
THE PARADOX OF ARBITRATION: NAVIGATING BETWEEN CONFIDENTIALITY AND TRANSPARENCY

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ABSTRACT

Transparency and confidentiality are fundamental yet often conflicting principles in arbitration, each serving distinct purposes. While transparency promotes accountability and fosters public trust in the arbitration process, confidentiality safeguards sensitive information and preserves the value of arbitration. This paper explores how these two principles can coexist and complement each other, ensuring the credibility of arbitration.

Beginning with their definitions and significance, the paper examines the Indian legal framework on arbitration to determine whether it favours confidentiality or transparency, assessing the key provisions in Indian Laws to understand their stance. Expanding the scope, the paper scrutinizes international approaches, comparing practices in jurisdictions such as the United Kingdom, the United States, and Australia. This comparative analysis highlights diverse interpretations supported by insights from significant judicial precedents.

The discussion highlights the role of international instruments, notably the UNCITRAL Rules on Transparency and Confidentiality in disputes, arguing that both principles can complement each other. The paper evaluates the challenges of balancing these principles and suggests reforms to harmonize these principles within India's arbitration framework emphasizing the need for flexible mechanisms that respect both the public interest and the parties' need for discretion. By combining global perspectives and practical suggestions, this paper aims to contribute to the ongoing discourse on enhancing legitimacy and efficiency in arbitration.

Keywords: Confidentiality, Transparency, Indian Laws, UNCITRAL Rules

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INTRODUCTION

Arbitration is a conflict resolution mechanism wherein parties to the dispute agree to settle the dispute through the aid and advice of the arbitrator to reach the final and binding solution. It can be carried out either under institutional rules or ad hoc rules. While arbitration focuses on the conflict mechanism, it is essential to put forth two important principles of arbitration those are confidentiality and transparency, the conundrum between the two persists as the former ensures the privacy of the parties is maintained while the latter focuses on the public interest and accountability.

Certain jurisdictions prioritize confidentiality while the other emphasize transparency in the arbitral proceedings. For instance, countries like the United States and the United Kingdom have traditionally leaned towards greater transparency in international arbitration. In contrast, jurisdictions such as Switzerland or Singapore are known for prioritizing confidentiality. The Indian framework focuses on confidentiality unless and until there is a need for transparency. This dichotomy in approach presents a significant challenge for global arbitration, the question arises as to whether these two principles be reconciled in a manner that serves the interest of all parties involved while maintaining the integrity of the arbitration process.

OBJECTIVES

- To understand what is meant by transparency and confidentiality in Arbitration.
- To accumulate jurisdictions of various foreign countries on Arbitration Law.
- To analyse Indian Arbitration Law in the context of confidentiality and transparency.
- To determine the role of UNCITRAL and other Arbitration Rules in the implementation of arbitration procedures in terms of transparency.

HYPOTHESIS

Transparency in arbitration enhances accountability and trust in the Arbitration proceedings, while confidentiality protects the interest of parties both of these principles can co-exist effectively when balanced properly, but lack of legal framework in some jurisdictions may pose challenges in achieving balance between the two.

RESEARCH QUESTIONS

- What are the fundamental principles of transparency and Confidentiality?
- What are the advantages and disadvantages of transparency and Confidentiality?
- How do different foreign jurisdictions strike a balance of transparency and confidentiality in their arbitration laws?
- What is India's approach to confidentiality and transparency?
- How do UNCITRAL Arbitration Rules contribute to transparency in arbitration?

RESEARCH METHODOLOGY

The research begins with the background of confidentiality and transparency, the study then focuses on the foreign jurisdictions' comparative analysis moving further with the Indian framework, and lastly delves into the institutional rules such as UNCITRAL and NAFTA, using a doctrinal approach. The authors have incorporated the research data from various sources such as research studies, websites, and rules laid down by arbitral institutions. The paper mainly extracts data through secondary resources.

1. THE CONCEPT OF CONFIDENTIALITY AND TRANSPARENCY IN ARBITRATION

“Arbitration is an alternative method of dispute resolution whereby the parties to a dispute agree to authorize an impartial third party to render a legally binding determination of the dispute”.² The dichotomy between transparency and confidentiality remains contentious and unresolved. The principle of confidentiality, deeply ingrained in arbitration, attracts disputants; as a result, arbitration has evolved as an alternative to litigation for resolving civil and commercial disputes.³ Confidentiality protects the privacy of the parties and fosters open communication, making arbitration particularly appealing between parties.

² Gary B Born, *International Arbitration: Law and Practice* 3 (Kluwer Law International, 2012)

³ Avinash Poorooye & Ronan Feehily: Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance, 22 HARV. NEGOT. L. REV. 275 (Spring 2017)

Conversely, Transparency promotes fairness, accountability, and trust in dispute resolution. It strengthens public confidence in the process and aids in identifying and rectifying potential errors during the proceedings. In the arbitral realm, it involves the disclosure of documents or other materials, open hearings, the participation of third parties in the arbitration process, and public access.⁴ In context of the international commercial arbitration, there have been persistent calls for greater transparency to ensure procedural integrity and public trust. Therefore, it is essential to appreciate both facets of Arbitration and how they can complement each other. By acknowledging the significance of both, stakeholders can design arbitral processes that reflect the needs and expectations of all parties involved.

- ***Confidentiality***

Confidentiality puts focus on privacy and safeguarding the sensitive information of the parties to the dispute. Confidentiality can be referred to as the legal and ethical obligation to maintain the privacy and secrecy of sensitive information such as the personal data of the parties, trade secrets, and records of the business.⁵ It creates an environment for open communication amongst parties, parties are often willing to disclose information in a confidential space which eventually increases the chances of successful sessions. The parties to the dispute withhold the higher degree of confidentiality depending upon the confidentiality agreement signed by them, this is because the cases to arbitration largely involve two private parties wherein the public has little to no interest in their dispute.⁶

Furthermore, the arbitrators, the counsels, experts, interpreters, and any other person involved in the setting has the duty to maintain confidentiality. In arbitration generally, privacy and confidentiality go hand in hand but there is a slight difference between the two, privacy in arbitration can be referred to wherein the third party is unable to participate or observe the proceedings and limits its transparency whereas Confidentiality focuses on information pertaining to the sessions between the parties, the principles of privacy and confidentiality should cooperate to provide complete confidentiality and complement each other as they are fundamental to commercial arbitration.

⁴ Id.

⁵ Dayanidhi & Riktika, *Exploring the Dichotomy of Transparency and Confidentiality in Modern Arbitration Proceedings*, 6 INT'L J.L. MGMT. & HUMAN. 2416 (2023)

⁶ Gary B Born, *supra* note 2.

Article 25(4)⁷, of the rules stated that “[hearings shall be held in camera unless the parties agree otherwise,” Article 24⁸ and Article 32(5)⁹, which stated that an arbitral decision could only be made public with the parties' cooperation, are examples of such restricted restrictions. However, to improve the effectiveness of arbitral proceedings and to reflect changes in arbitral practice, the rules were modified in 2010.

- **Transparency**

The definition of transparency is indefinite in Indian and International law. Transparency often promotes the idea of openness and access to information by the public.¹⁰ It also exhibits a decision-making process and publication of arbitral awards allowing the arbitrators to do in-depth research and follow the true process without any biases as it is likely to be rendered and scrutinized by the public.¹¹ There have been distinguished opinions between the publication of arbitral awards with the consent of parties and the formation of a supervisory entity to supervise and oversee the publication of awards.

While there have been appeals for increased transparency in the arbitration matters it is recommended to understand how the arbitration has appeared in the past, the fact that the arbitration proceedings have taken place in a virtual black box to keep the dispute away from the limelight of the press. Arbitrators conducted the proceedings on the basis of their professional experiences and ruled based on the sense of what was equitable and just,¹² setting aside legal consideration in the interest of achieving the result in the favour of the parties.

In the contemporary scenario, the notion of transparency has been advocated by the international community since it is thought to result in a more democratic, legitimate, and responsible system of global government. The concept of public access, transparency and disclosure is interconnected. The evolution of arbitral law, the prevention of future disputes, the consistency of arbitral awards, improved opportunities for the arbitral system to grow, and

⁷ U.N. Comm'n on Int'l Trade Law (UNCITRAL), Arbitration Rules, art. 28(3) (2021)

⁸ Id. Art. 24

⁹ Id. Art. 32(5)

¹⁰ Gary B Born, *supra* note 2

¹¹ Claudia Reith, *Enhancing Greater Transparency in the UNCITRAL Arbitration Rules - A Futile Attempt?* 2 Y.B. ON INT'L ARB. 297, 300 (2012).

¹² Id.

improved effectiveness in assessing an arbitrator's level of skill are all advantages of arbitral openness.

- **Public Access and Transparency:** Both of these components of arbitration facilitate the public's right to information and ability to attend the proceedings. The amalgamation of the two is not distinct from each other but portrays ideas in a sense wherein public access talks about individual rights which stems from fairness and justice, and transparency shows a wider perspective that relates to the system as a whole. Consequently, public access is not an important characteristic but merely helps in facilitating transparency.¹³
- **Disclosure and Transparency:** Disclosure and Transparency are of different natures but can co-exist. In a way, Arbitrators must declare any conflicts of interest that can influence their judgment or compromise their objectivity because doing so makes it possible for arbitrators to be chosen openly and reduces the likelihood that arbitral rulings will be appealed due to bias.¹⁴ Moreover, the aim is to protect the public interest, Pertinently the parties to the arbitration are private entities in such cases the disclosure obligation rarely arises when there is little to no public interest involved.¹⁵

Transparency has helped in the development of International Commercial Arbitration in various ways such as:

1. **Choosing the Arbitration Seat:** Selecting the arbitral seat is frequently a crucial decision. The choice of law, the parties' convenience, and the arbitral rules that the seat has adopted all have a major impact on this decision, keeping this in mind Multinational Corporations usually spend considerable time in forming the arbitration clause to safeguard their interest.
2. **Development and Competition in Arbitration:** The rise in businesses and Multinational Companies across the world has given birth to commercial disputes, which led to the growth of the arbitration system. The competition between Lawyers, Arbitrators and

¹³ Gary B Born, *supra* note 2

¹⁴ Paula Hodges, *The Perils of Complete Transparency in International Arbitration - Should Parties Be Exposed to the Glare of Publicity?* 3 PARIS J. OF INT'L ARB. 589, 596 (2012).

¹⁵ Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006).

Arbitral Institutions has spurred the system.

The release of UNCITRAL Rules on Transparency in the year 2014 for investor-state arbitrations was seen as the turning point for the promotion of transparency. Although the rule primarily focused on investor-state arbitration but has prompted calls for international commercial arbitration to be more transparent.

The need of compulsory transparency reforms is of need at present but to be precise and not without the consent of parties. The case of *Chevron v. Ecuador*¹⁶ illustrates the conflict between confidentiality and transparency as well as the significance of taking both party's interests into account when deciding whether to disclose material. It also emphasizes how crucial it is to thoroughly examine confidentiality agreements and the situations in which they might be violated.

2. GLOBAL PERSPECTIVE: COMPARATIVE STUDY OF FOREIGN JURISDICTIONS

Transparency and Confidentiality are conflicting but crucial aspects of Arbitration. While the former helps in development of arbitral jurisprudence, the later helps in protecting the interests of the parties involved. In incorporating these principles, many different countries have taken different approaches. Majority of the developed countries have tilted towards confidentiality. This is because confidentiality is a very attractive feature: - as it helps in maintaining business relationships¹⁷ and avoids situations like trial by media.

It is still pertinent to note that even though confidentiality is an important feature, it is not an essential one. Numerous arbitral awards have been made public following the principle of transparency. This supports the fact that confidentiality is not an essential factor like privacy. Taking these benefits into consideration, many countries have based their Arbitration Laws on either principle. In the instant chapter, arbitration laws of Australia, the U.S., and the U.K. have been analyzed, along with important precedents.

¹⁶ *Chevron v. Ecuador* 21ALR (2020) 144

¹⁷ Charles S. Baldwin, *Protecting Confidentiality and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 453 (1996).

- **France**

The French Judiciary has recognized express duty of confidentiality as an indispensable part of arbitration. There are no circumstances under which non-disclosure is allowed but no statutory provisions are present in French Law which talk about confidentiality. In the case of *Aita v. Ojeh*¹⁸, the Paris Court of Appeal upheld the principle of confidentiality. The Hon'ble Court denied to overturn an Arbitral Award passed in U.K. as it would lead to disclosure of confidential information. The Court had held that such challenge was made with malicious intent to violate confidentiality and would affect sanctity of the arbitral process.

The French Courts have also held that unwarranted suo-moto disclosure of confidential information by one party amounts to breaching the duty of confidentiality. It is also important to note that in many cases over the recent years the burden of proof has been increased. Even in the case of *Nafimco v. Foster Wheeler Trading Company*,¹⁹ the French Appellate Court had held that for successfully establishing breach of confidentiality, the allegor has to show pre-existing duty of the same which wasn't objected to by the other party.

- **United States**

In the U. S., there are opposing views on the conundrum of confidentiality and transparency. The general position vis-à-vis international commercial arbitration is that an implied duty of confidentiality would accrue if express agreement for the same is agreed upon (*United States v. Panhandle Eastern Corporation*²⁰).

It is important to note that in U.S. jurisdiction, exceptions have been introduced to confidentiality through the case of *Contship Containers Ltd. v. PPG Industries Inc.*²¹ It was held herein that confidentiality may be breached when the documents are essential and necessary for a fair adjudication or at low costs. Penultimately, the U.S. are the only jurisdiction which provides for such type of disclosure yet. Lastly, it should be considered that the term fair trial should be defined so as to prevent unnecessary misuse of confidential documents.

¹⁸ *Aita v. Ojeh*, Cour d'appel [Paris], 4 Rev. Arb. 584 (1986)

¹⁹ *Nafimco v. Foster Wheeler Trading Co. AG*, Cour d'appel [Paris], Jan. 22, 2004.

²⁰ *United States v. Panhandle E. Corp.*, 118 F.R.D. 346 (D. Del. 1988).

²¹ *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 442 F.3d 74 (2d Cir.2006)

- **United Kingdom**

In the United Kingdom the position of confidentiality has evolved through multiple landmark cases like *Dolling-Baker v. Merrett*²² and *Hassneh Insurance Co. of Israel v. Stuart J. Mew*²³ over the years. All of these have reiterated that when parties enter into arbitration there is an implied duty to maintain confidentiality. This was extended to evidence and statements presented, documents prepared and used in arbitration, etc.

In *Emmott v. Michael Wilson & Partners Ltd.*²⁴, the English Court of Appeal identified two important exceptions to confidentiality in arbitration. The first allows information to be shared when it is necessary to protect a party's legitimate interests, such as defending against a claim made by a third party in court. The second permits disclosure if confidentiality is being misused to deceive courts in other countries.

Penultimately, in cases like *Ali Shipping Corp v. Shipyard Trogir*²⁵, and *AEGIS v. European Reinsurance Co. of Zurich*,²⁶ general exceptions to confidentiality have been laid down.

According to these cases, confidential documents of an arbitration proceeding may only be disclosed when: - public interest is at stake,²⁷ the arbitration award has been challenged, consent of disputed parties is taken, disclosure of necessary to protect the party's interest, and when corporations have a duty of sharing information with shareholders.

Lastly, it is important to note that even though exceptions to confidentiality are present principles like the Riddick Rule are also present to protect confidentiality. According to this rule, any documents shared during the discovery phase of a case are strictly intended for the litigation at hand and cannot be repurposed for any other use unless there is explicit permission from the court or consent from the party that provided the documents.

This principle emerged from the landmark case *Riddick v. Thames Board Mills Ltd.*²⁸, where

²² *Dolling-Baker v. Merrett*, [1990] 1 W.L.R. 1205 (Eng C.A.).

²³ *Hassneh Ins. Co. of Israel v. Stuart J. Mew*, [1993] 2 Lloyd's Rep. 243 (Eng. Q.B.).

²⁴ *Emmott v. Michael Wilson & Partners Ltd.*, (2009) EWCA (Civ) 362

²⁵ *Ali Shipping Corporation v. Shipyard Trogir*. [1998] 1W.L.R. 440 (Eng. C.A.)

²⁶ *Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich*, [2003] 1 W.L.R. 1041 (P.C.).

²⁷ Keon-Hyung Ahn, *Confidentiality and the Riddick Principle in International Commercial Arbitration*, 31 J. ARB. STUD. 43 (2021).

²⁸ *Riddick v. Thames Board Mills Ltd.*, (1977) Q.B. 881.

the court highlighted the necessity of safeguarding the confidentiality of disclosed documents. Protecting this confidentiality is crucial for ensuring that parties feel secure in sharing complete and honest information. If there are concerns about potential misuse of such documents, it may deter parties from fully participating in the candid exchange of information, thereby jeopardizing the fair resolution of disputes.

- **Australia**

The Australian high courts have been supporters of duty of confidentiality in cases of international commercial arbitration. The case of *Esso Australia Resources Ltd. v. Plowman*²⁹ is an excellent example of the same. Herein, arbitration revolved around agreement between Esso Australia Petroleum, BHP and State-Owned Utility Company in Australia for supply of natural gas. The dispute was pertaining to the price review clause. Later, according to the arbitration clause in their contract, the case was put forth for arbitration.³⁰

An appeal was filed on behalf of the State-Owned Companies before the Australian High Court hoping to get a ruling that the information disclosed during arbitration by Esso Australia Petroleum and BHP wasn't subject to confidentiality.

The Hon'ble Court's judgment was considered by many as a *seismic shock*³¹ as it held that confidentiality is not an essential element of arbitration. It was held herein that if an explicit confidentiality clause is absent in an agreement, then arbitral proceeding's private nature would does not single-handedly establish confidentiality as an indispensable trait. For confidentiality to be essential, the dual test of presumption and explicit mention of the same should be passed.³²

Further, the difference between privacy and confidentiality was also established. It was laid down that privacy is an inherent factor in arbitration and confidentiality is an extra benefit (provided there is mutual prior consent of both parties). This decision shows a positive step towards transparency as the Hon'ble High Court did not provide a blind protection to confidentiality and recognized it as an important and non-essential element only. However, it

²⁹ *Esso Austl. Res Ltd. v. Plowman*, (1995) 183 CLR 10, (Austl. H.C.)

³⁰ Edouard Bertrand, *The Confidentiality of Arbitration: Evolution or Mutation Following Esso/BHP vs Plowman*, 2 INT'L Bus. L. J. 169 (1996).

³¹ Hew R. Dundas, Commentary, *Confidentiality in English Arbitration: The Final Word? Emmott v. Michael Wilson & Partners Ltd.*, [2008] EWCA Civ 184.

³² Avinash Poorooye & Ronan Feehily, *supra* note 3.

is important to note that this decision has been criticized on the ground that this case was not decided with regards to international arbitration but on the basis of domestic factors.

3. ANALYSIS OF INDIAN ARBITRATION FRAMEWORK

The Indian Arbitration laws stand crucial in the realm of commercial disputes. The Indian Arbitration Act, 1996 governs arbitration matters in the country. Since arbitration is mainly based on the party autonomy the very nature of it is to be held in private proceedings, unlike public trials. Therefore, parties to the dispute always have legitimate expectations that the proceedings should maintain confidentiality. Parties may seek different degrees of confidentiality. For example, if a side wins an arbitration, they must be permitted to reveal the arbitration's specifics, which are required to enable the arbitral award to be enforced.³³

The “**Saikrishna Report**”³⁴ report emphasized on common law jurisdictions like Hong Kong and the United Kingdom wherein the former provides confidentiality protection through an explicit section and the latter focuses on the implied duty of confidentiality. The report helped to incorporate an express duty of confidentiality in arbitration proceedings.³⁵ While there is no formal mention of the publication of Arbitral awards in the Arbitration Act, there are a few institutions that publish the redacted arbitral awards with the consent of parties some of these institutions are the International Chambers of Commerce (ICC), London Court of International Arbitration (LCIA), Indian Institute of Arbitration and Mediation.³⁶

In India, the committee noticed that there wasn't any provision for providing confidentiality in arbitration proceedings. Thus, the Act introduced section 42-A in the Arbitration and Conciliation (Amendment) Act, 2019:

“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

³³ Jaideep Khanna, *Confidentiality under the Indian Arbitration Regime*, 3 IND. ARB. L. REV. 84 (2021).

³⁴ Justice B.N. Krishna, Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (30 July 2017) 1,71

³⁵ Jaideep Khanna, *supra* note 33.

³⁶ Binsy Susan & Amogh Srivastava, *Publication of Arbitral Awards: Balancing Confidentiality and Transparency in Arbitration*, 4 IND. ARB. L. REV. 13 (2022).

*for the purposes of implementation and enforcement of award.”*³⁷

Section 42- A imposes strict obligation on “the arbitrator, the arbitral institution, and the parties to the arbitration agreement” to maintain confidentiality in the proceedings. It undermines the party autonomy to publish the arbitral awards or disclose any document, by submitting their disputes to the tribunal. The parties refer to arbitration for speedy recovery and their complex nature and in order to fully adjudicate disputes, non-signatories such as expert witnesses must be involved.

Even though they might not participate actively in arbitrations, these parties are nevertheless involved in the process. In the recent landmark judgment *Cox and Kings Ltd. vs. SAP India Pvt. Ltd.*³⁸, the Supreme Court ruled that by applying the Group of Companies doctrine the companies which are non-signatories to the arbitration agreement can be made parties to the proceedings if their actions implicitly indicate that they accept to be bound by the agreement. As a result, even though non-signatories are now almost always involved in arbitration procedures, Section 42-A does not impose a confidentiality obligation on them.

The parties are only released from the confidentiality requirement under Section 42-A when “disclosure is necessary for the purpose of implementation and enforcement of the award.” Sec. 42A does not fully cover all scenarios where involvement of court is necessary, it failed to adjudicate upon the possible situations wherein the disclosure of arbitral proceedings may be necessary.

For instance, Parties can seek interim relief under section 9 of the ACA Act, 1996 or an arbitrator mandate may be terminated by invoking Sec 14 of ACA, 1996. In each of these circumstances, there is a high probability that parties can rely upon pleadings of arbitral proceedings before the court.³⁹ Section 42 (A) functions as a barrier to the publication of arbitral awards and offers no exceptions for the publication of redacted awards.

Section 43(K) discusses the obligation of the Arbitration Council of India to maintain an electronic depository of arbitral awards made in India.⁴⁰ The main purpose of inserting this provision was to ease the difficulty faced by the courts in accessing authentic copies when the

³⁷ § 42, A&C Act.

³⁸ *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*, 2023 SCC OnLine SC 1634

³⁹ Jaideep Khanna, *supra* note 33.

⁴⁰ *Id.*

arbitral awards were challenged.⁴¹ All arbitral institutions and ad hoc arbitral tribunals would be obliged to transmit copies of their individual arbitral awards to the proposed centralized depository. Only during challenge proceedings would the courts have restricted access to the centralized depository.

Since the provision itself does not provide for the publication of redacted awards there are several domestic institutions that do so. The rules of each domestic institution are inconsistent and might differ. These institutions can be classified into three categories:

- ***Arbitral Institution where express consent of parties is not required***

The Mumbai Centre for International Arbitration (MCIA), Construction Industry Arbitration Council (CIAC), Indian Council of Arbitration (ICA), Delhi International Arbitration Centre (DIAC), and Nani Palkhivala Arbitration Centre (NPAC) are some arbitral institutions that presume parties' consent to publish redacted awards once parties agree to submit disputes for resolution under their arbitration rules, and they do not require or prescribe any express consent of the parties prior to publication of redacted awards.

- ***Arbitral Institutions which demand express consent of parties***

The London Court of International Arbitration, India (LCIA India), PHD Chambers of Commerce and Industry (PCIAC), and Indian Institute of Arbitration and Mediation, Delhi (IIAM), and International Chambers of Commerce (ICC) requires express consent of parties for publishing redacted awards.

- ***Arbitral Institutions which do not allow publication of awards.***

Arbitral Institutions like Centre for Alternative Dispute Resolution (ICADR), New Delhi, the Bangalore International Mediation, Arbitration and Conciliation Centre (BIMACC) does not allow the publication of arbitral awards as it expressly provides that the arbitral awards should be treated as confidential.

The Arbitration and Conciliation Act, 1996 has taken a liberal view while Section 42-A allows

⁴¹ Committee Report, Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (20 July 2017) [https:// legalaffairs.gov.in/sites/default/files/Report-HLC.pdf](https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf) accessed 3 October 2021, 77, para 18.

the disclosure of arbitral proceeding, when necessary, Section 43K discusses the maintainability of arbitral awards by the Council in electronic form but stays silent on the transparency which involves the publication of awards which would be accessed by the public at large. It ignores the fact of accessing the awards which might be helpful for educational and training purposes wherein students and practitioners would get insights in the applicability of principles of ADR to solve the problem.

Publicly available redacted awards on comparable disputes or legal issues would allow parties to assess the likelihood of success in a dispute based on the predictability of the outcome. They would be better able to weigh the costs and benefits of pursuing their claims (or not), which is likely to encourage other forms of alternative dispute resolution, such as mediation after parties have made an informed assessment of their chances of success.⁴² Therefore publishing awards would not only harmonize confidentiality but would promote transparency and the confidence of parties in the system.

4. INSTITUTIONAL RULES - UNCITRAL AND NAFTA

Arbitration is one of the most efficient ways to resolve disputes but when governments and investors or different nations or government and private contractors use arbitration to settle disputes, there may be complications. The question of disclosing the arbitration's details to the general public arise as the arbitration award has the power to affect public interest.

This leads to the building up tension between transparency: - disclosing information to public and confidentiality: - protection of sensitive information.⁴³ These questions are addressed by the many arbitration rules like the ones present under United Nations Commission on International Trade Law (UNCITRAL) and North American Free Trade Agreement (NAFTA).

- **NAFTA**

This is a trade agreement entered between three countries: - the United States, Canada and Mexico. This agreement reduces barriers like tariffs for promoting trade and investment. In this agreement, arbitration provisions are present in a scenario where disputes arise between foreign

⁴² Binsy Susan & Amogh Srivastava, *supra* note 33

⁴³ Florentino P. Feliciano, *The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration*, 87 PHIL. L.J. 1 (December 2012).

investors and the governments involved. These arbitration provisions are present in Chapter 11 of the agreement. The provisions of NAFTA are remarkably significant as they focus on maintaining the balance between transparency and confidentiality. Some of the provisions which show that the transparent nature of these rules are: -

- *Article 1126(13):*

This article states that all the parties of NAFTA have consented to making their hearings public; but these are only made public if the approval of claimant is also present.

- *Article 1137(4):*

Under this article {**and Annex 2(b))**}, awards can be made public with redaction of confidential information. Documents can be published without consent if the respondent is the USA or Canada, but consent is needed if Mexico is the respondent. However, it is important to note that *Articles 2102 and 2105* mandates that information related to national security or essential security must remain confidential.

- *Article 1128:*

This article permits the submissions of amicus curiae as it allows third parties to make submissions if a written notice is given to the disputing parties.

In many cases, arbitral tribunals have allowed transparency, provided that a balance is maintained between the confidentiality concern and burden of transparency on investors.⁴⁴ In the case of *Methanex Corporation v. United States*,⁴⁵ the transparency approach was fully adopted. In this case, Methanex Corporation had challenged a California regulation which had prohibited the use of a gasoline additive MTBE which was violative of NAFTA's provisions. The NAFTA tribunal has first time allowed the amicus curiae submissions from a non-disputing party. This is considered as a landmark case as it started a trend of growing public participation in arbitration cases which dealt with the larger public interest.

⁴⁴ Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSI D Case No. ARB(AF)/98/3, 26 June 2003, paras. 231-233; VanDuzer 2007, at 699.

⁴⁵ *Methanex Corporation v. United States*, (2005) 44 I.L.M. 1345. (UNCITRAL Arb. 2005)

It is also pertinent to note the case of *Ethyl Corporation v. Canada*⁴⁶, the tribunal had dealt with the ban on gasoline additive MMT. In this case a partial disclosure of documents was allowed. Further, in the case of *Pope & Talbot Inc. v. Canada*⁴⁷ the tribunal had permitted public access to confidential documents like written submissions and hearing transcripts with the mutual consent of disputing parties. Both of these cases show that steps have been taken to bring more transparency when the public interest is at stake.

Lastly, in *Metaclad Corporation v. Mexico*⁴⁸, the tribunal clarified that neither NAFTA nor ICSID rules imposed an inherent obligation of confidentiality, allowing public disclosure of awards and statements. All of these decisions set an important precedent for transparency in investor-state arbitration.

- **UNCITRAL**

The *UNCITRAL Rules of Transparency (2013)* have revolutionized the arbitration practices by implementing openness in proceedings, particularly in investor-state disputes. They strike the balance between protecting confidential information and public accountability. These rules are applicable to all investment treaties unless someone expressly opts out. The older treaties can also adopt these voluntarily or through the *Mauritius Convention on Transparency (2014)*; showing that these rules even have a retrospective application. Some of the important provisions of these rules are: -

- *Article 3:*

This article mandates public disclosure of key arbitration document like: - Notice of Arbitration, Statements of claim and defence, Arbitral Awards. These can be disclosed on the condition that sensitive information may be redacted. This ensures that the general public knows about the disputes that have an impact on them.

⁴⁶ Swan, Alan C. "Ethyl Corporation v. Canada, 38 I.L.M. 708, 715 Award on Jurisdiction (under NAFTA/UNCITRAL)." *The American Journal of International Law*, vol. 94, no. 1, 2000, pp. 159–66.

⁴⁷ Gantz, David A. "Pope & Talbot, Inc. v. Canada 42 I.L.M 1295." *The American Journal of International Law*, vol. 97, no. 4, 2003, pp. 937–50.

⁴⁸ Dodge, William S. "Metalclad Corp. v. Mexico. 40 I.L.M 36 (2001), and." *The American Journal of International Law*, vol. 95, no. 4, 2001, pp. 910–19.

- **Article 6 & 7:**

These articles together state that arbitration proceedings can be held publicly except in situations where sensitive business information is involved. Herein the tribunal has been given responsibility of live streaming the proceeding for ensuring public access. Even in the case of *Bear Creek Mining v. Peru*⁴⁹ open hearings had demonstrated the live application of transparency in treaty-based disputes.

- **Article 4 & 5**

These articles encourage public participation through amicus curiae submissions. This gives NGOs and academicians to make their submissions regarding matters of public interest. For example: - In *Biwater Gauff Ltd. v. Tanzania*⁵⁰ the tribunal keeping this point in mind had allowed for public intervention.

By implementation of document disclosure, public hearings, and third-party participation **UNCITRAL** Rules along with the Arbitration Rules of **NAFTA** exhibit a more open and transparent approach towards arbitration, making sure that public interest and accountability is taken into consideration.

CONCLUSION

In the instant paper, two essential elements of arbitration have been discussed – transparency and confidentiality. As we have seen confidentiality is essential so as to protect the interests of the parties involved. Whereas transparency ensures that cases there is accountability in cases of public interest, development of arbitral jurisprudence, granting of legitimacy to arbitration centers, etc. According to many judicial precedents and laws across different jurisdictions; there has been a gradual shift from confidentiality to transparency when it comes to matters which have a significant impact.

WAY FORWARD

As India continues to experience a gradual shift from confidentiality to transparency in

⁴⁹ *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Award 9 Nov.30,2017)

⁵⁰ Knahr, Christina, “Introductory Note to International Centre for Settlement of Investment Disputes (ICSID): *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID CASE NO. ARB/05/22, Procedural Order No. 3.” *International Legal Materials*”, vol. 46, no. 1, 2007, pp. 12–14.

arbitration, it becomes imperative to implement specific measures that bolster both public accountability and private interests. A critical step in this direction would be amending Section 42A of the Arbitration Act to explicitly allow for the publication of arbitration awards, provided that there is mutual consent from both parties. This amendment would ensure that sensitive information is redacted before publication, thus safeguarding the private interests of the parties involved while promoting transparency.

To further address public accountability, arbitration awards should be published in cases where significant national interest is involved, especially those pertaining to government projects. This approach would not only enhance trust in the arbitration process but also demonstrate the government's commitment to transparency when public resources and interests are at stake.

Moreover, India could take inspiration from leading international frameworks by collaborating with established platforms such as the International Chamber of Commerce (ICC) and Jus Mundi to publish anonymized and redacted awards. Such partnerships would allow for a structured dissemination of arbitration awards, fostering a culture of transparency while mitigating risks to sensitive business information. Lastly, it would be beneficial to refer to the transparency provisions outlined in NAFTA and UNCITRAL as a guiding framework for enhancing India's arbitration practices.