Kluwer Arbitration Blog

Hong Kong: A Listed Company's Duty of Confidentiality in Arbitration and its Duty of Disclosure to the Public

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Confidentiality is frequently promoted as a key advantage of international arbitration. It preserves the information exchanged in the arbitration proceedings and prevents the parties from disclosing information relating to the arbitration. The extent of confidentiality afforded to the parties varies from jurisdiction to jurisdiction. In certain jurisdictions, the law does not recognise the concept of confidentiality in arbitration proceedings, for example, in the US and Australia. In other jurisdictions, confidentiality is seen as being implied in the arbitration agreement, for example, in England and Wales.

In Hong Kong, the Hong Kong Arbitration Ordinance (Cap. 609) which came into effect on 1 June 2011 ("**Arbitration Ordinance**") expressly provides for statutory duty of confidentiality in arbitration. The 2018 HKIAC Administered Arbitration Rules effective on 1 November 2018 ("**2018 HKIAC Rules**") also contains similar provisions on the duty of confidentiality.

Despite the laws and institutional rules, the parameters of confidentiality are by no means clear-cut. In particular when the arbitrating party is also a company listed on the stock exchange – which is therefore subject to disclosure duty – one inevitably will ask the question: what is the boundary between the duty of confidentiality and the duty of disclosure?

Hong Kong law provides statutory protection over confidentiality in arbitration

The arbitration agreement between the parties, law of the seat of the arbitration, and the rules of the arbitral institution administering the arbitration would normally dictate the extent of duty of confidentiality in arbitration.

Hong Kong is one of few jurisdictions explicitly providing for statutory protection over confidentiality in arbitration. Pursuant to Section 18(1) of the Arbitration Ordinance, unless agreed by the parties, no party may publish, disclose or communicate

information relating to the arbitral proceedings and awards. Section 5 further states that the duty of confidentiality applies as long as the seat of arbitration is in Hong Kong. Notably, the scope of confidentiality is worded very widely preventing disclosure of even the existence of arbitration proceedings.

The 2018 HKIAC Rules largely mirror the position under the Arbitration Ordinance. In line with Section 18(1) of the Arbitration Ordinance, Article 45.1 imposes the duty of confidentiality on the parties. It further clarifies the scope of confidentiality to cover the arbitration itself, any award, and decision of the emergency arbitrator. As to the parties bound by the duty, Article 45.2 states that the duty applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC.

Few jurisdictions adopt the same position as Hong Kong. In England and Wales, by comparison, the Arbitration Act 1996 contains no provision on confidentiality. This is intentional. The rationale is that it is difficult and controversial to define the scope of the duty of confidentiality and its exceptions. As a result, the English courts have been developing the parameters of confidentiality over the years through cases. The classical position, as confirmed in *Ali Shipping v Shipyard Trogir* [1998] 1 Lloyd's Rep 643, is that the duty of confidentiality is implied in the arbitration agreement. This case has however been tested in various subsequent cases challenging the existence of an absolute duty of confidentiality.

Exceptions to the duty of confidentiality

In Hong Kong, while the parties to the arbitration are bound by the duty of confidentiality, they are permitted to disclose information relating to arbitration in limited circumstances. In *Housing Authority v Sui Chong Construction & Engineering Co Ltd* [2008] 1 HKLRD 84, the Hong Kong Court of First Instance considered that an arbitrating party could disclose confidential information relating to an arbitration if it is "*reasonably necessary*" for the protection of the party's legitimate interest in a claim brought by a third party. In reaching this conclusion, the court made reference to *Ali Shipping*, which is one of the leading English authorities on the duty of confidentiality. In *Ali Shipping*, the English Court of Appeal recognises an exception to the duty of confidentiality, i.e. where disclosure to a third party is "*reasonably necessary*" for the protection of the disclosing party's legitimate interest.

Section 18(2) of the Arbitration Ordinance also explicitly sets out exceptions to the confidentiality duty. Particularly under Section 18(2)(b), a party may publish, disclose or communicate information to any government body or regulatory body to which the party is obliged by law to do so. This is echoed by Article 45.3(b) of the 2018 HKIAC Rules.

In practice, the Section 18(2)(b) exception would apply to a public company listed on the Hong Kong stock market, which is subject to strict regulatory rules on disclosure. Specifically, under Rule 13.09 of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited ("**Listing Rules**") and Part XIVA of the Securities and Futures Ordinance (Cap. 571) ("**Securities and Futures Ordinance**"),

a listed company shall disclose inside information to the public as soon as reasonably practicable after such inside information has come to its knowledge. "*Inside information*" is defined as specific information about the corporation that is not generally known to the public but would, if generally known, be likely to *materially* affect the price of the listed securities.

The regulations will be seen as an exception to the duty of confidentiality. They impose a mandatory duty on listed companies to disclose arbitration-related information to the public as soon as reasonably practical. The duty of disclosure arises if the arbitration will likely *materially* affect the company's share price. Having said that, the regulations are silent on what constitutes *materiality*. In practice, the listed company will usually exercise discretion on the level of materiality, for example, by comparing the claim value against its annual revenue to decide if the arbitration is indeed material.

Some commentators further categorise the listed company's disclosure duty as one concerning public interest – because a listed company owes a duty to the public to disclose information likely to materially affect the share price to enable an investor to make an informed assessment of the activities, assets, and liabilities of the company. Failure to make prompt and fair disclosure would endanger the benefits of the investors and the wider public.

What is the boundary between the duty of confidentiality and the duty of disclosure?

It is reasonably clear that in Hong Kong, a listed company is obliged to disclose information relating to arbitration to the public if the dispute is considered to likely materially affect the share price. Its obligation is imposed by the regulations thus constitutes an exception to the duty of confidentiality.

However, this is never the end of the story. When the listed company intends to comply with its disclosure duty, there seems to be no clear guidance on what the listed company shall disclose, or what constitutes disclosure "*as soon as reasonably practical*". Some commentators hold the view that the listed company will have to at least disclose the existence of arbitration proceedings as it is likely to materially affect the price of the listed securities.

In the real world, listed companies face myriad uncertainties surrounding disclosure. To name a few:

- **When does the duty of disclosure arise?** The Listing Rules and the Securities and Futures Ordinance require disclosure by the listed company as soon as reasonably practicable after any inside information has come to its knowledge. It is uncertain if the listed company would have to disclose the existence of the arbitration as soon as arbitration commences, or if it could disclose the arbitration only after it has received the arbitral award. In our view, this will depend on the nature of the disputes and expectation of how that arbitration will impact on the listed securities.
- **More importantly, what should a listed company disclose, and not disclose?**

> The listed company should be cautious about disclosing more information than is reasonably necessary, as suggested in *Housing Authority*. In practice, Hong Kong courts recognise that injunctions can be used to prevent the disclosure of confidential information. Moreover, bearing in mind that the duty of confidentiality concerns a duty towards the parties in the arbitration, the listed company shall consider carefully the likely impact on the other party in case of disclosure.

Although there is no universal answer, to minimise the uncertainties, parties are encouraged to expressly agree on the extent of disclosure in the arbitration agreement, for example, that the parties agree to keep all information relating to the arbitration and the award confidential to the extent possible. Parties should also carefully consider the confidentiality positions under the applicable laws as well as the applicable institutional rules when drafting the arbitration agreement.

In case of disclosure, public companies should act with caution to disclose the information that is reasonably necessary for investors to make an informed decision. The public company must seek proper advice and carefully consider the timing and scope of disclosure before doing so. Needless to say, each instance will need to be examined on a case-by-case basis.

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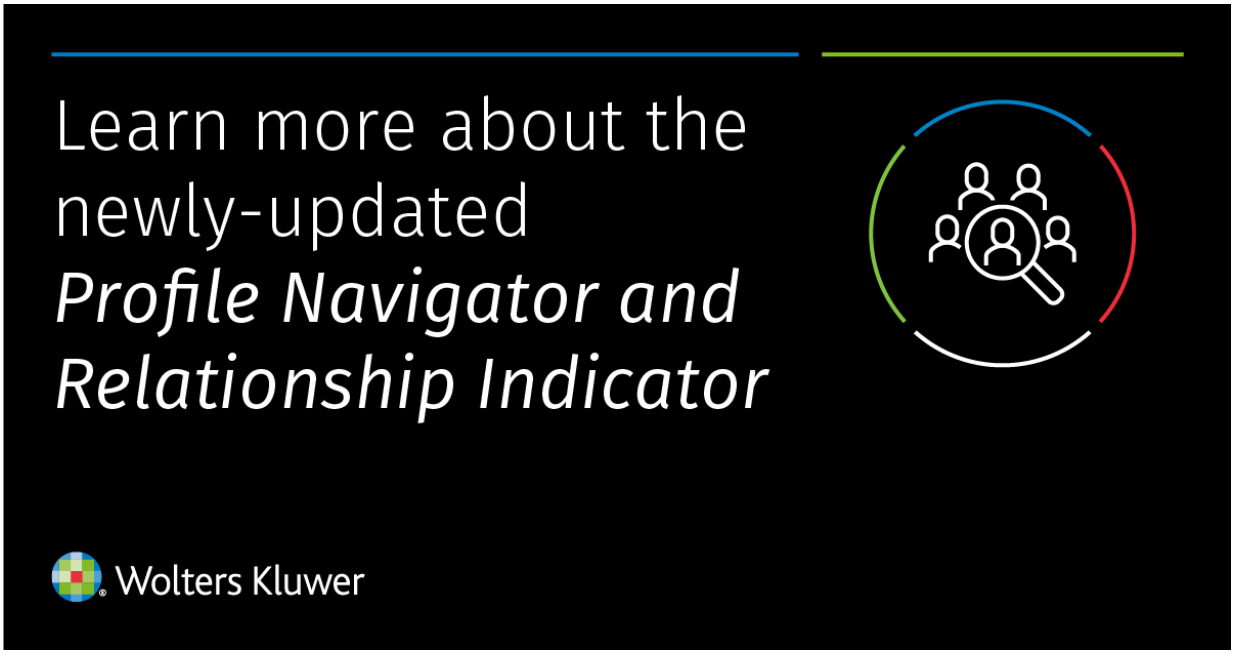

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