Kluwer Arbitration Blog

Parties' Confidentiality Obligations in International Commercial Arbitration: A Dutch Perspective

Denise Jansen (Houthoff) · Tuesday, February 22nd, 2022

Confidentiality is perceived to be one of the advantages of international (commercial) arbitration. Despite this, institutional arbitration rules are largely (or even completely) silent on the parties' confidentiality obligations, leaving such issues to be determined by the parties and/or the tribunal or, in many cases, the applicable law. Defining what the duty of confidentiality – if any – entails, is thus, not easy. These obligations may vary from not disclosing the merits of the case to not disclosing the amount in dispute or not disclosing the existence of the arbitration itself. The approach that different jurisdictions follow with regard to such obligations provides no further clarity.

This contribution aims to provide a brief overview on confidentiality from a Dutch law perspective. First, this blog post touches upon the general notion of confidentiality under Dutch arbitration law. Next, it discusses two clear-cut exceptions thereof. Lastly, it assesses what difficulties may arise and how to remedy these when seeking to enforce any confidentiality obligations. The analysis limits itself to the parties' obligations, leaving aside any obligations of tribunals or arbitration institutions.

The notion of confidentiality under Dutch arbitration law

Confidentiality remains a primary feature of Dutch arbitration law, even though the current version of the Dutch Arbitration Act ("**DAA**") neither defines the notion of confidentiality nor provides explicit party obligations. As part of the process of amending the DAA to its current version, the possibility of explicit confidentiality obligations was discussed in 2005. At that time, Prof. van den Berg proposed explicitly recognising this principle, by adding the following wording: "*An arbitration is confidential, and all persons directly or indirectly involved are bound to secrecy, except and to the extent that disclosure follows from the law or the parties' agreement" (unofficial translation)*.

The Dutch Minister of Security and Justice, however, rejected this proposal. The Minister's view was that codifying confidentiality would be difficult, as the proposed wording left too much room for discussion as to the scope of confidentiality, which would have resulted in legal uncertainty. Moreover, the Minister considered that

Article 1058(4) of the Dutch Code of Civil Procedure ("**DCCP**") under the 2015 DAA, which provides that no copies of or extracts from arbitral awards shall be provided to third parties, served to safeguard confidentiality. Yet, this provision does not fully remedy the absence of an explicit confidentiality rule setting out the scope of confidentiality, nor does it clarify who must comply with confidentiality obligations.

Ultimately, the Minister stated that confidentiality of international (commercial) arbitration was already an unwritten rule under Dutch arbitration law and would remain so.

The notion of confidentiality under Dutch institutional rules

Although Prof. van den Berg's proposal was not ultimately adopted in the DAA, it found its way into the 2010 update of the institutional arbitration rules of the Netherlands Arbitration Institute ("**NAI**") (see Article 55(2) of the NAI Rules, 2010). The confidentiality rule can also be traced in the 2015 NAI Rules (see Article 6 of the NAI Rules, 2015).

Other Dutch arbitral institutions however have not followed suit. For instance, the Arbitration Board for the Building Industry (*Raad van Arbitrage voor de Bouw*) and UNUM Transport Arbitration & Mediation do not contain confidentiality provisions whatsoever.

Confidentiality obligations arising from the parties' agreement or the tribunal's confidentiality order

Parties may also establish their own framework regarding confidentiality. The greatest benefit of an agreement in this regard is that it provides certainty regarding the exact scope of confidentiality, duration of the agreement and remedies available in case of a breach thereof. The parties may, for example, agree to the exact issues to be covered by their agreement, which may range from the documents submitted or disclosed in the arbitration and/or the awards themselves to the existence of the arbitration in itself.

Alternatively, parties may simply adopt specific arbitration rules that provide for confidentiality.

One caveat regarding the impact of confidentiality agreements is that they do not encompass third parties, for instance witnesses or experts providing evidence in an arbitration. Hence, it is recommended to conclude separate confidentiality agreements if the parties wish the confidentiality obligations to apply in relation to such participants too.

Parties may also – individually or jointly – request the tribunal to render a confidentiality order during the arbitral proceedings. It is generally accepted that the tribunal may also do so at its own motion, even in the absence of an express provision

in applicable arbitration rules or arbitration laws. Under Dutch law specifically, such authority is based on Article 1036(1) DCCP, pursuant to which the tribunal shall determine the manner in which the arbitral proceedings shall be conducted insofar the parties have not agreed thereupon.

In practice, tribunals employ a wide range of methods when dealing with confidentiality. These methods can range from a limitation on disclosure only to *redacted* documents, to the involvement of third parties to review the confidential information and assess, if necessary, certain issues of the dispute taking into account such information.

The exceptions to confidentiality from a Dutch perspective: two clear-cut examples

Although confidentiality is an unwritten rule under Dutch arbitration law, and even if the parties have explicitly agreed thereupon, exceptions may apply. For instance, the existence of an arbitration may be revealed in arbitration-related court proceedings, including interim relief proceedings (pursuant to Article 254 DCCP), enforcement proceedings (pursuant to Article 1062 DCCP in case of a domestic arbitral award and either Article 1075 or 1076 DCCP in case of a foreign arbitral award), setting aside proceedings (pursuant to Article 1065 DCCP), or revocation proceedings (pursuant to Article 1068 DCCP).

This exception follows from the public character of court judgments pursuant to Article 121 of the Dutch Constitution and Article 29 of the DCCP. The public character of court proceedings only entails that court decisions and hearings in (open) court are public. In case of a hearing held behind closed doors, only an anonymised copy or extract of the decision will be issued in accordance with Article 29(4) DCCP. Party submissions and other documents submitted in court proceedings (including those relating to an arbitration, e.g., the arbitral award) are not made public unless and to the extent they are quoted in a decision (see Article 29(3) DCCP. This is in contrast to, for example, US litigation proceedings).

Moreover, confidentiality will *not* prevail when it clashes with mandatory provisions of Dutch law. For example, according to Articles 2:101(1) and 2:210(1) of the Dutch Civil Code ("**DCC**") respectively, both public limited and private limited companies must prepare and file their annual accounts with the Dutch Chamber of Commerce. As part thereof, and pursuant to Article 2:374 DCC, such companies must include provisions in the annual accounts, "*which* (…) *may be seen as likely or certain* (…)."Accordingly, legal claims and, by extension, legal claims being adjudicated in arbitration may be included in such annual accounts.

Difficulties of and remedies to enforcing confidentiality obligations

Tribunals have a multitude of tools to enforce confidentiality provisions during an arbitration. Once tribunals have rendered their awards, however, they no longer have

the mandate to enforce a breach of in-arbitration confidentiality obligations.

It may be difficult to effectively enforce confidentiality obligations in practice outside of arbitral proceedings. In case one party breaches its confidentiality obligations, the aggrieved party may initiate interim relief proceedings before the Dutch courts (pursuant to Article 254 DCCP), irrespective of whether the parties concluded a confidentiality agreement. This is possible because, in the absence of a confidentiality agreement, the unwritten confidentiality rule still provides the right to initiate such proceedings. The advantage of having agreed on confidentiality obligations however is that the aggrieved party will have fewer hurdles to overcome in terms of proving an actual breach, in particular where the agreement stipulates the exact elements of the arbitration that must be kept confidential.

The most common and immediate manner to remedy a breach of confidentiality is to seek an injunction in interim relief proceedings that would prohibit the breaching party from any further disclosure of information governed by the confidentiality agreement. Nonetheless, such a remedy does not reverse the initial harm. In order to 'undo' the harm, a party may seek damages arising from the breach (in accordance with Article 6:74 DCC). However, certain elements required under Dutch law to successfully claim damages may prove to be difficult, for example, establishing a causal link between the breach and the damage or providing the court with a calculation of the damages incurred, to name but a few. To overcome at least some of these hurdles in advance, parties could agree *ex ante* on a penalty clause in case of a breach of any confidentiality obligations. In most civil law jurisdictions, penalty clauses are enforceable. This is however generally not the case in common law jurisdictions.

Conclusion

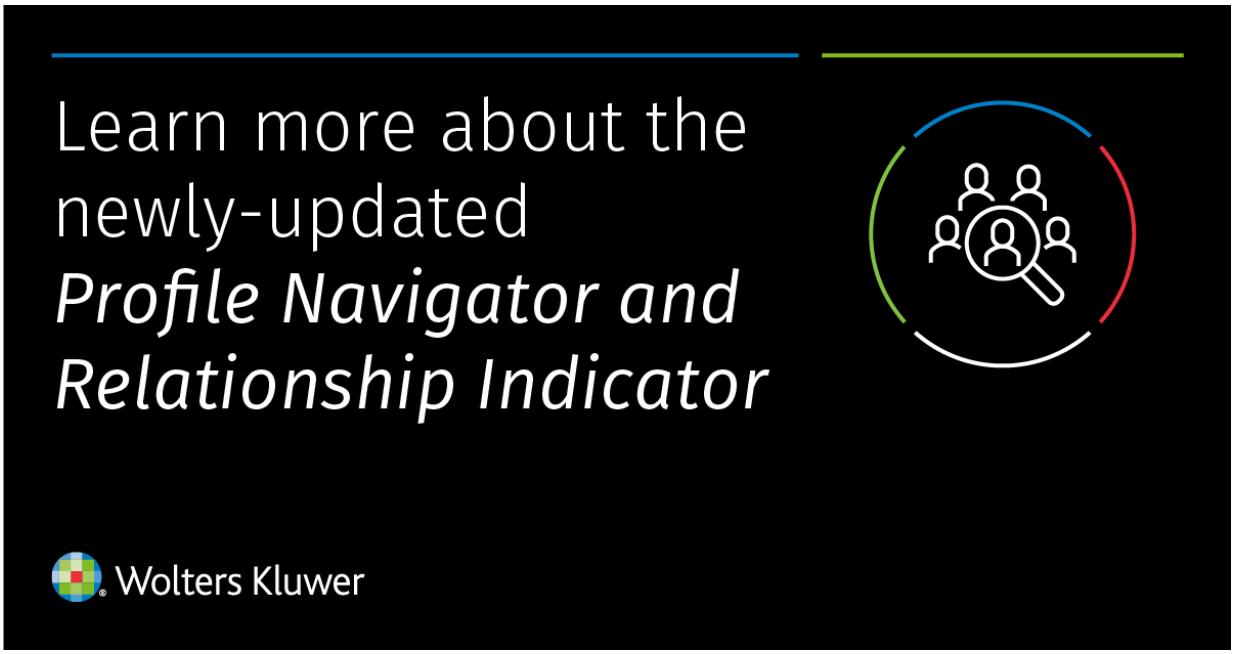
Although under Dutch arbitration law, confidentiality is an unwritten principle, the disputing parties would do well to include comprehensive (and comprehensible) confidentiality obligations, either by explicit agreement or by reference to arbitration rules that provide for confidentiality (such as the NAI Rules), depending on their specific needs.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+

relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



This entry was posted on Tuesday, February 22nd, 2022 at 8:00 am and is filed under Confidentiality, Netherlands
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.