Section 42 A of the Indian Arbitration Act,1996: From Promise to Predicament -The Contemporary Frankenstein of the Indian Arbitration Regime.

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Introduction

Arbitration was introduced in the Indian legal regime as a speedy alternative to dispute resolution by judicial adjudication. Party autonomy is at the core of arbitration as a private dispute resolution mechanism; hence, flexibility and confidentiality are the key components of arbitration proceedings. While Governments Promote it for its efficiency, private entities choose it for its confidential nature. Confidentiality in arbitration, in general, shields the reputation and the commercially sensitive information of the parties to arbitration from any prejudice, whatsoever. Hence, confidentiality is a fundamental duty and a correlative right of parties to arbitration. However, it has not been specifically spelled out in the major governing international law on arbitration, namely the UNCITRAL Model Law, and is therefore dealt with differently across different jurisdictions. Globally, four major models of confidentiality are in place:

First, confidentiality as a mere contractual right - There is no implied right of confidentiality, and therefore, confidentiality is not presumed in arbitration. It is protected to the extent specifically provided for in the arbitration agreement between the parties. For instance, the Federal Arbitration Act and the Uniform Arbitration Act do not provide for confidentiality. On the other hand, Norway's Arbitration law expressly provides that arbitration proceedings are not per se

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confidential unless otherwise agreed to by the parties. Arbitration laws of Indonesia, China, and Japan, etc., also fall within this regime.[1]

Second, the rule of implied confidentiality. This regime is followed in the U.K., and here the duty of maintaining confidentiality is deemed to arise from the agreement to arbitrate. However, the extent of application of the confidentiality rule would depend on the terms of the Arbitration Agreement and thus shall differ from case to case. Confidentiality may even be departed from when parties contract out of it or in case of competing public interest.[2]France follows the implied confidentiality rule in case of domestic arbitration; however, is silent on its extension to international arbitration.[3]

Third, Singapore's partly implied and partly expressed rule of confidentiality. Like the U.K., Singapore also recognizes the implied duty of confidentiality but supplements it with explicit provisions set out in the International Arbitration Act of 1994. The arbitral tribunals and the Courts are empowered under section 12(1)(j) to enforce the confidentiality obligation. Further, section 22 stipulates that the proceedings related to international arbitration before any Court shall be held in camera, unless otherwise ordered by the Court, on its own motion or on the application of any party.[4]

Fourth, confidentiality is a statutory rule. In certain other jurisdictions, confidentiality is explicitly provided in the Arbitration statute; however, the rules are different in their scope and application. They may be absolute or qualified, or may or may not extend the immunity to court proceedings. In Hong Kong, the statute provides for a qualified obligation of confidentiality subject to the contract between the parties to the arbitration.[5]In Scotland, the Arbitration (Scotland)Act, 2010 permits any party to a court proceeding related to arbitration to apply to the Court for an order of

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[1] Soumya Sinha Confidentiality Concerns in Arbitration Disputes: Implementation of Confidentiality in Courts of Law https://aria.law.columbia.edu/confidentiality-concerns-in-arbitration-disputes-implementation-of-confidentiality-in-court(16 October, 2022) (Last visited 05.02.24)

[2]Available at https://www.nishithdesai.com/NewsDetails/10670#:~:text=For%20example%2C%20Rule%2039%20of,the%20award%20s hall%20be%20 confidential. (July 12, 2023),(last visited on 05.02.24) .

[3] Supra 1

[4] International Arbitration Act, 1994(Singapore) https://sso.agc.gov.sg/act/iaa1994?ProvIds=P12-#pr22- , (last visited on 05.02.2024).

[5] Hong Kong Arbitration Ordinance ,S.18(2011)

anonymity of the party in any report of the Court proceedings.[6] In New Zealand, the expressed confidentiality obligation also extends to Court proceedings. In addition to this, different arbitral institutions have their own confidentiality framework.

Rule of Confidentiality In India

The assurance of confidentiality imbues arbitration proceedings with a level of trust and confidence essential for their smooth functioning. Arbitrators are bound by strict ethical obligations to maintain confidentiality, ensuring that sensitive information shared during proceedings remains privileged and protected from disclosure. Similarly, arbitral institutions play a pivotal role in upholding confidentiality by implementing robust procedural safeguards and confidentiality protocols. Moreover, parties to arbitration agreements are duty-bound to respect and uphold confidentiality, thereby fostering an atmosphere of mutual respect and trust conducive to amicable resolution.

Until 2019, Indian arbitration law did not clearly recognize confidentiality. The Arbitration and Conciliation Act of 1996[7] contained a confidentiality provision in section 75 of the Act under Part III dealing with conciliation. Hence, confidentiality in arbitration was regulated primarily by the arbitration agreement between the parties and/or the rules of arbitral institutions. To address this uncertainty, the *High-level Committee to Review the Institutionalization of Arbitration Mechanism in India*, headed by Rtrd.Justice B.N.Srikrishna recommended the insertion of a specific provision on confidentiality in arbitral proceedings, subject to the three main exceptions: disclosure in the performance of the legal obligation, enforcement and protection of rights, or in enforcing or challenging an award before a Court or judicial authority.[8]Hence, in pursuance of the objective to turn India into an arbitration hub by augmenting the arbitration law of India, a mandatory confidentiality provision was incorporated under section 42A by the 2019 Amendment Act.

Section 42-A- A Protection or A Problem?

[6] Arbitration (Scotland) Act , Section15(2010)
[7] Hereinafter referred to the as the Act
[8] High level Committee to Review Institutionalization of Arbitration Mechanism in India, point 13, page no.75

Section 42-A of the Arbitration and Conciliation Act, 1996 reads as follows:

"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 the award where its disclosure is necessary for the purpose of implementation and enforcement of the award."

Section 42-A embodies a non-obstante rule of confidentiality, meaning it shall prevail over all other conflicting provisions under any law. The language it is couched in renders it a near-absolute effect, with the only exception being the disclosure of the award in the implementation and enforcement of the award, if necessary. Also, it should be noted that it shall apply to arbitrations seated in India, i.e., domestic arbitration.

Though it is based on the recommendation of the Justice Krishna Committee and inspired by Hong Kong's codified law on confidentiality, it is a far cry from the two, both in its scope and effect, due to the rudimentary and vague construct of the provision.

Scope of the Indian Confidentiality Rule

Confidentiality, in general, means:

"*to not disclose information concerning the arbitration to third parties or the public".*[9]This duty includes inter alia "*the non-disclosure of the hearing transcripts, written pleadings, evidence, materials produced during disclosure and the arbitral award(s) and orders, to third parties*[10]".

[9] Gary Born, *International Commercial Arbitration* , pg.3001 (3rd Edn. Kluwer Law International 2020).

[10] Drasti Jain and Aryan Deshmukh,*A Conflict of Principles: Confidentiality and Open Justice in Arbitration Disputes in Court*
Availablehttps://www.scconline.com/blog/post/2022/04/13/confidentiality-and-open-justice-in-arbitration-disputes-in-court/(April 13, 2022)(Last visited on 06.04.2024)

The provision states that *"... Shall maintain confidentiality of all proceedings ...*". In the absence of a clear delimitation of the scope of the words "*all proceedings*", issues relating to the contents of protections, court proceedings, and persons to whom it applies will arise.

"Maintain confidentiality in all proceedings" and Mandatory Disclosure by Arbitrators

Section 12 (1)(a) of the Act makes improper disclosure of material facts by an arbitrator giving rise to justifiable doubts as to his independence and impartiality a ground for challenging the arbitral award. Hence, the arbitrator under Schedule V, read with Schedule VII of the Act, is bound to make mandatory disclosures affecting his independence. Clauses 23 & 24 of Schedule V provide the following disclosures relating to arbitration to which one of the parties to the current arbitration was a party.

'The arbitrator's law firm has, within the past three years, acted for one of the parties or an affiliate.'[11]

'The arbitrator currently serves or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.'[12]

From the above, the conflict between the confidentiality rule and the mandatory disclosure norms relating to the independence and transparency of the arbitral tribunal is quite apparent and glaring. If the arbitrator fails to make any disclosure, whether it will still be a ground for challenging the arbitral award, considering the non-observant confidentiality clause, would be a question that the Courts may have to answer. Another connected question is whether the names of the parties to the arbitration are also protected within the scope of "all proceedings", like in the case of Singapore, where anonymity is maintained even with respect to the names of the parties.

Disclosure In Related Court Proceeding

[11] Clause 23, schedule V
[12] Clause 24, schedule v

One of the major fallouts of section 42-A is the absolute and narrow terms in which it is crafted without regard to the various provisions in the Act, which provide for recourse to the Courts. Rather, it has carved out only one exception in respect of the enforcement and implementation of awards. As mentioned earlier, the Krishna Committee had clearly recommended three exceptions that were broad enough to cover the majority of the court proceedings requiring disclosures, which, if incorporated in the present provisions, would have averted much of the evils arising out of the absence of the same. Even the Hong Kong legislation recognizes necessary exceptions. On account of this, the provision comes in conflict with other provisions dealing with the intervention of Courts such as section9[13] relating to interim relief, sections 14 & 15 for substitution or removal of arbitrator[14] section 29A for extension of time limit for completion of arbitration on the expiry of 12 month's time limit[15], section 34[16] relating to setting aside of arbitral award and section 37 [17]for appeal against the order of the arbitral tribunal. In certain cases, disclosure may also be relevant to criminal proceedings, whether the non obstante clause in such a case will be allowed to have an overriding effect at the cost of Justice is a question that requires a definitive answer.

Who is Bound to Maintain Confidentiality

The provision is exhaustive as to the persons/institutions who are bound by the obligation, i.e, the parties to the arbitration, arbitrators, and the arbitral institutions. However, it does not take into account other third parties who may directly or indirectly take part in the arbitral or court proceedings, such as witnesses, stenographers, experts, transcribers, etc. Also, it is not clear whether it applies to parties claiming through them or parties through whom they claim. For instance, the obligation of non-disclosure of attorney-client privileged communication under section 126 of the Indian Evidence Act[18] is, as a corollary, extended under section 127 of the Evidence Act to servants, clerks, and interpreters. [19]Other jurisdictions where the codified confidentiality clause is in vogue have a specific mention of the persons to whom it applies. In the

[13] Section 9 of Act
[14] Section 14 & 15 of the Act
[15] Section 29 A
[16] Section 34 of the Act
[17]Section 37 of the Act
[18] Indian Evidence Act, Section 126(1872)
[19] Indian Evidence Act,1872 section 127(1872)

absence of a binding obligation of confidentiality, the third parties may make unwarranted disclosures with impunity.

The confidentiality provision under section 42A thus shall cover all relevant parties engaged in the arbitration proceedings, such as clerical and secretarial staff, administrative personnel from the arbitral institution, and the pertinent court. With the extension of the legal provision to cover a broad spectrum of involved parties, including clerical and secretarial staff, administrative personnel from both the arbitral institution and the relevant court, witnesses, specialists, record-keepers, and other related entities, it will ensure comprehensive protection of sensitive information and proceedings.

Enforcement of Confidentiality Obligation

Another practical issue pertains to the enforcement of the confidentiality clause, as the Act does not make necessary provisions for ancillary remedies, relief, and sanctions in case of breach of the confidentiality clause. Singapore Arbitration statute, for instance, clearly empowers arbitral tribunals and Courts to enforce confidentiality clauses.[20]

Interested Third Parties

The narrow construction of the provision leaves no room for consideration of the interest of other third parties having a legitimate interest in the outcome or result of arbitration proceedings. Some of such third parties are a company acquiring another company, COC members in a CIRP process, holding company, corporate auditors, etc. Also, there is a rising trend of consolidation of arbitration proceedings and impleadment of non-signatories.[21]Lack of clarity on this front may

[20]Singapore International Arbitration Act, section 12 (1994)

[21]Ramachandran Balachandran & Simran Jalan, *A Case of Recognizing the Pitfalls in Section 42A of the Indian Arbitration Act*,RMNLU Arbitration Law Blog. https://rmlnluseal.home.blog/2020/06/09/a-case-of-recognizing-the-pitfalls-in-section-42a-of-the-indian-arbitration-act/(June 09, 2020) (last visited on 05.04.2024)

have a domino effect on other commercial transactions as enumerated above, where there is a necessity for transparency.

The Conundrum of Third-Party Funding

Third-party funding (TPF) refers to the practice where an independent party, not directly involved in the dispute, finances one of the disputing parties to pursue or defend a legal claim. In the context of arbitration, TPF has become a game-changer, allowing parties with limited financial resources to access justice and level the playing field against well-funded opponents. A party, after being funded by a TPF, is barred from disclosing any information regarding an ongoing arbitration. This will put the case in jeopardy if they are not able to finance their case. TPF facilitates access to justice by allowing parties, particularly those with financial constraints, to pursue meritorious claims. This democratization of legal proceedings aligns with the principles of justice and fairness.

However, the legal bar imposed upon section 42A will render third-party funding meaningless in the arbitration regime since it would be impractical for a funder to fund an arbitration if he is barred from knowing the substance of a case. Though third-party funding is in a nascent stage in India, in many foreign jurisdictions, it is quite a common practice for companies to fund an arbitration. There are even firms that exclusively provide for third-party funding. In a profit-driven market, many entities may face an uphill battle for survival in the absence of third-party funding. Furthermore, if due to the stringency of section 42A, a funder backs out, it will put such a company in a weak position against a significantly financially stronger party. How can a bootstrapped entity survive a financial fight against a business giant without third-party funding? It will put significant stress on their financials through the exorbitant legal costs and will hamper or disrupt their principal business. Parties may succumb to the monetary risk where the merits of their claims may be compromised. The adoption of best practices like these, capable of expanding the horizon of arbitration in India, may encounter significant challenges in the face of stringency under section 42A.

Though the safeguard fosters an environment of trust and transparency, it also discourages third-party funders from engaging in arbitration processes within India. Such assurance under 42A may mitigate the concerns regarding the exposure of confidential information, but without the backing of a third-party funder for certain disputes, the effectiveness of arbitration as a dispute resolution

mechanism for facilitating smoother collaboration between parties and funders will not be bolstered.

Ultimately, the inclusion of a strong confidentiality clause under section 42A, especially regarding third-party funders who may not be direct parties to the arbitration, is essential. It will be fundamental in fostering the expansion and accessibility of arbitration while upholding the process's integrity.

Confidentiality and Public Policy

While confidentiality is often hailed as a cornerstone of arbitration, its harmonization with the broader interests of public policy introduces a nuanced dimension to the discourse. The confidentiality rule cannot be allowed to be absolute without prejudice to the public interest. Certain types of arbitration involve an element of public interest, such as consumer arbitration and investor-state arbitration, where transparency is a rule and confidentiality is an exception. Article 22 of the model Bilateral Investment Treaty[22] of the Indian Government also mandates transparency in Investor-state arbitration. Additionally, UNICTRAL has made specific rules for transparency in Treaty-based Investor-State Arbitration[23]. Also, there may be occasions where examination of confidential arbitral records may be necessary for Court or other proceedings where public interest is involved. For instance, in the case of the *Chartered Institute of Arbitrators vs. B*[24], access to confidential arbitration documents was allowed by the Court for a disciplinary proceeding against an arbitrator in recognition of the public interest involved. The blanket provision of confidentiality also raises issues of public policy.

Confidentiality and Legal Obligation of Disclosure under other Laws: Interface, conflict, and interpretation

[22] Model Bilateral Investment Treaty, 2015

[23] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf, (last visited on 04.04.2024)

[24] [2019]WLR(D)146.

The extent and scope of the rule of confidentiality has often been called in question, particularly due to its conflict with legal obligation of disclosure provided under other laws, namely, the RTI Act and SEBI regulation inter alia, and due to the overlap of arbitration and other proceedings under other laws. Below, the authors have discussed some of such instances which have contributed to defining the contours of the rule:

As per the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015, Listed Companies have an obligation to provide minimum information about pending arbitral proceedings. The disclosure obligation per se conflicts with the confidentiality rule, as the scope of the rule is not well defined. Given the conflict, GAIL sought clarification from SEBI whether the disclosure obligation would be binding even after the introduction of the confidentiality rule under section 42A of the Arbitration Act. In response, SEBI clarified that the disclosure of minimum information relating to arbitration proceeding shall be made to the extent permissible under section 42A of the Arbitration Act, including the initiation of arbitral proceedings, amount involved in arbitral proceeding, passing of arbitral award, its impact on the listed entity and termination of the award, court orders in relation to arbitral proceedings among others". From the clarification, it may be inferred that the confidentiality rule does not apply to information about arbitration but bars disclosure of information or documents forming part of the arbitration. This also implies that where there is a legal obligation to disclose, a party to an arbitration may be compelled to waive its right to privacy under the confidentiality rule.[25]

Further, section 22 of the RTI Act provides that the obligation to disclose information shall prevail over the secrecy provision under any other law. Though the confidentiality rule, being a law later in time, shall have precedence over the obligation to disclose information under the RTI Act, 2005, however, the immunity is not absolute and has to be determined on the yardstick of public policy, commercial confidence, and privacy. In *R.S. Sravan Kumar* case, where application was made to Department of Space, Bengaluru seeking information on the legal team engaged for arbitration proceedings between Devas Multimedia and Antrix Corp., (the commercial wing of Indian Space Research Organization), the fee paid to the legal team, damages awarded to the other private party,

[25]Vallabh M Joshi, *Navigating the Regulatory Landscape: Harmonizing provisions of SEBI (LODR) and Section 42A of Arbitration and Conciliation Act, 1996* .
https://www.mmjc.in/navigating-the-regulatory-landscape-harmonizing-provisions-of-sebi-lodr-and-section-42a-of-arbitration-and-conciliation-act-1996/(last visited on 24.06.2024)

and whether the same was inter alia, the CIC upheld the denial of information relating to the award of damages and its payment holding it to be barred by section 42A, it directed the disclosure of legal team engaged and the professional fee paid to them by Antrix Co. as a public institution.

Additionally, overlapping proceedings have also emerged as an exception to the rule of confidentiality. In a competition proceeding between Future Coupons Private Limited and Amazon NV Investments Holding LLC[26], Competition Commission of India(CIC) allowed the pleadings of pending arbitration proceedings between the two parties to be adduced as evidence, rejecting the objection of contravention of section 42A, on the ground that facts of Arbitration proceedings relevant to the proceeding of violation of Competition Act, 2002 are amenable to examination by CIC.

CONCLUSION

The Indian confidentiality rule, which was introduced to bring about more certainty in the Indian arbitration scenario, is rather a Pandora's box of conflicts and inconsistencies of the Indian Arbitration regime. While codification of the rule is welcome, the Indian model seems to lack context due to poor craftsmanship. It is rudimentary in its form and therefore treacherous in its effect. Speaking of effect, the absolute mandatory confidentiality rule is inconsistent with the underlying principle of arbitration law, i.e., party autonomy, and therefore is antithetical to the flexibility of arbitration proceedings. Arbitration law is meant to be a facilitator, whereas the strictly normative language of the confidentiality rule defeats the purpose it is meant to serve. Furthermore, the whole object of arbitration is to provide a more efficient alternative to courts; however, as discussed above, it is likely to give rise to a host of issues, making intervention of the Court necessary and inevitable. However, the absolute construction of the provision does not leave much room for purposive construction and clarification by the Courts. The inclusion of the term "notwithstanding" has inadvertently compounded challenges rather than resolving them as initially envisioned. This underscores the pressing need for a review and adjustment of section 42A of the Arbitration Act, 1996, to mitigate unintended repercussions and reestablish the essential balance required for a robust and streamlined arbitration system in India. Therefore, the author argues that

[26] 2021 SCC OnLine CCI 63

only through a legislative amendment can the provision be freed from its flaws and aligned with its intended purpose.