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Policy of Minimal Intervention Reaffirmed by Singapore High Court

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In two recent decisions, the Singapore High Court reaffirmed its stance on minimal intervention in arbitration proceedings. The two decisions were made against different sets of circumstances but the Court nonetheless abided by its policy of minimal intervention. This posting examines the two recent decisions, in particular, the approach taken by the High Court.

In *ALC v ALF* [2010] S.G.H.C. 231 ("*ALC v ALF*"), the High Court revoked the issue of a subpoena that had earlier been granted on an ex-parte basis (as is usually the case) on the grounds that the issue of the subpoena had been an abuse of process.

ALC v ALF is a case that fell within the domestic arbitration regime and was governed by the Arbitration Act (Cap 10) (the "Arbitration Act"). Nonetheless, the Court's observations would likely apply in the international context, given the similarities between the Arbitration Act and the legislation governing international arbitrations, namely the International Arbitration Act (Cap 143A) (the "International Arbitration Act").

The issue of a subpoena was sought by the defendant in *ALC v ALF*, this following immediately after the arbitrator's decision to deny, after a full hearing, the defendant's request that the plaintiff's witnesses provide sworn testimony attesting to the adequacy of the discovery. The arbitrator did reserve the parties' rights to present further submissions if it should turn out that discovery was inadequate.

Notwithstanding the arbitrator's ruling, the defendant proceeded to apply for a subpoena in the Singapore High Court for the same purpose – to require an employee of the plaintiff to attend the hearing to give evidence regarding the adequacy of the plaintiff's discovery.

In its decision to revoke the subpoena, the Court noted that the parties had agreed to a procedure where only the witnesses agreed to by the arbitrator would attend the hearing. The court considered the terms of the procedural order issued by the arbitrator, and found that the parties had clearly agreed that the arbitrator would have final say as to the calling of witnesses to the hearing.

The Court ruled that the defendant ought to have sought direction from the arbitrator before calling the plaintiff's employee as a witness. The Court held that the defendant's attempt to circumvent this arrangement was premature, improper and constituted an abuse of process.

ALC v ALF reaffirms the prior decisions of the Supreme Court that upheld the policy of minimal

curial intervention in the arbitral process. The Court specifically held that recourse should be had to the parties' contractual arrangement and agreement on procedures before seeking curial intervention.

The judgment does leave open for consideration the position where there is no applicable contractual arrangement or agreement on procedures – in such an event, should a party still seek the consent of the arbitral tribunal? In some cases, rules and/or legislation answer the point – *see e.g.*, Article 27 of the UNCITRAL Model Law and section 43(2) of the English Arbitration Act 1996. Under the Arbitration Act (or indeed, the International Arbitration Act), the position remains undecided. Section 30 of Arbitration Act (and section 13 of the International Arbitration Act) does not expressly provide that an arbitral tribunal should be consulted before applying to court for a subpoena.

Whilst the judgment in *ALC v ALF* is undoubtedly correct on the facts, one questions whether the Court would have ruled in similar fashion had there been no agreement on directions relating to the calling of witnesses. Would the Court still have abided by the policy of minimal intervention?

The second decision in this posting concerns the powers of the Courts to order pre-arbitral discovery. In *Equinox Offshore Accommodation Ltd v Richshore Marine Supplies Pte Ltd* [2010] S.G.H.C 122 ("*Equinox*"), the Singapore High Court denied an application for pre-arbitral discovery.

The plaintiffs in *Equinox* had sought pre-arbitral discovery from the defendant to ascertain the viability of commencing arbitration proceedings against the defendant for overcharging the plaintiff under a commission arrangement. This discovery was sought pursuant to a provision in the agreement that allowed the plaintiff to inspect the records of the defendant. The self-same agreement had an arbitration clause.

The Court ruled that legislation did not confer on the Courts the power to order pre-arbitral discovery. Neither did the Court have inherent jurisdiction to grant such discovery. The Court again placed emphasis on minimal interference – if parties had chosen arbitration as their mode of dispute resolution, the entire conduct of the arbitration proceedings should be left to the arbitral tribunal. This ought to extend to pre-arbitral discovery as well.

The decision itself raises interesting questions. Among other issues, it would follow from the decision that the Courts do not have the power to grant pre-arbitral discovery against third parties for the purposes of ultimately commencing arbitration proceedings between the contracting parties – this may be a matter that needs to be addressed by agreement (if not also by legislation).

In fact, the Court in both *ALC v ALF* and *Equinox* gave primacy to the contractual agreements and arrangements between the parties. The Court in Equinox echoed the sentiment in *ALC v ALF* and observed that it "surely is for the parties to make the necessary contractual provision for such a pre-arbitral process of discovery".

In conclusion, these recent decisions highlight the Singapore Courts' careful refrain from undue interference in the arbitral process, and ought to be welcome in this regard. There is now greater clarity in the scope of the Courts' powers in providing interim relief in aid of arbitration and parties should consider this when drafting their arbitration agreements. A failure to do so could leave parties without a proper recourse, given the Courts' approach to applications for interim relief.

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