Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd [2009] SGCA 45

Case Number : CA 5/2009

Decision Date : 29 September 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Kronenburg Edmund Jerome, Jacqueline Teo Lin and Loh Hui-Qi Vicki (Tan Peng Chin LLC) for the appellant; Oommen Mathew (Haq and Selvam) and John Thomas (David Nayar and Vardan) for the respondent

Parties : Navigator Investment Services Ltd — Acclaim Insurance Brokers Pte Ltd

Arbitration

29 September 2009 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") who refused to grant a stay of an application for pre-action discovery and pre-action interrogatories in *Acclaim Insurance Brokers Pte Ltd v Navigator Investment Services Ltd* [2009] SGHC 12 ("Judgment"). As would be apparent in the course of this judgment, this case raises two interesting (and important) points of practice, namely: (a) the significance of the Singapore International Arbitration Centre ("SIAC") Rules in the determination of the applicable legislation for the arbitration concerned (*viz*, whether the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA") or the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") applies); and (b) how the court will approach a stay application under s 6 of the AA and/or s 6 of the IAA where an application for pre-action discovery and/or pre-action interrogatories is concerned.

Background facts

2 It is not necessary to set out the facts leading to the present dispute in detail, as they are not material for the purposes of the present appeal. On 25 June 2004, the appellant, *viz*, Navigator Investment Services Ltd ("Navigator"), a wholly-owned subsidiary of Aviva Ltd ("Aviva"), and the respondent, *viz*, Acclaim Insurance Brokers Pte Ltd ("Acclaim"), entered into a Distributorship Agreement ("the Distributorship Agreement"). Under the Distributorship Agreement, Acclaim was appointed as a distributor for Navigator's investment products. In return, Acclaim was entitled to claim for certain distribution fees. Acclaim later entered into a similar arrangement with iFast Financial Pte Ltd ("iFast"). The present proceedings, however, do not involve iFast.

3 On 1 August 2006, Acclaim entered into a Financial Adviser Manager Agreement ("the FAM Agreement") with Edward Wong Leong Wei ("Wong"), and later appointed him as the head of one of its units. As part of his duties, Wong managed a team of Financial Adviser Representatives ("FARs") who were required to source for and recommend investments to clients. Under the FAM Agreement, Wong was entitled to receive commissions and payments for the services rendered by him or his FARs.

4 In early July 2007, Wong and his FARs went on a staff retreat to Phuket, Thailand. An

employee each from Aviva and iFast was allegedly present at the retreat. Upon their return from Thailand, Wong allegedly instructed his FARs to sign pre-prepared letters of resignation which were backdated to 14 June 2007. Wong then allegedly used Acclaim's old letterhead to write letters purporting to accept these resignations and to discharge the FARs from their agreements with Acclaim. It was alleged that these letters were similarly backdated to 14 June 2007.

5 Sometime in July 2007, Wong's FARs allegedly arranged for $26 million worth of "Funds Under Administration" (*ie*, the aggregate amount invested by Acclaim's clients for a period of over 90 days in Navigator's investment products) to be transferred from Acclaim's account with Navigator to Leadenhall Insurance Brokers Pte Ltd ("Leadenhall"). Leadenhall was a financial adviser company in which Wong and/or Wong's father allegedly had pecuniary interests. As an aside, approximately $31 million worth of "Funds Under Administration" in Acclaim's account with iFast was also allegedly transferred to Leadenhall. To effect the transfer, it was necessary to obtain each client's written consent and signature. It is alleged that many signatures were forged. Numerous clients subsequently complained about the transfers.

6 On 8 August 2007, Wong's services with Acclaim were terminated for reasons not apparently related to the present action. On 16 August 2007, Wong forwarded the resignation letters of the FARs who had resigned to Acclaim, and, together with 14 FARs, demanded unpaid commissions at Acclaim's office. Thereafter, Acclaim filed reports with the police, the Monetary Authority of Singapore and the Corrupt Practices Investigation Bureau with respect to Wong's conduct. Acclaim also wrote to Aviva (*ie*, Navigator's parent company (see [2] above)) and iFast to request for information relating to the transfer of the "Funds Under Administration". Aviva wrote back, confirming that the transfers had taken place. However, Aviva did not agree to provide any documents without their clients' prior consent. On the other hand, iFast provided Acclaim with copies of the transfer documents.

Procedural history

7 On 14 December 2007, Wong and Stralos Services Pte Ltd ("Stralos") commenced Suit No 781 of 2007 ("Suit 781") in the High Court against Acclaim for unpaid commissions and earnings allegedly due under the FAM Agreement.

8 On 17 December 2007, Acclaim filed Originating Summons No 1830 of 2007 ("OS 1830") to seek pre-action discovery of certain documents as well as pre-action interrogatories of certain information from Navigator. The documents and information which Acclaim sought related to the transfer of the "Funds Under Administration" from Acclaim to Leadenhall. In his affidavit filed on 17 December 2007, Anthony Lim ("Lim"), the founder shareholder, managing director and chief executive officer of Acclaim, set out the facts leading up to an alleged conspiracy/collusion, and further outlined the purpose of OS 1830 as follows (at paras 50–52 and 54–55):

> 50 In this application [*ie*, OS 1830] we are seeking the aid of the Honourable Court to compel Navigator to disclose the documents and answer questions which are relevant to the issues which have arisen here as we assess the possibility of launching action [*sic*] against the parties that may have conspired against Acclaim and have caused losses through their possibly illegal acts of forgery. The documents will assist us in our continuing investigations and we undertake also to transmit them to the authorities for their further action.
>
> 51 The documents sought will enable us to determine the identity of the FARs who were involved in the transfer of the Funds Under Administration in Navigator from Acclaim to any other Financial Adviser Company, and the exact amounts transferred by each FARs [*sic*]. The documents will further show whether the transfers were properly effected in writing or not, and

whether the clients' signatures on the transfers appeared ex-facie compliant or discrepant when compared with the initial account opening forms. The documents requested will also indicate whether the transfers complied with Navigator's own forms and procedures. Finally, the documents sought and questions asked will enable us to determine the identity of the person(s) in Navigator who approved and effected the transfers, in order to assess whether a claim may lie against him/her.

52 We are also seeking confirmation of the Financial Adviser Company to which the Funds under Administration was transferred. … [W]e require confirmation of the same so that we will not be unnecessarily suing a wrong party in respect of the Navigator Funds under Administration.

…

54 Depending on the results of the investigations, the employees/personnel in Navigator who may have conspired with, or unlawfully authorized or effected the transfers will be likely to be made defendants in subsequent proceedings in court. Again, depending on the results of the investigations Navigator itself may be made a defendant on the basis of vicarious liability for the acts of its employees/personnel.

55 The documents will also assist us in determining whether a claim for the tort of forgery may lie against the individual FARs.

9 On 9 January 2008, Acclaim filed its Defence and Counterclaim in Suit 781, in which it denied that Wong and/or any of his FARs were entitled to commissions or earnings. In its Counterclaim, Acclaim averred, *inter alia*, that Wong, Leadenhall, representatives from Navigator and iFast, and up to 26 FARs had conspired against Acclaim to injure it. It further averred that Wong had committed various breaches of contractual and fiduciary duties.

10 In response, on 10 January 2008, Navigator commenced Originating Summons No 53 of 2008 ("OS 53") against Acclaim, in which it sought the following reliefs:

(a) a declaration that Acclaim should arbitrate the dispute and the application for pre-action discovery and pre-action interrogatories;

(b) an injunction to restrain Acclaim from commencing or continuing any action against Navigator concerning disputes arising out of or in connection with the Distributorship Agreement in Singapore or any other jurisdiction;

(c) an order for OS 1830 and the supporting affidavit filed by Lim on 17 December 2007 (see [8] above) to be struck out and expunged;

(d) an order to seal the court files for OS 1830 and OS 53; and

(e) an order to restrain Acclaim from disclosing to any non-party the contents of OS 1830, OS 53 and all related affidavits.

11 On 11 January 2008, Navigator filed Summons No 130 of 2008 ("SUM 130") to stay OS 1830 in favour of arbitration pursuant to s 6 of the AA. Further on 12 January 2008, Navigator filed Summons No 148 of 2008 ("SUM 148") to restrain Acclaim from commencing or continuing any action against it with regard to disputes arising out of or in connection with the Distributorship Agreement until the final disposal of OS 53, to seal the court files for OS 1830 and OS 53 until the final disposal of OS 53,

and to restrain Acclaim from disclosing to any non-party the contents of OS 1830, OS 53 and all related affidavits.

12 SUM 148 was heard on 14 January 2008 by a High Court judge, who ordered the sealing of the court files but made no orders on the other prayers sought. No order was made in relation to the prayer for an injunction against proceedings after Acclaim had agreed that it would not be instituting proceedings pending the hearing of OS 1830. No order was made in relation to the prayer for non-disclosure after Acclaim had given an undertaking in terms. The same High Court judge heard OS 53 on 5 March 2008 and made no orders with respect to that particular application, although the interim order made and undertakings given in relation to SUM 148 were ordered to stand until the disposal of OS 1830. On 25 September 2008, an assistant registrar dismissed SUM 130. Navigator appealed against that decision in Registrar's Appeal No 383 of 2008 ("RA 383"). On 17 November 2008 (three days before Acclaim was due to file its submissions for RA 383), Navigator filed Summons No 5059 of 2008 ("SUM 5059") to amend SUM 130 to seek a stay of OS 1830 under s 6 of the IAA in addition or in the alternative to the grounds originally stated in SUM 130. The Judge dismissed both RA 383 and SUM 5059, and Navigator appealed against his decision in Civil Appeal No 5 of 2009 ("CA 5"), *ie*, the present appeal.

13 On 18 April 2008, Navigator commenced Arbitration No 21 of 2008 ("ARB 21") at the SIAC, seeking, *inter alia*, declarations that it was not liable to Acclaim in any way. Navigator and Acclaim have filed their respective statements of claim and defences for ARB 21. However, as a result of the proceedings in SUM 130, the arbitrator concerned suspended ARB 21 *sine die*, until further application by either of the parties. The relevant correspondence between the parties suggests that Navigator had proposed that discovery in ARB 21 proceed notwithstanding the suspension. However, Acclaim was not amenable to this proposal because the documents, if provided, would remain confidential and could not be used for the purposes of Suit 781.

The Judge's decision

14 The Judge began by dismissing SUM 5059. In his view, there was nothing to indicate that the IAA applied since ARB 21 "concerned parties in Singapore on matters governed by Singapore law, and Singapore was the forum of the arbitration" (Judgment at [3]). The Judge also found that Acclaim had not consented to having arbitration under the IAA (*ibid*). Furthermore, Navigator had taken "an inordinately long time" to claim that ARB 21 was an international arbitration and had failed to run that argument before the assistant registrar below (*ibid*). In the Judge's view, the onus on Navigator to demonstrate that the arbitration was an international arbitration was a high one, and, given the paucity of evidence as well as argument, the amendment should not be allowed (*ibid*).

15 Following from his dismissal of SUM 5059, the Judge decided against exercising his discretion to stay OS 1830 (Judgment at [4]). He gave the following reasons for doing so (*ibid*):

> Reverting to the appeal proper, [Navigator] argued that the matter was already under arbitration and there were no legislative provisions for pre-arbitration proceedings. Discovery was thus, a matter for determination by the arbitrator after the arbitration had begun. The arbitration process, unlike litigation, commences only after there is an identifiable dispute. Hence, a pre-arbitration discovery process would be anomalous with the concept of arbitration. Furthermore, the absence of legislative provisions for pre-arbitration discovery must imply that there was no reason to stop a party from applying to court for a pre-action discovery. If the court thinks that there are no grounds for making the order of discovery the application would be dismissed, but it would be dismissed in the process of a civil action. It is only when a dispute is identified that the parties can refer to arbitration. … In the present case, [Acclaim's] application for pre-action

> discovery was made with litigation against various parties in mind and not just against [Navigator]. The basis was for an action in tort which might or might not overlap with their contractual rights against [Navigator]. In a multi-faceted action such as that which [Acclaim] w[as] involved in, … the discretion lay with the court in deciding whether this application for a stay of proceedings ought to be allowed. Furthermore, the commencement of the arbitration proceedings in this case was initiated on what seems to me to be dubious grounds only after [Acclaim] sought discovery. In these circumstances, I do not think that the [assistant] registrar had erred in exercising his discretion not to order a stay. I would have done likewise.

Navigator's submissions on appeal

16 Turning to an overview of the arguments of the respective parties (the specific arguments being dealt with in more detail at the appropriate junctures below), Navigator began by submitting that the IAA was applicable. The arbitration clause within the Distributorship Agreement ("the Arbitration Clause") provided that any arbitration would be resolved in accordance with the "Arbitration Rules of the [SIAC] for the time being in force". Since the dispute arose at the end of 2007, Navigator contended that the applicable rules were the SIAC Rules (3rd Ed, 1 July 2007) ("the SIAC Rules 2007"). Accordingly, the IAA was applicable, as Rule 32 of the SIAC Rules 2007 states that the law of the arbitration shall be the IAA where the seat of arbitration is Singapore. The transitional provisions of the SIAC Rules 2007 did not apply because the parties had not, in the Arbitration Clause, expressly referred to arbitration under the SIAC Domestic Arbitration Rules, as required under Art 2(1) of Schedule 1 of the SIAC Rules 2007.

17 Proceeding on this basis, Navigator argued that SUM 5059 should be allowed, especially since there was no prejudice caused to Acclaim that could not be addressed by an appropriate costs order. Applying s 6 of the IAA, Navigator argued that OS 1830 was a "proceeding" for the purposes of that particular section, and, further, that the Arbitration Clause was wide enough to apply to the disputes alleged by Acclaim. As a result, Navigator contended that a stay of OS 1830 was mandatory (pursuant to s 6(2) of the IAA).

18 Navigator further argued that even if a stay was not granted under the IAA, this court should nevertheless grant a stay under its inherent jurisdiction.

Acclaim's submissions on appeal

19 Acclaim argued that whether the AA or the IAA applied would be immaterial, because under s 6 of the AA and s 6 of the IAA, a party is entitled to stay court proceedings only *after* appearance has been entered but before any pleading or step in the proceedings has been taken. In the present case, Navigator had not entered an appearance in respect of OS 1830 and was therefore precluded from applying for a stay under either the AA or the IAA.

20 Acclaim further argued that there was no "dispute" in OS 1830 within the meaning of the Arbitration Clause since it was only attempting to obtain documents and answers in order to assess the possibility of commencing a claim against Navigator. Acclaim also highlighted that it had not added Navigator as a party to any proceedings and/or commenced any proceedings against it.

21 Acclaim also pointed out that Navigator could not rely on both the AA and the IAA as the AA and the IAA could not apply at the same time. In any case, the AA was applicable because the parties had never agreed in writing that the IAA or the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") was applicable. Further, Acclaim highlighted that since Rule 32 of the SIAC Rules 2007 was carried over from the SIAC Rules (International) (2nd Ed,

22 October 1997) ("the SIAC Rules 1997"), the provision was intended to lay to rest any doubts that an international arbitration having its seat in Singapore was to be governed by the IAA, and not some other legislation or the Model Law. Acclaim did not dispute that the Arbitration Clause referred to the SIAC Rules 2007, but argued that, in regard to the applicable substantive legislation (as opposed to procedural rules), the rules in force at the date the Distributorship Agreement was entered into should apply.

22 Acclaim argued that even if the IAA was applicable, Navigator was estopped from arguing that any arbitration was governed by the IAA. It argued that Navigator had always acted on the basis that the AA was applicable, given the fact that SUM 130 and OS 53 had been argued based on the AA. In respect of ARB 21, Navigator had never mentioned that the proceedings were governed by the IAA until SUM 5059 was filed. Therefore, Acclaim argued, both parties had proceeded on the basis that the AA was applicable, and it would be unjust for Navigator to renege on the agreed interpretation of the Arbitration Clause. According to Acclaim, the doctrine of estoppel by convention applied to prevent Navigator from arguing that ARB 21 was an international arbitration which should be governed by the IAA.

23 Further, Acclaim contended that Navigator had taken a step in the proceedings by its actions in filing OS 53. By seeking declaratory relief, an injunction against proceedings, an order to expunge the documents filed, as well as an injunction restraining Acclaim from disclosing matters to third parties, Navigator had gone beyond the court's normal jurisdiction to stay proceedings and also beyond its right to arbitrate. It was also highlighted that Navigator had argued OS 53 on its merits before the High Court judge concerned.

Preliminary issues

24 Before we deal with the substantive merits of the appeal, it would be appropriate for us to deal with the following issues at this juncture.

25 First, Navigator applied under Summons No 1910 of 2009 to admit certain documents for the purposes of the present appeal. These documents can be categorised, simply, as documents relating to Suit 781, documents stating that Navigator did not agree to provide discovery and/or answer interrogatories before OS 1830 was filed, and a letter from Navigator to Acclaim dated 9 March 2009 offering discovery in ARB 21. Given that no trial or hearing on the merits has taken place in the present proceedings, it was within the court's discretion to admit these documents (see the decision of this court in *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427 at [27]). We allowed Navigator's application to admit the documents at the hearing of this appeal on 21 May 2009 for the following reasons:

(a) With respect to the documents relating to Suit 781, we accepted Navigator's explanation that it only discovered those documents when it had made a request to inspect the court file for Suit 781 after the Judge's decision had been delivered, though we should not be taken as suggesting that either party was at fault for the initial omission.

(b) With respect to the documents stating that Navigator did not agree to provide discovery and/or answer interrogatories before OS 1830 was filed, we accepted that the documents were introduced as a response to the allegations raised by Acclaim that there was such an agreement (here and below) and therefore allowed their admission.

(c) With respect to the letter that purportedly evidenced Navigator's offer of discovery in ARB 21, we noted that Acclaim had, in a similar vein, sought to introduce its solicitors' response

(dated 10 March 2009) to Navigator's letter which set out its version of events. Given that these letters arose after the conclusion of the High Court hearing, we therefore exercised our discretion and allowed both letters (*ie*, Navigator's letter and Acclaim's response) to be admitted.

26 The next issue concerns the Judge's decision in SUM 5059, *viz*, the application by Navigator to amend SUM 130 to include the IAA as a ground for staying OS 1830. We accept that the application for this amendment was made at a very late stage. However, the issue of whether an arbitration is governed by the IAA or the AA is a question of law. It is difficult to see how any prejudice that cannot be compensated by an appropriate costs order could, in the circumstances, arise. In this regard, it is noteworthy that Acclaim had made extensive arguments before the High Court and before this court as to the applicability of the IAA. In the circumstances, we will consider whether the IAA (or the AA) is the applicable legislation in the context of the present proceedings.

Issues before this court

27 Having decided in Navigator's favour in relation to SUM 5059, the two issues for us to decide are as follows: (a) whether the AA as opposed to the IAA is applicable; and (b) whether OS 1830 should be stayed under either s 6 of the AA or s 6 of the IAA (as the case may be). The issue of whether OS 1830 should be granted (or dismissed) does not arise for consideration in the context of the present proceedings.

Whether the AA or the IAA applies

The Arbitration Clause

28 The Arbitration Clause states, as follows:

> Any dispute arising out of or in connection with this Agreement [*ie*, the Distributorship Agreement] will be negotiated in good faith by the Parties with a view to a resolution of such dispute. If the dispute [is] not resolved within thirty (30) days of the date of the dispute first arising, *it shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the [SIAC] for the time being in force. The Arbitration Rules shall be deemed to be incorporated by reference into this Agreement*. [emphasis added]

The parties' respective submissions

29 Navigator highlighted that since the Arbitration Clause referred to the "Arbitration Rules of the [SIAC] for the time being in force", the applicable rules would be the SIAC Rules 2007. Rule 32 of the SIAC Rules 2007, in particular, was emphasised, as it states as follows:

> Where the seat of arbitration is Singapore, the law of the arbitration under these Rules [ie, the SIAC Rules 2007] shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) [ie, the IAA] or its modification or re-enactment thereof.

Navigator argued that the parties, by adopting the SIAC Rules 2007, which provided that the IAA was applicable (pursuant to Rule 32), had thereby opted for the IAA to apply.

30 Acclaim, on the other hand, argued that the IAA was not applicable for two reasons. First, there was no agreement between it (*ie*, Acclaim) and Navigator that the IAA or the Model Law was to apply. The requisite factors set out in s 5(2) of the IAA were also not satisfied. Therefore, any arbitration conducted would be domestic in nature. Rule 32 of the SIAC Rules 2007 was carried over

from Rule 32 of the SIAC Rules 1997 (which applied to international arbitrations) and could not have been intended to apply to domestic arbitrations. Rather, it was meant to lay to rest any doubts that the governing law in the case of an international arbitration having its seat in Singapore was the IAA, and not some other legislation or the Model Law. Second, while the Arbitration Clause did refer to the SIAC Rules 2007, the issue here concerned the substantive legislation, as opposed to the code or procedural rules, that was applicable. Therefore, the "incidental reference" in the SIAC Rules 2007 to the IAA was not intended by the parties to mean that the IAA was to be the governing legislation, as the parties had "only consented to the rules of procedure which were applicable as at the time in force". [note: 1]

Our decision

31 In our view, the IAA was the applicable legislation in the present case. Section 5(1) of the IAA is the crucial provision, as it allows for parties to agree that the IAA applies. The said provision reads as follows:

> **Application of Part II**
>
> **5**.—(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.

32 The purpose of the provision just quoted is clear. In Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (August 1993) (Chairman: Mr Giam Chin Toon) ("the Sub-Committee Report"), it was observed thus (at para 16):

> Although the Committee noted the view that the courts should be more closely involved in arbitration disputes which are domestic in character (both in order to protect weaker parties and for the purposes of being involved in the evolution of decisions that concern domestic law and practice), **the preference of the Committee is to permit commercial parties the freedom to agree to have disputes dealt with according to the international arbitration regime (albeit with a lesser degree of curial intervention)**. The Committee did not consider whether there should be any specific exceptions to this liberty of the parties to agree upon the nature of the regime to be adopted. [emphasis in bold in original]

And as Hsu Locknie, in "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Singapore" [1994] SJLS 387, stated in a similar vein (at 394):

> [F]or purely domestic arbitrations which otherwise would not fall within [the IAA's] terms, parties may choose to have its provisions apply. In these cases, parties are allowed to "opt-in" under section 5(1) and have the [IAA] apply to their arbitration. This arrangement gives *maximum flexibility to parties* and respects the *party autonomy* principle. [emphasis added]

33 Indeed, it is not irrelevant to note that the AA was enacted in 2001 in order to bring it, as stated during the Second Reading of the Arbitration Bill (Bill 37 of 2001) by the Minister of State for Law, Assoc Prof Ho Peng Kee, "more in line with [the IAA] and international practices, as reflected in [the Model Law]" (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213). Assoc Prof Ho proceeded to observe further as follows (at col 2214):

> As the Model Law has been well received by Singapore arbitrators and practitioners, the next step is to align our domestic laws with the Model Law. This will narrow the differences between

the two regimes. …

Sir, this Bill is largely based on [the Model Law], which already forms the basis of [the IAA]. The Bill also incorporates useful provisions from the 1996 UK Arbitration Act [*ie*, the Arbitration Act 1996 (c 23) (UK)]. This approach allows the creation of an arbitration regime that is in line with international standards and yet preserves key features of those existing arbitration practices that are deemed to be desirable for domestic arbitrations.

34 The issue before this court, therefore, is what the parties had agreed to when they referred, in the Arbitration Clause itself (reproduced at [28] above), to "the Arbitration Rules of the [SIAC] for the time being in force". *Prima facie*, the rules for the time being (as opposed to the rules applicable at the time the contract was made) are applicable where the contract provides that disputes are to be decided in accordance with the rules of a particular tribunal (see Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration* (Butterworths, 2nd Ed, 1989) at p 282 and Robert Merkin, *Arbitration Law* (Informa London, 2008) ("*Arbitration Law*") at para 14.6; see also the decision of this court in *Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd* [2004] 4 SLR 19 at [19]– [20]). In the present case, only one set of rules was applicable at the time of the dispute, *viz*, the SIAC Rules 2007. Acclaim does not dispute that the Arbitration Clause refers to the SIAC Rules 2007. Therefore, the issue is whether the reference to, as well as the incorporation of, the SIAC Rules 2007 was sufficient to bring an arbitration commenced pursuant to the Arbitration Clause within the purview of the IAA.

35 Rule 32 of the SIAC Rules 2007 (reproduced above at [29]) states that the "law of the arbitration shall be the [IAA]". In our view, if the parties have agreed that the *lex arbitrii* is the IAA, it is difficult to see how the parties can be said not to have agreed that the IAA was to apply within the meaning of s 5(1) of the IAA. Support for this proposition can be found in *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.013. More importantly, in the decision of this court in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 ("*NCC International*"), V K Rajah JA observed (at [52]):

However, where the arbitral tribunal does have concurrent jurisdiction with the court to grant interim relief in domestic arbitration, liberal curial intervention may no longer be appropriate. Such concurrent jurisdiction may arise in two situations. First, pursuant to s 28(1) of the AA, the parties may agree to confer on the arbitral tribunal jurisdiction to make certain interim orders. Second, notwithstanding that domestic arbitration does not fall within the ambit of "international" arbitration as defined under the IAA, the parties can expressly opt to have the IAA apply ***by either*** *agreeing in writing to this effect* ***or adopting institutional rules which expressly stipulate that the IAA shall apply*** *…* ***One instance of such an institutional rule is [Rule] 32 of the [SIAC Rules 2007], which provides that where the seat of arbitration is Singapore, the law of arbitration conducted under the auspices of the [SIAC] shall be the IAA***. [emphasis added in italics and bold italics]

36 The observations set out in the preceding paragraph were recently applied by Assistant Registrar Nathaniel Khng ("AR Khng") in the Singapore High Court decision of *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229 ("*Sembawang Engineers and Constructors*"). The issue that had to be considered, in AR Khng's words, was as follows (*id* at [23]):

The question … is whether an agreement for the application of the [IAA] as the law of the arbitration through the adoption of the SIAC Rules 2007 is sufficient to make s 5(1) of the [IAA] operative. Put in another way, would an agreement for the application of the [IAA] as the law of the arbitration through the adoption of the SIAC Rules 2007 be considered to be an agreement

that Part II of the [IAA] or the Model Law applies to the arbitration?

He proceeded to observe, as follows (*ibid*):

> On a plain reading of s 5(1), it would appear that an affirmative answer to this question is very plausible. Counsel for the Plaintiff and the Defendant were both in agreement that there has, as yet, been no case that has expressly dealt with this point. Some support for the proposition that the adoption of the SIAC Rules 2007 suffices to make s 5(1) operable may, however, be forthcoming from the recent decision of the Court of Appeal in [*NCC International*] ….

37 AR Khng proceeded to cite, as well as apply (*id* at [25]), the observations of Rajah JA in *NCC International* (to which we have already made reference (at [35] above)). In AR Khng's words (*Sembawang Engineers and Constructors* at [26]):

> The remarks made by Rajah JA, although *obiter dicta*, are compelling support for the proposition that where the SIAC Rules 2007 is adopted, the domestic arbitration in question will be treated as an international arbitration for the purposes of the [IAA].

He did, however, raise (as well as address) two possible concerns with regard to the adoption of such an approach.

38 The first was whether or not s 5(1) of the IAA ought to be confined, instead, *only* to the concept of an *express* agreement (*id* at [27]). AR Khng was of the view that if this had been the case, the *legislature* would (by analogy (only) with s 15(2) of the IAA) have *expressly* stated so (*id* at [28]). With respect, this may be too nuanced an approach to attribute to the legislature. In any event, this particular concern may not, in the final analysis, be a real one (or at least one that raises any real concerns). Let us elaborate.

39 Where (as in this case) the parties have *expressly* agreed (via the Arbitration Clause) not only that the arbitration "shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the [SIAC] for the time being in force" but also that the aforementioned rules "shall be deemed to be incorporated by reference into this Agreement", the result is that the parties must be taken to have agreed to the *legal substance* contained in, *inter alia*, those rules (including Rule 32). If so, then it is clear that the parties must have *expressly* agreed (as is clearly stated in Rule 32 itself) that the law of the arbitration shall be the IAA. This, of course, *falls squarely within* the ambit of s 5(1) of the IAA itself. And this is why Rajah JA made the observations to the *same* effect in *NCC International* (reproduced above at [35]). Indeed, such an approach is wholly consistent with the legislative background to s 5(1) of the IAA, which is (as described briefly earlier (at [32] above)) to accord to the parties concerned the freedom to agree to have their disputes dealt with pursuant to the IAA.

40 The second concern which was expressed by AR Khng was described as follows (*Sembawang Engineers and Constructors* ([36] *supra*) at [29]):

> The second concern is that s 5(1) of the [IAA] states expressly that the parties must agree that Part II of the [IAA] or the Model Law applies to the arbitration. On the strictest reading of s 5(1), a domestic arbitration will only be treated as an international arbitration where parties agree that Part II of the [IAA] or the Model Law applies to the arbitration in a *general* sense. This might raise the query as to whether such a general averment to the applicability of the [IAA] must be given or whether an agreement that the law of the arbitration is the [IAA] *à la* r 32 of the SIAC Rules 2007 suffices. [emphasis in original]

41 AR Khng's response to this particular concern was as follows (*id* at [30]– [31]):

> 30 In *substance*, however, the choice of the [IAA] as the law of the arbitration may be construed as amounting to an agreement that the [IAA] generally applies to the arbitration. As Jean François Poudret & Sébestien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) states (at p 83):
>
> > The arbitration law (*lex arbitrii*) *encompasses all provisions governing the arbitration in a given country*, particularly the formal validity of the arbitration agreement, the arbitrability of the dispute, the composition of the arbitral tribunal, fundamental procedural guarantees, assistance from the courts and judicial review of the award. [emphasis added]
>
> 31 The concept of the law of the arbitration aside, one would observe that there is nothing in the records of Parliamentary debates to oppose the proposition that an agreement that the [IAA] is the law of the arbitration suffices for the operation of s 5(1) of the [IAA]. Neither is there anything to oppose this proposition in the drafting history of the said provision. In fact, the opportunity for parties to elect between the two legal regimes for arbitration appears to have been included to allow parties to have greater freedom in tailoring the applicable law of the arbitration to their needs and/or desires. …
>
> [emphasis in original]

42 Although we think that this second concern is one that has been raised *ex abundanti cautela*, we are nevertheless in agreement with the reasoning by AR Khng as set out in the preceding paragraph.

43 In the circumstances, we find that the parties had *agreed* that the IAA was to apply. We therefore turn to consider whether the court should grant a stay of OS 1830 under s 6 of the IAA.

The granting of a stay under section 6 of the IAA

Overview

44 The issue to be considered is whether or not the court should grant a stay under s 6 of the IAA in the context of an application for pre-action discovery and/or pre-action interrogatories. This particular issue appears simple in form but belies (in its substance) crucial issues centring on the interface between court proceedings on the one hand and arbitration proceedings on the other. Indeed, it constitutes the confluence of a couple of broad policies and (in a more specific vein) raises the larger question as to how these policies can (if possible) be integrated harmoniously into one smooth stream. Even where one proceeding must be chosen over the other, as is the case here, the court must ensure that the *underlying rationale* of the other proceeding is not undermined.

Section 6 of the IAA

45 The crucial provision is, of course, s 6 of the IAA, the material parts of which read as follows:

> **Enforcement of international arbitration agreement**
>
> **6**. —(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the

agreement may, ***at any time after appearance and before*** *delivering any pleading or taking any other step in the proceedings*, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) *shall* make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, *unless* it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

…

[emphasis added in italics, bold italics and underlining]

46 Indeed, the present issue is raised in a somewhat unusual context in so far as the relevant timeframe *vis-à-vis* s 6 of the IAA is concerned. The issue that frequently arises is whether or not it is *too late* for the applicant to apply for a stay pursuant to s 6 of the IAA because it has taken a step in the proceedings within the meaning of subsection (1) thereof (which is, it should be emphasised, *not* the situation in the context of the present appeal). There is, in fact, a wealth of case law in relation to this particular issue (see, *eg*, the recent decision of this court in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 (and the various authorities (both local as well as foreign) considered therein); see also Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) at pp 19–21). The present proceedings, on the other hand, raise the issue as to whether or not an application for pre-action discovery and/or pre-action interrogatories comes within the purview of s 6 of the IAA *in the first place*, given the requirement for "appearance" under s 6(1) of the IAA. Indeed, the difference between the two (contrasting) points of time in s 6(1) of the IAA is apparent from the word "and" in that provision (which has been rendered in bold italics, as well as underlined and italicised, in the preceding paragraph).

The parties' respective submissions

47 Turning to the parties' respective arguments in greater detail and, first, to those proffered by Navigator, it was argued that all the requirements set out in s 6 of the IAA with respect to OS 1830 had been satisfied and that it was therefore mandatory for the court to order a stay of that particular application. It was also argued that OS 1830 was a "proceeding" within the meaning of s 6 of the IAA, and that the reference to "appearance" in that section did not refer to the filing of a Memorandum of Appearance, but only "an entry into the fray".[note: 2] There was also clearly a dispute between the parties, as evidenced by documents such as Lim's affidavit filed on 26 March 2008 in response to the summary judgment application by Wong and Stralos. Since the requirements of s 6 of the IAA were satisfied, it was mandatory for the court, pursuant to s 6(2) (reproduced at [45] above), to order a stay of OS 1830 (unless the court "is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed" (*per* s 6(2))).

48 Acclaim, on the other hand, highlighted that OS 1830 was an application for pre-action discovery and pre-action interrogatories, and that no substantive action had been commenced. Acclaim argued that a stay could only be applied for after appearance had been entered, and that no appearance was required for such pre-action applications. Indeed, Navigator did not enter an appearance here. Acclaim also relied on the decision of this court in *Woh Hup (Pte) Ltd v Lian Teck Construction Pte Ltd* [2005] SGCA 26 ("*Woh Hup*") to contend that "pre-action discovery is not caught by the [A]rbitration [C]lause" and that it was premature for the court to consider the Arbitration Clause when hearing a pre-action discovery application.[note: 3]

Our decision

49 It is only logical, as well as correct in principle, that there is a *specific timeframe* within which a party can apply for a stay of proceedings pursuant to s 6 of the IAA. In this respect, we have already had occasion (see [46] above) to consider what is the *latest* point in time such an application can be made. We are now concerned with the opposite end of the spectrum, *viz*, what is the *earliest* point in time at which such an application can be made. In the context of the present appeal, the key words in s 6(1) of the IAA (reproduced at [45] above) are "at any time after appearance". (It might be observed, parenthetically, that the phrase "at any time after appearance" and before delivering any pleading (or its equivalent) or taking any other step in the proceedings may be traced back to s 11 of the Common Law Procedure Act 1854 (c 125) (UK) (see also s 4 of the Arbitration Act 1889 (c 49) (UK), s 4 of the Arbitration Act 1950 (c 27) (UK) and s 1 of the Arbitration Act 1975 (c 3) (UK)).) In other words, the *earliest* point in time at which an application for a stay under s 6 of the IAA can be made would be after the applicant has entered an "appearance" in the context of the court proceedings concerned. Read literally, this would mean that Navigator was not even entitled to apply for a stay under s 6 of the IAA in the first instance as it had not entered any appearance with respect to Acclaim's application under OS 1830.

50 In this regard, it is pertinent to note that even *prior to* the amendments in 2006 that resulted in the present version of the Rules of Court, *viz*, the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules 2006"), an application for pre-action discovery and/or pre-action interrogatories did *not* require the applicant concerned to enter an appearance. In particular, applications for pre-action discovery and pre-action interrogatories under, respectively, O 24 r 6 and O 26A r 1 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules 2004") were to be commenced by originating summons in Form 7. The *title* to Form 7 in the Rules 2004 stated as follows: "ORIGINATING SUMMONS (WHERE APPEARANCE *NOT* REQUIRED)" [emphasis added]. Applying O 12 r 9(2) of the Rules 2004, which states that no appearance need be entered to an originating summons where special provision to that effect is made, the respondent to an application for pre-action discovery and/or pre-action interrogatories was therefore *not* required to enter an appearance even before the Rules 2006 came into effect.

51 This brief historical excursus is necessary because, since the aforementioned amendments in 2006, *no appearance* is required to be entered with respect to *all* originating summonses *generally* (see O 12 r 9 of the Rules 2006). This does not, of course, necessarily mean – nor did Acclaim (correctly, in our view) argue – that *all* originating summonses cannot now be stayed. The acceptance of such a sweeping assertion would result in *wholly unintended substantive effects* arising from what was essentially a straightforward streamlining of the procedural process that was effected in 2006. Hence, it was necessary for us to set out (as we have done above) what the legal position was *prior to* the amendments in 2006, which, as we have seen, did *not* require the respondent to enter an appearance. The key to the whole issue, in our view, lies in the proper construction of the word "appearance" in s 6(1) of the IAA.

52 There is, admittedly, no magic in the word "appearance" itself. Indeed, the Arbitration Act 1996 (c 23) (UK) dispensed with the phrase "at any time after appearance and before delivering any pleading or taking any other step in the proceedings" and substituted it (in s 9(3) of that particular statute) with the phrase "before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him". As Prof Merkin put it (in *Arbitration Law* ([34] *supra*) at para 8.26):

> The new wording reflects the earlier inappropriate use of the word "appearance" and is deliberately phrased in more general terms to take account of any procedural changes which may be made to the Rules of Court at a future date.

Indeed, in the United Kingdom, Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996) (Chairman: Lord Justice Saville), it was observed as follows (at para 51):

> We have made it clear that a stay can be sought of a counterclaim as well as a claim. The existing legislation could be said not to cover counterclaims, since it required the party seeking a stay first to enter an "*appearance*", which a defendant to a counterclaim could not do. Indeed, "*appearance*" is no longer the appropriate expression in the High Court in any event, and never was the appropriate expression in the county court. [emphasis in original]

53 That having been said, it is important to ascertain what the *legal significance* is from a *substantive* perspective in so far as the express reference to "appearance" in s 6(1) of the IAA is concerned. Looking, then, at the *substance* of the matter, it is our view that the *earliest* point in time at which a stay application can be made under s 6 of the IAA is when a *substantive claim has already been crystallised* (and this is, in fact, also consistent with the latest UK position, as briefly described in the preceding paragraph). As *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) aptly puts it (at para 12/1/1):

> The rationale of the process of appearance is to enable the defendant to officially communicate his intention to defend or challenge *the action*. An appearance is also required even if his intention is to challenge the jurisdiction of the court or to contend that Singapore is not the proper forum for *the dispute*. [emphasis added]

It has also been observed in a similar vein, in *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure*"), that (at para 12/1/1):

> Appearance is the process by which a person against whom *a suit has been commenced*: (1) shows his intention to defend the suit; and (2) submits himself to the jurisdiction of the court, subject to the provisions of rr. 6 and 7 below. [emphasis added]

54 Indeed, it is only at (or after) *this* particular point in time (when a substantive claim has already been crystallised) that the defendant, cognisant of a clear claim that has *in fact* been brought against it, can then apply to the court to stay that particular claim (subject, of course, to the *latest* point in time at which such an application can be made, as stipulated in s 6(1) of the IAA itself (see also [46] above)). Indeed, as just alluded to, it would appear to be contrary to both logic as well as commonsense for a *potential* defendant to apply for the stay of a claim that had *yet to be brought* against it. But what if there was a situation where a claim would almost surely be made? For example, could it be argued, in the context of the present case, that Acclaim would almost surely commence court proceedings against Navigator, especially since one of the conditions for an application for pre-action discovery and/or pre-action interrogatories, according to O 24 r 6(3)(*a*) and O 26A r 1(3)(*a*) of the Rules 2006, is that the person against whom the order is sought "*is likely* to be a party to subsequent proceedings" [emphasis added]? As a matter of fact, however, there is no way of knowing with any certainty the answer to this question. More importantly, there must also be a *clear* and *defined cut-off point*, and that point, in our view, must be when a substantive claim has already crystallised. If so, then it follows that an application for pre-action discovery and/or pre-action interrogatories would, by its very nature, fall *outside* this particular cut-off point and, hence, *not* fall within the scope of s 6 of the IAA.

55 It is important to note, at this juncture, that the mere *availability* of pre-action discovery and/or pre-action interrogatories does *not* mean that such an application will be *granted automatically* by the court or as of right. On the contrary, the applicant (in this case, Acclaim) would

still need to satisfy the court that it ought to be granted such relief (pursuant to the applicable principles in relation to O 24 and O 26A of the Rules 2006). Indeed, if the applicant has been guilty of an abuse of process, the court would clearly refuse the application. In *Woh Hup* ([48] *supra*), this court, whilst holding that the court has the power to grant an application for pre-action discovery, notwithstanding the fact that the respondent concerned was a party to an arbitration agreement, opined thus (at [34]– [35]):

> 34 This does not mean, however, that parties to arbitration agreements may indiscriminately apply to the courts to obtain pre-action discovery. We are cognisant of the policy-related concerns raised by the appellants' counsel, who has pointed out that allowing parties to an arbitration agreement to obtain pre-action discovery might potentially give rise to an abuse of process, since the court would not consider the applicability of the arbitration agreement at that juncture. The appellants also argued that the trial judge's qualification that the disclosed documents be used only for court proceedings was of little assistance; such a qualification might not sufficiently safeguard against the possibility that a party who had obtained discovery might subsequently institute arbitration proceedings, while falsely claiming that the arbitration proceedings were not premised on the documents disclosed.
>
> 35 There seems to be a conflict between a plaintiff's need to know whether he has a likely cause of action and the prejudice that may be caused to the defendant who has given discovery if the parties end up going to arbitration instead. *While the plaintiff may legitimately apply for pre-action discovery, the potential for abuse is particularly high where the arbitration clause is or is very likely to be operative*. It appeared to us, therefore, that in circumstances where, on a plain literal reading, the arbitration clause *prima facie* covers the dispute in question, the court may refuse to grant discovery to prevent a possible abuse of process by the applicant. Such a refusal would be made without prejudice to a later court's determination on the applicability of the arbitration clause.
>
> [emphasis added]

56 Indeed, as we point out later (at [61] below), the approach of the courts is to facilitate and promote arbitration wherever possible between commercial parties. Hence, any application (including an application for pre-action discovery and/or pre-action interrogatories) will be carefully scrutinised by the court concerned to ensure that the arbitration process is not being circumvented or otherwise undermined. Indeed, where the arbitration clause is *prima facie* applicable, absent exceptional circumstances, a court would not grant pre-action discovery or pre-action interrogatories (see *Woh Hup* at [35]), especially where *both* the parties involved *as well as* the issues in dispute between them are one and the same, on the ground of abuse of process. Such a strict approach by the court would be consistent with the ideal of facilitating as well as promoting arbitration wherever possible.

57 That having been said, there may, on the contrary, be *valid reasons* as to why an application for pre-action discovery and/or pre-action interrogatories should be granted, even if an arbitration agreement is *prima facie* applicable. For example, as was pointed out in *Woh Hup* ([48] *supra*), pre-action discovery might be important in order to assist the applicant to ascertain whether it had a viable cause of action (or causes of action) against the respondent (at [35]). Navigator took great pains to emphasise that this was not the situation in the present case but we need not make any findings in this regard. If, in fact, the causes of action concerned fall within an arbitration clause in an arbitration agreement, the applicant ought then to refer the dispute to arbitration. If, however, the applicant commences an action in court contrary to the terms of the arbitration agreement, the respondent can apply under s 6 of the IAA to stay the action in favour of arbitration. Such flexibility is especially important and useful where the *lex arbitrii* or the rules of the arbitral tribunal do not

provide for any practical solution to allow the putative claimant to obtain discovery and/or interrogatories at a stage when it is still in the dark about the possible causes of action it may have against the other party and is therefore unable to file a statement of case.

58 Alternatively, as in the present case, pre-action discovery and/or pre-action interrogatories may be sought with a view to mounting a claim not only against a party with whom the applicant has an arbitration agreement, but also against third parties with whom the applicant has no such agreement (see O 24 r 6(5) and O 26A r 6(5) of the Rules 2006). Looked at in this light, the fact situation in the present proceedings is distinguishable from the usual situation where the parties to the arbitration agreement *and* the parties to the court proceedings concerned are (as was the case in, for example, *Woh Hup* ([48] *supra*)) *one and the same*. Indeed, where an application for pre-action discovery and/or pre-action interrogatories is made, as was the case here, in the context of multi-party proceedings, there appears, *ceteris paribus*, to be no reason why the court's power to grant pre-action discovery or pre-action interrogatories should be curtailed, although this power will be exercised *sparingly* and only (we hasten to add) *where valid reasons can be shown*.

59 Hence, from the perspective of the rules of *civil procedure*, it would appear that applications for pre-action discovery and/or pre-action interrogatories ought to be *available* to a party *notwithstanding* the provisions of s 6 of the IAA. Of course, this does *not* mean that such an application for discovery or interrogatories *will* be ordered – an important point which has been considered above (at [55]) and which we will return to below (at [67]). However, this is not an end to the matter. Counsel for Navigator, Mr Edmund Kronenburg, argued that adopting such an approach would undermine the need to promote the growth and use of arbitration in Singapore. If Mr Kronenburg is correct, there is an actual, and not merely a potential, conflict between the policies which were alluded to right at the outset of the present part of this judgment (see [44] above).

60 But would this, in fact, be the result? Or, as also alluded to at the outset of this part of the judgment, can the policies be harmoniously integrated, notwithstanding the availability of pre-action discovery or pre-action interrogatories to the parties? In our view, there is, in fact, *no* conflict between the policies just mentioned. Many of the points have, in fact, already been dealt with above, although it is (in the circumstances) not only useful but also important to reiterate them in the context of the present argument proffered by Mr Kronenburg. Let us elaborate.

61 As a matter of general policy, it is now clearly established that the courts will endeavour to do their level best to facilitate and promote arbitration between commercial parties wherever possible. Indeed, as far back as 1977, for example, Lord Denning MR observed, in the English Court of Appeal decision of *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357, thus (at 360):

> At one time the Courts used to be very jealous of arbitrations. They used to find all sorts of reasons for interfering with arbitrators and their awards. But the approach to arbitration has changed in modern days. The Courts welcome arbitrations in commercial disputes. They encourage references to arbitration to commercial men in the City of London. They do not lightly interfere with their awards.

The position stated by Lord Denning is an *a fortiori* one today. The approach at the present time in the local context has been succinctly stated by V K Rajah JA in the recent decision of this court in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] SGCA 41, as follows (at [28]):

> There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting

> arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.

62 Given the clear and unquestionable commitment of the courts in facilitating, as well as promoting, arbitration between commercial parties wherever possible, would the decision of this court to the effect that the courts are able to grant pre-action discovery and/or pre-action interrogatories militate against such a commitment?

63 It is clear, in our view, that the question posed in the preceding paragraph must be answered in the *negative*. Indeed, as we have already noted above (at [57]), the grant of pre-action discovery and/or pre-action interrogatories might (depending on the precise facts) even *aid* arbitration – at least in so far as such discovery and interrogatories might assist the applicant to ascertain whether it had a viable claim against the respondent. Further, having regard to the factual context in which the present appeal has arisen, we see no reason why Acclaim ought to be deprived of the opportunity to discover whether it has a claim against Navigator and/or other parties as well (some of whom, in fact, had initiated the claim against Acclaim in the first place); in particular, Acclaim's stated purpose of commencing OS 1830 was not simply to identify any possible claim against Navigator *per se* but also (*inter alia*) to identify the FARs whom it could possibly claim against (see the extracts from Lim's affidavit filed on 17 December 2007 set out at [8] above). However, we must be careful to point out that we make *no findings on the substantive issue* in OS 1830 as such because it is not before us. Without a doubt, the court hearing the merits of OS 1830 will have to consider all the factors raised by the parties in arriving at its decision.

64 There is, of course, a difference between pre-*action* discovery on the one hand and pre-*arbitral* discovery on the other. Indeed, arguments have been made that the court does not have the power, under s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), read together with para 12 of the First Schedule thereof, to grant pre-arbitral discovery (see the Singapore High Court decision of *Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd* [2005] 1 SLR 266 at [20]; see also *Woh Hup* ([48] *supra*) at [11]– [16]). It has, to the best of our knowledge, not been settled by our courts as to whether or not the *courts* would be able to grant pre-*arbitral* discovery. This court in *Woh Hup* ([48] *supra*) noted that there were doubts on whether the court had the power to order pre-arbitral discovery, but left the point open as it was unnecessary for this issue to be decided (at [36]). Prof Pinsler has persuasively argued why *the courts* do *not* have the jurisdiction to grant pre-*arbitral* discovery (see Jeffrey Pinsler, "Is Discovery Available Prior to the Commencement of Arbitration Proceedings?" [2005] SJLS 64). This view is persuasive not only because of the detailed arguments set out in this learned article, but also because it would be most appropriate for the courts (if it is at all possible) to leave the *entire* conduct of arbitration proceedings in the hands of the arbitral tribunal.

65 At this juncture, however, we should deal with an important objection to the court having the power to grant pre-action discovery and/or pre-action interrogatories. This relates to the desire by the parties in most (if not all) arbitrations to keep the proceedings *confidential*. However, we do not think that this would constitute an insuperable obstacle as such. Whilst the law clearly recognises the duty (and, indeed, the importance) of confidentiality in arbitration, this duty of confidentiality is by no

means an absolute one (see, generally, Quentin Loh Sze On SC and Edwin Lee Peng Khoon, *Confidentiality in Arbitration: How Far Does It Extend?* (Academy Publishing, 2007), especially at chapters 12 and 13). In particular, one established exception to such a duty is where it is reasonably necessary to protect the legitimate interests of a party to the arbitration (see, *eg*, the English Court of Appeal decision of *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 at 326–327).

66 Further, the implication that court proceedings are somehow less confidential is one that is overstated. There are, in fact, procedures in place for the sealing of court files (including the files relating to the application for pre-action discovery and/or pre-action interrogatories itself, as was the case here), as well as for hearings or proceedings to be heard in camera if it is "expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason to do so" (*per* s 8(2) of the SCJA). However, we also acknowledge the fact that an application made on the ground of confidentiality may be a more limited right inasmuch as it might be denied by the court "in exercise of its inherent jurisdiction because of the fundamental importance of the litigation" (see *Singapore Civil Procedure* ([53] *supra*) at para 33/3/2). This brings us, in fact, to what is, in our view, the *most important argument as well as safeguard* which strongly supports the decision we have arrived at to the effect that pre-action discovery and pre-action interrogatories are *available* even to parties to an arbitration agreement under the IAA.

67 *Most importantly*, as we have already been at pains to explain (at [55] above), an application for pre-action discovery and/or pre-action interrogatories is *not* one that will be granted *automatically*. Indeed, if the applicant is guilty of an abuse of process, the application will presumably be nipped in the bud by the court concerned (if necessary, with, *inter alia*, an appropriate order for costs). *In particular*, we are of the view that if there is a total coincidence with regard to both the parties as well as the issues in dispute between them in so far as both the court and any ongoing or potential arbitration proceedings are concerned, the court concerned should be extremely reluctant to grant pre-action discovery or pre-action interrogatories, especially if it results in delay or stifles the proper conduct of arbitration proceedings. This would be *especially* the case if arbitration proceedings are already in progress. Where there are *separate court actions* involving third parties (as is the situation in the present case), the *precise facts and circumstances* will be of *crucial importance* to the court in arriving at its decision. 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 (a point which we have already emphasised in some detail (at [61] above)). Any attempt to circumvent this ideal *via* court procedures will, *ex hypothesi*, be an *abuse of the process of the court* and will (as already mentioned) not be tolerated by the court concerned. At the same time, however, it is equally important to ensure that court procedures (which aim at achieving both procedural as well as substantive justice (see, *inter alia*, the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR 425 at [8])) are not undermined as a consequence. A *judicious balance* between court proceedings and arbitration proceedings (with the facilitation as well as promotion of the latter wherever possible) must always be the ultimate aim of the courts.

68 Although our reasoning and decision set out above applies specifically to s 6 of the IAA, we see no reason why the same reasoning and result should not, *ceteris paribus*, apply to s 6 of the AA as well.

Conclusion

69 For the foregoing reasons, we allow the appeal against the decision in SUM 5059 but dismiss the appeal against the decision in RA 383. Navigator is to bear the costs of the entire appeal (*ie*, CA 5). The usual consequential orders are to apply.

[note: 1]Respondent’s Case at pp 51–52.

[note: 2]Appellant’s Case at p 49.

[note: 3]Respondent’s Case at p 30.

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