ALC *v* ALF
[2010] SGHC 231

Case Number	: Originating Summons No 747 of 2010/W
Decision Date	: 11 August 2010
Tribunal/Court	: High Court
Coram	: Crystal Tan Huiling AR
Counsel Name(s)	: Andrew Yeo Khirn Hin and Loong Tse Chuan (Allen & Gledhill LLP) for the plaintiff; Mohan Pillay and Daniel Tay (MPillay) for the defendant.
Parties	: ALC — ALF

Civil Procedure

Arbitration

Evidence

11 August 2010 Judgment reserved.

Crystal Tan Huiling AR:

Introduction

1 This is an application by the plaintiff to revoke Subpoena No. 600018 of 2010 dated 16 July 2010("the Subpoena") issued against the plaintiff's employee, Mr [XY]. As there does not appear to be any locally reported authorities dealing with the law of subpoenas issued in support of arbitration proceedings, I was of the view that it would be useful if I released my grounds on this matter. The application was heard before me on 6 August 2010 but as the first tranche of the arbitration hearing has been scheduled to begin on 16 August 2010, these grounds were written and made available to parties on an urgent basis. This case raises interesting issues on the interplay between competing evidentiary considerations and the role of the court in arbitration proceedings.

Background facts

2 The factual matrix can be stated within a reasonably brief compass.

3 The plaintiff is a statutory body while the defendant is a Singapore company carrying on the business of *inter alia*, mixed construction activities.

4 On or about 1 October 2004, the parties entered into a contract under which the plaintiff engaged the defendant as the main contractor for a particular project ("the Contract"). Disputes arose subsequently between the parties under the Contract.

5 Clause 71 of the Conditions of Contract provides for the resolution of disputes to be determined by an arbitrator in accordance with the Arbitration Rules of the Singapore International Arbitration Centre. On or around 19 March 2009, the defendant commenced arbitration proceedings ("the Arbitration") against the plaintiff by issuing a Notice of Arbitration. A sole arbitrator ("the Arbitrator") was appointed in the case. On or around 19 June 2009, the defendant submitted its Statement of

Case and on or around 29 July 2009, the plaintiff submitted its Statement of Defence and Counterclaim.

6 Following two procedural hearings on 18 August 2009 and 20 April 2010, the procedure for the Arbitration was decided on with directions made by the Arbitrator, with the consent of both parties. These directions were set out in Procedural Order No. 1 [note: 1]. Paragraph 4.1(a) of Procedural Order No. 1 further states that the parties and the Arbitrator shall use *inter alia*, the International Bar Association ("IBA") Rules on the Taking of Evidence in International Commercial Arbitration (1 June 1999 Edition) [note: 2] ("IBA Rules") as a guideline on procedural matters. The Procedural Order provides that:

> (a) The parties were to provide to the other all documents on which they rely to support their respective cases by 16 December 2009,
>
> (b) If either party was not satisfied with the discovery provided by the other party, the dissatisfied party could submit to the Arbitrator, by 18 February 2010, a Request to Produce Documents to obtain additional discovery from the other party.

7 On 16 December 2009, the parties exchanged discovery. Both parties subsequently submitted Requests to Produce Documents to the other. After a contested hearing before the Arbitrator on 20 April 2010, the Arbitrator ordered both the plaintiff and the defendant to provide further discovery ("the Discovery Order") [note: 3].

8 On 21 May 2010, 4 June 2010 and 6 July 2010, the plaintiff complied with the Discovery Order and submitted the Third, Fourth and Fifth Supplemental List of Documents respectively. However, the defendant was dissatisfied with the disclosure produced by the plaintiff and wrote to the Arbitrator in a lengthy 82-page letter on 7 June 2010 [note: 4], questioning the adequacy of the plaintiff's disclosure in compliance with the Discovery Order. The defendant implored the Arbitrator to direct the plaintiff to procure sworn statements from *inter alia*, Mr [[XY]]. On 10 June 2010, the plaintiff's solicitors responded to the defendant's request, declining to do so.

9 On 11 June 2010, the Arbitrator rejected the defendant's request stating in plain terms:

> I do not consider it appropriate to require sworn testimony regarding these issues. Should it later emerge that the [plaintiff] has failed to comply with my order, I will entertain submissions regarding the consequences of such non compliance, including submissions that it would be appropriate to draw adverse inferences in the circumstances.

10 No further application was made by the defendant to the Arbitrator in respect of the adequacy of the plaintiff's disclosure.

The Subpoena

11 More than a month after the Arbitrator's ruling on the defendant's request for sworn testimony in relation to the adequacy of the plaintiff's disclosure, the defendant submitted a request to this Court for the issuance of the Subpoena against Mr [XY] on 16 July 2010. The Subpoena requires Mr [XY] to attend the arbitration hearing from 16 to 27 August 2010 to give evidence on matters relating to the *adequacy* of the plaintiff's disclosure. The basis of the Subpoena is that Mr [XY] was named in an order for specific discovery made against the plaintiff. I should point out at this juncture that first, no evidence has been sought by the defendant from Mr [XY] in respect of the substantive

issues in dispute between the parties; and second, the evidence sought from Mr [XY] was the subject of the defendant's request to the Arbitrator in their letter of 7 June 2010, which the Arbitrator has responded to and flatly denied.

12 On 22 July 2010, the plaintiff filed an urgent application, *viz*, Originating Summons No 747 of 2010 to set aside the Subpoena.

Law on Subpoenas

13 Order 38, rule 14 of the Rules of Court (Cap 332, r 5, 2006 Rev Ed) states that:

(1) A subpoena must be in Form 67, 68 or 69, whichever is appropriate.

(2) Issue of a subpoena takes place upon its being sealed by an officer of the Registry.

(3) Before a subpoena is issued, a Request in Form 70 for the issue of the subpoena must be filed in the Registry; and the Request must contain the name and address of the party issuing the subpoena, if he is acting in person, or the name of the firm and business address of that party's solicitor.

(4) The Registrar may, in any case, revoke a subpoena upon application by any person or on his own motion.

(5) Any party who is dissatisfied with any decision of the Registrar made under this Rule may apply to a Judge of the High Court or a District Judge, as the case may be, for a review of that decision.

(6) An application under this Rule shall be made by summons supported by an affidavit, within 14 days of that decision.

14 A few preliminary comments on the issuance of a subpoena bear mention. The issuance of a subpoena takes place upon the *administrative* act of the subpoena being sealed by an officer of the Registry (O 38 r 14(2)). Personal service of the subpoena is necessary (O 38 r 18(1)) though substituted service may be ordered. The subpoena must be served within 12 weeks of its issue and within a reasonable time before the attendance of the witness is required.

15 Two separate legal regimes govern the conduct of arbitration in Singapore. Where the *situs* of arbitration is Singapore, the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Arbitration Act") or the International Arbitration Act (Cap 143A, 2002 Rev Ed) will regulate the conduct of the arbitral proceedings. It was undisputed between both parties that this was a domestic arbitration for which they had agreed under Clause 72 of the Conditions of Contract that the provisions of the Arbitration Act would apply. Pursuant to Section 30 of the Arbitration Act, subpoenas may be issued to compel the attendance of a witness before an arbitral tribunal:

(1) Any party to an arbitration agreement may take out a subpoena to testify or a subpoena to produce documents.

(2) The Court may order that a subpoena to testify or a subpoena to produce documents shall be issued to compel the attendance before an arbitral tribunal of a witness wherever he may be within Singapore.

(3) The Court may also issue an order under section 38 of the Prisons Act (Cap 247) to bring up a prisoner for examination before an arbitral tribunal.

(4) No person shall be compelled under any such subpoena to produce any document which he could not be compelled to produce on the trial of an action.

16 This provides the arbitral tribunal with the High Court's supportive powers so as to facilitate the arbitral proceedings. Order 69 rule 12 of the Rules of Court further makes it clear that the procedure for issuance of a subpoena in support of arbitration proceedings is governed by Order 38, rules 14 to 23 of the Rules of Court:

> Order 38, Rules 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 shall apply, with the necessary modifications, in relation to the issue of a subpoena under section 30 of the [Arbitration] Act as they apply in relation to proceedings in the Court.

17 Parenthetically, the term 'subpoena' is derived from the Middle English *suppena* and the Latin phrase *sub poena* meaning "under penalty". Though the issuance of a subpoena may appear to be administrative in nature, the subpoena process *per se* is not to be regarded lightly as it is the mechanism by which witnesses are made to attend a trial for the purposes of giving evidence (*subpoena ad testificandum*) and/or producing documents (*subpoena duces tecum*), which could inevitably lend a very different complexion to either party's case. The coercive force of its power derives from the very consequences of non-compliance.

18 Since the advent of the Rules of Court in 1996, the rules have expressly empowered the court to revoke a subpoena on its own motion or on the application of any other person. It should be pointed out that while there may conceivably be numerous objections to the subpoena of a witness, the cases in this area can be broadly subsumed under two categories: *width* and *improper purpose*. Turning to the first category of *width*, a possible objection to a subpoena is that it is too wide if it imposes an unduly onerous obligation upon a person to collect and produce documents which have little or no relevance to the proceedings at hand: *Commissioner for Railways v Small* (1938) 38 SR NSW) 564("*Commissioner for Railways v Small*"). A subpoena may be regarded as too wide if compliance with its wording would be oppressive: *Senior v Holdsworth* [1976] QB 23. Where a subpoena is directed to a non-party, it can be set aside if it is insufficiently precise and requires the non-party to make a judgment as to which documents relate to the issues between the parties: *National Employers Mutual General Association Ltd v Waind & Hill* [1978] 1 NSWLR 377.

19 On the other hand, the more common form of objection to a subpoena is that it constitutes an *abuse of process* or where the subpoena has been issued for a collateral purpose such as where it seeks to obtain discovery or further discovery against a party: *Finnie v Dalglish* [1982] 1 NSWLR 400. Other categories of improper purposes include the following: where a subpoena seeks to obtain

discovery against a non-party or is used for the purposes of a fishing expedition*: Commissioner for Railways v Small;* where to require the attendance of a witness would be oppressive: *Raymond v Tapson* (1882) LR 22 ChD 430 and *Senior v Holdsworth*, *ex parte Independent Television News* [1976] QB 23; where it is not issued for the purpose of obtaining relevant evidence and the person to whom it was addressed is unable to give relevant evidence: *R v Baines* [1909] 1 KB 258 or where there is an alternative statutory procedure for the production of documents: *R v Hurle-Hobbs, ex parte Simmons* [1945] 1 KB 165. As Professor Jeffrey Pinsler, SC observes in *Singapore Court Practice 2009*(LexisNexis, 2009) at para 38/14-16/8:

> As a matter of general practice, the courts have only questioned the propriety of a subpoena on the basis of abuse of process. Although the court has always had the inherent power to set aside a subpoena in these circumstances, the exercise of this jurisdiction, which often depended on whether the opposing party challenged the subpoena, has been rare. As the court has an unfettered discretion in the matter, it is likely to exercise greater scrutiny over the use of the subpoena process. *It may take a broader view of what constitutes misuse of the subpoena process so that the power of revocation will not only be exercised where the process has been used for an ulterior purpose, but where the proposed witness is not in a position to offer any, or any significant, evidence in the case*…The improper use of the subpoena process…would incur unnecessary costs, unjustifiably involve the use of additional trial time, and require of the witness an unwarranted sacrifice of his time and commitment to the case. In this respect, there is authority to the effect that the court may set aside a subpoena if a witness would be oppressed as a result of giving the evidence required.
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> [emphasis added]

20 The threshold for satisfying the court that its discretion should be invoked in favour of setting aside a subpoena is therefore, not an easily surmountable one. In *Ong Jane Rebecca v Lim Lie Hoa and Ors* [2003] 1 SLR 457("*Ong Jane Rebecca*"), the High Court considered an application to set aside a *subpoena ad testifcandum* and a *subpoena duces tecum* which had been served on a partner of an accounting firm in charge of the firm's work in compiling an account of all the assets in an estate. The subpoenas were issued in the context of an inquiry into the estate. The partner applied to set aside the subpoenas on the basis that it was not necessary for disposing of the cause or matter or for saving costs and asserted that he was no longer in charge of the manner and the file had been transferred to another accounting firm. As a result, he did not have any relevant documents. Declining to set aside the subpoenas, Choo Han Teck JC (as his Honour then was) opined that:

> The subpoena should obviously not be used frivolously or in a scandalous manner, that is to say, to cause to be issued indiscriminately without any basis or reason so as to embarrass or inconvenience the person subpoenaed. Such occasions have been extremely rare, in my experience…The ultimate value of the witness is not the gauge to determine whether he ought to be subpoenaed...the subpoenas were not unreasonably issued. It is open to [the applicant] to testify when called, that he has no further or other documents in his possession, and be cross-examined on his testimony. These are all matters rightfully in the domain of the judge at the substantive hearing.

21 Moving swiftly to consider a more recent case in this area, in *Basil Anthony Herman v Premier Security Co-operative Ltd and Ors* [2010] SGCA 15("*Basil*"), five witnesses refused to produce relevant documents and/or swear or affirm affidavits. The appellant subpoenaed all five witnesses but on the first day of trial, the respondents sought to set aside the subpoenas on the basis that they were irrelevant, oppressive and/or an abuse of process. The trial judge found that no satisfactory reason could be given to justify the issuance of subpoenas and ordered that it be set aside. On

appeal, the Court of Appeal held that the subpoenas ought not to have been set aside and ordered a new trial on the basis that the evidence of the five witnesses had been improperly rejected and the improperly rejected evidence would, if admitted, have a substantial and realistic prospect of making a meaningful difference to the outcome of the case. Delivering the judgment of the Court of Appeal, V K Rajah JA emphatically stated (at [24] to [26]):

> The right of a litigant to bring relevant evidence before the court
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> 24 At this juncture, we would emphasise that every litigant has a general right to bring all evidence *relevant* to his or her case to the attention of the court. This general right is so fundamental that it requires no authority to be cited in support of it; in fact, to say that the right derives from some positive decision or rule is to understate its constitutive importance to the adversarial approach to fact-finding. The importance of the right is reflected in the fact that a litigant may pray in aid the machinery of the court to compel, on the pain of contempt, all persons who are in a position to give relevant evidence, to come forward and give it.
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> 25 The general right is, of course, subject to specific limits. For present purposes, the following limits are germane. A litigant only has the right to adduce *relevant* evidence, as defined by the Evidence Act (Cap 97, 1997 Rev Ed) and other applicable rules; irrelevant evidence is inadmissible and will not be considered by the court. The adduction of relevant evidence must, as far as practicable, take place in accordance with the rules of procedure whose purpose is to ensure the *fair*, economical, swift and orderly resolution of a dispute. Finally, a litigant is prohibited from manipulating the court's machinery to further his ulterior or collateral motives in an abusive or oppressive manner.
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> 26 In striking the proper balance between the general right and the specific limits, a trial judge must not only be guided by the applicable rules and decisions, but must look beyond the mechanical application of these rules and decisions, and carefully assess the interests at stake in every case to ensure that a *fair* outcome is reached through the application of *fair* processes. It should always be borne in mind that grave consequences might flow from the wrongful exclusion of evidence (such as by shutting out a witness from testifying or preventing cross-examination). In cases where the relevance of evidence sought to be adduced is unclear, or even doubtful, we are of the view that it is usually both prudent and just to err in favour of admission rather than exclusion. With specific regard to the calling of witnesses, we would reiterate what was said in *Auto Clean 'N' Shine Services (a firm) v Eastern Publishing Associates Pte Ltd*[1997] 2 SLR(R) 427 (at [17]), where this court allowed an appeal to introduce eleven new witnesses of fact after the summons for directions stage:
>
>> [A] balance should be struck between the need to comply with the rules and the parties' right to call witnesses whom they deem necessary to establish their case. It may well be that the additional evidence to be adduced by the parties may assist in illuminating the issues before the court or result in the expeditious disposal of the proceedings. If, however, it really turns out at the trial that the evidence adduced is unnecessary, irrelevant or vexatious, the trial judge is in full control and is in a position to deal with the party adducing such evidence in an appropriate way, such as by disallowing the evidence which is being elicited from the witness and/or by an order as to costs. *It must always be borne in mind that the duty of the court is to examine all the evidence put forward by the parties which is material and relevant to the dispute between the parties and not to shut out potentially material and relevant evidence by a strict adherence to the rules of civil procedure*.
>>
>> [emphasis in original]

22 These observations in *Basil* and *Ong Jane Rebecca* highlight the proposition that in considering whether to set aside a subpoena, the court looks at a whole host of competing considerations in each case, such as the evidentiary and procedural consequences of excluding a witness from providing his evidence *vis-à-vis* the relevance and/or materiality of such evidence and the difference it could make to the eventual outcome of a case. In my view, however, the question in the present case turns on whether these considerations operate differently in the context of the present case, where the subpoena is issued for a witness to attend before an *arbitral tribunal*.

The plaintiff's submissions

23 Counsel for the plaintiff argued vigorously that the Subpoena should be set aside as it was an abuse of process having regard to *first*, the defendant's alleged failure to comply with the agreed procedure for the conduct of the Arbitration [note: 5]. Instead of seeking a remedy from the Arbitrator, the defendant applied to the court for orders relating to such evidence. *Second*, counsel for the plaintiff further averred that the Arbitrator had already declined to make any order to have the plaintiff's employees, including Mr [XY], to give sworn testimony regarding the adequacy of the plaintiff's disclosure. As such, by obtaining the Subpoena from court, the defendant had intruded on the jurisdiction of the Arbitrator [note: 6]. *Third*, the Subpoena sought evidence on matters *outside* the substantive issues in dispute between the parties as it sought testimony regarding the adequacy of disclosure from Mr [XY], who was not even a member of the project team for the Contract. *Fourth*, the materiality of the evidence sought from Mr [XY] was unclear [note: 7].

The defendant's submissions

24 Counsel for the defendant submitted that Mr [XY] was being called as a witness "to give evidence in support of, and to establish its case for adverse inferences to be drawn against the plaintiff in arbitral proceedings [note: 8]". In response to the plaintiff's four-pronged attack, he contended that *first*, this was not the proper forum to determine the materiality and/or relevance of the evidence of Mr [XY] and was a matter for the Arbitrator to determine at the arbitral proceedings [note: 9]. In the absence of any contrary evidence, counsel for the defendant argued that one could conclude that Mr [XY] had no issues appearing as a witness to give evidence on behalf of the defendant in the arbitral proceedings. *Second*, counsel for the defendant further averred that there was no basis to the plaintiff's allegation that the Subpoena was improper and that the Arbitrator was not prepared to receive and hear evidence, including sworn testimony, on issues relating to the plaintiff's compliance with the discovery order [note: 10].

My decision

Terms of Procedural Order No. 1, IBA Rules and Correspondence between the parties and the Arbitrator

25 Counsel for the plaintiff drew my attention to the terms of Procedural Order No. 1 dated 19 August 2009, agreed on between the parties with the Arbitrator as well as the IBA Rules which both parties agreed to use as a guideline on procedural matters (Part 4.1(a) of Procedural Order No. 1). Casting an eye over the terms of Procedural Order No 1, it became immediately apparent that parties had in fact, applied their minds to the calling of factual witnesses and the presentation of such evidence. It is worth setting out Parts 12.4, 12.5 and 13.4 of the Procedural Order No 1 in full:

> 12.4 Any person may present evidence as a witness, including a party or a party's officer,

employee or other representative.

> 12.5 The Arbitrator may, at any time before the arbitration is concluded, order any party to provide or to use its best efforts to provide, the appearance for testimony at a Hearing of any person, including one whose testimony has not been offered.
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> …
>
> 13.4 Witnesses or experts may only appear at the Hearing if the respective procedures contained in Parts…12 have been complied with, unless the consent of the Arbitrator is obtained.

26 Further, the parameters of the questions that could be put to a witness were also within the purview of the Arbitrator, as provided for under Part 13.10 of the Procedural Order No. 1:

> 13.10 The Arbitrator may limit or exclude any questions to, answers by or appearance of an expert or witness, if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome or duplicative.

27 Both parties were further at liberty to apply to the Arbitrator at any time, giving proper notice to the opposing party, to vary or supplement the orders (Part 23.4). Turning next to the IBA Rules, these are guidelines promulgated to assist parties and arbitrators and provide for some form of uniformity amongst international arbitral tribunals [note: 11] :

> in order to enable them to conduct the evidence phase of international arbitration proceedings in an efficient and economical manner. The Rules provide mechanisms for the presentation of documents, witnesses of fact, expert witnesses and inspections, as well as for the conduct of evidentiary hearings.

28 *Prima facie*, it is clear that several of the terms of the Procedural Order are imported from the tenor of the IBA Rules. Article 2 of the IBA Rules provides that where parties or the Arbitral Tribunal agreed to apply the IBA Rules (such as in the present case), the Rules shall govern the taking of evidence. This would extend to the Arbitral Tribunal's determination of the "admissibility, relevance, materiality and weight of evidence" (Article 9.1). Much in the same vein as Part 13.10 of the Procedural Order No. 1, the IBA Rules also reserves complete control over the hearing in the hands of the Arbitral Tribunal who may limit or exclude *inter alia*, the appearance of a witness if it considers such appearance to be irrelevant, immaterial, burdensome or duplicative. What happens in a situation when one party wishes to adduce live evidence from a witness who is not prepared to attend voluntarily at a hearing? In such a situation, Articles 4.10 and 4.11 of the IBA Rules contemplate the following:

> 4.10 If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ***ask it to take whatever steps are legally available to obtain the testimony of that person*** . The Party shall ***identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant and material to the outcome of the case. The Arbitral Tribunal shall decide on this request and shall take the necessary steps if in its discretion it determines that the testimony of that witness would be relevant and material*** .
>
> 4.11 The Arbitral Tribunal may, at any time before the arbitration is concluded, order any Party to provide, or to use its best efforts to provide, the appearance for testimony at an Evidentiary

Hearing of any person, including one whose testimony has not yet been offered.

[emphasis added in bold]

29 Two observations are pertinent in this respect: first, both the terms of Procedural Order No. 1 and the IBA Rules expressly reserve the decision as to what *legal* steps a party should take in the event it wishes to adduce evidence from a person who will not appear voluntarily at its request *to the Arbitrator*; and second, the party should write *first* to the Arbitrator, enclosing the grounds on which they seek such a witness's testimony and explain its relevance to the substantive case.

30 As mentioned previously (see [8]),while the defendant had written to the Arbitrator on 7 June 2010 regarding the *adequacy* of disclosure produced by the plaintiff, nowhere in the 82-page letter does the defendant mention that they intend to call Mr [XY] as a witness. On the contrary, the specific content of their request to the Arbitrator bears quoting *in extenso*:

> We refer to the Arbitrator's Communication No. 62 dated 22 April 2010 enclosing the Arbitrator's direction to the [plaintiff] to produce documents falling within the categories set out in [the Discovery Order] and to the [plaintiff's] Communication No. 60 dated 21 May 2010 enclosing the [plaintiff's]Third Supplemental List of Documents submitted in connection with the Discovery Order.
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> …
>
> By a letter dated 2 June 2010, we wrote to the [plaintiff's solicitors] to express [the defendant's] concerns. As an assurance that the [plaintiff] has complied with the Discovery Order, *we requested sworn statements from Mr [[XY]]*, [EF] and [GH]on behalf of the [plaintiff] to confirm that [the plaintiff] has provided full and proper disclosure of all documents to be produced in compliance with the Discovery Order as they have been named in the Discovery Order. Whilst [the plaintiff's solicitors] responded to our letter on 4 June 2010, no such confirmation was forthcoming.
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> …
>
> In view of the seriousness of this matter, the [defendant] respectfully seeks the following directions from the Arbitrator:-
>
> (b) *if the [plaintiff] takes the position that it has complied fully with the Discovery Order, the [plaintiff] shall procure sworn statements by the following individuals to confirm this:-*
>
> (i) Mr [[XY]];
>
> (ii) [EF]; and
>
> (iii) [GH].
>
> [emphasis added]

31 The plaintiff's response as at 10 June 2010 [note: 12] was consistent with their oral submissions before me:

> The assurances sought by the [defendant], in the form of sworn statements, are not

contemplated in Procedural Order No.1, the Discovery Order or the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The grounds relied upon by the [defendant] are wholly inadequate for such an extraordinary request. In this letter, we will show that the [defendant's] concerns are founded on conjecture rather than evidence.

32 Of critical importance was the reply by the Arbitrator [note: 13], which both parties drew my attention to, though for different purposes:

I refer to [the letters from the plaintiff and the defendant.]

The [defendant] raises questions regarding the adequacy of disclosure by the [plaintiff] of documents the subject of my order in respect of matters of disputed disclosure and seeks sworn testimony regarding the areas of alleged non compliance.

The [plaintiff] says it has made full disclosure.

I do not consider it appropriate to require sworn testimony regarding these issues. Should it later emerge that the [plaintiff] has failed to comply with my order, I will entertain submissions regarding the consequences of such non compliance, including submissions that it would be appropriate to draw adverse inferences in the circumstances.

[emphasis added]

33 Counsel for the plaintiff opined that the Arbitrator declined the defendant's request for sworn statements while counsel for the defendant asserted that the Arbitrator's comments should be viewed in the proper context and that he had clearly indicated his willingness to receive and hear evidence, including sworn testimony, on issues relating to the plaintiff's compliance with the Discovery Order. At the risk of stating the obvious, it is clear that the Arbitrator's reply can only be construed in the following manner: *first*, the defendant did not write to the Arbitrator informing him of their intention to subpoena Mr [XY] as a witness – they only wrote to him asking him to decide on whether it would be appropriate to order Mr [XY] to provide sworn statements as to the *adequacy* of disclosure. *Second*, the Arbitrator in his reply, expressly reserved his right to decide at a later juncture of the proceedings, whether he would require sworn testimony regarding the adequacy of disclosure by Mr [XY].

34 In my view, from the aforementioned express provisions under Procedural Order No. 1, IBA Rules and the correspondence between both parties and the Arbitrator, it was clear that parties had *contractually* agreed on the procedure to be adopted with regard to the calling of witnesses. The defendant could have applied directly to the Arbitrator, indicating their intention to subpoena Mr [XY] as a witness at the Arbitration and obtain his instructions as to how to proceed. These were the agreed procedural terms by which both parties entered into in good faith and to circumvent and sidestep these directions seemed to obviate the very purpose of entering into such detailed directions with the Arbitrator in the first place.

The Arbitrator as master of procedure

35 In *Anwar Siraj v Ting Kang Chung* [2003] 3 SLR(R) 287(cited with approval in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86 at [60]("*Soh Beng Tee*")) involving an application to remove an arbitrator, Justice Tay Yong Kwang observed of the role of the arbitrator (at [41] and [42]):

> The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice.
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> …
>
> [T]he Court's supervisory role is to be exercised with a light hand and that arbitrators' discretionary powers should be circumscribed only by the law and by the parties' agreement.

36 The arbitrator's powers consist of those that are implied by virtue of his office as arbitrator and those that have been conferred on him by the arbitration agreement and the relevant arbitration legislation: *Halsbury's Laws of Singapore* vol 2(LexisNexis, 2003 Reissue, 2003) at para 20.069. He maintains control not just over the substance of the dispute between the parties but is also master of the procedure governing the arbitration, particularly where parties *contractually* confer on the arbitrator the power to make an order that a witness provides testimony.

Respect for party autonomy

37 The judicial policy of minimal interference in arbitration is well rooted in Singapore jurisprudence, spurred on in part, by the recognition of arbitration as an efficient and useful alternative dispute resolution mechanism to settle commercial disputes: *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213; and the need to respect party autonomy in deciding both the procedural rules as well as substantive law to govern a contract. In *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25("*Navigator Investment*"), the Court of Appeal reaffirmed its commitment that the courts will "endeavour to do their level best to facilitate and promote arbitration between commercial parties whenever possible" (at [61]). Moreover, as the Court of Appeal noted in *Soh Beng Tee* at [65]:

> [H]aving opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. *It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned*.
>
> [emphasis added]

38 As Mr Leslie Chew, SC remarks in *Introduction to the Law and Practice of Arbitration in Singapore* (LexisNexis, 2010) at p 37:

> First and foremost, the agreement by the parties to adopt arbitration as the means of resolving their dispute is *the ultimate in the exercise of party autonomy*. By choosing arbitration as the mode for the resolution of their dispute, parties who have opted for arbitration take the dispute out of the primary control of the national court. To be sure, the national courts retain supervisory control. However, *the choice in favour of arbitration means that the matter is to be resolved outside the precincts of the courthouse as it were*.
>
> Next, and just as important, is the fact and reality that by adopting arbitration, parties to a dispute will then have the right to choose their 'judges'. They choose who their arbitrators will be. By contrast, forum shopping is frequently frowned upon…

[P]arties to an arbitration pursuant to an arbitration agreement or clause, have the right to choose what rules of procedure should govern their arbitral proceedings. This is an equally crucial exercise in party autonomy.

[emphasis added]

39 In my view, this respect for party autonomy extends to matters that could be dealt with by the arbitrator as master of the procedure *prior* to commencement of the arbitral hearing where parties had *contractually* agreed on procedural directions. In *Woh Hup Pte Ltd v Lian Teck Construction Pte Ltd* [2005] SGCA 26, the Court of Appeal considered an application for pre-arbitral discovery and observed that "any matter submitted to arbitration, should, in general, and certainly wherever possible, be dealt with by the arbitral tribunal"(at [36]). To invoke the assistance of the courts would run "contrary to the spirit and scheme of arbitration" (at [36]). Counsel for the defendant pointed repeatedly to the Arbitrator's response of 11 June 2010 which stated that "should it later emerge that the [plaintiff] has failed to comply with [his] order, [he] will entertain submissions regarding the consequences of such non-compliance, including submissions that it would be appropriate to draw adverse inferences in the circumstances"(see [9]). He averred that this suggested that the Arbitrator was prepared to receive and hear evidence, including sworn testimony, on issues relating to the plaintiff's compliance with the Discovery Order. With respect, I must disagree with counsel on this point. As I have indicated (see [33]), the Arbitrator has stated in no less than plain terms that *he* will entertain submissions on whether the plaintiff has failed to comply with the Discovery Order, including whether it would be appropriate to draw adverse inferences but at a later stage. He did not go on to make directions that the defendant applies for a subpoena in court, prior to commencement of the Arbitration.

40 In my view therefore, the defendant ought to have sought directions from the Arbitrator on calling Mr [XY] as a witness in the Arbitration prior to making the application to the court, given that the terms of Procedural Order No. 1 provided that this was one of the live issues well within the purview of the Arbitrator's control. By sidestepping this arrangement, this seemed to strike at the very heart of the powers of the arbitral tribunal, as agreed upon by the parties.

Whether there has been an abuse of process in the present case

41 Counsel for the plaintiff argued that by obtaining the subpoena from the court instead of applying to the Arbitrator for an order, the defendant abused the court's processes by circumventing the jurisdiction of the Arbitrator. To buttress his point, counsel for the plaintiff pointed out that the defendant's act had contravened the express agreed procedural directions entered into by the parties with the Arbitrator and that in all likelihood, the real reason for the defendant turning to the courts rather than the Arbitrator was because their request would likely be turned down by the latter. When I pressed counsel for the defendant on the reason for seeking an order from this court rather than approaching the Arbitrator, his cautious response was that Section 30 of the Arbitration Act permitted a party to *elect* between the two options of either applying to the court or seeking the Arbitrator's opinion. He averred that it was not necessary for one party to exhaust the option of applying to the Arbitrator first before knocking on the doors of the court and there was nothing in the Arbitration Act or Procedural Order No. 1 to suggest that the defendant had to exhaust his remedies before applying to court.

Observations on Section 30 of the Arbitration Act

42 At first blush, Section 30 of the Arbitration Act provides that any party to an arbitration agreement may apply for a subpoena in this court. The power of the High Court to issue subpoenas to

compel the attendance of witnesses in arbitration proceedings to give oral evidence or produce documents has been retained from the former Arbitration Act (Cap 10, 1985 Rev Ed). A preliminary observation to make is that Section 30 stops short of carving out specifically *when* a party should seek the intervention of the courts. To ask a rhetorical question of the plaintiff– does it mean that in every situation, parties could apply to court for a subpoena to compel the attendance of witnesses at an arbitration hearing *only* after they approached the arbitrator first? I queried counsel for the plaintiff for circumstances under which Section 30 of the Arbitration Act may be invoked. He submitted that the first situation would be where parties had *not* provided for express procedural directions relating to the calling of witnesses; and second, where there were third parties involved over whom the arbitral tribunal had no jurisdiction. I agreed with counsel for the plaintiff on both fronts; a party to an arbitration agreement could apply for a writ of subpoena in court first where parties did not provide *expressly* and *contractually* for procedural directions to be finalised by the Arbitrator; and second, where a party was seeking to adduce the evidence of non-parties who were not privy to the arbitration agreement. In such instances, the court can assist the arbitral process. To buttress this point, I should point out that section 28 of the Arbitration Act (a provision which both parties did not cite in their submissions) recognizes that parties can agree on the scope of powers to be exercised by the arbitral tribunal and the arbitral tribunal has the power to *make orders* or *give directions* to any party for a witness to be examined.

43 In the presence of an express and contractual arrangement, I disagreed with counsel for the defendant that he could pick and choose his options. Parties had set out the procedural directions at length with the Arbitrator during the course of the procedural hearings and it seemed to me that the proper course of action would be to apply to the Arbitrator in the first instance, before knocking on the doors of the court. The defendant could not have his cake and eat it.

An abuse of process?

44 Having made the aforementioned observations, I proceeded to consider whether the issuance of the subpoena constituted an abuse of process. As the courts have held, the categories qualifying as an 'abuse of process' are not closed and depend on the circumstances of each case (*Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [22]; *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [71]("*NCC International*")). However, four categories of proceedings which may constitute an abuse of process were helpfully distilled in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582("*Chee Siok Chin*"):

> (a) Proceedings which involve a deception on the court, or are fictitious or constitute a mere sham
>
> (b) Proceedings where the *process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way*
>
> (c) Proceedings which are *manifestly groundless or without foundation* or which serve no useful purpose
>
> (d) Multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.
>
> [emphasis in original]

45 Counsel for the plaintiff relied predominantly on the second ground in *Chee Siok Chin* to argue that the defendant tried to use the court processes improperly to obtain a subpoena behind the back

of the Arbitrator. They referred me to *NCC International* where the appellant and the respondent had agreed to refer any disputes to arbitration but the appellant applied for an interim mandatory injunction pending arbitration. The Court of Appeal held that the appellant used the court's process in an improper way as interim relief should rightly have been sought from an arbitral tribunal as provided in the contract between the parties(at [73]). The Court's observations in this regard are particularly apposite (at [53]):

> [R]egardless of whether the court's jurisdiction is exercised under the [Arbitration Act] or the [International Arbitration Act], the same general principle of limited and cautious curial assistance applies. The court will intervene only sparingly and in very narrow circumstances, such as where the arbitral tribunal cannot be constituted expediently enough, where the court's coercive enforcement powers are required or *where the arbitral tribunal has no jurisdiction to grant the relief sought in the manner at hand*. [emphasis added]

46 Instead of seeking recourse via arbitration, the appellant's first port of call was to apply to court for *ex parte* interlocutory relief in the form of an interim injunction. Counsel for the plaintiff argued that the facts of the present case were analogous. First, in my view, the facts of *NCC International* were distinguishable from the present case in one important aspect – in *NCC International*, the conduct of the appellant amounted to an abuse of the process of the court because the Court was of the view *inter alia*, that the appellant *lacked any genuine intention to commence arbitration* and took no steps to commence arbitration even after the lapse of more than seven months from the date of the dispute. In the present case, there was no such lack of genuine intention to commence arbitration on the part of the defendant.

47 Having said that, what was strikingly similar in both cases was that the defendant and the appellant in *NCC International* were essentially "using the curial process to resolve its dispute with the [plaintiff] contrary to the [agreed procedural course of conduct]" (at [70]) and on a procedural matter for which the arbitral tribunal had jurisdiction to grant the relief sought. As Rajah JA astutely observed in *NCC International* (at [74]):

> As this particular issue of whether specific performance of that contract should be ordered fell squarely within the province of the arbitral tribunal, the appellant was in essence requesting the court to nakedly usurp the functions of the arbitral tribunal rather than to assist in or support the intended arbitration.

48 In this connection, parties had conferred on the Arbitrator, *inter alia*, the power to order any party to provide or to use its best efforts to provide, the appearance for testimony at the arbitration of any person, including one whose testimony has not been offered (Clause 12.5 of Procedural Order No 1). I was of the view that the issuance of the subpoena fell squarely within the second category as stated in *Chee Siok Chin* and was reminded of Andrew Phang JA's observation in *Navigator Investment* (at [67]):

> The key general point to note is that the courts will constantly bear in mind the need to both facilitate and promote arbitration wherever possible between commercial parties**...***Any attempt to circumvent this ideal via court procedures will*, ex hypothesi, *be an abuse of process of the court and will…not be tolerated by the court concerned*.
>
> [emphasis added]

49 By compelling the attendance of Mr [XY] without seeking prior directions of the Arbitrator for an order that the plaintiff procure his attendance at the arbitration hearing or for the approval to issue a

subpoena against him was, in my view, a direct circumvention and usurpation of the Arbitrator's control of the procedure of the Arbitration. The Arbitrator's discretion encompassed the ability to determine the relevance, admissibility, materiality of evidence and the appearance of witnesses. The application to issue a subpoena against Mr [XY] was, to my mind, premature and improperly obtained and in my view, constituted an abuse of the court's process.

Whether the evidence is relevant and/or material

Admission of evidence is best left to the Arbitrator to decide

50 As I have found that the issuance of a subpoena was improperly done, it is not necessary for me to consider this secondary ground. For the sake of completeness, I considered counsel for the defendant's arguments on the relevance and/or materiality of Mr [XY]'s evidence. He cited the cases of *Basil* and *One Jane Rebecca* to argue that the admission of evidence was a matter best left to the Arbitrator to decide and drew particular attention to the Court of Appeal's observation at [26] of *Basil* that [note: 14] :

> …the trial judge is in full control and is in a position to deal with the party adducing such evidence in an appropriate way, such as by disallowing the evidence which is being elicited from the witness and/or by an order as to costs. It must always be borne in mind that the duty of the court is to examine all the evidence put forward by the parties which is material and relevant to the dispute between the parties and not to shut out potentially material and relevant evidence.

51 The sacred right of a litigant to bring all evidence relevant to his case before the court is immutable. The admission of all *relevant* evidence in each case is of critical importance as this may well impact on the eventual outcome of a case. Both *Basil* and *One Jane Rebecca* reiterate these hallowed principles and I fully endorse the views expressed there. In my view, however, the considerations at play in the present case are different given that this is a subpoena issued in support of arbitration proceedings. In arbitration, the arbitral tribunal possesses the power to decide both the *procedure* and *substance* of the arbitration. The arbitrator is in effect, the 'trial judge' and best apprised to deal with the submissions of the party seeking to adduce evidence. I agreed with the defendant that the Arbitrator is the proper tribunal to decide on the admission of Mr [XY] as a witness but this is a decision he could only make *if the defendant had applied to him first*. On this point, counsel for the plaintiff helpfully drew my attention to two authorities; first, Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989 Ed) (cited with approval in *NCC International* at [55]), where the learned authors opined (it should be added, in the context of s 12(6) of the Arbitration Act 1950 in the UK) at p 296, that:

> In certain respects, namely the ordering of discovery and interrogatories, the powers of the Court duplicate those of the arbitrator. *When a party wishes to avail himself of these over-lapping powers, he should first have recourse to the arbitrator, and should not invoke the Court's power unless the arbitrator's order proves ineffectual*.
>
> [emphasis added]

52 Second, counsel for the plaintiff pointed me in the direction of the position in Hong Kong, where Mr Neil Kaplan observed on the concurrent powers of the arbitral tribunal and the court, in *Arbitration in Hong Kong: a Practical Guide* (Sweet & Maxwell Asia, 2003) at p 387(cited with approval in *NCC International* at [66]) that:

> This concurrent power of the court is not inconsistent with the philosophy of the Arbitration

> Ordinance and the Model Law that the *parties should be held to an agreement to arbitrate, and that the arbitral tribunal should have control of the proceedings* (*subject to anything agreed to the contrary by the parties, and specific statutory powers of the courts*) *so long as the court's power is used as a fallback position only*. Accordingly, it is *appropriate for parties seeking an order which the tribunal has the power to give, to approach the tribunal before the court*.
>
> [emphasis added]

53 In the context of the present case, this leans in favour of upholding the contractual and procedural arrangements that parties entered into with the Arbitrator. Such evidentiary considerations, while admittedly important, must be balanced and weighed against the court's recognition of the powers of the arbitral tribunal and the parties' pre-ordained contractual agreement.

54 Moreover, an important point I should add is that even though I am of the view that the subpoena should be set aside, there is in effect little prejudice caused to the defendant who is not shut out from applying to the Arbitrator to call Mr [XY] as a witness at the Arbitration and presenting such evidence to bolster their case. The defendant could well make a case for this before the Arbitrator and afford him the opportunity to decide. This would remain faithful to the arrangements parties had made at the outset, prior to commencement of the Arbitration.

Conclusion

55 Moving forward, a possible practical solution to avoid similar applications in the future is for parties to agree expressly at the outset (whether as part of the terms of a procedural order or separately), to have subpoenas made returnable before the arbitrator. It would also be desirable to obtain the consent of the parties for the arbitrator to rule on any objections which may arise in relation to subpoenas.

56 Taking into account all the aforementioned considerations, I reached the view that the issuance of a subpoena in the present case was done improperly and ought to be set aside. To recapitulate, my reasons were that *first*, arbitration is the *contractually* chosen method of dispute resolution between commercial parties. As such, the issue of whether the subpoena should have been issued must be viewed from the perspective of the other contracting party. *Second*, though evidentiary considerations are important, where commercial parties have *contractually* chosen to utilize arbitration as their means of dispute resolution, recourse should be had to the contractual arrangement *first* before knocking on the doors of the court and seeking curial intervention. *Third*, the observations of the court in *Basil* and *One Jane Rebecca* are to be borne in mind in all cases involving the setting aside of subpoenas but as this case involved arbitration proceedings, the interplay of considerations varied and the issue of whether the evidence of Mr [XY] ought to be adduced should be a matter reserved for the discretion of the arbitral tribunal.

57 I therefore allowed the plaintiff's application. I remain grateful to both counsel for their submissions and will hear the parties on the issue of costs.

[note: 1] Affidavit of Mr [ZP] filed on 22 July 2010 ("Mr [ZP]'s affidavit") at p 16.

[note: 2] Mr [ZP]'s affidavit at p 32.

[note: 3] Mr [ZP]'s affdavit at p 53.

[note: 4] Mr [ZP]'s affidavit at p 67.

[note: 5] Plaintiff's written submissions at paras 33 to 39.

[note: 6] Plaintiff's written submissions at paras 40 to 44.

[note: 7] Plaintiff's written submissions at paras 45 to 47.

[note: 8] Defendant's written submissions at para 19.

[note: 9] Defendant's written submissions at paras 7 to 13.

[note: 10] Defendant's written submissions at paras 24 to 28.

[note: 11] Foreword by David W Rivkin in the IBA Rules on the Taking of Evidence in International Commercial Arbitration found in Mr [ZP]'s affidavit at p 38.

[note: 12] Mr [ZP]'s affidavit at p 151.

[note: 13] Mr [ZP]'s affidavit at p 161.

[note: 14] Defendant's written submissions at para 7.

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