power to grant discovery requests prior to and in aid of arbitration.[24] In relation to whether the courts have the statutory[25] power to order such discovery, the Assistant Registrar considered two possibilities: the *IAA* and the *RC*.

It may be readily acknowledged that the *IAA* does not expressly confer courts the power to order discovery before arbitration. Nor does it appear that the issue has ever been considered by Parliament or the Law Reform Committee of the Singapore Academy of Law.

It is equally true that the provisions in the *RC* are framed in a manner that does not contemplate their application to arbitration proceedings. Order 24, rule 6(1) governs the procedure for the "discovery of documents before the commencement of proceedings." The strongest clue that the "proceedings" referred to in Order 24, rule 6(1) are limited to proceedings in court is found in rule 6(3)(a), which requires the affidavit filed in support of such an order to indicate whether "the person against whom the order is sought is likely to be party to the subsequent proceedings in court".[26] This provision is intended to inform the court whether the party against whom discovery may be ordered is a non-party to the dispute. If arbitration proceedings were intended to fall within the definition of "proceedings" in rule 6(1), one would expect rule 6(3)(a) to require the applicant to state, in the alternative, whether the respondent is likely to be a party to subsequent proceedings in arbitration. After all, the court's heightened concern that non-parties are not unduly troubled by discovery orders should apply equally to court and arbitration proceedings.

It is perhaps slightly odd, though, to begin with the *RC* rather than the *Supreme Court of Judicature Act*[27]. The *RC* merely prescribes the procedure and practice to be

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[23] It is clear that the Court of Appeal in *Navigator Investment* did not regard such a discovery request as 'pre-arbitral' although it is hard to see why this is not so: see *supra* note 11 and accompanying text.

[24] In the parlance hitherto adopted by the cases, this refers to where one is concerned with a pre-arbitral discovery request.

[25] As far as possible, courts prefer to find a statutory basis for the exercise of their power. See, for example, observations of the Singapore Court of Appeal in *Koh Zhan Quan Tony v. Public Prosecutor and another motion* [2006] 2 S.L.R.(R.) 830 at para. 15 (C.A.).

[26] This point was noted in *Equinox*, *supra* note 1 at para. 14 and in Pinsler, "Discovery", *supra* note 6 at 65.

[27] Cap. 322, 2007 Rev. Ed. Sing. [*SCJA*].

followed in the High Court.[28] The *RC* are subsidiary to the *SCJA*, which is the legislation that confers powers on the courts.[29] The power of the courts to order discovery prior to the commencement of proceedings derives from paragraph 12 of the First Schedule to the *SCJA*. This paragraph states that the courts have the "[p]ower 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." Notably, paragraph 12 of the First Schedule to the *SCJA* does not in terms expressly limit the definition of "proceedings" to proceedings in court. It is worth noting in this regard that in a recent decision[30] interpreting s. 299 of the *Companies Act*[31], which requires a company to obtain the leave of court before commencing "proceedings" after it has become the subject of winding up proceedings, the High Court interpreted "proceedings" to include arbitration proceedings. The High Court's reasoning was that arbitration is nowadays a well-established means of resolving disputes and that to exclude arbitration from the definition of proceedings would leave a "gaping exception"[32] to the statutory regime (in that case, the preservation of the assets of an insolvent company). To the extent that it creates an undesirable lacuna to hold that courts do not have the power to order pre-arbitral discovery, an argument can be made that the *SCJA* does confer on courts the power to order pre-arbitral discovery.

Admittedly, this argument is doomed to fail. The *SCJA* is framed in terms that condition the *exercise* of the court's power in such manner as prescribed by the *RC*.[33] As we have already seen, the language of the *RC* appears to limit its application only to proceedings in court. From here, there are only two possibilities: Either the Rules Committee has construed the *SCJA* correctly or it has not. It is unlikely that the Rules Committee got it wrong given the scrutiny that it would have passed.[34] Even if the Rules Committee was wrong, the practical reality is that until Order 24, rule 6 is amended, there is no statutory basis on which courts will have the means by which to exercise their power. Indeed, as presently worded, an application for pre-arbitral discovery under Order 24, rule 6 is simply impossible.

### B. *Any Inherent Jurisdiction?*

If a statutory basis cannot be found for the courts' power to order pre-arbitral discovery, should the courts nevertheless be prepared to exercise their inherent jurisdiction to do so in certain circumstances?

On this question, the basic premise of the Assistant Registrar's analysis was that there was no need for the courts to exercise their inherent jurisdiction to order pre-arbitral discovery as the courts' powers in aid of arbitration are already the subject

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[28] Section 80(1) of the *SCJA*.

[29] This is, however, not to the exclusion of any other written law (see s. 18(1) of the *SCJA*), which is why it was relevant to look to the *IAA* to see if it conferred on the courts the power to order pre-arbitral discovery.

[30] *The "Engedi"* [2010] 3 S.L.R. 409 (H.C.).

[31] Cap. 50, 2006 Rev. Ed. Sing.

[32] *Supra* note 30 at para. 36.

[33] See also s. 18(3) of the *SCJA*, which reads: "The powers referred to in [the First Schedule] shall be exercised in accordance with any written law or Rules of Court relating to them."

[34] The *RC* has to be approved by the Chief Justice and subsequently presented to Parliament: see s. 80(5) and (6) of the *SCJA*.

of detailed legislative provisions.[35] It is true that, in general, courts should exercise caution before exercising their inherent jurisdiction, particularly when the point is covered by an elaborate legislative framework. There is a risk that doing so may upset the balance that Parliament was attempting to strike. Thus, in a case cited by the Assistant Registrar, the Singapore Court of Appeal declined to exercise its inherent jurisdiction to allow a pair of lawyers to intervene in certain disciplinary proceedings that concerned them because the structure of the disciplinary process was such that they would, in any event, have the opportunity to refute any adverse findings.[36] But where invoking the inherent jurisdiction of the court will not upset the statutory scheme, there is no reason not to exercise it in an appropriate case, even in an area of law governed by extensive legislation. The Singapore High Court has held, for example, that the courts have the inherent jurisdiction to order discovery of handwriting samples against non-parties in spite of the extensive legislation relating to discovery.[37]

Any concern that the exercise of inherent jurisdiction to order pre-arbitral discovery may upset the legislative structure simply does not arise in the context of the *IAA*. Although the *IAA* provides for the courts' powers in aid of arbitration, these do not relate in any direct or tangential way to discovery orders prior to and in aid of the commencement of arbitration proceedings. In other words, the *IAA* is truly silent on the issue. In such a case, the inherent jurisdiction of a court is not displaced.[38]

The Assistant Registrar came to a different view primarily because he thought it significant that Parliament had only recently amended the *IAA* to remove the power of the court to order discovery in relation to ongoing arbitrations. But the removal of this power is neither surprising nor significant. Consistent with international practice, it has long been recognised by our courts that where arbitration proceedings have commenced, decisions of this nature ought to be left to the arbitral tribunal unless for special reasons the assistance of the court is desperately required.[39] But the policy of minimal curial intervention only forbids *intervention* in arbitral proceedings. Discovery orders prior to arbitration precede the commencement of the arbitration; they are, by definition, sought and ordered before an arbitral tribunal has been constituted. There is no risk of conflicting jurisdiction.

The Assistant Registrar sought to answer this point in three ways. First, the Assistant Registrar held that "[a]s the evidence obtained in advance of the arbitration would be crucial to the issues to be adjudicated in the course of arbitration, discovery

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[35] It is well-established that courts in Singapore do possess inherent jurisdiction in relation to civil proceedings (see *Wellmix Organics (International) Pte. Ltd. v. Lau Yu Man* [2006] 2 S.L.R.(R.) 117); it has been exercised in many contexts (see Jeffrey Pinsler, "The Inherent Powers of the Court" [1997] Sing. J.L.S. 1 and Jeffrey Pinsler, "Inherent Jurisdiction Re-visited: An Expanding Doctrine" (2002) 14 Sing. Ac. L.J. 1). It is often held that for the exercise of inherent jurisdiction a real need, as opposed to a mere interest or desire, has to be demonstrated.

[36] *Wee Soon Kim Anthony v. Law Society of Singapore* [2001] 2 S.L.R.(R.) 821 (C.A.); analysed in *Equinox*, *supra* note 1 at paras. 17 and 18.

[37] *UMCI Ltd. v. Tokio Marine & Fire Insurance Co. (Singapore) Pte. Ltd. and others* [2006] 4 S.L.R.(R.) 95 (H.C.).

[38] The statutory jurisdiction of the Court is "in addition to, and not in substitution of, powers arising out of [its] inherent jurisdiction": see Isaac H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curr. Legal Probs. 23 at 24–25; see also *R v. Forbes* (1972) 127 C.L.R. 1 at 7 (H.C.A.)—it was noted that "inherent jurisdiction, which, as the name indicates, requires no authorising provision".

[39] *NCC International AB v. Alliance Concrete Singapore Pte. Ltd.* [2008] 2 S.L.R.(R.) 565 (CA.).

would most certainly affect the conduct of the proceedings."[40] It is true that the evidence discovered pre-arbitration will be used during the arbitration itself but this is hardly the same as construing an order compelling such disclosure as an interference of the actual conduct of the arbitration itself. An order for pre-arbitration discovery (not unlike pre-action discovery) would only be for the purpose of assisting a potential claimant to determine whether he has a cause of action. This itself entails two self-checking mechanisms: Discovery would only be ordered in the clearest of circumstances, and the extent of the discovery order—or any interference with the conduct of the arbitration—would likely be extremely limited.

Second, the Assistant Registrar also held that "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".[41] This passage is difficult to understand. If it means that the substantive issue as to whether the claimant can make out his cause of action is a matter for the arbitral tribunal, this is not disputed but completely irrelevant to whether discovery should be ordered. If the passage means that the *IAA* somehow governs the extent to which courts may assist a potential claimant to determine whether he has a cause of action or frame his cause of action in arbitration, the *IAA* does not.

Finally, the Assistant Registrar observed that if there was a lacuna created by the inability to obtain court-ordered discovery prior to arbitration, this could be addressed by parties providing for this in their agreements.[42] Leaving aside the improbability of commercial parties ever negotiating pre-arbitration discovery clauses, this skirts the issue. Either the courts have the power to order such discovery or they do not. If they do, there is no need to specifically contract for it; parties are bound by the legal regime of the seat of the arbitration chosen. If, on the other hand, courts do not have the power to order such discovery, parties cannot contract to give the courts powers they do not have.

### C. *When, If at All, to Order 'Pre-Arbitral' Discovery?*

If, as we must, we take seriously the policy in favour of minimising curial intervention in the arbitral process, and only act in aid of arbitration, there will be few cases where it would be appropriate to grant discovery when the potential claim falls within the competence of an arbitral tribunal. But these are not unimaginable. The hypothetical posed in *Navigator Investment* (that of a potential claimant in arbitration being unable to identify the causes of action he may have, and having no recourse under the rules of arbitration) is itself a useful illustration of when discovery prior to and for the purpose of commencing arbitration proceedings may be necessary: perhaps evidence is about to be lost forever or there is a risk that it will be destroyed or tampered with so as to render it less probative.[43]

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[40] S*upra* note 1 at para. 23. The Assistant Registrar cited Pinsler, "Discovery", *supra* note 6 at 66.

[41] *Ibid.*

[42] *Supra* note 1 at para. 25. The Assistant Registrar cited Pinsler, "Discovery", *supra* note 6 at 74.

[43] See *Travelers Insurance*, *supra* note 19 at para. 27. Section 12A(4) of the *IAA* provides that in cases of urgency, the court may make such orders as may be necessary for the purpose of preserving evidence or assets. Although in most cases this power would suffice, there may be rare cases in which the deterioration of the evidence calls for its immediate disclosure so as to enable the potential claimant to have access

Much closer to the line is whether discovery should be granted in cases where the putative defendant's objection to discovery may be said to constitute an abuse of process or something akin to it—where, for example, by successfully resisting discovery, the respondent could potentially derail the commencement of arbitration. *Equinox* itself provides a useful illustration of this. The defendant, who resisted discovery, was concurrently under a contractual obligation to turn over the records and accounts to the plaintiff for their inspection. In other words, these records would have had to be disclosed eventually regardless of the outcome of the discovery application. By resisting the discovery request, the defendant managed to force the plaintiff into a longer arbitration—one set of proceedings in order to compel the disclosure of the records and accounts (whether pursuant to contract and/or a discovery process), and another to determine if there had been overcharging. Parties who may have no substantive defence often seek delay for strategic purposes, such as to encourage settlement. If, on the other hand, the records and accounts showed that the defendant did not overcharge, so much time and resources on the part of the parties as well as the arbitrators would have been incurred for no good reason. Of course, this suggestion is vulnerable to the objection that courts have no business delving into the merits of a claim in arbitration. There is no easy answer to this but it is submitted that perhaps the door should not be too firmly shut so that the court may address truly blatant abuses of process designed to sabotage the arbitral process.

To varying degrees, these situations show that permitting discovery prior to and for the purpose of commencing arbitration proceedings may not always encourage the circumvention of a contractually agreed mode of dispute resolution.[44] Denying discovery in some circumstances can have the perverse effect of allowing a party to bypass an arbitration agreement.

## IV. Conclusion

Courts can have a complementary role to play in facilitating the arbitration process.[45] The question is whether court-ordered discovery in favour of a party to an arbitration agreement prior to arbitration assists or interferes with the arbitral process. To date, the courts have drawn the line at what they have termed 'pre-action' as opposed to 'pre-arbitral' discovery. However, that distinction—intended to denote the difference between discovery in support of proceedings in court as opposed to arbitration—is merely semantic once it is recognised (as the Court of Appeal in *Navigator Investment* did) that a party to an arbitration agreement can in some cases seek discovery in court prior to and for the purpose of commencing a possible arbitration. To focus on the intention of the parties as the court did in *Equinox* does not appear to assist matters further. The test is not only difficult to apply in practice but would also rule out granting discovery in the very circumstance that the Court of Appeal in *Navigator Investment* considered appropriate to grant discovery. The framework proposed

to it. It is unclear whether s. 12A(4) of the *IAA* is wide enough to allow the court to grant discovery of evidence about to be lost or only to make orders for the preservation of such evidence.

[44] See *Equinox*, *supra* note 1 at para. 25. The Assistant Registrar cited Pinsler, "Discovery", *supra* note 6 at 74.

[45] See, for example, the observations in Nigel Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford: Oxford University Press, 2009) at paras. 7.01-7.04.

here is not only consistent with the policy of minimal curial intervention but also leaves parties with less room to manipulate the characterisation of their discovery request. In so far as whether the courts may retain a residual discretion to order discovery prior to arbitration even where the putative claim falls within the scope of arbitration, it is suggested that on balance it may prove useful to retain that discretion in circumstances where the discovery order will in fact encourage adherence to the arbitration agreement and the arbitration process.