THE DILEMMA OF CONFIDENTIALITY IN ARBITRATION PROCEEDINGS: A LEGAL QUAGMIRE

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ABSTRACT

Already stuck at an impasse, the on-going Amazon-Future Group dispute has again made headlines recently, this time due to the alleged breach of confidentiality by one of the parties. Disputes like these have reignited debates on the issue of confidentiality. Although there is no fixed definition of confidentiality, this notion is not alien to the world. The obligation of confidentiality has been entrenched in the legal regime in the form of "client-attorney" privilege for a long time. The scope of this privilege has now been expanded to include actors like arbitrators, opposite parties as well as other participants in an arbitration process. This development has even more incentivized the parties to prefer arbitration over litigation. However, there are some moral and ethical concerns with regard to the scope and limitation of such an obligation. This research paper, therefore, aims at understanding the concept of confidentiality and analyze its scope. It elucidates the growing importance of this concept in the process of arbitration and provides an overview of stance taken by different jurisdictions and international arbitration institutions regarding confidentiality in the arbitration proceedings. The author also traces the development of this notion in the Indian arbitration regime and attempts to pin point the lacunas in the current legislation in this regard. In the end, the author critically analyzes the prevailing conflicts and loopholes in the confidentiality protection regime and tries to suggest expedient solutions to resolve the same.

INTRODUCTION

In the last few years, alternate dispute resolution mechanisms like arbitration have gained immense popularity across the globe owing to their desirable attributes like cost-effectiveness, speedy disposal of disputes, and greater party autonomy. Here, unlike litigation, parties get to set their own "rules of the game", such as the seat of arbitration, the language of arbitration, applicable laws, etc. Confidentiality is one of the by-products of such enhanced autonomy in the hands of the parties in an arbitration process. Parties who do not want their disputes to become the "talk of the town" often see it as a way to guard their reputation and protect commercially sensitive information that might be divulged in the course of the arbitral proceedings.

The concept of confidentiality is usually confused with that of privacy.[1] However, it is apposite to understand that the ambit of confidentiality is much broader than privacy.[2] Private proceedings do not necessarily impose the obligation of confidentiality on the parties. They only restrict the participation of third parties in the arbitral proceedings.[3] On the other hand, the commitment of confidentiality goes a step ahead and prohibits the disclosure of the information in public altogether.[4]

The issue of confidentiality is not just limited to its existence. Even if the duty of confidentiality is explicitly recognized, its content and scope may vary.[5] The material scope of confidentiality could essentially cover everything under the sun, from the pleadings and memorials of the parties to the expert reports, testimonies of the witnesses as well as information contained in the arbitration filings.[6] However, there is no unanimous answer as to the extent to which the participants of an arbitration proceeding are under the duty to observe confidentiality of information.

This research paper, thus, aims at understanding the concept of confidentiality and elucidates its growing importance in the process of arbitration. The author, in an attempt to provide a

[1] Amy Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006).
[2] *Id.*; Fortier Y., *The Occasionally Warranted Assumption Of Confidentiality*, 15 Arb. Int'l 131, 131-132 (1999).
[3] Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. Kan. L. Rev. 1255, 1260 (2006).
[4] *Id.*
[5] Marlon Meza-Salas, *Confidentiality in International Commercial Arbitration: Truth or Fiction?*, KLUWER ARBITRATION BLOG (May 17, 2021, 6:15 PM), http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/.
[6] *Id.*

comparative view to the readers, delves into the stance taken by different jurisdictions and international arbitration institutions regarding confidentiality in the arbitration proceedings. He further goes on to analyze the development of the notion of confidentiality in the Indian arbitration regime and subsequently highlights the lacunas in the current legislation. Finally, the author critically analyzes the prevailing conflicts pertaining to the notion of confidentiality and suggests expedient solutions to resolve the same.

SIGNIFICANCE OF CONFIDENTIALITY IN ARBITRATION

In recent times, the duty of confidentiality has become one of the major concerns of the parties to a dispute. Parties usually tend to face such confidentiality issues either while presenting evidence in support of their case or when they are requested to produce evidence by their opponent.[7] In any case, protection is generally sought with respect to the documents containing trade secrets or commercially sensitive information, such as manufacturing know-how, corporate records, price information, etc. Disclosure of such documents can harm one or both the parties involved, affecting their market standing and competition.[8] Further, some parties, being very much aware of their own shady acts, do not want certain allegations, such as that of misrepresentation and incompetence to be unveiled in front of the outside world.[9] Apart from this, in some cases, the stand taken by the parties in public may completely differ from the one they might take in private. Consequently, in order to ensure proper administration of justice, confidentiality becomes important in such cases.

Therefore, confidentiality in arbitration proceedings is ideal for parties who wish to save themselves from the glaring eyes of the media, their competitors, etc., and avoid any negative publicity which can potentially harm their position in the market.

INTERNATIONAL PERSPECTIVE

Confidentiality is one of those rare phenomena of International Commercial Arbitration ["**ICA**"] that has no uniform applicability across the sphere. One of the major reasons for the same is that The United Nations Commission on International Trade Law ["**UNCITRAL**"]

[7] Domitille Baizeau and Juliette Richard, *Addressing the Issue of Confidentiality in Arbitration Proceedings: How is This Done in Practice?* 43 ASA, 54 (2016), https://www.lalive.law/data/publications/08-Chapter_4.pdf.
[8] *Id.*
[9] ALAN REDFERN ET. AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 43 (3rd ed. 1999).

Model Law on ICA ["**the Model Law**"][10] is silent on the issue of confidentiality and instead leaves it on the sweet will of the parties to decide whether they want to put a confidentiality clause in the arbitration agreement or not. Until the year 2010, Rule 32 of UNCITRAL Arbitration Rules provided for the non-disclosure of the arbitral award to the public save otherwise with the consent of the parties.[11] However, according to the newly revised rules, Rule 34.5 now recognizes disclosure as a legal duty and protection of a legal right of the party as some exceptions to the non-publication of the award.[12] Hence, embracing the attribute of party autonomy in an arbitration proceeding, the Model Law has refrained from making confidentiality a mandatory provision.

Further, a series of recent rulings of the courts of various nations and the non-uniformity in legislative provisions of the states and institutional rules reflect upon the split on the definition of confidentiality. Consequently, the stand of the nations on the issue of confidentiality differs and can be classified in three categories, firstly, the nations that reject the notion of any implied duty of confidentiality, secondly, the nations that recognize the notion of implied confidentiality and lastly, the nations which provide for an express provision of confidentiality in their municipal laws.

A. *No Implied Duty of Confidentiality:*

Sweden was the first country to reject the idea of an implied duty of confidentiality.[13] Swedish Supreme Court, in the case of *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc,*[14] observed that there is no implied duty of confidentiality in private commercial arbitrations. Accordingly, there are only two ways by which confidentiality can be ensured under Swedish laws, i.e., if there is an express contract for it or adopted arbitration rules expressly provide for it.[15]

[10] UNITED NATIONS, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last visited Apr. 20, 2021).
[11] *Id.* at Rule 32.
[12] *Id.* at Rule 34.5.
[13] Jeffrey W. Sarles, *Solving The Arbitral Confidentiality Conundrum In International Arbitration*, JOSE MIGUEL JUDICE (May. 02, 2021, 9:29 PM), https://www.josemigueljudice-arbitration.com/.
[14] Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc., Case No. T 1881-99 (Swedish Sup. Ct. 27 Oct. 2000).
[15] *Id.*

Further, the High Court of Australia in *Esso Australia Res. Ltd. v. Plowman*[16] held that confidentiality, unlike privacy, is not an essential attribute of commercial arbitration and private nature of the arbitral proceedings does not impart confidentiality as a *sine-qua-non* of arbitration. It observed that even a non-party to a dispute is entitled to discovery of arbitration documents and information.[17]

In the United States of America, although there is no ruling from the federal court rejecting the implied duty of confidentiality, there are various decisions of the district courts that deny any such duty. One such authority is the decision of the district court in the leading case of *United States v. Panhandle E. Corp.*[18], where the US government ordered the production of the documents from an International Chambers of Commerce ["**ICC**"] Arbitration proceeding that took place between the Panhandle subsidiary and an Algerian Oil Company. Panhandle opposed the discovery of the documents on the grounds of confidentiality. The court disregarded the objection stating that there is no implicit confidentiality in arbitration proceedings, and further ICC rules also do not provide for the same.[19] Therefore, the request of the federal government was honored, and production was allowed.

B. *Implied Confidentiality*:

Although the United Kingdom's domestic law on Arbitration does not provide any express provision for confidentiality, the recent landmark ruling of the English Court in the case of *Ali Shipping Corp.* v. *Shipyard Trogir*[20] has acknowledged the implied duty of confidentiality in every arbitration agreement and covers within its ambit not only the outcome of the proceedings but also the pleadings, written submissions, notes, and transcripts of the evidence. However, the confidentiality under English law is subject to some exceptions, namely, disclosure with the consent of the parties, for confirmation and enforcement proceedings, to protect the legitimate interest of the parties or by order of the court if it is in the interest of the public.[21] Recently in 2019, the English Commercial Court in the case of *The Chartered Institute*

[16] Esso Australia Res. Ltd. v. Plowman, (1995) 128 A.L.R 391, 183 C.L.R. 10 (Austl.).
[17] *Id.*
[18] United States v. Panhandle E. Corp., 118 F.R.D. 346 (D. Del. 1988).
[19] *Id.*
[20] Ali Shipping Corp. v. Shipyard Trogir, 2 All E.R., 1 Lloyd's Rep. 643 (Eng. Ct. App. 1998).
[21] *Id.*

of Arbitrators v. B & Ors.[22] again affirmed public interest as an exception to the disclosure of confidential information.

Following a more balanced approach, Singapore has tried to hit an equilibrium between confidentiality and transparency. Although Singapore's arbitration legislation does not provide for an express provision of confidentiality during the arbitral proceedings,[23] Section 57 of the Act prohibits the publication of information relating to proceedings taking place in a closed courtroom, except with the consent of the parties or in cases where the court is of the opinion that putting such information in the public domain will not affect the legal interest of the parties.[24] However, like the UK, Singapore recognizes the existence of an implied duty of confidentiality in arbitration proceedings.[25]

C. *Express Provision of Confidentiality:*

Countries like Hong Kong and New Zealand have taken a step further in realizing the scheme of confidentiality and incorporated an express provision for confidentiality in their respective State Legislations on Arbitration. The New Zealand Arbitration Act of 1996,[26] under Section 14B, prohibits the disclosure of confidential information by the parties and the arbitral tribunal but at the same time has also carved out some important exceptions to the general principle of confidentiality,[27] such as if the disclosure is made with the consent of the parties, to the parties' advisor, for the protection of the legitimate interest of the third party, and by order of the court.[28]

Also, Hong Kong Arbitration Ordinance 2011[29] also gives statutory recognition to the principle of confidentiality but in a stricter sense. As per the ordinance, the arbitration proceedings are to be heard in a closed court,[30] and publication of the information pertaining to the proceedings is prohibited.[31] In cases where parties do not agree on confidentiality measures, statutory

[22] The Chartered Institute of Arbitrators v. B & Ors., [2019] EWHC 460 (Comm).
[23] Arbitration Act, 2001, No. 37, Acts of Parliament, 2001 (Singapore); Darius Chan, *Singapore's International Arbitration Act 2012 vs Hong Kong's Arbitration Ordinance 2011*, KLUWER ARBITRATION BLOG, (May 12, 2021, 9:24 PM), http://kluwerarbitrationblog.com/2012/04/05/singaporesinternational-arbitration-act-2012-vs-hong-kongs-arbitration-ordinance-2011/.
[24] Arbitration Act, 2001, § 57, No. 37, Acts of Parliament, 2001 (Singapore).
[25] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2nd ed. 2014).
[26] Arbitration Act, 1996, No. 99, Acts of Parliament, 1996 (New Zealand).
[27] *Id*. at § 14B.
[28] *Supra* note 26, at § 14C.
[29] The Arbitration Ordinance, 2011, No. 30, Ordinance, 2011 (Hong Kong).
[30] *Id.* at § 16.
[31] *Supra* note 29, at § 17.

restrictions apply. Mandatory legal disclosures, disclosure necessary for protecting or pursuing a legal right or interest of the party, and disclosure in the course of challenging the arbitral award are the three exceptions to the rule of confidentiality under the Hong Kong law.[32]

Institutional Rules:

The largest international arbitration institution, ICC, casts a duty upon the tribunal and the secretary to ensure confidentiality of information[33] and further prohibits people who are not involved in the dispute from being a part of the arbitral proceedings.[34] However, the ICC Rules are quiet on the question of confidentiality of awards, documents produced, and information disclosed during the proceeding. Similarly, the International Centre for Dispute Resolution Rules of the American Arbitration Association 2014 imposes duties of confidentiality only on the tribunal and the Administrator[35] and empowers the tribunal to make orders concerning confidentiality.[36]

Some Arbitral institutions confer greater protection in terms of confidentiality. In line with the English Law, the London Court of International Arbitration Rules, 2020 provides that unless otherwise agreed upon by the parties, a duty is cast upon the parties to maintain confidentiality in terms of awards, documents, and all the information pertaining to the arbitral proceedings which are not available in the public domain, save and to the extent that where there lies a legal duty for disclosure, or in order to protect or pursue a legal right or to enforce or challenge an arbitral award.[37]

The rule of confidentiality is explicitly recognized by the Hong Kong International Arbitration Centre ["**HKIAC**"] Administered Arbitration Rules 2018 under Article 45.[38] It imposes an obligation of confidentiality on the parties, arbitral tribunal, experts, and witnesses, which prohibits them from publishing any information pertaining to the arbitration proceedings

[32] *Supra* note 29, at § 18.
[33] INTERNATIONAL CHAMBER OF COMMERCE (ICC), art. 21.3, http://www.iccwbo.org/court/english/arbitration/rules.asp (last visited May 02, 2021).
[34] *Id.* at art. 20.7.
[35] AMERICAN ARBITRATION ASSOCIATION, art. 37.1, https://www.adr.org/sites/default/files/ICDR_Rules.pdf (last visited, May 07, 2021).
[36] *Id.* at art. 37.2.
[37] LCIA, art. 30, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (last visited May 11, 2021).
[38] HKIAC, art. 45, https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (last visited May 11, 2021).

without the permission of the parties.[39] It also recognizes certain exceptions such as disclosure to enforce or challenge an award, to protect or pursue a legal right or when disclosure is made to an adviser of any of the parties.[40]

Like others, Singapore International Arbitration Centre Rules of 2016 also contain an express provision of confidentiality.[41] Protection of the interest of the parties, disclosure with the consent of the parties, order of the court, and disclosure for the purpose of challenging and enforcing the award, etc., are some of the well-recognized exceptions under these Rules.[42]

CONFIDENTIALITY PROTECTION REGIME IN INDIA

Prior to the Amendment Act of 2019,[43] the Arbitration and Conciliation Act, 1996 ["**the Act**"][44] was silent on the issue of confidentiality. Section 75 of the Act was the only governing force that provided that the conciliator and the parties to a dispute should endeavor to maintain confidentiality with all the matters relating to conciliation proceedings and the information thereto.[45] However, this was applicable to only conciliation proceedings.

Even though the Act failed to address the confidentiality concerns in an arbitration proceeding, the arbitration institutions in India tried to incorporate the principle of confidentiality in their rules. For instance, Mumbai Centre for International Arbitration ["**MCIA**"] Rules, 2016 required the parties and the tribunal to maintain confidentiality with regard to the arbitral proceedings and award except in situations where the disclosure is to enforce a legal duty or to challenge or enforce an award, or by order of the court, etc.[46] Following the footsteps of MCIA, Madras High Court Arbitration Centre (Internal Management) Rules, 2017[47] and Delhi International Arbitration Centre (Arbitration Proceedings) Rules 2018[48] also went ahead to incorporate *in verbatim* the provision of confidentiality as envisaged in MCIA Rules 2016.

[39] *Id.* at art. 45.1.
[40] *Supra* note 38, at art. 45.3.
[41] SINGAPORE INTERNATIONAL ARBITRATION CENTRE, Rule 39.1, https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule30 (last visited May 21, 2021).
[42] *Id.* at Rule 39.2.
[43] The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019 (India).
[44] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[45] *Id* at § 75.
[46] MUMBAI CENTER FOR INTERNATIONAL ARBITRATION, Rule 35, https://mcia.org.in/wp-content/uploads/2016/05/MCIA-Rules_2017.pdf (last visited May 21, 2021).
[47] MADRAS HIGH COURT, Rule 33, http://www.hcmadras.tn.nic.in/arbitration-rules_2017.pdf, (last visited May 21, 2021).
[48] THE DELHI INTERNATIONAL ARBITRATION CENTRE (DIAC), Rule 36

In the year 2017, in order to review the institutionalization of arbitration mechanisms in India, a High-Level Committee ["**the committee**"] was formed, which was headed by Justice (retired) B.N. Srikrishna. The committee, in its report, observed that, in the absence of any express provision in the Act, the parties have to resort to either a confidentiality clause in the arbitration agreement or the arbitration rules if they provide for the same.[49] Thus, to address this divergence and mandate the duty of confidentiality, the committee recommended that a new provision is to be inserted in Part I of the Act, which provides for confidentiality of arbitral proceedings unless disclosure is demanded as a part of legal duty, or to protect or enforce a legal right, or to challenge or enforce an award before the courts of law.[50]

Accordingly, in an attempt to clear the air with regard to the nature and scope of confidentiality, the Act was amended in the year 2019, and Section 42-A was introduced, which reads as under:

"Section 42-A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution, and the parties to the arbitration agreement shall maintain the confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of the award."[51]

Although this Section was inserted in tune with the recommendations of the committee, the concerned recommendations were not implemented *in toto*, which has led to ambiguity and vagueness in the purview of confidentiality. These lacunas in the newly inserted provision will be dealt with in a later part of the paper.

FLAWS IN CONFIDENTIALITY PROVISION OF THE INDIAN LEGISLATION

Even though the Act now provides for an express provision of confidentiality, it still suffers from various lacunas, which are discussed hereinafter:

A. *Poor drafting:*

A plain reading of Section 42-A[52] itself portrays that the principle of confidentiality is

http://dacdelhi.org/topics.aspx?mid=76 (last visited May 21, 2021).

[49] Justice B. N. Srikrishna, *Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India*, LEGAL AFFAIRS. GOV (July 30, 2017), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[50] *Id.*

[51] Supra note 43, at § 9.

[52] *Supra* note 44, at § 42-A.

embedded in absolute terms, which is bound to pose some serious questions about its practical application. In instances where the parties to a dispute seek interim reliefs from the court,[53] during the engagement of experts,[54] termination of the mandate of the arbitrator,[55] the appointment of arbitrator by the court,[56] or even to challenge the award itself,[57] disclosure of confidential information might be required. However, these scenarios have not been taken into account by the draftsmen.

Further, the said provision fails to differentiate the documents, which inherently cast a duty on the tribunal and the parties to maintain confidentiality from other documents which are required to be produced during the proceedings. Although the inherently confidential documents such as those carrying trade secrets, intellectual property rights, or business proprietary information etc., benefit from the strictest norms on confidentiality, the other documents that are produced in the course of proceedings should not be accorded the same privilege since they are susceptible to various exceptions which will be dealt with by the author subsequently. Acknowledging the same, even the Singapore High Court, in the case of *International Coal Pte Ltd. vs. Kristle Trading Ltd. & Anr.*,[58] had observed that different protection should be accrued to different documents and information in arbitration.

B. *Impact of Non-Obstante clause on mandatory disclosures:*

Party autonomy is one of the main pillars of alternative dispute mechanisms. However, Section 42-A, being a non-obstante clause, takes away this attribute altogether. It ignores the idea that the parties to a dispute may either expressly, by incorporating a confidentiality clause in the arbitration agreement, or impliedly, by agreeing to the arbitration institutions rules which provide for confidentiality, consent to disclose the documents during the proceedings, which has now been barred by the effect of this provision.

Since this non-obstante clause prevails over any other law in force at the time, it hampers the working of other legislation which mandates the disclosure of information. For instance, under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, the listed companies are under an obligation to make certain disclosures

[53] *Supra* note 44, at § 9.
[54] *Supra* note 44, at § 26.
[55] *Supra* note 44, at § 14,15.
[56] S*upra* note 44, at § 11.
[57] *Supra* note 44, at § 34.
[58] International Coal Pte Ltd. vs. Kristle Trading Ltd. & Anr., [2008] SGHC 182.

about their financial situation, performance, ownership, governance, etc., by way of statements, periodic filings, reports and other documents[59] in order to enable the investors to keep a track on their performance and to make an assessment of the current status of the company. In scenarios like these, this clause is bound to cause a consequential conflict of interests. Thus, the application of the said provision needs to be balanced with other legislation in force.

C. *Non-recognition of certain other exceptions:*

In complete oblivion of the current global trends, recommendations of the committee,[60] and the prevailing institutional rules, Section 42-A only provides for one exception to the rule of confidentiality viz. disclosure inevitable for the purpose of enforcement and implementation of the award. It does not recognize any other exceptions to the subject matter, such as a legal duty to disclose information, disclosure that is in the interest of the public, or disclosure to protect the legal rights of the parties.

Disclosure of information as a part of one's legal duty is a well-recognized exception to the rule of confidentiality as it may emanate from the terms of the agreement mutually agreed between the parties in respect to confidentiality. Further, this legal duty can also be cast upon the parties by various other legislations, as discussed above.

Non-recognition of public interest as one of the exceptions to confidentiality enables the government to enjoy the privilege of absolute protection from disclosure in cases where one of the parties to the dispute is State. This adversely affects transparency and accountability on the part of the government, allowing them to misuse their power. This notion was also validated by the Australian High Court in the case of *Esso Australia Resources Ltd. vs. Plowman,*[61] where while denying any implied duty of confidentiality, the court rightly reasoned that if there had been any duty of confidentiality, "public interest" has to be a necessary exception to this duty as the public has legitimate expectations to know what transpired in the arbitral proceedings.

Besides, the fact that Section 42-A fails to recognize legal right as an exception to confidentiality may pose serious hardships to the parties to a dispute in situations where they

[59] Security and Exchange Board of India, Section 4, https://www.sebi.gov.in/legal/regulations/jan-2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-january-10-2020-_37269.html, (last visited May 9, 2021).
[60] *Supra* note 49.
[61] *Supra* note 16.

are compelled to disclose some information pertaining to arbitral proceedings in order to establish its legal right in a separate conflict. Queens Division Bench, being considerate of such situations, recognized legal right as an exception to confidentiality in the case of *Hassneh Insurance Co of Israel vs. Steuart J Mew*[62] as the disclosure of award and details helps the party in setting up defense or use it as a basis for the cause of action.

D. *Failure to take into account non-parties in an arbitral proceeding:*

Legislators have failed to take into account the duty of confidentiality of other actors to an arbitration proceeding. This Section only contemplates the duty of confidentiality on the part of parties, institutions, and the tribunal.[63] However, other participants of the proceedings such as witnesses, experts, and stenos are not constrained under the discipline of confidentiality. Moreover, third-parties such as the parent company, insurance company, third party funder, shareholders of a company, or corporate auditors, who have a legitimate interest in the proceedings and its outcome, have also been completely ignored by this Section.

These inadequacies in the Indian legislation give rise to some serious challenges while dealing with the issue of confidentiality in cases like that of the Amazon-Future dispute. This ongoing dispute has caught more heat with the rumors of the alleged violation of the confidentiality clause that was embedded in the Shareholders Agreement entered into between the parties. As per the reports, despite the existence of an explicit clause imposing a duty of confidentiality on all participants, some people have been able to get their hands over the emergency arbitrator order, even though it has not been released in the public domain yet.[64] Consequently, in order to assess and resolve this problem, it is now supposed to be tested under the provisions of the Act in an appropriate forum. However, with so many loopholes in the provision itself, fair evaluation of the situation and proper administration of justice in that regard seems to be far from reality as of now.

ANALYSIS & SUGGESTIONS

In these unpredictable and ever-changing times, the obligation of confidentiality is one of the most sought out attributes by the parties to a dispute. It has proved to be one of the primary forces behind the rapidly increasing popularity of arbitration. However, despite this, an array

[62] Hassneh Insurance Co of Israel v Steuart J Mew, (1992), [1993] 2 Lloyd's Rep 243 (QB).
[63] *Supra* note 49.
[64] *Id.*

of concerns in this field still remains unattended, leading to a lot of ambiguity and uncertainty. Therefore, envisioning the smooth conduct of arbitration proceedings across the sphere, it is the need of the hour to align our minds and adopt a unified approach.

The prevailing winds of popular opinion are that confidentiality should not impair transparency. To implement this notion, a common express provision pertaining to confidentiality needs to be incorporated in the state municipal laws and rules of arbitration institutions, which also appreciates some important exceptions to this rule, like those mentioned above. The most feasible way to establish this uniform confidentiality rule is to hold a conference on the subject composed of delegates from leading arbitral institutions and experts from all over the world, with an aim to come up with an ironclad provision of confidentiality. However, this does not imply undermining the autonomy of the parties in a dispute. In fact, the aim should be to strike a balance between the uniform confidentiality rule and the idiosyncrasy of party autonomy in arbitration by allowing the parties to diverge from the proposed rule if they wish to and set their own limitations.

It is coherent that putting an arbitral award in the public domain is not viable since it directly jeopardizes the interest of the parties involved. However, on the other hand, fairness and accountability on the part of the arbitrators is essential to the process and cannot be curbed under the garbs of confidentiality. Therefore, in order to reconcile these conflicting interests, it is rational that instead of the whole award, only the reasoning provided by the arbitrator be transmitted in the public domain. This will help in establishing a judicial precedent for future arbitrations without affecting the legitimate interests of the parties to the dispute.

In India, even though the legislators attempt to keep pace with the international trends and practices, a simple reading of Section 42-A itself reveals some serious concerns with regard to its practical application. The inconsistency between the rules of arbitral institutions and statutory provisions makes the operation of confidentiality even more difficult for the parties. Turning a blind eye towards prevalent global trends, the non-obstante clause in the Act not only disregards the well-recognized exceptions to confidentiality but also discards the very notion of party autonomy. This leaves the parties with no other choice but to comply with the necessary mandate of confidentiality. Therefore, the onus now rests upon the courts of law to construe this provision so as to resolve the ambiguity and ease its application.