IX. CONFIDENTIALITY CONCERNS IN ARBITRATION DISPUTES: MEASURES NEED TO BE ADOPTED TO ASSURE CONFIDENTIALITY TO PARTIES IN INDIA

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ABSTRACT

Confidentiality or non-disclosure of an arbitration agreement is amongst the various advantages of arbitration which makes parties prefer it over litigation. A clause to this effect is featured in the legislations of various nations all over the world, though in a varied fashion. Various institutional rules also facilitate this assurance of maintaining confidentiality. India too, via a recent Amendment to its Arbitration Act, tends to promise this attribute of confidentiality to the parties. However, the provision has not been drafted suitably as it does not define the extent of the confidentiality clause and the circumstances under which the said clause will become non-operational. This paper is an attempt to analyze whether India is sufficiently committed to providing the parties with a requisite amount of confidentiality and also suggests measures through which the confidentiality clause can be effectively utilized in a Court of Law.

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I. INTRODUCTION

Globally, arbitration has been accredited as the transcendent form of dispute resolution among businessmen and governments for their economic and commercial transactions.[1] Arbitrability in corporate affairs like sale and purchase, mergers and acquisitions, investment, insurance, insolvency and bankruptcy, infrastructure and project finance, capital market and other business transactions has been serviceable in facilitating and promoting trade culture around the world as it unraveled the encumbrances of dispute resolution by courts. Fortunately, inefficiencies, tediousness and high costs involved in the traditional court system,[2] could ideally be replaced with the efficient, amicable, exclusive, certain, neutral, economical, and expeditious arbitration process. Non-interference of local courts and the likelihood of outcome is also ascertained in dispute resolution.[3] The involvement of parties themselves in the process gives rise to creative and realistic business solutions.[4]

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[1] Husain M. Al-Baharna, *International Commercial Arbitration in Perspective*, 3 ARAB L. QUARTERLY 1(1988).
[2] *Id.*, at 3.
[3] Philip R. Wood, *Arbitration or Courts in Financial and Corporate Agreements*, NLS BUS. L. REV. 1 (2015).
[4] Debi S. Saini, *Alternative Dispute Resolution- What it is And How it Works by P.C. Rao and William Sheffield,* 41 JILI 296 (1999).

Additionally, investors and businessmen cite the standard of confidentiality and privacy which is guaranteed in an arbitration, to choose it over litigation because sometimes mere filing of a complaint has the potential to malign ones' public reputation and future career prospects.[5] For example, a filmmaker would not like to have public disclosure of the proceedings for a breach of copyright licensing agreement; an official of a consumer-oriented company would not want provocative allegations of misconduct to be released in the public; a company would necessarily avoid the public scrutiny of its trade secrets and affairs; private investors would not like to have divulgence of their investment strategies or disputes. Therefore, privacy and confidentiality majorly affect the choice of parties to prefer arbitration over litigation.[6] These are indispensable features of arbitration and are considered to be its hallmarks.[7]

It is also important to note that privacy differs from confidentiality as it mandates only the exclusion of strangers from the arbitration process. Confidentiality, on the other hand, puts an obligation upon the parties for the non-disclosure of the arbitration process to the public, in relation to, the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the awards.[8] Parties come to arbitration not only for privacy but also for guaranteed and assured confidentiality in the proceedings.[9]

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[5] Kevin J. Hamilton and Harry H. Schneider Jr., *Confidential Arbitration Agreements for High-Profile Clients and Senior Executives,* 43 ABA 40 (2016).
[6] Shubham Kaushaland Vijay Purohit,*Arbitration And Conciliation (Amendment) Act, 2015 : Making India An Arbitration Friendly Seat,* 3 RSRR 22 (2016).
[7] Alexis C. Brown, *Presumption Meets Reality : An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L. REV. 971 (2001).
[8] Gu Weixia, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?* 15 AM. J. INT'L ARB. 2 (2005).
[9] *Id.*

Although a global concord to consider privacy as an inherent and quintessential part of arbitration has been established, confidentiality remains indecisive and dubious in arbitration. Notwithstanding jurisdictions like Hong Kong and Singapore which statutorily recognize this duty of confidentiality in arbitration, covering all aspects of it, jurisdictions like America and Australia do not consider it to be inherent in arbitration and hence, grant no statutory recognition. Nevertheless, scholars and academicians agree that there is either an implied or an explicit duty on the existence of confidentiality in all arbitration agreements.[10] It is argued that confidentiality didn't get an explicit recognition as privacy because it was thought that confidentiality was a direct and obvious consequence of privacy itself, and an explicit mention would be redundant. Additionally, some scholars base this obligation of confidentiality on the principle of good faith, and that non-disclosure is inherent to this principle. Accordingly, more and more arbitration legislations throughout the world have been including the said provision for confidentiality.

In India, the recent disclosure of the arbitration dispute of the Amazon-Future group reignites the debate on the issue of confidentiality, asking whether this could be enforced in a Court of Law. The paper, therefore, seeks to analyze the extent and scope of non-disclosure or confidentiality as practised in India and other jurisdictions (Part I) and also would be listing out solutions that would be desirable in facilitating confidentiality concerns in a Court of Law (Part II).

[10] Brown, *supra* note 7.

PART I

II. RECOGNITION OF CONFIDENTIALITY CLAUSE IN DIFFERENT ARBITRATION FRAMEWORKS.

A. Nations statutorily recognize the duty of confidentiality.

As has been mentioned earlier, statutory recognition of confidentiality clauses varies significantly across the nations. Countries like Canada, China, Costa Rica, Denmark, Iran, Italy, Japan and the United States do not have any statutory provision recognizing confidentiality. Conversely, countries like Australia,[11] Singapore,[12] Spain, New Zealand,[13] Hong Kong, France,[14] and Scotland,[15] statutorily recognize this duty of confidentiality. Some countries like Hong Kong also sustain it to enforce in a Court of law. Moreover, in countries like England and France, an implied accountability duty of confidentiality has been recognized through judicial decisions.[16]

B. Conventions and recognition of confidentiality.

There are three major conventions governing arbitration *viz.*, the New York Convention, the European Convention, and the Panama Convention. None of these recognizes the duty of confidentiality in their articles. However, the absence of recognition of such duty in these conventions can be explained because the purpose of these conventions is not to frame rules

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[11] Australian International Arbitration Act, 1974, art. 23.
[12] Singapore International Arbitration Act, 1994, § 22.
[13] New Zealand Arbitration Act, 1996, art. 14.
[14] French Code of Civil Procedure, 1981, art.1469.
[15] Scottish Arbitration Act, 2010, Schedule 1 Rules 26 and 27.
[16] C. Dolling Baker v. Merett, (1990) 1 W.L.R. 1205; Nafimco v. Foster Wheeler Trading Company,AG [2003] Rev Arb 143.

for the arbitral process, and the lack of consensus among nations on this issue would not permit such recognition.

C. Arbitration institutions facilitating the clause for confidentiality.

Acknowledging the importance of confidentiality in international commercial arbitration, various arbitration institutions (international as well as national) have incorporated provisions to that effect in their respective institutional rules. International institutions like the London Court of International Arbitration ("LCIA"),[17] the World Intellectual Property Organization ("WIPO"),[18] the Commercial Arbitration and Mediation Center for the Americas ("CAMCA") Mediation and Arbitration, and the International Centre for the Settlement of Investment Disputes ("ICSID"), explicitly recognize the duty of confidentiality in their respective rules. However, the degree of appreciation of the obligation of non-disclosure differs. For example, WIPO rules include a comprehensive recognition, whereas CAMCA casts this duty of confidence only upon arbitrators and institutional administrators and not upon the parties.

Similarly, institutions like the American Arbitration Association ("AAA"),[19] the Japanese Commercial Arbitration Association ("JCAA"),[20] the Hong Kong International Arbitration Center ("HKIAC"),[21] the Singapore International Arbitration Centre ("SIAC"),[22] and the China International

[17] London Court of International Arbitration Rules, 2014, art. 30.
[18] World Intellectual Property Organization Rules, 2002, art. 73-75.
[19] American Arbitration Association Rules, art. 34.
[20] Japanese Commercial Arbitration Association Rules, 1997, Rule 42.
[21] Hong Kong International Arbitration Center Rules, 2008, Rule 39(1).
[22] Singapore International Arbitration Centre Rules, 2007, art. 34.

Economic and Trade Arbitration Commission ("CIETAC"),[23] also realize the rule of non-disclosure although in a dissimilar fashion.

D. Judicial recognition of the duty of confidentiality.

Various judicial decisions, although heterogeneous around the world, agree that non-disclosure or confidentiality form an inextricable characteristic of arbitration. In the English case of *C. Dolling Baker v. Merett,*[24] Lord Parker acknowledged the implied duty of confidentiality in arbitration. A French Court also upheld this implied duty of non-disclosure in *Nafimco v. Foster Wheeler Trading Company.*[25] In Sweden, this duty exists in the form of good faith, as in *A.I. Trade finance Inc v. Bulgarian Foreign Trade Bank Ltd,*[26] it was held that the disclosure of information in the framework of the arbitral proceedings should be considered as a violation of good faith.

III. CONFIDENTIALITY IN INDIAN ARBITRATION REGIME.

In India, arbitration is governed by the Arbitration and Conciliation Act, 1996. Section 42A, inserted through an amendment in 2019,[27] obliges parties, arbitrators and the arbitral institution to "maintain the confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award." The provision was added on the recommendations of Justice B.N. Srikrishna Committee,

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[23] China International Economic and Trade Arbitration Commission Rules, 2004, art. 43(1), 44(2).
[24] C. Dolling Baker v. Merett, (1990) 1 W.L.R. 1205.
[25] Nafimco v. Foster Wheeler Trading Company, AG [2003] Rev Arb 143.
[26] A.I. Trade finance Inc v. Bulgarian Foreign Trade Bank Ltd, Case No. Y 1092-98, SVEA Court of Appeal.
[27] Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019.

which was constituted to suggest measures to increase the pace of arbitration in India. However, the language of the provision is drafted so poorly that ambiguity arises as to the magnitude of this duty. Moreover, it doesn't include the circumstances where this duty can be evaded legally. Issues such as whether the existence of arbitration itself should also not be disclosed, whether witnesses would also have to comply with this duty or whether this duty is absolute in nature have also not been answered. If these issues are not expressly addressed, desired results will not be achieved.

Confidentiality in arbitration is not given adequate importance in India, and institutions don't majorly recognize this obligation. The establishment of the New Delhi International Arbitration Centre (NDIAC) is expected to bring in a positive framework for appreciating the confidentiality, secrecy and privacy of the arbitrable matter. Judicial recognition is also limited in this aspect. Though in *Shailesh Dhairyawan v. Mohan Balkrishna,*[28] the Supreme Court assigned confidentiality as one of the attributes of arbitration, but not much has been elaborated upon this mandate.

The following part lists out measures that will help India to enforce the non-disclosure rule in a Court of Law.

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[28] Shailesh Dhairyawan v. Mohan Balkrishna, (2016) 3 SCC 619.

PART II

IV. HOW TO ENFORCE CONFIDENTIALITY IN A COURT OF LAW?

A. Statutory recognition of the duty of confidentiality in definite terms.

A provision clearly mentioning the extent of confidentiality and the parties who are subjected to it should be included in the statute. Extent here implies clarity on confidentiality of the arbitration itself, the documents, transcripts and other written and unwritten material, and the arbitral award.

1. Confidentiality of existence of arbitration itself.

Sometimes, mere disclosure of ongoing arbitration proceedings may disrupt the public image to such an extent that even the existence of the entity becomes difficult. For example, a proceeding related to the breach of a copyright licensing agreement against a filmmaker may prove to be fatal for the whole production house. Therefore, arbitration has become an acclamatory spot for Indian filmmakers,[29] as their reputation remains unharmed. Unproven accusations of misconduct against a consumer-oriented company may also prove to be virulent for all its future transactions, and in such situations, the confidentiality of the arbitration itself is worthwhile.

This has been recognized in the Scottish Arbitration Rules,[30] WIPO Rules,[31] HKIAC Rules,[32] and the SIAC Rules.[33] Undeniably, the

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[29] Meghna Agarwal and Nishtha Gupta, *The Scope of Copyright in the Indian Film Industry,* 1 IJAL 46 (2012).
[30] Scotland Arbitration Act, 2010, Rule 26(4)(a) and (b).
[31] *Supra* note18, art. 73(a).

confidentiality of the arbitration itself directs the secrecy of all information associated with it, including, the parties involved, the cause of action, the relief prayed, the amounts involved, etc.

However, an absolute provision to this effect is unattainable, especially for public listed companies. These companies are required by law to furnish their annual reports and accounts, disclosing all information that is likely to have an impact on their share value. For example, the SEBI Listing Obligations and Disclosure Requirements Regulation, 2015,[34] mandates public listed companies to disclose certain information to enable investors to track the performance of the company. Similarly, under the Companies Act, 2013, a company is required to disclose material information by way of the board of directors' report and the annual returns on its website.[35] To address this issue, it has been suggested that disclosure be dependent upon the test of amount of the dispute and the likelihood of success.[36] If the possibility of success is on the higher side, and if the claim involved is minimal, even the confidentiality of the existence of the arbitration can be maintained.

2. Confidentiality of material information pertaining to Arbitration.

Non-disclosure of material information produced during the arbitration process has reached a global consensus and it should be maintained to the maximum extent possible.[37] This is because here, non-

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[32] *Supra* note21, art. 39(1).
[33] *Supra* note 22, art. 34(3).
[34] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.
[35] Companies Act, 2013, §133, No. 18, Acts of Parliament, 2013.
[36] *Supra* note 8, at 22.
[37] *Id.*, at 12.

revealing is required to maintain trade secrets, trade partners, policies, accounts, transactions and other business-related privileged information.

This obligation has extensively been statutorily recognized and reflected under the rules of various arbitral institutions. In New Zealand, for instance, the Arbitration Act, 1996 commands that in every arbitration agreement, the parties and the arbitral tribunal shall not disclose confidential information.[38] Similarly, Rule 26 of Schedule 1 to the Scottish Arbitration Act, 2010 provides that disclosure of confidential information tantamounts to breach of an obligation of confidence. Institutional rules such as Article 30(1) of LCIA Rules, Article 74(a) WIPO Rules, Article 41(1) of DIAC Rules, and Article 40(2) of JCAA Rules directly prohibit the disclosure of any material with regards to arbitration.

3. *Confidentiality of the Award.*

The concealment of the arbitral award also needs to be considered while deliberating upon the extent of confidentiality. Generally, it is conceded that confidentiality extends to all orders and decisions of the tribunal. Accordingly, various institutional rules direct in their respective rules to not publish the awards without the consent of the parties. For example, Scottish Arbitration Rules (Rule 26(4) (c)),[39] AAA Rules (Rule 27(4)),[40] Milan Rules (Article 8(2)),[41] LCIA Rules (Article 30(3)),[42] and

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[38] *Supra* note 13, §14 B.
[39] *Supra* note15, Rule 26(4) (c).
[40] *Supra* note 19, Rule 27(4).
[41] Milan Chamber of Arbitration Rules, 2020, Article 8(2).
[42] *Supra* note *17*, Article 30(3).

HKIAC rules (Article 39(3)),[43] notably prohibit the publication of the award without the parties' authorization.

Therefore, India too needs to statutorily recognize the mandate of non-publishing of arbitral awards without the parties' consent. However, it is argued that such stipulation would trouble Section 43K of the Arbitration Act, wherein the Arbitration Council of India is instructed to maintain an electronic depository of arbitral awards. To eliminate this complication, the publication of a properly redacted award could be espoused. A redacted award omits the names of the parties, the arbitrators and any such information which is covered by the confidentiality obligation. The whole purpose of the publication of redacted awards is to facilitate research and study even in the absence of parties' consent.

Additionally, not only tribunals but also the courts should uphold the non-disclosure of the arbitral award unless the circumstances requisites. For example, the New Zealand Arbitration Act (Section 14 F),[44] and the Scottish Arbitration Act,[45] prohibits even the courts from publishing confidential information in certain circumstances. The special committee on arbitral reforms also recognized that there are some jurisdictions wherein confidentiality is preserved even in the courts which can also be followed in India.

[43] *Supra* note 21, Article 39(3).
[44] *Supra* note 13, § 46 F.
[45] Scottish Arbitration Act, 2010.

4. Applicability

A definite and unequivocal provision on who can be compelled to guard confidentiality is also needed. India needs to impose this duty not only on the arbitrators, arbitral institutions and the parties, but also upon persons who are acting on behalf of the persons involved in the arbitral proceedings. In countries like Peru, this onus of confidentiality is imposed upon the parties, the secretary, the arbitral institution and every person participating in the arbitral proceedings.[46] The German Arbitration Institute (DIS) Rules also obligate the persons acting on behalf of the parties to maintain confidentiality.[47] Similarly, Scottish Arbitration Rules require the parties and tribunal to take reasonable steps to prevent unauthorized disclosure of confidential information by the tribunal, any arbitrator or a party.

5. Conditions for Disclosure

The law in India should categorically discuss the circumstances under which a party would be redeeming itself from this mandate of maintaining confidentiality. The statutes in New Zealand, Scotland and Australia may assist to draft such limitations on the said clause of confidentiality. Chiefly, the clause should be subjected to any other agreement to the contrary, thereby giving primacy to parties' choice. For example, Section 14 of Arbitration Law of the Dubai International Financial Centre,[48] and Article 15 of the Peruvian Legislative Decree of 2008.[49]

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[46] Legislative Decree No. 1071 of 2008, art. 51.
[47] The German Arbitration Institute Rules, 2018, art. 43(1).
[48] Dubai International Financial Centre Rules, 2007 § 14.
[49] Peruvian Arbitration Act, 2008, art. 15.

Secondly, the disclosure should be made only when there is a legal duty to do the same. As has been discussed earlier, the Companies Acts and the governing rules of SEBI thrust a legal duty on public listed companies to reveal all the information which is likely to have an impact on their share value. A legal duty also arises in light of a court order.

Thirdly, other limitations include disclosure in the interest of justice, and to foster public and private interest. Herein, a duty to disclose arises if a State or State entity is a party to the arbitration. For example, in *Esso Australia Resources v. Plowman,*[50] it was stated that when a state is a party to an arbitration agreement because of which consumers are directly impacted, then it is the very right of individuals to be aware of the happenings related to it. Accordingly, India too needs to incorporate some exceptions on this duty of confidentiality in arbitration agreements.

6. Stating the effect of non-compliance.

Lastly, a provision containing the duty of maintaining confidentiality should also include consequences of non-compliance which would ensure its effective adherence.

B. Recognition of Confidentiality by the Arbitral Institutions.

Apart from a statutory recognition under the Act, rules of arbitration institutions in India should also explicitly contain a provision with respect to confidentiality in definite terms. As discussed above, the establishment of the NDIAC is expected to bring in a positive framework for appreciating the confidentiality, secrecy and privacy of the arbitrable matter.

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[50] Esso Australia Resources v. Plowman, (1995) 183 CLR 10.

C. Redaction and destruction of confidential information.

Redacting and destructing confidential information is another way of maintaining the secrecy of confidential material. Redaction refers to the process of editing the documents in such a way that only the required information for the purpose of the proceedings is presented. Destruction of the documents after their use would also prevent them from falling into the public domain.

D. Exclusion of Strangers

Additionally, all strangers (like spouses, business partners, media) should be excluded from the hearings and conduct of the arbitration.

E. Meeting New Challenges of online hearing.

The unprecedented Covid-19 pandemic has majorly affected litigation and arbitration, as the traditional method of dispute resolution requiring physical presence of the parties has been replaced with the process of online hearing. Virtual hearings, however, set new challenges to maintain confidentiality and privacy in an arbitration agreement. Issues of security and data privacy are interlinked with online hearings. Such issues can be resolved to a certain extent by adhering to *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic.*[51]

The Note states that the parties shall first consult with the tribunal in order to establish whether the hearing will remain confidential and make

[51] *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, ICC (Apr. 09, 2020), https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf.

confidentiality commitments binding. From a more practical standpoint, the Note also prescribes that the parties determine the confidentiality terms for recording the hearing. Thus, the clause of consequences of non-compliance in the statute should clearly recognize the breach of confidentiality in online hearings too.

V. CONCLUSION

Undoubtedly, confidentiality is a major attribute of arbitration agreements. Various legislations and arbitration institutions around the world adhere to this mandate, however, in a varied fashion. Confidentiality in arbitration is not given adequate importance in India, though recently in 2019, through an amendment, a clause to this effect has been added into the Arbitration Act. The language used in the provision, however, is so vague that various related issues remain unanswered. The purpose of the Act to make India a hub of arbitration and to make it as efficient as its rivals in Asia namely Hong Kong and Singapore, cannot be achieved with the clause in its present form.

Therefore, the paper has facilitated some of the measures which can be adopted to ameliorate the condition. Firstly, India needs a confidentiality clause in clear and definite terms, specifying the extent and limitations, to have a practical implication of the same. Then, the same must be recognized in various arbitrations institutions too. Measures such as redaction and destruction of confidential information have also been suggested. The implementation of all these measures will bring India at par with its rivals and it can soon become a global hub of arbitration.