Courts Have No Power To Order Pre-Arbitral Discovery

Introduction

In *Equinox Offshore Accommodation Ltd v Richshore Marine Supplies Pte Ltd* [2010] SGHC 122, the Singapore High Court was faced with the question of whether or not the courts have the power to grant an order for pre-arbitral discovery. It was held that pre-arbitral discovery is not within the jurisdiction of Singapore courts.

The power to grant pre-action discovery is contained in O24 r6(1) of the Rules of Court. However, Teo Guan Siew AR determined that this power was only intended to cover proceedings in court, and does not extend to pre-arbitral discovery. Furthermore, the exercise of the Court’s inherent jurisdiction for the grant of pre-arbitral discovery is not justified because there is no real need or compelling reason; there is already specific legislation in place to deal with court-ordered measures in aid of arbitration.

The Court emphasized that arbitration is a matter of contractual consent between the parties, and that they should be bound by the arbitration rules and procedures selected. It is thus for the parties to make the necessary provisions for a pre-arbitral process of discovery. Furthermore, the Court will seek not to affect the conduct of arbitral proceedings, and will thus avoid the grant of intrusive orders such as pre-arbitral discovery.

Brief Facts

(1) Equinox Offshore Accomodation Ltd (“the Plaintiff”) entered into an agreement (“the Agreement”) with Richshore Marine Supplies Pte Ltd (“the Defendant”).

(2) The Agreement contained an arbitration clause which stated that any dispute arising out of or in connection with the Agreement would be referred to arbitration in Singapore in accordance with the Singapore International Arbitration Centre (“SIAC”) Rules.

(3) The Plaintiff then sought discovery of the Defendant’s accounts and records pursuant to O24 r6(1) of the Rules of Court, on the basis that it had grounds to believe the Defendant had overcharged the Plaintiff in breach of the terms of the Agreement.
**Issue**

It was found that the Plaintiff was seeking *pre-arbitral* discovery rather than *pre-action* discovery because its cause of action clearly fell within the scope of the arbitration clause. Its purpose of seeking discovery was to determine whether it had a viable claim to commence arbitration proceedings.

The key issue to be determined was thus whether or not the Court had the power to grant an order for pre-arbitral discovery.

**Holding Of The High Court**

The Court concluded that it did not have the power to order pre-arbitral discovery. This power was neither available under O24 r6(1) nor under the Court’s inherent jurisdiction.

**O24 r6(1)**

O24 r6(1) allows the Court to grant “discovery of documents before the commencement of proceedings”. It was determined that the word “proceedings” here only refers to court proceedings, and does not cover arbitral proceedings.

(i) O24 r6(3) lays down further requirements for an application under O24 r6(1), and makes reference to “subsequent proceedings in court”. Its proximity and relation to O24 r6(1) suggests that O24 r6(1) is also concerned only with court proceedings.

(ii) The power to order discovery under O24 r6(1) is vested pursuant to the Supreme Court of Judicature Act. Since this Act concerns the courts, O24 r6(1) should also be read to apply to court proceedings only.

Therefore, O24 r6(1) does not grant the Court power to order pre-arbitral discovery.

**Inherent Jurisdiction**

The Plaintiff also contended that the Court could exercise its inherent jurisdiction under O92 r4 of the Rules of Court to order pre-arbitral discovery. Here, the Court laid out some guiding principles regarding the exercise of this inherent jurisdiction (see *Wee Soon Kim v Law Society of Singapore* [2001] 2 SLR(R) 821):

(i) It is insufficient to show an interest or desire that the Court exercise its inherent jurisdiction; a real “need” of sufficient gravity must be shown.

(ii) It is insufficient to show that no prejudice will be caused to the other party; strong and compelling reasons must exist.
(iii) In particular, if a statutory regime with detailed rules already exists to govern the procedure, it is unlikely that a strong “need” will arise.

The Plaintiff here failed to demonstrate that there was such a “need” for the exercise of the Court’s inherent jurisdiction.

(i) In this case, the proceedings were governed by the SIAC Rules as well as O69A of the Rules of Court, which already contain detailed rules regarding the procedural rights and reliefs connected to international arbitration. Neither source provides for the Court to make orders for pre-arbitral discovery.

(ii) In fact, recent amendments to the International Arbitration Act sought to curtail the Court’s power to make orders relating to the conduct of arbitral proceedings. This suggests that the Court’s inability to order pre-arbitral discovery is in line with Parliament’s policy of non-interference.

The Court considered that there might be a perceived “gap” in legislation, which fails to provide for pre-arbitral discovery. However, it was held that there was no need for the Court to intervene as primacy had to be accorded to the contractually chosen nature of arbitration.

(i) The parties clearly sought to avoid court proceedings by entering into an arbitration agreement. The other contracting party might thus be unjustly deprived of the benefits which form the basis of its agreement to arbitrate if the Court grants pre-arbitral discovery.

(ii) It is for the parties to make the necessary contractual provisions for any mechanism compelling the disclosure of documents. Since the parties chose arbitration, they should be bound by the arbitration rules and procedures selected.

Therefore, the Court would not exercise its inherent jurisdiction to grant an order for pre-arbitral discovery.

Concluding Words

At first blush, it may appear unfair that no legislative mechanism for the grant of pre-arbitral discovery exists. However, one must consider the fact that the entire point of choosing arbitration is to avoid the court process. Therefore, both Legislature and Judiciary have indicated that courts should have a policy of minimal interference with the arbitral process. This extends to pre-arbitral processes which will certainly affect the conduct of arbitral proceedings.

Parties to arbitration agreements should thus ensure that all procedural mechanisms not included in the relevant rules and legislation are adequately provided for in the agreement itself, or else risk being stranded without the aid of the Court when trying to enforce proceedings.
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