FACETS OF CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS

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ABSTRACT:

In recent times, we have witnessed an exponential increase in the relevance and scope of international commercial arbitration as a mode of dispute resolution. Parties to most commercial disputes tend to favour arbitration for adjudication of disputes due to its cost and time efficiency. Furthermore, the principle of confidentiality plays a pivotal role in the increased acceptance of arbitration. Arbitration is mostly private in nature which excludes third parties from being privy to the process. Hence, parties to the arbitration generally presume a certain level of confidentiality to the proceedings and the documents produced therewith.

However, do these presumptions of confidentiality have legal backing? This article will analyze the approach of the courts and legislature of different national jurisdictions and the changing trends in them. Whether the principle is implied in all arbitral proceedings or does they need express provisions in the arbitral agreements with regard to that or are they statutorily protected are some points which this article intends to ponder upon. The article will also briefly look into the rules of international institutions like UNICITRAL, International Chamber of Commerce, and International Bar Association etc. with regard to the obligation of confidentiality in international commercial arbitration.
INTRODUCTION

Throughout the years, arbitration has become the most preferred method of dispute resolution especially, for commercial disputes. It developed as a branch of dispute resolution competent enough to adjudicate disputes between different corporations around the globe or even between states. It stems from the contractual relationship between the parties. This very feature makes it less formal, time and cost-efficient and also commerce friendly. When it comes to enforcement also, arbitration holds a considerable edge over other modes of dispute resolution because practically enforcement of an arbitral award internationally is easier as opposed to the enforcement of a national judgment.

Confidentiality of proceedings is often regarded as the most attractive feature of arbitration over litigation as a dispute resolution mechanism across the globe. Considering the parties involved in the dispute, the market situations, and other implied factors, it is very essential to have a set of principles to properly represent the best interest of the parties. Confidentiality is often considered as the most important of these principles. Companies often tend to resolve commercial disputes through this method in the interest of protecting their image in public and protecting their trade secrets from being disclosed. The concept of confidentiality imposes a duty on all those who are involved in the arbitration proceeding to restrain from disclosing any information regarding the dispute or any other aspect of the proceeding. They include any information pertaining to witnesses, pleadings, submissions, award, etc.

Today, if we compare the concept of confidentiality in arbitration in different jurisdictions, it will be evident that there is no uniform concept of confidentiality existing. Many national legislations do not regulate confidentiality at all, other countries mention it in a very general way, and exceptionally some statutes contain broader regulations. Diversity is so great that even where it is recognized, there are huge differences in its content and scope. So, it is not surprising that many commentators reject the existence of an implied confidentiality duty in International Commercial Arbitration. The truth is that confidentiality in International Commercial Arbitration can be misleading and many times even goes to the extent of being treated as a myth.
The primary aim of this article is to explore the concept of confidentiality in arbitration proceedings, particularly in international commercial arbitration. It would focus on the domain and limits of the principle. Considering the wide scope of the topic, the study will highlight the current status and the legal foundation of the principle of confidentiality in international commercial arbitration. It also intends to address its sources and the judicial take on the concept. The study will then focus on the scope, extent and limitations of the principle.

THE CONCEPT OF CONFIDENTIALITY:

For years, arbitration has been used as an effective alternative dispute resolution method because of its speed and expert arbitrators, but especially because of its private and confidential character.\(^1\) Arbitration as an alternative dispute resolution mechanism evolved due to the lack of rapidity in the traditional litigation methods which lead to overwhelming judicial delays. Confidentiality and rapidity of the proceedings gave international acceptance to arbitration, more particularly in international commercial disputes. Arbitration is both economical and expedient. Moreover, in the case of cross border commercial disputes parties prefer arbitration due to the primary reason that an award by an international arbitration tribunal will have worldwide acceptance in countries who are signatories to the international conventions on the enforcement of arbitral awards.\(^2\)

With the increasing acceptance to arbitration, various arbitration institutions were established to manage and control the proceedings. Arbitrations thus evolved as an alternative dispute resolution mechanism with quick remedy and completely confidential proceeding in the absence of any third-party involvement. The parties can continue with their commercial relationship while the arbitration proceedings are pending thus saving the business relationship from being severed.

Till the late 1980s, confidentiality was considered as an inviolable characteristic of arbitration that cannot be contested. However, with the advent of globalization and market liberalizations two contradicting schools of thought emerged around confidentiality.

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One among them completely denied the existence of the duty of confidentiality and proposed that it should have been asserted for a long time if it existed. The second school, on the contrary, favoured the obligation of confidentiality in arbitration proceeding. They argued that arbitration has a private character, and that assumes the de facto obligation to protect all aspects of arbitration from disclosure to any third party or the public at large.

The duty of confidentiality in arbitration applies to all the parties. This includes the parties to the arbitration, the arbitrator himself and the third parties like expert witnesses etc. A duty of confidentiality can arise in arbitration in a different manner. Since the autonomy of the parties is supremely important in arbitration, the most common way of ensuring confidentiality is through the express stipulation of a confidentiality clause in the arbitration agreement by the parties themselves. It is the most convenient way as far as the legal system is concerned because in a duty of confidentiality arising out of confidentiality clause stipulated by the parties themselves, it is easy for the arbitrator to adjudicate the deviation or flaws in the conduct of the parties because the extent of confidentiality and the extent of permissible deviance will be spelled out in the arbitration agreement itself which was formed with the consent of both the parties.

It is often perceived that confidentiality has not been clearly defined or recognized on an international level or most of the national legislations. Most of the international institutional arbitration rules do not provide for the duty of confidentiality. Furthermore, on several occasions, we have witnessed that various national courts have denied the application of the principle.
CONFIDENTIALITY V. PRIVACY

Confidentiality and privacy are the hallmarks of any arbitration proceeding. The terms ‘privacy’ and ‘confidentiality’ are often used interchangeably. However, it is very important to understand that the term ‘confidentiality’ is not used synonymously with the term ‘privacy’ in the context of arbitration.

Privacy can be defined as an interest in controlling the gathering and disclosure of personal information about oneself.\(^3\) In the context of arbitration proceedings, privacy means that only parties to the arbitration agreement may attend the arbitral hearing and participate in arbitral procedure.\(^4\) Privacy is mostly used to denote the freedom from being observed in the hearings of the arbitration. Therefore, there is no intervention by any third parties in the arbitration. Hence, right to privacy is regarded as an implied right which automatically attaches to all arbitration agreements. Nonetheless, mere exclusion of third parties from arbitration proceeding does not ensure that the information or documents relating to the arbitration would not go public. This demonstrates the border between privacy and confidentiality in the context of arbitration.

Confidentiality often refers to imposing an obligation on the parties to refrain from disclosing substantial information regarding the arbitration to third parties. Privacy extends only to keeping third parties out of the proceeding. Thus, confidentiality encompasses two facets that are, *ratione personae* and *ratione materiae* whereas the latter relates only to the *ratione personae* dimension.

In other words, the scope of the principle of confidentiality is wider than that of privacy since the former embraces both the people involved as well the documents or information submitted in the procedure. So confidentiality as opposed to privacy places a larger burden on the parties’ to the Agreement by not only discouraging third-party intervention in the hearings but also by disallowing them to disclose any information.\(^5\)

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Even though the two concepts can be differentiated in this regard, many believe that both privacy and confidentiality have to work in tandem to ensure the existence of complete confidentiality of proceedings of arbitration.

**INSTITUTIONAL CONFIDENTIALITY**

Surprisingly, no international conventions on international commercial arbitration assure the duty of confidentiality. The three major international conventions on the subject are the Geneva Convention, New York Convention, and the Panama Convention and neither of them provides for the obligation of confidentiality. Facilitating enforcement of international arbitral awards was the primary purpose of these conventions and thus, little did they focus on the details of the arbitral procedure.

Similarly, the rules of the International Chamber of Commerce (ICC) and the UNCITRAL rules of arbitration are also devoid of any significant provisions to assure a duty of confidentiality. The ICC draft commission was not able to reach a consensus with respect to the protection of confidentiality and thus left the confidentiality in arbitral proceedings according to the agreement between the parties. A limited recognition to the duty of confidentiality can be seen in the UNCITRAL Arbitration Rules, 2010 with respect to the disclosure of arbitral awards\(^6\). This is also limited to certain specific aspects only.

While most of the International conventions and organizations ignored to recognize the duty of confidentiality, International Bar Association (hereinafter referred to as “IBA”) adopted a set of guidelines in relation to various aspects of arbitration. Article 3.13 of the IBA Rules on Taking of Evidence in International Commercial Arbitration provides for the obligation of confidentiality and states that “any document submitted or produced by either the parties or non-parties in the arbitration is to be kept confidential by the arbitral tribunal and by the other parties”\(^7\). However, the duty under IBA Rules does not extend to non-documentary evidence submitted for the arbitral proceeding.

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\(^6\)UNCITRAL Arbitration Rules, § 32.5, 34(5).

\(^7\)IBA Rules on the Taking of Evidence in International Commercial Arbitration, § 3.13, 2010.
The Rules mandate that the duty is not absolute and also states certain exceptions to the duty namely, to fulfill any legal duty by a party, to protect or pursue any legal right, enforce or challenge the award in any subsequent bona fide legal proceeding.8

The American Arbitration Association (AAA) rules also recognize the duty of confidentiality in a limited extent under Article 34. This protection pertains only to the confidential information disclosed by the parties or witnesses and also the obligation of non-disclosure is cast only upon the arbitrator and the administrator9.

APPROACH OF NATIONAL JURISDICTIONS

Apart from certain exceptions, the legal basis of the rule of confidentiality remains uncertain. No international conventions or international institutional arbitration rules recognizes the principle of confidentiality in its full vigour. Thus, in the absence of legislations, the opinion of judiciary becomes the guiding light. National courts have taken diverse views on the scope and extent of the principle such as in England and France the courts tend to recognize the existence of an implied duty of confidentiality. Unlike those, the courts in USA, Australia and Sweden stipulated the need for express conditions in the arbitration agreement. They denied the existence of an implied duty of confidentiality. At the same time, countries such as New Zealand, Singapore, and Spain etc. have statutory provisions to this effect.

IMPLIED DUTY OF CONFIDENTIALITY

In countries having confidentiality as an implied duty, one can see that there will not be many significant differences between the concepts of confidentiality and privacy. Irrespective of any express stipulations of confidentiality made between the parties, the courts in these countries regards privacy of arbitral process as a pivotal element and therefore an implied concept of confidentiality stems from this and it becomes a pre requisite of an arbitration agreement.

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Under this system, confidentiality is thus seen as an offshoot of privacy. Classic examples of this system are countries like UK and France.

**ENGLAND**

England is the only country which recognized the existence of a broad, inherent duty of confidentiality. Surprisingly, there is no mention of such duty in the Arbitration Act, 1996. However, it does not indicate that the duty has been specifically ignored. Considering the complex nature of the principle, the law makers preferred that it would be in better interest of justice to let the courts define the scope and ambit of the rule as per the facts and circumstances of each case.

The decision in *Oxford Shipping Co. v. Nippon Yusen Kaisha*\(^{10}\) is a starting point in considering the English position on the confidentiality principle in arbitral proceedings. In the case, the Court of Appeal held that considering the private nature of the arbitral proceeding, the parties are prohibited from disclosing information relating to the arbitration. A similar view was taken in *Dolling–Baker v. Merrett*\(^{11}\) wherein the court opined that there is an implied obligation to refrain from using any information or documents thereof for any other purpose. In this case, the Court of Appeal held that private nature of arbitration is one of the most significant component of the process and went on to say that all arbitration contracts must inevitably contain an implied duty not to “*disclose or use for any other purpose any documents prepared for and used in the arbitration save with the consent of the other party, or pursuant to an order or leave of the court.*”\(^{12}\) Court further clarified that the duty of confidentiality which is implied in nature is not dependent on the nature of materials protected, and further went onto say that the disclosure is permissible only when law requires it to be done or when the court is “*satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action.*”\(^{13}\)

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Further in *Hassneh Insurance Co. of Israel v. Steuart J. Mew*\(^{14}\) the question before the court was that whether a party to an international arbitration could disclose to a third party, the award, reasons and other documents pertaining to the arbitral proceeding for facilitating a settlement discussion with the object of avoiding a subsequent proceeding. The English Commercial Court reiterated the decision in *Dolling – Baker* case and denied the involvement of any third party for that matter. In this case, the court expanded the scope of confidentiality by incorporating arbitral awards within the ambit of confidentiality. The court held that arbitration without a protection to the confidentiality of its award would violate the sanctity of privacy of arbitration. However, the court observed that the rule of confidentiality is not absolute. Divulging of information may be permitted where it become necessary for safeguarding the rights of any of the parties to the arbitration or any third party. This theory was later partially overruled in *Ali Shipping Corporation v Shipyard ‘Trogir’*\(^{15}\) wherein the court that the confidentiality obligation did not arise from the private nature of the proceeding but as a matter of law. In this case, the court reiterated the law laid down in Dolling –Baker case and *Hassneh* case. This judgement stamped the position of confidentiality as an implied duty in England.

The court of appeal also identified five possible exceptions to the duty of confidentiality. These are:

1. the consent of the party who initially produced the material,
2. order of the Court,
3. leave of the Court,
4. for the protection of the legitimate interests of a party, and
5. public interest.

The court further said that a ‘reasonable necessity’ test will be used to determine how and when to use these exceptions. On the question of how to use this test, the court held that it must be ‘sufficiently necessary’ to enforce or protect the rights of a party in the arbitration.


The court further clarified that the situation must be such that the protection of the rights of the party to the arbitration is possible only in the event of disclosure of the award or reasoning to a third party. In other words, the disclosure must be necessitated to protect the right of the party involved in the arbitration.

While these judgments made the foundation of the concept of confidentiality in English law, more recent judgments tend to take a case to case approach to decide the issue of confidentiality.

In City of Moscow v. Bankers Trust\textsuperscript{16}, a challenge to the validity of an award made by bankers trust was dismissed by the commercial court. However, the commercial court failed to mark the judgment as confidential. As a result, the judgment got published on websites. This was objected by the bankers trust and they got a ruling in their favour. The importance of this case is that, the court took a different stance from the pro-confidence approach it had been taking in the past decisions. In this case, the court held that “factors militating in favor of publicity have to be weighed together with the desirability of preserving the confidentiality.”\textsuperscript{17} This is clearly against the earlier views of the court saying that the importance of the documents involved is immaterial while considering the duty of confidentiality. The court went away from the idea of blanket protection of confidentiality in this case.

Another important case in this regard is the case of Emmott v. Michael Wilson & Partners Limited\textsuperscript{18}. In this case, the court came up with two more exceptions to the concept of confidentiality. The first exception is a situation when such disclosure is warranted to protect the interest of an arbitrating party. This arises while a party is defending a claim brought by a third party. The second exception pertains to a situation where the protection to confidentiality is misused to mislead any foreign courts.


\textsuperscript{17}Id. at 15.

Over a period the English courts filled up the legislative vacuum on the topic by formulating three rules describing the essential characteristic of the principle.

1. The first rule stipulates that the private nature of an arbitral proceeding implies that in the absence of express consent by the parties, the arbitrator cannot combine two concurrent arbitration proceedings with closely related disputes.\(^{19}\)

2. The second rule is that due to the nature of arbitration, there exists an implied duty of confidentiality imposed on the parties.\(^{20}\)

3. The third rule is the duty is not absolute and is subject to be overridden on various grounds.\(^{21}\)

To sum up, the courts in UK recognised the presumption of confidentiality, with certain grounds of limitation, to all documents created for or in the arbitration. The duty arises with respect to all the documents involved in the procedure such as pleadings, transcripts, depositions of witnesses, expert opinions and arguments. Any involvement by third parties would defeat the very purpose of private arbitrations. The protection also extends to arbitral awards and the reasons thereof with the exception of disclosure for the purpose of enforcement or appeal.

**FRANCE**

Like the English Courts, the French courts also recognize the implied duty of confidentiality as an inherent principle of arbitrations. Since there is no statutory recognition for the concept, under the French regime also the principle developed through verdicts of the courts and customs to a great extent. The French courts opined that in arbitration, both confidentiality and public disclosure requests can co-exist.\(^{22}\)

A notable decision in *Aita v. Ojjeh*\(^{23}\) ruled that a proceeding for annulment of award violates the principle of confidentiality. The court further opined that annulment proceeding lead to public

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debate of confidential facts and thus violating the principle in arbitration which needs the highest degree of consideration.

Further, in the case of *Soci´et´e True North etSoci´et´e FCB International v. Bleustein*, the court held that the act of one of the parties to the arbitration of disclosing the fact of commencement of the arbitration without the consent of the other party would amount to the breach of the duty of confidentiality. Later, the court appalled the absolute position of the principle. However, the court did not articulate any limitations to it.

However, upon an analysis into the case laws of both the countries, it becomes evident that the scope of implied duty of confidentiality is lesser in the French legal system as compared to the English legal system. This opinion gains its importance in the light of the verdict in *Nafimco v. Foster Wheeler Trading Company*. In this case, the French Court of Appeal held that the party raising the breach of confidentiality has a burden to prove that there was a pre-existing duty of confidentiality towards him which was neither objected nor waived by the other party. As per this decision, in the absence of an express stipulation of confidentiality between the parties, the one who alleges the breach is placed under a burden to prove that an implied duty had actually existed between them. This significantly restricts the scope of the implied duty of confidentiality.

**EXPRESS DUTY OF CONFIDENTIALITY**

As opposed to countries which recognize confidentiality as an inherent principle of arbitration, there are certain countries that do not recognize the duty of confidentiality in arbitration unless it is expressly stipulated by the parties to the arbitration through a confidentiality clause in the arbitration agreement. This system symbolizes express duty of confidentiality. The proponents of this system include Australia, USA and Sweden.

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USA

The opinions of US courts on the treatment of confidentiality are both conflicting and ambiguous. However, they too have disregarded the implied duty of confidentiality and stuck themselves to confidentiality arising out of express stipulation by the parties to the arbitration.

In a landmark decision in the case of *United States v. Panhandle Eastern Corporation*\(^{26}\), the court held that a mere argument that the parties had an understanding of keeping the confidentiality of the arbitration is useless without an express stipulation in the agreement. In an action for production of documents pertaining to previous arbitration conducted under ICC Rules, the government contended that there is no explicit provision for confidentiality in the agreement or the applicable rules. The court approved that the government could access the information. The court did not recognize the general principle of confidentiality in international arbitration and affirmed the need of a confidentiality clause in the agreement to protect confidentiality in arbitration and negated the concept of implied arbitration present in international arbitration.

A similar observation was made in the case of *Contship Containerlines Ltd v. PPG Industries Inc*\(^{27}\). In this case, the US district court kept the supremacy of the US laws above the laws of other jurisdictions. While rejecting the contention of the defendant on protection accorded to documents produced in previous arbitration the court held that disclosure can be compelled irrespective of the English Law under two grounds such as when the production of the document is relevant and when the document is necessary for the fair disposal of the issue.

SWEDEN

All domestic and international arbitral proceedings seated in Sweden are governed by the Arbitration Act, 1999. The Act has been formulated in line with the UNICITRAL Model Law. The Act however, does not provide for confidentiality of proceedings. Thus, the courts in Sweden often tend to recognize a duty of confidentiality only if it is expressly mentioned in the arbitral agreement.


The Swedish Supreme Court’s view on confidentiality is similar to that of the Australian High Court’s view in the landmark case of *Esso Australia Resources Ltd. v. Plowmen*\(^{28}\) which will be discussed herein later. The reasoning of the Esso Case was followed by the Swedish Supreme Court in the case of *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc*\(^{29}\). In this case, the issue was the disclosure of arbitral award unilaterally by one of the parties without the consent of the other. The question was whether this breached the duty of confidentiality or not.

The Swedish Supreme Court held in this case that the inception of the duty of confidentiality must be traced back to the arbitration agreement and without such a duty arising from the agreement, the arbitration will not automatically imply any duty regarding confidentiality. The court further went on to say that an absolute obligation of confidentiality is neither possible nor desirable in arbitration.

**STATUTORY**

A very few countries have recognized the duty of confidentiality in arbitration through national legislations. New Zealand is one of the first countries to codify the obligation for both domestic and international arbitration. Other proponents of this system include Australia, India and Singapore.

**NEW ZEALAND**

In New Zealand, the arbitration is facilitated and governed by the provisions of New Zealand Arbitration Act, 1996 which got amended in 2007. Following the judgment in the *Esso case*,\(^{30}\) concerns regarding the conduct of arbitral proceedings arose in New Zealand as a result of which, confidentiality and privacy in arbitral proceedings were recognized statutorily. Section 14B of New Zealand’s Arbitration Act provides that “the parties and the arbitral tribunal must not disclose confidential information”\(^{31}\) in arbitration agreements governed by the law of New Zealand. Adding clarity to this, Section 2 of the said act defines what all constitutes confidential information. The

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\(^{29}\) *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, ref T-1881-99 (Swedish Sup Ct 27 October 2000).


definition provided in section 2 is wide enough to cover all the information relating to an arbitration proceeding or an arbitration award\textsuperscript{32}.

By virtue of section 14, the obligation of confidentiality is the default rule which was criticized by a lot of jurists on the ground that it failed to address the obvious exceptions such as consequences of challenging the arbitral award.

In \textit{Television NZ Ltd v. Langley Productions Ltd.}\textsuperscript{33}, the court acknowledged the need for framing limitations to the presumptive confidentiality rule and held that the general rule of confidentiality in arbitral proceedings has to give in for upholding the principle of open justice when the parties decides to challenge the award.

In furtherance of the New Zealand Law Commission Report, 2003, exceptions to the default rule of confidentiality was encapsulated in section 14C. Further Section 14F, allowing a rebuttable presumption in favour of public hearings of arbitral matters in open courts, reflects a balancing of the competing interests in transparency and accountability of the judicial process and the expectation of commercial parties to keep the arbitration confidential.\textsuperscript{34}

\textbf{AUSTRALIA}

Australia is famed for taking contentious approaches to confidentiality in arbitral proceedings. The Australian judgments of the 1990s were instrumental for triggering a heated debate and causing a paradigm shift in the application of the concept of confidentiality in arbitration from a very rigorous application to a much more liberal application.

The most noteworthy judgment came in the case of \textit{Esso Australia Resources Ltd. v. Plowman}\textsuperscript{35}. In a decision first of its kind, the Australian High Court held that in the absence of an express stipulation of confidentiality, the private nature of arbitration proceedings is not meant to give a presumption of confidentiality which is indispensable for an arbitration. The court noted that it is impossible to attain complete confidentiality of the arbitral proceeding due to various reasons such

\textsuperscript{32} New Zealand Arbitration Act, § 2 (2007).
\textsuperscript{34}David AR Williams & Amokura Kawharu, \textit{Arbitration and Dispute Resolution}, New Zealand Law Review 99 (2009).
as absence of obligation on witnesses, requirement to disclose award to the court under several circumstances, need for disclosure to protect rights of third party.

This judgment caused a huge turn around in the recognition of confidentiality in Australia because prior to this judgment, the Australian court verdicts were inclined to recognizing implied duty of confidentiality having similar reasoning like that of the courts of UK and France.

Yet another massive revamping with respect to confidentiality started in 2010 with the legislative intervention on confidentiality. The Australian legislature recognized the significance of confidentiality in Commercial Arbitration and felt a need for a greater level of confidentiality in order to keep up with the international standards. As a result, the International Arbitration Act, 1974 was amended to insert Part III, including sections 23C to 23 G which dealt with protection of Confidentiality, to encourage international arbitrations taking place in Australia.\(^{36}\)

Section 23 C of the International Arbitration Act, 1974 casts an obligation on the parties to arbitral proceedings on non disclosure of confidential information unless:

- disclosure was made in one of the circumstances mentioned in sect. 23D of the International Arbitration Act, 1974.
- disclosure was made in pursuance of an order of the arbitral tribunal allowing such disclosure under section 23E of the International Arbitration Act, 1974 or;
- disclosure was made in pursuance of an order from the court allowing disclosure in certain circumstances under section 23G of International Arbitration Act, 1974.\(^{37}\)

These provisions were introduced on an ‘opt in basis’ in 2010, meaning that the parties had to expressly agree in order for these confidentiality provisions to apply in their arbitration. So even when statutory provisions was introduced, the application of these provisions was made only when the parties opted in for confidentiality. However, in 2015, the legislature further reformed the


confidentiality in arbitration. Consequently, section 22 of International Arbitration Act, 1974 was amended and it was provided that the confidentiality provisions would apply in an ‘opt out basis’ meaning that the confidentiality provisions would automatically apply unless and until the parties choose to exclude them. This amendment in a way reverses the decision in *Esso case* as confidentiality is now statutorily protected for every arbitration with the exception that the parties can opt out of it. Thus, confidentiality is the rule and opting out an exception.

In this backdrop, it will be fair to say that confidentiality is now statutorily recognized in Australia.

**SINGAPORE**

Similarly the national legislation of Singapore also statutorily protects the concept of confidentiality in arbitration. Again the protection is not absolute.

The Arbitration is governed by the Singapore Arbitration Act which was revised in 2002. Section 57 of Singapore Arbitration Act provides for confidentiality with the exceptions.

In the exceptions, section 57(3) is very interesting. As per this section, disclosure of confidential information is permitted with the consent of the parties or when the court is satisfied that such disclosure would not reveal the matter or identity of the parties to the proceedings.

Section 57(4) further gives a very interesting exception. Section 57(4) says that notwithstanding section 57(3) “*where a court gives grounds of decision for a judgment in respect of proceedings . . . and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications.*”

This is a perfect example of the Singaporean law trying to contribute to the development of law by giving a right of publication at the same tie preserving the much needed confidentiality of the matter.

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INDIA

The most recent legislative activity regarding the principle of confidentiality was in India. In India, the Arbitration and Conciliation Act, 1996 governs matters regarding arbitration. In the 1996 legislation, confidentiality was envisaged in section 75 of the Act. However, this provision was applicable only to conciliation proceedings and was not applicable to arbitration proceedings.

In 2019, the government introduced the Arbitration and Conciliation (Amendment) Act, 2019 which revamped the laws pertaining to arbitration in India with an aim to make India more pro arbitration.

Arbitration and Conciliation (Amendment) Act, 2019 introduced a mirroring section to Section 75. Section 42 A obliges the arbitrator, arbitral institution, and parties to the arbitration to maintain confidentiality of all aspects of the arbitration proceeding except the final award. The exemption of protection to the arbitral award limited to the disclosure for implementation and enforcement of it.

Section 42A of the Amendment Act is very strong in its scope and ambit. The section begins with a non-obstante clause suggesting the intention of the legislature to make the provision of confidentiality prevail over all other provisions of the Act in case of any conflicts.

However, even the statutory provision in India is deemed to be far from perfect. One major limitation with the Indian statute is that the provision does not stipulate the position of other entities involved in arbitration such as witnesses, experts etc. Also, the section does not provide for any consequences on non – compliance of confidentiality obligation. Hence, there is an absence of effective check on the implementation of confidentiality obligation and the current provisions are directory in nature.
CONCLUSION

Confidentiality remains as the core principle and primary attraction of arbitration. The confidentiality obligation under arbitration has various aspects. It may be considered as a benefit over traditional litigation mode of dispute resolution whereas some might argue that apart from being the much speedier and economic justice delivery system, it also protects the interest of the parties by keeping their affairs away from the public eye. The principle is of great advantage to parties in commercial disputes as it protects commercially sensitive information. As an efficient private method of dispute resolution, it is often taken for granted.

It is evident from the discussions so far, that the position of confidentiality is not uniform and settled in the international sphere. The interpretation of the applicability and scope of the principle vary in different national jurisdictions. In countries like UK and France it is impliedly recognized, whereas in countries like US and Sweden, it is recognized only if it is expressly stipulated in the agreement. Then there are some countries like New Zealand and India (after the 2019 amendment act) which gives statutory protection to the concept of confidentiality. At present only a handful of jurisdictions recognise the duty of confidentiality through legislations. The legislative vacuum for the rest is filled in by interpretations by the courts from time to time. On a bear reading, it might seem that the concept of confidentiality is implemented in the best way in those countries having statutory protection. This is unfortunately far from true. In fact if we look closely both the New Zealand law legislation and the Indian legislation which incorporated confidentiality is far from perfect. Even the New Zealand legislation which is the most comprehensive statutory legislation as far as confidentiality is concerned was not able to enumerate all the exceptions possible for the rule of confidentiality. On the other hand, the Indian law as per the Amendment Act of 2019 has a lot of lacunae. The provisions of confidentiality are too rigid and are not adaptive to the scenarios of practical application.

Even though certain international institutions have set forth guidelines for international commercial arbitration with respect of general obligation to maintain the secrecy of the proceedings, there are no mandatory provisions for the same.
Therefore, still it is desirable for the parties to include a confidentiality clause to their arbitration agreement. Even so, the obligation is not absolute. Over the period of the time, judicial interpretations came up with various limitations that are applicable to the principle.

It is evident that complete confidentiality is not very desirable to arbitration. Hence, it is imperative to stick a balance on the topic of confidentiality wherein the interests of the parties are protected by keeping the proceeding essentially private and confidential while ensuring that no harm is made to any third party or the public in general by such confidentiality.