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Confidentiality in Arbitration - to what extent does it hold up?

Mihir Popat^a

^aO.P. Jindal Global University, Sonipat, India

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To get a better understanding of confidentiality, it is essential to first differentiate it from a related notion known as privacy. While both are polar opposites, the distinction lies in their breadth and reach. In contrast to confidentiality, privacy is a more limited notion that relates solely to hiding information from other parties by excluding them from participating in the arbitral procedures. The purpose of confidentiality is to ward off any third-party interference in the arbitral procedures. On the other hand, the duty to preserve secrecy requires the parties to refrain from disclosing any information related to the arbitral proceedings to other parties. This may contain witness information, pleadings, submissions, and transcripts, among other things. Thus, confidentiality, as opposed to privacy, imposes a greater burden on the parties to the Agreement by prohibiting third parties from intervening in the proceedings and also prohibiting them from disclosing any information. The manuscript walks through the Arbitration mechanism in India. The heart of the text draws the recent literature concerning the confidentiality aspect of Arbitration. Moreover, it will look into some of the significant jurisdictions that would throw light onto the confidentiality mechanism being in practice. Lastly, to wrap the talk, we would drop in suitable suggestions to reach a power-packed conclusion.

Keywords: confidentiality, arbitration, settlement.

INTRODUCTION

When parties decide to settle a dispute via Arbitration, the parties involved tend to let out information regarding finances, intellectual properties, and other classified data. One of the determining reasons why parties resort to Arbitration is to ensure that such material information is protected from public exposure since it could impact their market stature and competition. In India, the law associated with domestic arbitration, foreign-seated arbitration, and enforcement of foreign awards is governed by the **Arbitration and Conciliation Act, 1996**. The act built on the UNCITRAL Model Law as embraced by the United Nations Commission on International Trade Law.¹

THE LAUNCH OF THE CONFIDENTIALITY CLAUSE VIA SECTION 42A

This clause was introduced with the Arbitration and Conciliation (Amendment) Bill, 2019, once it got approval by both the Upper and the Lower house of the Parliament. The backstory was that a bill depicting similar provisions was supposed to be passed but lapsed before it could go through the Rajya Sabha. By bringing in such a clause, does it certainly fill the gap of confidentiality of Arbitration?²

When we study the Indian Arbitration and Conciliation Act, 1996, Section 75 of the act provided confidentiality merely at conciliatory proceedings.³ What happens next is, on thorough scrutiny of the confidentiality provision across different jurisdictions, the Srikrishna Committee viewed that it was flawed. To resolve this issue, the committee drew certain exceptions through which information was disclosed depending on the particular situations. This situation comes to play when some part of the information is required by legal duty,

¹ Zia Mody & Aditya Vikram Bhat, 'The Dispute Resolution Review: India' (*The Law Reviews*, 22 March 2021) <<https://thelawreviews.co.uk/title/the-dispute-resolution-review/india>> accessed 10 June 2021

² Chanaka Kumarasinghe & Sadhvi Mohindru, 'Legislative Reforms to the Indian Law on Arbitration' (*HFW*) <<https://www.hfw.com/Legislative-reforms-to-the-Indian-Law-on-Arbitration>> accessed 10 June 2021

³ Khushbu Turki and Shagun Singhal, 'Section 42A- A Stumbling Block for Unprejudiced Arbitration in India' (*Arbitration and Corporate Law Review*, 10 August 2020) <<https://www.arbitrationcorporatelawreview.com/post/section-42a-a-stumbling-block-for-unprejudiced-arbitration-in-india>> accessed 10 June 2021

protecting and enforcing a legal right or challenging an award before a court or a judicial authority.

But these recommendations were not fully included in the 2019 Amendments while putting Section 42A forward⁴. Moreover, a close reading of section 42A⁵ indicates the language adopted by Section 75⁶ of the Indian Arbitration Act that talks about confidentiality and implies that the bill drifts from the committee recommendations.⁷

LIMITATIONS OF SECTION 42A OF THE ACT

Section 42A could be a mandatory provision since it is a non-obstante clause. The courts might decipher this provision to be merely directory in nature if there is an existing pre-arbitration confidentiality agreement between the parties, along with party autonomy and flexibility in the process of such proceedings. It brings us down to the fact that a breach of Section 42A could not act as a reason to repeal the arbitral award under Section 34(2) (a) (v). Lastly, parties could execute separate confidentiality agreements with others not covered by Section 42A to prevent unjustifiable disclosures and ensure compliance.⁸ Further, Section 42A fails to categorize the information that is recognized and protected. It means that there is an absence of a clear distinction between the ‘inherently confidential information such as trade secrets, finances, etc., and the other documents disclosed at the proceedings. On this, the court in Singapore concerning the International Coal case⁹ said that “in arbitration, the kind of protection differs with documents and information.”¹⁰

While we compare it with other jurisdictions, they offer a range of exceptions to confidentiality which are as follows: listed companies need to disclose their material information, preserve the

⁴ *Ibid* 1

⁵ Arbitration and Conciliation (Amendment) Bill 2019, s 42A

⁶ Arbitration and Conciliation (Amendment) Act 2019, s 75

⁷ Tejas Karia and others, ‘NPAC’s Arbitration Review: New Confidentiality provision in the Indian Arbitration Act’ (*Bar & Bench*, 30 September 2019) <<https://www.barandbench.com/columns/npac-arbitration-review-confidentiality-provision-indian-arbitration-act>> accessed 10 June 2021

⁸ AKS Partners, ‘Covid-19 and E-Arbitrations: An Indian Perspective’ (*Lexology*, 30 July 30 2020) <<https://www.lexology.com/library/detail.aspx?g=40e5193a-22d0-411c-97e7-222dc434c285>> accessed 11 June 2021

⁹ *International Coal Pte Ltd v Kristle Trading Ltd and Anr* {2008} SGHC 182

¹⁰ *Ibid* 7

public interest, etc. And also stand along with third-party rights via indemnity and guarantee. But, since Section 42A fails to recognize these, India's plan to be the pivotal Arbitration seat in South Asia might go down the drain.¹¹ Section 42A indicates that the arbitrator, the arbitral institution, and the parties to the dispute, must maintain confidentiality at such proceedings, with the award being an exception, disclosed for its implementation or enforcement.

"As per the recent ICC updates regarding the conduct of arbitration per the ICC rules state that all awards made as from 1 January 2019, no less than two years after notification, be published. And should be based on an opt-out procedure." Moreover, the opt-out procedure entitles the party to object to publicizing an award or request a rework of it. To this, according to the parties' agreement, the same will be redacted.¹² About publishing an award, the Legislature turned its back to decide the fate of such an award by not incorporating the opt-out scheme under Section 42A of the Act. Some queries seem unanswered, such as decision-making authority regarding broadcasting an award for its implementation and clarity for full disclosure or party discretion over the redacted award.¹³

PEEKING INTO OTHER JURISDICTIONS REGARDING CONFIDENTIALITY

What happens here is, some jurisdictions have an implied duty regarding the confidentiality clause, while some recognize it by way of a statutory provision as followed by India. And some arbitration jurisdictions are entirely blind to a confidentiality clause.¹⁴

A) United Kingdom:

The UK arbitration practice is monitored by the English Arbitration Act, 1996. The act does not indicate any specific provision regarding confidentiality in arbitration proceedings.

¹¹ *Ibid*

¹² Subhiksh Vasudev, 'The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?' (*Kluwer Arbitration Blog*, August 25, 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/>> accessed 11 June 2021

¹³ *Ibid*

¹⁴ Rohan Gopal, 'Confidentiality: A New Pandora's Box under the Indian Arbitration Regime- Part II' (*GNLU Student Research Development Council*, July 22, 2020) <<https://gnlusrdc.wordpress.com/2020/07/22/confidentiality-a-new-pandoras-box-under-the-indian-arbitration-regime-part-ii/>> accessed 12 June 2021

Nevertheless, the English Courts stand by implied duty to preserve confidentiality. Here, the confidentiality aspect is divided into two parts: a) inherently confidential information such as trade secrets, b) other information regarding the hearings, submissions, award, etc. Moreover, just the inherently confidential information bears absolute confidentiality. And the latter half of such information has certain exceptions, which are as follows:

a) Parties' express or implied consent, b) disposal of the matter as a part of necessary disclosure, c) disclosing information to protect the legitimate interests of the parties, etc.¹⁵

B) Singapore:

The Singapore Arbitration Act, 2001, runs the arbitration practice in Singapore. As per section 56 of the Act, the parties to the dispute can choose a close court for the arbitration proceedings. Further, the parties' consent is required to publish the judgement produced in the closed court according to section 57(3) (a). As Per Section 57(3) (b), the court could publish such information if the party's confidentiality is not hampered. Also, the court is empowered to produce the judgement if it talks about considerable legal interest per section 57(4). We could note that the court could conceal any part of the order as the party wishes.¹⁶

ANALYSIS

Rule 39.1 of the *Singapore International Arbitration Centre (SIAC)* requires the parties to arbitration to treat the award and the related matters such as documents, evidence, pleadings, etc., as confidential. Note that express consent is required by the parties for matters that could likely infringe confidentiality. Additionally, per the parties' need, a separate contract regulating confidentiality be formulated barring the mandatory rules.

Rule 30 of the *London Court of International Arbitration (LCIA)* places an obligation over parties to ensure confidentiality of the award and the documents along with other materials put forward during the arbitration proceedings, which are not publicly available. It is crucial to

¹⁵ *Ibid*

¹⁶ *Ibid*

spot that the LCIA has to obtain the parties' and the Arbitral Tribunal's consent before publishing the award.¹⁷

To this, the source of the obliged confidentiality in the arbitration agreement, we realize that it comes to place either by implication or through an express confidentiality clause. It says the law that governs the arbitration agreement is a go-to to determine the confidentiality questioned. When a provision different from that of the seat governs the arbitration agreement, then jurisdictions like the UK, Singapore, and Australian courts would determine the question of confidentiality by soliciting the law of that arbitration agreement. Lastly, in practical terms, the practitioners might pause while drafting the choice of legal provisions based on such an analysis¹⁸.

BREAKDOWN

Contrasting our provision with the UK, which follows the concept of implied confidentiality, we realize that a statutory clause works better at modulating confidentiality. It is because such a statutory clause ensures party certainty and restraints the reach for judicial intervention. Considering the several amendments introduced to narrow the scope of judicial interference that has disturbed the Indian Arbitration practice, this tends to be the right step.¹⁹

The non-obstante clause could make the application of this provision rigid. Unlike the other jurisdictions, Section 42A of the Indian Arbitration Act does not recognize some of the key exceptions that could dare to its fulfillment. Further, shedding light on the party autonomy, parties to the dispute must have the option of putting together a contract for regulating confidentiality independently as put in place by some of the vital Arbitration establishments.

¹⁷ *Ibid*

¹⁸ Mark Darian & Varun Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81(4) *International Journal of Arbitration, Mediation and Dispute Management* 360-366

¹⁹ *Ibid* 17

CONCLUSION

We can safely conclude that the confidentiality provision could not be twisted for any ill purpose to attain secrecy. An example shows that parties impacted by the enacted rules that prevent the damaging by-products of international trade (Corruption and Money Laundering) opt for arbitration to abuse the confidentiality benefit. It is essential to study the confidentiality aspect of arbitration closely to prevent it from legitimate criticism. Lastly, restricting the parties from availing convincing arguments who disparage arbitration as a door to justice.²⁰

²⁰ Valery Denoix de Saint Marc, 'Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations' (2003) 20(2) *Journal of International Arbitration*, *Kluwer Law International* 211-216