

Insights

## HK COURT REJECTS “ARBITRAL CONFIDENTIALITY” ARGUMENT IN PARALLEL COURT AND ARBITRATION PROCEEDINGS

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### SUMMARY

In *Beijing Songxianghu Architectural Decoration Engineering Co., Ltd v Kitty Kam* [2024] HKCFI 1657 (date of reasons for decision: 19 June 2024), the Hong Kong Court of First Instance (“**the Court**”) dismissed an application for a confidentiality order – made on the basis of confidentiality protected in the arbitration under the Arbitration Ordinance (Cap 609) – to effectively render the Court proceedings and all information relating to a set of related arbitration proceedings confidential (“**Confidentiality Application**”).

The Court rejected the Defendant’s argument that arbitral confidentiality was being undermined by the Plaintiff’s decision to commence both an arbitration and allegedly “*parallel proceedings*” in Court, which “*effectively left open a loophole that allow the Plaintiff to breach its confidentiality obligations ... through the backdoor at its wishes*”. This case highlights that arbitral confidentiality is not absolute, and must be balanced with the fundamental principle of open administration of justice when a party discloses information in protecting or pursuing a legal right or interest in legal proceedings.

### BACKGROUND

In this Court action, the Plaintiff, *Beijing Songxianghu Architectural Decoration Engineering Co., Ltd*, claimed against an individual – Defendant Kitty Kam (“**Kam**”) – to recover two sums totalling some HK\$253 million for fraud, dishonest assistance, and conspiracy to injure by unlawful means.

Shortly after this Court action was commenced, the Plaintiff commenced an arbitration against an entity related to Kam, named Sunshine Success Global Inc (“**SSGI**”).

After the arbitration was commenced but prior to the Confidentiality Application in the Court by Kam, the Plaintiff had sought a Mareva Injunction against Kam to restrain her from removing from

Hong Kong any of her assets up to the value of the claim of HK\$253 million.

Two months later, Kam had made an application for a stay of the Court proceedings pending the final determination of the arbitration between the Plaintiff and SSGI. Kam offered to become a Respondent in the arbitration and be bound by the result, and argued that (1) there were many common issues between the arbitration and the Court action, and (2) staying the Court action would avoid inconsistent findings and save judicial resources and costs.

The Mareva Injunction was granted by the Court, and Kam's application for a stay in favour of arbitration was dismissed ("**Mareva Decision**"). In this earlier Mareva Decision, the Court had remarked, *inter alia*, that:-

- There was a good arguable case of fraud by Kam
- The Plaintiff had been cheated a large sum of money, and the current whereabouts of the money was unknown
- There were many common issues between the arbitration and this Court action
- The Plaintiff had commenced these Court proceedings as of right, and such right should not be deprived without strong reason
- SSGI basically was Kam's alter ego
- There was much overlap between the Court proceedings and the arbitration
- Despite the advantages of having the dispute resolved by one tribunal, the evidence showed that SSGI (under Kam's instructions) had been dragging its feet in the arbitration
- Plainly, a determined party can cause considerable delay in the resolution of an arbitration

After the Mareva Decision, Kam sought an order that the Plaintiff's Statement of Claim be struck out (or alternatively, that the Mareva Injunction be discharged). Kam also lodged the Confidentiality Application, relying on sections 16 and 18 of the Arbitration Ordinance, which provide that:-

**"16. Proceedings to be heard otherwise than in open court**

(1) Subject to subsection (2), proceedings under this Ordinance in the court are to be heard otherwise than in open court.

(2) The court may order those proceedings to be heard in open court—

(a) on the application of any party; or

(b) if, in any particular case, the court is satisfied that those proceedings ought to be heard in open court.

(3) An order of the court under subsection (2) is not subject to appeal.”

#### **“18. Disclosure of information relating to arbitral proceedings and awards prohibited**

(1) Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to—

(a) the arbitral proceedings under the arbitration agreement; or

(b) an award made in those arbitral proceedings.

(2) Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party—

(a) if the publication, disclosure or communication is made—

*(i) to protect or pursue a legal right or interest of the party; or*

*(ii) to enforce or challenge the award referred to in that subsection,*

*in legal proceedings before a court or other judicial authority in or outside Hong Kong;*

(b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or

(c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.” *(emphasis added)*

## COURT’S DECISION

This article will focus on the Court’s decision on the Confidentiality Application.

The Court first remarked that the Plaintiff was **suing different parties under the two sets of proceedings**, namely Kam on the one hand and SSGI on the other hand. Although the Plaintiff intended to amend its Statement of Claim to plead a case that SSGI was an alter ego of Kam, this intended amendment was “strenuously resisted” by Kam (substantive hearing to be heard separately). The Court therefore only considered the parties’ present pleaded case, i.e. the alter ego point has **not** been pleaded by the Plaintiff.

The Court held that the starting point to the Confidentiality Application must be that open administration of justice is a “*fundamental principle of great importance*”, referring to the well-

known judgment in *Asia Television Ltd v Communication Authority* [2013] 2 HKLRD 354 and Article 10 of the Hong Kong Bill of Rights Ordinance (Cap 383).

Article 10 of the Hong Kong Bill of Rights Ordinance provides that:-

**“Article 10**

**Equality before courts and right to fair and public hearing**

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. *The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” (emphasis added)*

In *Asia Television Ltd v Communication Authority* [2013] 2 HKLRD 354, at [19]-[36], CJHC Judge Cheung (as he then was) formulated ten “basic principles” relating to open justice (which will not be repeated here), and the Court of Appeal in that case affirmed the constitutional significance of open justice.

The Court held that any departure from the open administration of justice must be “*justified by reference to the principles and the circumstances of the case in question*”, and that a central consideration is “*whether the due administration of justice requires the principle of open administration to be compromised*”.

Although arbitral confidentiality is indeed protected by section 18 of the Arbitration Ordinance, section 18(2)(a)(i) provides the exception that a party may disclose such information “*to protect or pursue a legal right or interest of the party*”. Almost identical wording appears at Article 45.3 of the 2018 HKIAC Administered Arbitration Rules, which governed the arbitration – an exception exists “*to protect or pursue a legal right or interest of the party ... in legal proceedings before a court or other authority*”.

It was not disputed that the Plaintiff was entitled to bring this action against Kam as of right – within the meaning of section 18(2)(a)(i) of the Arbitration Ordinance and Article 45.3 of the 2018 HKIAC Administered Arbitration Rules. This is consistent with the Court’s remarks in the Mareva Decision that the Plaintiff had commenced these Court proceedings as of right, and such right should not be deprived without strong reason.

Although Kam sought to rely on the English Court of Appeal case of *CDE v NOP* [2021] EWCA Civ 1908 (where the defendants also had been accused of having orchestrated a fraud), the Court held that, properly understood, the judgment in that case reinforced that disclosure to protect or pursue a legal right of that party does not amount to a breach of the arbitral confidentiality. The facts of *CDE v NOP* were that the English Court of Appeal held that the first instance judge was correct in holding the case management conference in private, but the judgment also made clear that the considerations in favour of confidentiality in the context of a case management conference **did not** have the same force if applied in the context of a hearing where the merits of the dispute would be considered – such as the striking out application made by Kam, which may affect the Plaintiff’s substantive rights.

The Court concluded that it fell on Kam to satisfy the Court that there were otherwise cogent reasons in this particular case to justify a departure from open justice, or that due administration of justice requires the principle of open administration of justice to be compromised. Other than arbitral confidentiality, Kam did not put forth any such other reasons or justification, and therefore rejected Kam’s Confidentiality Application.

## BCLP DISCUSSION

It is interesting to speculate whether the Court would have ruled any differently, if (1) Kam had not resisted the Plaintiff’s intention to amend its Statement of Claim to plead a case that SSGI was an alter ego of Kam, and/or (2) SSGI / Kam was not “dragging its feet” or causing considerable delay in the arbitration.

In relation to Kam’s offer to become an additional Respondent in the arbitration and be bound by the result, it is not surprising that this seemingly was not given much weight. First, arbitration is a consensual process based on the parties’ agreement. There was no inherent or statutory power for the court to order that Kam be joined into the arbitration, and any such joinder therefore would need the consent and agreement of Kam and all parties to the relevant arbitration agreement. Further, given that SSGI (presumably under the instructions of Kam, if SSGI was her alter ego as alleged) had been dragging its feet in the arbitration, this would have affected the attractiveness of joining Kam as an additional party.

The Court’s decision in this case serves as a useful reminder of the applicable principles in relation to both arbitral confidentiality and open administration of justice, and the potential tension between them. It also highlights the importance of careful drafting of arbitration agreements, from the perspective of both (1) possible joinder of additional or related parties, and (2) the risk of valid disclosure of otherwise confidential information as a recognised exception to arbitral confidentiality – as provided for under the relevant local laws and/or application arbitration rules.

## RELATED PRACTICE AREAS

- International Arbitration

## MEET THE TEAM



### **Glenn Haley**

Hong Kong SAR

[glenn.haley@bcplaw.com](mailto:glenn.haley@bcplaw.com)

[+852 3143 8450](tel:+85231438450)



### **Barry Wong**

Hong Kong SAR

[barry.wong@bcplaw.com](mailto:barry.wong@bcplaw.com)

[+852 3143 8419](tel:+85231438419)

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