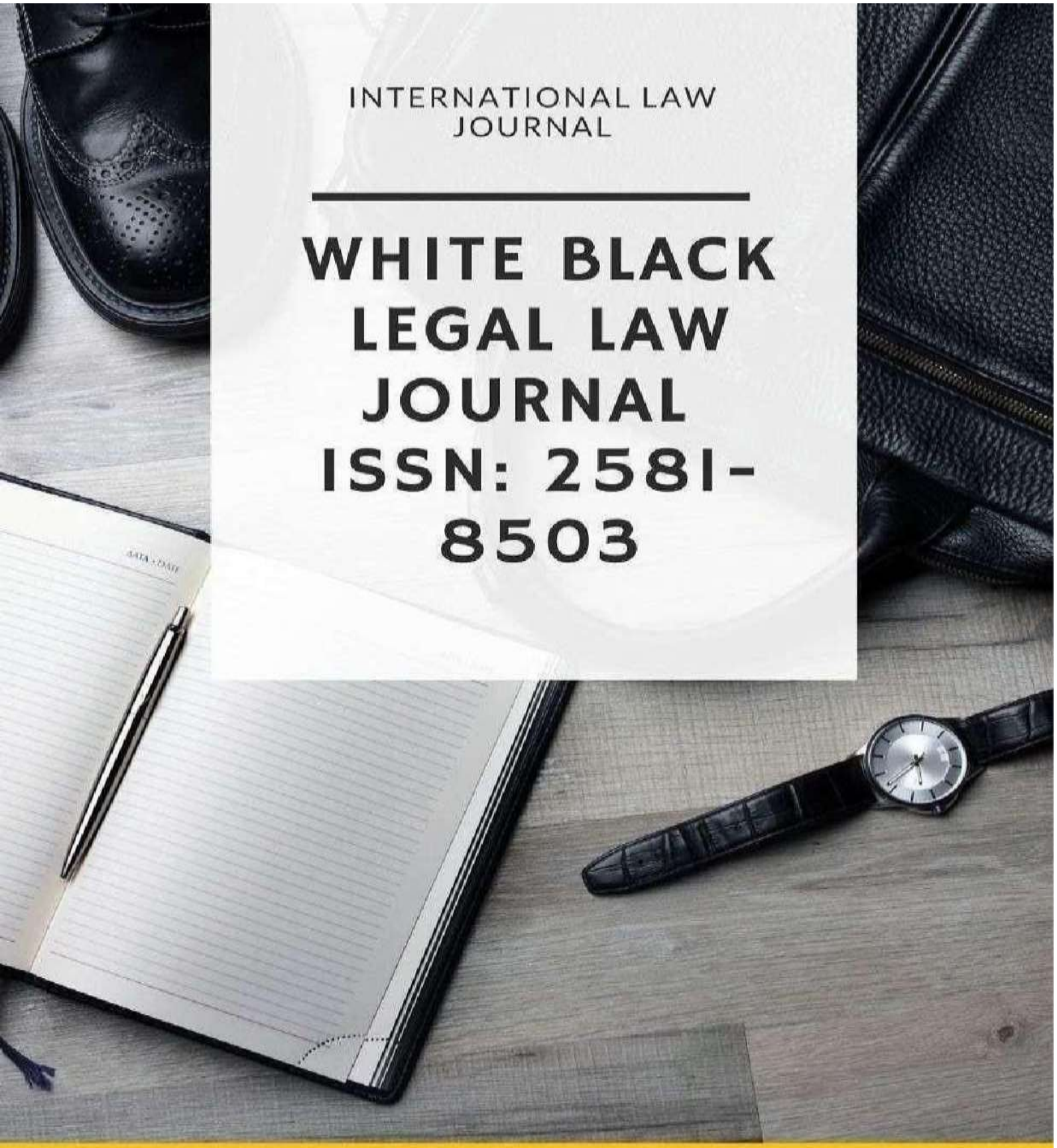

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# CONCEPTUAL FRAMEWORK OF CONFIDENTIALITY IN ARBITRATION

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Arbitration is now one of the preferred options for companies to resolve disputes. It's become a popular alternative to litigation for its speed, neutrality, flexibility, and the parties' independence. In the marketing of arbitration, parties and lawyers tend to list the many advantages of arbitration, including secrecy. Many people assume parties automatically have the benefit of avoiding public disclosure of their dispute, the testimony provided and the judgment or award rendered when arbitrating due to the process's secrecy.

Surprisingly, secrecy in arbitration is not all that easy. Confidentiality and arbitration is not all or nothing. The meaning thereof has different nuances in the law because of a variety of factors including the arbitration rules and procedures, national laws, and/or the parties' agreement. In recent times, arbitration is mainstream countries are involved. This makes it difficult, as doing justice by the public requires the maintenance of other important characteristics, such as truth, openness and accountability.

The research deals with arbitration secrecy. This is a study of the place of secrecy in international arbitration. This is through the laws of India, the United Kingdom and US case law. These three countries were chosen due to their differing opinions about the need for confidentiality in arbitration. Indian law deals expressly with the issue of secrecy, British law considers it present but not codified, and American law leaves it to the parties to determine (without assuming it is important). This paper considers a few approaches in seeking to establish if or not secrecy in arbitration is a safe method of secrecy.

The rest of the research is outlined in Chapter 1. The chapter begins with a definition of secrecy and how it differs from privacy. The article then goes into the various legal protections for secrets, including agreements, implied law and statutes. The role of secrecy in arbitration and the interests which secrecy seeks to protect are also explored. Here, we explore the idea of secrecy in arbitration and its operation in different countries, including the US, UK and India. Finally, the article will examine the key reasons why secrecy is not the failsafe protection that

it is sometimes thought to be.

## 1.1 Significance of Confidentiality in Modern Arbitration

Secrecy has become crucial to the conduct of international business arbitration, independent of the parties' wishes. The complexity of cross-border business disputes often mean that trade secrets, intellectual property, financial data and plans, proprietary technological specifications, discussion of corporate mergers and acquisitions, and other highly confidential data are at the centre of the disputes. The risk of irreparable damage to the company from the disclosure of such information to competitors, investors, media or governments far outweighs any benefit or loss from the arbitration award.

Confidentiality is also important in the growing number of investment treaty arbitration cases. These disputes involve contentious issues, including government spending, resource allocation and environmental regulation. Here, public interest in protecting the process whereby state decision-making that affects them is discussed and resolved begets a confrontation with the private party's interest in preserving confidential information.

The value of secrecy has increased in the world of international business arbitration because it offers a theoretically neutral arena where parties from different political, regulatory and legal systems can settle their disputes free from potential government interference, public contestability and media attention. This is highly valued in circumstances where the parties are from states where political pressure has a strong influence on court proceedings or where business court decisions can be published and widely reported.

Despite its importance, the legal notion of secrecy in arbitration is being scrutinised. There is a growing movement amongst academics, judges and legislators alike questioning the truthfulness, predictability and effectiveness of the secrecy claimed by parties to arbitration. Such questions are examined in this dissertation.

## 1.2 Privacy and Confidentiality: A Critical Conceptual Distinction

A lack of clear understanding of the ideas of privacy and confidentiality still troubles arbitration discourse. Their confusion leads to misconception about the obligations of the parties to arbitrations, even though the two concepts are in close proximity; they are theoretically (and

legally) distinct.

The arbitral procedures are restricted (which is what is referred to as "privacy"). Attendance by the public is generally not allowed. Arbitral sessions are private, as opposed to public, open and reportable proceedings in most common law countries' courts. Only the arbitral tribunal, lawyers for the parties, and witnesses, experts or institution representatives whose presence the parties or tribunal has permitted may attend. This feature of arbitration is agreeable to the general public and most courts.

On the other hand, confidentiality is a positive legal obligation. It not only places a duty not to disclose information related to the arbitration procedures but goes beyond the aspect of privacy. Secrecy is mandated in relation to: the proceedings; the names of the parties; documents and evidence filed as part of the procedures; verbal testimony; submissions; hearings; and finally, the arbitral award. Confidentiality, unlike privacy, which is a characteristic of the arbitration process regulating attendance, is a substantive rule of law, rather than a mere principle of the arbitration process that relates to the communication with third parties after the arbitration proceedings.

This makes a difference in practice. Privacy with respect to individuals is almost a requirement throughout the arbitration process. But secrecy is not. The existence or otherwise of any secrecy and if so, the extent of it, is based on a variety of factors that vary between the agreement, the institution and the states involved. The parties involved with an arbitration may have the wrong impression that what is said in the process is secret, because confidentiality is the same as privacy.

The issue of privacy and confidentiality has been brought up in important cases. For example the English case of Dolling-Baker v. Merrett [1990] 1 WLR 1205 is an example. The Court of Appeal said that people have a duty to keep things confidential because arbitration is private. However the court did not say that this duty applies in every situation. They said there are exceptions to this duty.

The Australian High Court looked at this issue in the case of Esso Australia Resources Ltd v. Plowman (1995) 183 CLR 10. They had an opinion. They said that just because something is private it does not mean it is confidential. Justice Mason wrote the opinion for the majority.

He said privacy is not the thing that matters. There needs to be another reason for something to be kept confidential. Just because the court proceedings are private it doesn't mean everything should be kept secret.

**There has to be more to it, than privacy.**

The fact that proceedings are private is not enough to justify keeping all information hidden. Questions of privacy and confidentiality come up in both the Dolling-Baker v. Merrett and Esso Australia Resources Ltd, v. Ploughman cases.

These cases demonstrate the reality that secrecy and privacy are not synonymous, and have different legal implications with different degrees of protection and consequences for breaches. It's a distinction to keep in mind when considering the comparative point of discussion in this dissertation.