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Confidentiality in Arbitration: Legal and Practical Challenges in India



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Confidentiality in Arbitration: Legal and Practical Challenges in India

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Arbitration as a private method of dispute resolution is favoured over traditional litigation for numerous reasons, with confidentiality being one of the key advantages. The confidentiality of arbitral proceedings is the cornerstone of arbitration, ensuring that the details of the dispute, the proceedings, and the final decision remain private. Unlike court cases, where records are typically public, arbitral proceedings being inherently confidential aid in protecting trade secrets, sensitive business information, and the reputations of the parties involved. Furthermore, confidentiality is pivotal in fostering a conducive atmosphere for settlement. It minimises public posturing, which often serves as a barrier to genuine negotiation, and allows parties to engage in discussions more openly and cooperatively. Without the pressure of public scrutiny, parties are more likely to negotiate in good faith and reach amicable solutions, facilitating a smoother and more efficient resolution process. This article delves into the nuances of confidentiality in arbitration within the Indian context, examining the legal framework, challenges, judicial interpretations, and suggestions for reform.

The High-Level Committee Report of 2017

In 2017, the Ministry of Law and Justice established a High-Level Committee (Committee) chaired by Justice B.N. Srikrishna to examine the existing arbitration jurisprudence in India and propose ways and means to further institutionalise arbitration in India. The Committee's findings were published in a report (HLC Report) dated 30-7-2017. One of

the important aspects that came to be discussed extensively in the HLC Report was confidentiality in arbitration.

The HLC Report observed that the Arbitration and Conciliation Act, 1996 (Arbitration Act) lacked any explicit provisions mandating the confidentiality of arbitral proceedings. This legislative shortfall meant that parties involved in arbitration had to exercise additional caution by incorporating specific confidentiality clauses in their arbitration agreements or dispute resolution clauses. The lack of statutory recognition of confidentiality requirements was particularly disadvantageous for parties that relied on standard format clauses or hastily drafted contracts, as they would often inadvertently fail to address the necessity for confidentiality.

In its analysis, the HLC Report emphasised on the importance of confidentiality as a foundational facet of a mature jurisdiction's arbitration jurisprudence. The HLC Report advocated for the statutory recognition of confidentiality to ensure it becomes an ingrained as a fundamental expectation within the Indian arbitration law framework. The recommendation made by the Committee in the HLC Report on confidentiality reads as below:

A new provision may be inserted in Part I of the [Arbitration Act] providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority.

Section 42-A of the Arbitration Act

Consequent to the publication of the HLC Report and the recommendations of the Committee therein, Section 42-A was introduced into the Arbitration Act by way of the Arbitration and Conciliation (Amendment) Act, 2019. The insertion of Section 42-A represents an essential milestone for statutorily recognising confidentiality requirements in arbitration in India. Section 42-A of the Arbitration Act reads as under:

42-A. Confidentiality of information. — 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 award.

As would be seen above, Section 42-A of the Arbitration Act codifies the duty of confidentiality, extending it to arbitrators, arbitral institutions, and parties involved in the arbitration process. The only exception provided in the aforesaid provision is when disclosure is essential for enforcing or implementing the arbitral award.

Challenges

While Section 42-A explicitly sets forth an obligation to maintain confidentiality, it does so

with certain limitations. It excludes interested third parties from these confidentiality obligations, thus ensuring that the confidentiality of the arbitration process is preserved only amongst the primary stakeholders.

Further, this provision does not fully address the complexities of court proceedings relating to arbitration cases. For instance, parties often seek the court's intervention in terms of the provisions of the Arbitration Act for, amongst other things, the following reliefs:

- (i) appointment of an independent arbitrator under Section 11;
- (ii) injunctive or interim relief under Section 9;
- (iii) request the termination of an arbitrator's mandate under Section 14;
- (iv) extending the mandate of the Arbitral Tribunal under Section 29-A;
- (v) setting aside the arbitral award based on the limited grounds set out under Section 34; and
- (vi) appealing against the decision rendered under Section 34 on a challenge against an arbitral award.

In the above scenarios, parties may need to rely on confidential information from the arbitration proceedings. As such, there is no provision within Section 42-A of the Arbitration Act to preclude the filing of such pleadings in court, potentially undermining the confidentiality of the arbitration process.

Moreover, the non obstante clause under Section 42-A of the Arbitration Act, while aimed at enforcing confidentiality, raises questions about the interplay between statutory mandates and party autonomy. The provision's narrow exception allowing disclosure solely for the enforcement and implementation of awards fails to account for other scenarios where disclosure might be necessary. These limitations bring out a need for judicial clarity and potentially broader legislative refinement to address various circumstances in which confidentiality might conflict with procedural necessities.

In essence, while Section 42-A represents a step forward in formalising confidentiality in arbitration, its application reveals gaps and areas for potential improvement.

Judicial trends

An intriguing issue arose in *R.S. Sravan Kumar v. CPIO*¹. This case revolved around a request for information under the Right to Information Act, 2005 (RTI Act), concerning an international commercial arbitration between Devas Multimedia Pvt. Ltd. (Devas) and Antrix Corporation Ltd. (Antrix), the commercial arm of the Indian Space Research Organisation.

In 2019, the appellant submitted an RTI application seeking detailed information about

the arbitration case. The requested details included (i) the entire legal team representing India in the arbitration initiated by Devas; (ii) the fees paid to this legal team; (iii) the damages awarded to Devas and whether these were paid; and (iv) any limitations on the payment of the award.

The Central Public Information Officer (CPIO) of the Department of Space, Bengaluru, initially rejected the application. This decision was appealed, bringing the matter before the Central Information Commission (CIC).

The CIC's ruling involved an interpretation of Section 42-A of the Arbitration Act. The CIC held that since an arbitration award had not been passed in this case, the information sought regarding the damages and payment (Points 3 and 4) required no disclosure. However, the CIC determined that because Antrix Corporation is a public authority, the expenditure on legal fees and the identity of the legal representatives should be disclosed.

The case in *R.S. Sravan Kumar*² highlights the complex interplay between confidentiality in arbitration and the transparency obligations under the RTI Act. The ruling brings out the need to take a nuanced approach when dealing with information requests related to arbitration involving public entities. While maintaining the confidentiality of sensitive arbitration details is crucial, transparency in the expenditure of public funds is equally important. The decision demonstrates that confidentiality in arbitration does not provide blanket immunity from transparency requirements, particularly when the State or public bodies are involved. It also illustrates the necessity for clear legislative guidance to navigate the often-conflicting demands of confidentiality and transparency in arbitration, ensuring that public interest is adequately safeguarded without compromising the integrity of the arbitral process.

Another notable example of conflicts arising out of confidentiality requirements in arbitration includes a case³ before the Competition Commission of India (CCI) involving Amazon.com NV Investment Holdings LLC (Amazon) and Future Coupons Private Limited (FCPL).

In this case, FCPL introduced pleadings from ongoing arbitration proceedings as evidence before the CCI. Amazon raised a preliminary objection, arguing that this use of arbitral pleadings contravened Section 42-A and was an attempt to undermine the confidentiality of the arbitration process. Amazon contended that such disclosure was prohibited and could potentially disrupt the arbitration.

The CCI, however, rejected Amazon's objection. It acknowledged that while the factual basis of the allegations in both the CCI proceedings and the arbitration might be similar, the purposes of the two proceedings were distinct. The CCI emphasised that its primary concern was to assess compliance with competition law, which is separate from the

resolution of disputes in arbitration. The CCI held that the arbitration and CCI proceedings are mutually independent, each addressing different legal issues. Consequently, the confidentiality mandated by Section 42-A did not preclude FCPL from using the arbitral pleadings in the CCI proceedings.

Moreover, the CCI pointed out that if Amazon believed there was a breach of confidentiality in terms of the provisions under the Arbitration Act, it was free to seek remedies in the appropriate legal forum. The decision by the CCI illustrates that confidentiality in arbitration is not inviolable and may yield to the demands of public interest and regulatory oversight.

A review of the aforementioned decisions would suggest that while Section 42-A provides a strong foundation for confidentiality in arbitration, its practical application requires careful consideration of the interplay between arbitration and other legal processes. Parties to arbitration must be mindful of these dynamics and prepare for situations where the confidentiality of arbitration may intersect with broader legal obligations.

Confidentiality and open justice

The tension between the confidentiality inherent in arbitration and the principle of open justice in court proceedings is a fundamental issue in modern legal systems. Arbitration, with its focus on private dispute resolution, stands in contrast to the common law tradition's emphasising on transparency and public accountability in judicial proceedings.

Open justice, an important facet of common law, ensures that court proceedings are accessible to the public, thus promoting judicial accountability, facilitating the development of legal precedents, and enhancing public trust in the judicial system.

Reconciling these principles requires addressing several complex issues. The independent nature of court proceedings, even those stemming from arbitration, demands a clear understanding of the extent to which confidentiality should be preserved. Furthermore, respecting the parties' consent and autonomy to maintain confidentiality in arbitration is crucial, as arbitration is fundamentally based on mutual agreement. Courts must carefully consider whether infringing confidentiality in court proceedings undermines the parties' autonomy and the original arbitration agreement.

A carefully balanced approach is therefore required to address the requirements of confidentiality and open justice. It involves evaluating whether the need for confidentiality is sufficiently compelling to override the fundamental principle of open justice and vice versa. While open justice is a vital aspect of the legal process, confidentiality may be necessary to protect parties' interests and ensure the effective functioning of arbitration. Courts must navigate this delicate balance, ensuring that neither principle is unduly compromised.

In jurisdictions, where specific legal provisions mandate confidentiality in arbitration-related court proceedings, the resolution of this conflict may be more straightforward. However, in the absence of such provisions, as in the case of India, courts must employ a nuanced approach, weighing the interests of transparency against the need for confidentiality. Judicial discretion plays a key role in ensuring that the public's right to access justice is maintained without undermining the effectiveness and integrity of arbitration.

Conclusion

The question of confidentiality in arbitration remains a contentious issue, given the varied approaches adopted by different jurisdictions and the absence of explicit and internationally accepted guidelines. Section 42-A of the Arbitration Act, while a step towards codifying confidentiality, falls short in several critical areas. It overlooks the principle of party autonomy, which is fundamental to arbitration, allowing parties the freedom to decide the extent of confidentiality they wish to maintain. Moreover, the rigid wording of Section 42-A does not accommodate voluntary consent for the disclosure of certain documents, nor does it adequately address mandatory legal disclosures. Additionally, the provision lacks clarity on the consequences of breaching confidentiality, which is essential for its effective enforcement.

This lack of precision and flexibility within Section 42-A not only undermines its practical utility but also risks wasting valuable judicial resources in interpreting its loosely worded provisions. Despite recognising confidentiality as an inherent obligation, Indian jurisprudence still grapples with providing robust statutory recognition and consistent application of this principle.

Drawing from international experiences and judicial precedents can help in crafting a more effective and coherent legal regime that adequately protects the confidentiality of arbitration proceedings while accommodating necessary legal disclosures. This will not only enhance the efficacy of arbitration as a dispute resolution mechanism but also fortify the confidence of parties choosing arbitration over traditional litigation.

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1. 2019 SCC OnLine CIC 9981.

2. 2019 SCC OnLine CIC 9981.

3. *Amazon.com NV Investment Holdings LLC v. Future Coupons (P) Ltd.*, 2021 SCC OnLine CCI 63.