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16 MARCH 2020

Third-Party Subpoenas in Arbitration

Coneff Corporation Sdn Bhd v Vivocom Enterprise
(Originating Summons No WA-24C(ARB)-26-06/2019)

“What if a third party has documents essential to proving your case in arbitration, perhaps the proverbial smoking gun, and all you need is a ^[1] subpoena from the court to compel production?”

An arbitral tribunal cannot, on its own, order a non-party (**Third Party**) to an arbitration agreement to produce relevant documents in aid of the arbitration. This is due to the overarching principle that only signatories to an arbitration agreement are subject to the arbitral tribunal. However, there may be circumstances in which documents or evidence from a Third Party may be critical in proving one's case.

^[2]
In *Coneff Corporation Sdn Bhd v Vivocom Enterprise*, the Malaysian High Court identified the principles that will guide the exercise of its discretion, under s 29 of the Arbitration Act 2005 (**AA 2005**), to order a Third Party to produce documentary evidence in aid of an arbitration.

Takeaway points

The High Court regarded the principal criteria in justifying the issuance of a subpoena under s 29 of the AA 2005 to be **relevancy** and **materiality**. This is consistent with the established principles for subpoenaing a witness in court proceedings under **O 38 r 14 of the** ^[3]

Rules of High Court 2012 (see *Wong Sin Chong*).

In summary:

- (a) the subpoenaed document or witness must be in possession of evidence relevant to a pivotal issue in the arbitration proceedings;
- (b) the person subpoenaed need not be a party in the arbitration proceedings;
- (c) the subpoena would not be ordered if it is oppressive or for a non-legitimate purpose; and
- (d) specificity in making a request for documents is a relevant consideration.

The Malaysian judiciary's willingness to exercise its discretionary powers in aid of an arbitration once again re-affirms Malaysia as an arbitration-friendly jurisdiction. Clients can take comfort in ensuring that Third-Party documents that are relevant and material to the arbitration are well within the courts' reach

The facts of this case and the High Court's judgment may be viewed [here](#).

Lim Chee Yong and Soh Zhen Ning (Pupil-in-Chambers)

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Published by the Energy, Infrastructure & Projects and International Arbitration Practice

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[1]

Heather L Heindel, "Third-Party Document Discovery in Arbitration? Do Not Count On It", American Bar Association (8 October 2018)

<https://www.americanbar.org/groups/construction_industry/publications/under_construction/2018/fall/discovery-in-arbitration/> (accessed 9 March 2020)

[2]

Coneff Corporation Sdn Bhd v Vivocom Enterprise (Originating Summons No WA-24C(ARB)-26-06/2019)

[3]

Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 4 CLJ 345