# Confidentiality Under Indian Arbitration Regime: Is It Really Justice Behind Closed Doors?

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## Introduction

Confidentiality of arbitration proceedings is a contentious unresolved subject matter amongst the authorities and users of arbitration around the world. A majority of authorities and users of arbitration often regard confidentiality as one of the essential tenets of an arbitration proceeding, as it facilitates efficient and efficacious dispute resolution. Whereas on the other hand, substantial detractors refute this proposition by asserting that it is neither essential nor a beneficial feature of the arbitration process. The notion that users consider confidentiality as an indispensable characteristic of an arbitral process which enforces compulsion upon the parties not to release any information concerning the proceeding to a third party in contrast to the view that confidentiality is comparatively insignificant to arbitration users[1] is much tenable, as the former view is supported by a plethora of evidence including both, empirical data and anecdotal views of experienced users.[2] In order to avoid any equivocation, it is imperative to distinguish the two synonymous yet distinct expressions, "privacy" and "confidentiality" concerning the arbitral process. Privacy denotes the exclusion of a third party from attending and participating in the arbitration proceeding thus preventing extraneous intervention in the proceeding whilst the latter refers to a broader spectrum, excluding not only attendance of the

[1] Naimark & Keer, 'International Private Commercial Arbitration – Expectations and Perceptions of Attorneys and Business People', in C. Drahozal & R. Naimark (eds), *Towards A Science of International Arbitration: Collected Empirical Research* (Kluwer Arbitration 2005); Harris B, 'Report on the Arbitration Act 1996', (2007) 23 Arbitration International 437

[2] Bühring-Uhle, 'A Survey on Arbitration and Settlement in International Business Disputes', in C. Drahozal & R. Naimark (eds), *Towards A Science of International Arbitration: Collected Empirical Research* (Kluwer Arbitration 2005) 25, 35 ("confidential is considered as the third most important feature of arbitration"); Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration' (2010) 5, 29 ("corporations...have strong preferences regarding confidentiality": "62% of respondents said confidentiality is very important to them in international arbitration"); Queen Mary, University of London, 2008 International Arbitration Survey: International Arbitration: Corporate Attitudes and Practices' (2008) 6 (54% of respondents cited privacy as one of key advantages of arbitration"); Queen Mary University and White & Case, The 2018 International Arbitration Survey: The Evolution of International Arbitration' (2019) ("87% of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature.")

third party from the arbitration proceedings but also prohibiting disclosure to a non-party of any or all documents, submissions or result of the arbitration proceedings.

Thus, "confidentiality of the arbitral proceedings serves to centralise the parties' dispute in a single forum and to facilitate an objective, efficient and commercially-sensible resolution of the dispute, while also limiting disclosure of the parties' confidences to the press, public, competitors, and others".[3]

The extant provision regulating non-disclosure of the information under the Indian arbitration regime is of a recent origin. Section 42A, which reads "confidentiality of information" is inserted in the principal Act via the Arbitration and Conciliation (Amendment) Act, 2019.[4] It imposes a mandatory and non-derogatory duty on the parties, the arbitrator, and the institute to keep all the information concerning the arbitration process classified except in cases where its discovery is necessary for the execution of the award. The authors within this note explore and examine the nature and scope of confidentiality obligation under the Indian arbitration regime in comparison to the approach adopted by other jurisdictions, specifically Hong Kong and Australia, and the various challenges this newly inserted section would pose in rendering justice behind closed doors.

**National Laws: Confidentiality of Arbitration Proceedings**

The present conundrum of uniformity in the disclosure of proceedings of an arbitral process owes its existence to the absence of international norms. United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 or the European Convention on International Commercial Arbitration, 1961 are all silent on the subject of confidentiality of arbitration proceedings. The justification for such absence is the recognition of parties' procedural independence vis-à-vis the non-disclosure of information of the arbitration proceedings, which is an established principle of almost all developed legal systems.[5] The parties through the agreement regulate the character and extent of the disclosure of information relating to an arbitral process which is recognised and given effect by the national courts. In the wake of such a

[3] Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014)
[4] The Arbitration and Conciliation (Amendment) Act, 2019, s 9 (India)
[5] See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article II (1); Report of the Secretary-General on Possible Features of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/207(1981), 12.1.1986.

situation, various national legal systems have adopted different approaches to the aspect of confidentiality of arbitration proceedings while few are still silent on this subject.

Hong Kong provided a comparatively recent and innovative approach via legislation for confidentiality. Section 18 of the Arbitration Ordinance (Cap. 609), 2011, provides for an express provision unfolding the confidentiality of the arbitration process and the arbitral award. The section opens with a derogation clause allowing parties to agree to the contrary and lays down that parties to an arbitration proceeding will not publish, disclose or communicate any information concerning the arbitration proceedings or the final award passed, except when such disclosure is necessary for protecting any legal right or interest of the party, or for execution or setting aside the award before any judicial authority, or when the party in compliance to a legal obligation has to disclose such information to any governmental body or court, or lastly in cases of disclosure to seek professional assistance.

The Australian national law on arbitration, International Arbitration Act 1974 (Act of 1974), Section 23C to 23G provides explicitly for stipulations concerning the disclosure of confidential information of arbitration proceedings and instances when it can or cannot be disclosed. As per Section 22, Sections 23C to 23G are opt-in provisions. It means that the said provisions apply to an arbitration proceeding only if the parties have expressly opted for these provisions under the agreement or otherwise in writing.

Section 23C expresses that the parties to the arbitration proceedings and the tribunal shall not reveal confidential material or information in relation to arbitration proceedings which has commenced upon an arbitration agreement except under the following circumstances:

1. Disclosure is permitted under Section 23D which provides for the followings instances under which confidential information may be disclosed:
    a) upon the consensus of all the parties to the arbitration proceeding; or
    b) when disclosing information to any professional or other specialists of the party to the arbitral proceeding; or
    c) where disclosure is necessary and reasonable in order to provide the party a complete opportunity to put forth its case; or

d) where disclosure is necessary and judicious for establishing or protecting the legal right of a party to the arbitration proceeding concerning a third party; or
e) for the objective of implementing the award; or
f) where disclosure is necessary for the purpose of the Act of 1974; or
g) under an order of the court; or lastly
h) where disclosure is pursuant to any relevant law or order of any regulatory body.

2. Upon the order passed by an arbitral tribunal under Section 23E in the circumstances excluding those enumerated under Section 23D and in the absence of court order under Section 23F; or lastly

3. In pursuance of a court order made under Section 23G.

Under the Act of 1974, sections 23F and 23G provide for circumstances under which the court may through an order, prohibit or allow disclosure of confidential information respectively. The factors which the court takes into consideration for either prohibiting or allowing the disclosure of confidential information include public interest and reasonableness of such disclosure. The court, while deciding under Sections 23F and 23G takes into account the balance of probabilities resting on the circumstances of the arbitral proceeding bearing in mind the public interest favouring disclosure or non-disclosure of confidential information. Thus, if the circumstances of the arbitral proceedings in view of the public interest favouring disclosure outweigh the circumstances of the arbitral proceedings favouring non-disclosure, the court shall pass an order of disclosure and vice-versa.

Upon analytical comparison of the provisions pertaining to the confidentiality of arbitral proceedings under the Indian, Hong Kong, and Australian national laws, it is axiomatic that all provisions, in general, prohibit disclosure of confidential information pertaining to an arbitral process and apply automatically. The authors observe, upon closer scrutiny that the Indian provision is somewhat unwarranted as it does not take into consideration various inevitable situations where disclosure becomes imperative either in the public interest or for the parties' interest. Moreover, in comparison to the Hong Kong provisions, Australian provisions are better suited for the current arbitration users as they are more detailed and take into account the circumstances favouring disclosure or non-disclosure from all angles. The express discretionary power vested in the courts under sections 23F and 23G of the Act of 1974 allows the court to evaluate each case based on the facts and circumstances involved, covering miscellaneous instances which are not covered under 24D of the Act of 1974. Such

provision is absent under the Hong Kong legislation. Lastly, the Hong Kong legislature has adopted an opt-out approach while the Australian legislature has adopted an opt-in approach. Out of both the approaches the users are more inclined towards the opt-out approach as it always provides an extra layer of protection in case of any omission on part of the parties in the agreement.

**India's Attempt to Deliver Justice behind closed doors: Challenges**

Judicial pronouncements across various jurisdictions have thrown light upon the aspect of confidentiality in arbitration proceedings, forming an essential element that either has a direct or an implied effect on the arbitral process or its outcome. The confidentiality aspect relates to the extent to which it applies and its scope governing the rights of the parties in an arbitral agreement.

According to English jurisprudence, the aspect of confidentiality in an agreement may be implicit, which in turn is predicated on the inherent private agreement between the parties.[6] Moreover, as the jurisprudence developed, the English Court of Appeal, in *John Forster Emmott v. Michael Wilson & Partners Ltd*[7], clarified that apart from inherent confidentiality of trade secrets and other documents relating to arbitral proceedings, there is an implied obligation on the parties against disclosure of any information pertaining to documents and proceedings, except where the parties consent to the same, or it is required by an order or with the leave of the court. However, the Australian High Court dissented from the view of implied confidentiality in arbitral proceedings. In *Esso Australia Resources v. Plowman*[8], the Australian High Court held that although an arbitral agreement is essentially private in nature, it is not ipso facto confidential. The court, therefore, recognised privacy in arbitration but vacated the duty to maintain confidentiality.

The Singapore High Court, in *AAY and Others v. AAZ*[9], while agreeing with the English jurisprudence, observed that wherever an arbitral agreement is not specifically acquiesced by the parties to be of a confidential nature, the obligation of confidentiality will apply as a default. This obligation, however, does not apply where the public interest is involved concerning the discourse of information about public authorities. Now analysing in light of these paramount judicial interpretations, Section 42A

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[6] Dolling-Baker v. Merritt, [1991] 2 All ER 890 ECA Civ; Hassneh Insurance Co. v. Mew, [1993] 2 Llyod's Rep. 243 Q.B. (Comm. Ct.), and Ali Shipping v. Trogir, [1998] 2 All E.R. 136 (CA).
[7] John Forster Emmott v. Michael Wilson & Partners Ltd, [2008] EWCA Civ 184, [2009] Bus LR 723.
[8] Esso Australia Resources v. Plowman, [1995]HCA 19, [1995] 128 A.L.R 391.
[9] AAY and Others v. AAZ, [2009] SGHC 142, [2011] 1 SLR 1093.

under the Indian arbitration regime is ambiguous and is potentially equivocal. The applicability of Section 42A has not been adequately defined and is somewhat limited in its scope as it provides for disclosure of information only for the implementation of the award and fails to incorporate other important instances where disclosure of information becomes imperative, such as for the protection of the right of the party to the proceeding; or the protection of third party's right; or in the interest of justice; or last but not limited to, due to operation of law. Thus, there may arise several challenges by the parties to the arbitral agreement against disclosure mandated by public authorities or private parties who would enter into a different commercial agreement with the parties to the arbitral agreement. Indian arbitration law, despite referring to the concept of confidentiality, is still devoid of the possibilities under which the provision may have a conflict with other statutes and legal compliances which may lead to problematic situations such as:

1. Disclosure in due diligence process: In due diligence, obligations may potentially affect the confidentiality in arbitration or related documents pertaining to a business transaction. A potential acquirer in a merger and acquisition transaction may want to conduct thorough due diligence which may affect the confidentiality obligation of the target company. Specifically, for public companies, the due diligence process makes a business transaction transparent and also forms a part of better corporate governance.
2. Regulatory authorities: Disclosure obligations from regulating authorities such as the *Securities and Exchange Board of India* (SEBI) or The Insurance Regulatory and Development Authority of India (IRDAI) or other regulatory bodies may also negatively affect confidentiality obligations in arbitration. The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 necessitate listed companies to make periodic disclosures of information in the public interest that are necessary to assess the status of that company.
3. Challenging the award: The confidentiality of the award or at least the operative part of the award is subject to disclosure before a competent court of law if the aggrieved party seeks to challenge the final award under section 34 of the Arbitration and Conciliation Act, making it a public document.[10]
4. In pursuance of a court order: Wherein an arbitral proceeding is still pending, and a party to such an arbitral proceeding is also involved in litigation with a third party who is not within the covenant of confidentiality of the arbitral proceeding. The court, if it considers necessary

[10] Lise Bosman, ICCA International Handbook on Commercial Arbitration, (ICCA & Kluwer Law International 2020).

for unprejudiced disposal of the case upon the application of the third-party may pass an order directing the arbitral tribunal to disclose relevant documents produced in arbitral proceedings thus nullifying the covenant of confidentiality.

5. Claim against a third-party: In the circumstances where the award contains certain assertions that the party to the arbitration may utilize to either establish or defend any legal right against a third party, then in such circumstances, the confidentiality of the award may be compromised.

**Conclusion**

It is not only the Indian arbitration regime that faces a conundrum with reference to the extant provision on confidentiality, but it is a global concern as there is an absence of authoritative directive on the aspect of confidentiality in arbitration proceedings. This has resulted in the adoption of diverging practices on the issue of confidentiality by different countries in light of the judicial precedents of such jurisdictions. An arbitral process surely is subject to privacy and confidentiality, but it is not absolute. The authors are of the view that the insertion of Section 42A is a lackadaisical attempt to render justice behind closed doors because the provision is weak in its scope and will lead to a plethora of judicial interpretations in the future in view of the disclosure requirements posing as challenges to Section 42A. Unlike the Hong Kong or Australian jurisdictions, the Indian provision is susceptible to other practical, commercial, and legal implications which pose as a hindrance in the arbitral proceeding. Neither is Section 42A an opt-out provision which the authors consider as a paramount feature of the law of arbitration.

It is commendable that the Indian legislature decided to cover this emerging concern beforehand via the Amendment Act of 2019. However, it seems that the legislature failed to apply its mind towards considering the numerous challenges such a rigid provision would result into, as Section 42A seems to a mirror emulation of Section 75 which is an existing provision concerning confidentiality in conciliation. Expansion of the scope of confidentiality and inclusion of certain exceptions will lead to having a robust provision that minimizes the scope of dispute and promotes business opportunities that support the Indian economy to stay ahead in the global market.