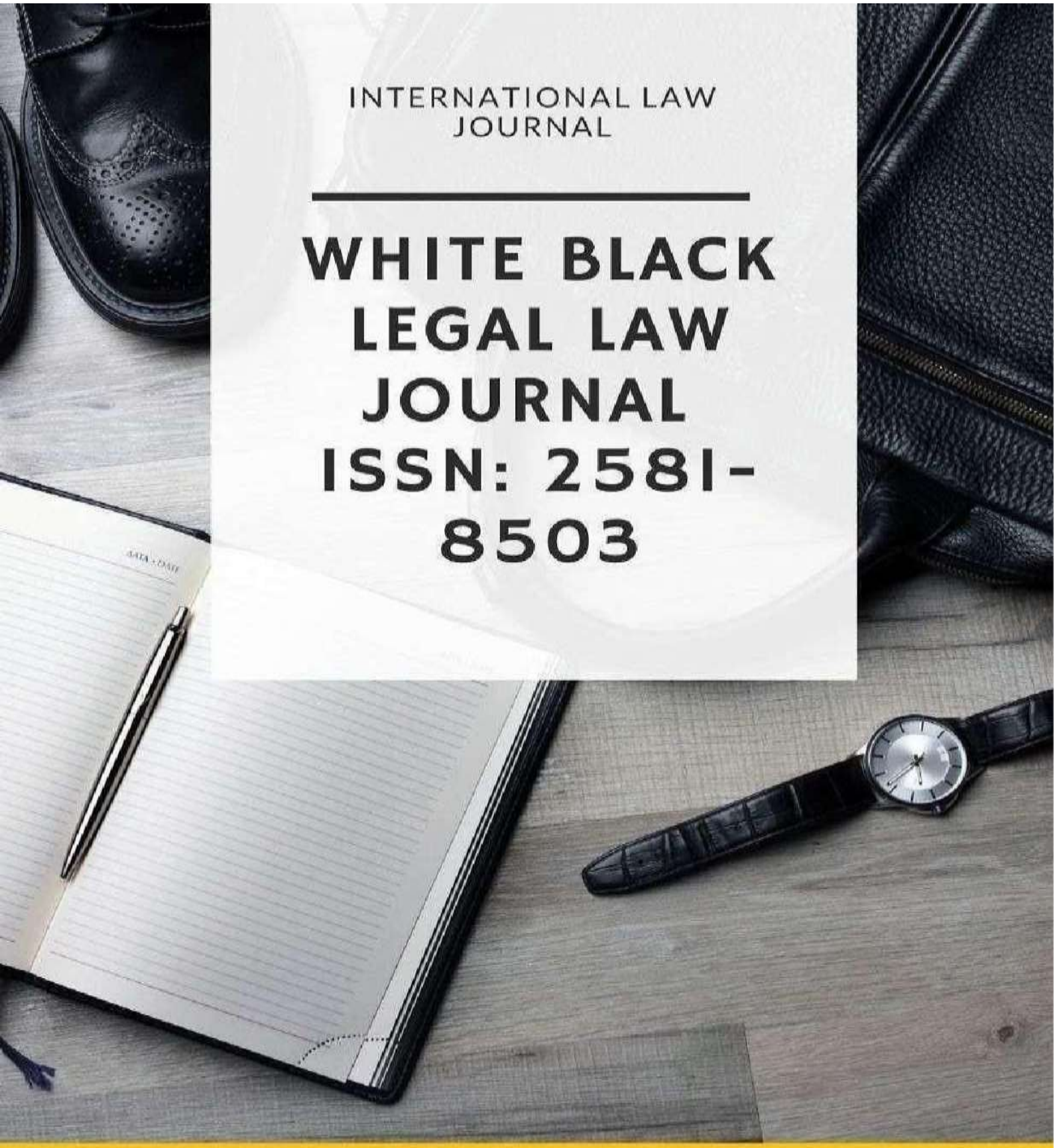

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CONFIDENTIALITY IN ARBITRATION PROCEEDINGS

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Introduction

According to Section 75 of the Adjudication Act, confidentiality has always been a fundamental component of the Arbitration Act. However, arbitration procedures were not covered by Section 75 of the Arbitration Act; only conciliation procedures were. According to Section 75 of the Arbitration Act, the conciliator and the parties must maintain the confidentiality of all information pertaining to the conciliation proceedings, including the settlement agreement, unless disclosure is required for implementation and enforcement.

A High Level Committee led by Justice B. N. Srikrishna was established in 2017 to examine the institutional of arbitration in India. The committee produced a report that recommended a number of changes and modifications to the Arbitration Act. The highest-level Committee recommended, among other things, that the concept of confidentiality be incorporated into arbitration processes. The Arbitration & Conciliation (Amendment) Act, 2019 was passed in response to the suggestions, introducing Section 42A that extended the confidentiality principle to arbitration proceedings.[1]

Section 42A is reproduced below:

42A. The arbitrator, the arbitral institution, or all parties to the agreement for arbitration shall maintain the confidentiality of all arbitral proceedings, with the exception of the award, where its disclosure is required for the purpose of enforcing and implementing of the award, notwithstanding anything stated in any other law currently in effect.[2]

The Supreme Court made it clear in Kamal Gupta and Anr. v. L.R. Builders & Anr. (2025) that non-signatories to the arbitration agreement are not entitled to attend arbitration proceedings. The Court emphasized the duty of arbitrators, arbitration institutions, or the parties themselves to maintain confidentiality of all procedures by citing Section 42A. The Court believes that

[1] Justice B. N. Srikrishna, Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism India, LEGAL AFFAIRS. https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf
[2] https://legalaffairs.gov.in/sites/default/files/arbitration-and-conciliation%28amendment%29-act-2019.pdf

allowing non-signatories to attend would be a violation of this obligation.[3]

Meaning of Confidentiality[4]

The Arbitration Act contains no explicit definition of confidentiality. According to the Oxford Dictionary, confidentiality is the expectation that someone will keep information private. According to Black's Law Dictionary, the term "confidential" means "entrusted with the confidentiality of another or responsibility for his secret affairs or purpose; intended to be held in trust or kept secret." In the form of client-attorney privilege, confidentiality is a well-known concept that is deeply embedded in the legal community worldwide.

One consequence of the parties' increased liberty in the arbitration process is confidentiality. Parties that don't want their disagreements to become the "talk of the town" frequently view it as a means of preserving their good name and safeguarding sensitive business data that may be revealed during the arbitral process.[5]

Confidentiality and privacy are often used interchangeably.[6]

Client attorney confidentiality is specifically protected in India under Section 126 of the Indian Evidence Act, 1872, which prohibits attorneys from disclosing any information their clients have given them or any advice they have given them, with several exceptions.

Confidentiality was first introduced to arbitration hearings by According to Section 42A of the Arbitration Act, confidentiality regarding the arbitration proceedings will be maintained by the arbitrator or arbitrators, the arbitral institution, and the parties involved, with the sole exception being the disclosure of the arbitral award for purposes related to its implementation and enforcement.

Indian Legal Framework

It is crucial to remember that not all of the recommendations made by the B.N. Srikrishna Committee are included in this clause. Three exemptions to the secrecy issue were proposed by the Committee, specifically:

1. Disclosure mandated by a legal obligation;
2. Disclosure to defend or uphold a legal right;

[3] 'Supreme Court on Confidentiality in Arbitration in India' (*IndiaLaw LLP*) <www.indialaw.in/blog/arbitration-and-conciliation/supreme-court-on-confidentiality-in-arbitration-in-india/

[4] https://www.legalserviceindia.com/legal/article-3752-confidentiality-in-arbitration-proceedings.html

[5] https://ijirl.com/wp-content/uploads/2022/04/THE-DILEMMA-OF-CONFIDENTIALITY-IN-ARBITRATION-PROCEEDINGS-A-LEGAL-QUAGMIRE.pdf

[6] Amy Schmitz, Untangling the Privacy Paradox in Arbitration, 54 U. KAN. L. REV. 1211 (2006).

3. Enforcing or contesting an award in front of a court or other judicial body.

The legislature, while making the amendments and incorporating the recommendations of the In order to expedite the execution of arbitral rulings, the Committee only made a single exception to Section 42A. Therefore, it is easy to conclude that India's position on the limitations and exceptions to confidentiality is not in line with the procedures of National courts of other jurisdictions, which hold that exceptions to the privacy of the arbitration proceedings apply in cases where allegations are significant and there is a reasonable chance of success.

In addition to departing from other jurisdictions' methods, the Indian law ignores some situations in which the public may benefit from learning of arbitration proceedings, particularly where a state is a party to the arbitration. Therefore, in these situations, an exception to the widely accepted norm must be established, and restricting this through Section 42A may constitute a violation of the public's right to information.

In the case of Esso Australia Resource Ltd. v. Plowman, the Australian High Court addressed a violation of a right to access data in an arbitration dispute involving a state-owned company. The Court acknowledged that the outcome of such a dispute has wider ramifications that impact the public's interests. The Hon'ble High Court came to the conclusion that the public had an appropriate interest in learning about the nuances and specifics of the arbitration procedures since the public's right to be apprised of the activities of public authorities was crucial in this situation.

Scope and Limitations[7]

Although Section 42A represented some advancements in the area of confidentiality in arbitration, its efficacy is severely limited. By definition, it solely binds the arbitrators, parties, and the arbitral institutions; it makes no mention of other important parties, such as tribunal administrators, witnesses, experts, or even legal counsel. There is a lot of opportunity for uncertainty in this gap. Furthermore, the Act makes no mention of the consequences for confidentiality violations. Section 42A has been criticized for being "vague and limited." Simply put, the clause does not specify how private materials should be handled when parties ask the court for help, nor does it provide explicit directions regarding what occurs if confidentiality is broken. In reality, parties routinely petition courts for evidence gathering (under Section 27), appointment of arbitration (under Section 11), or temporary relief (under Section 9); these requests frequently contain papers that came from private arbitration

[7] https://thelegalquorum.com/balancing-transparency-and-privacy-confidentiality-in-indian-arbitration/#_ftn4

procedures. However, there is no way for the Act to preserve or seal such court documents. The Act essentially allows significant loopholes in its practical implementation and enforcement, even while it imposes a duty of confidentiality on major parties.

Institutional Rules and Other Sources: Many Indian arbitral institutions strive to remedy these weaknesses by adding their own secrecy requirements. For example, the Mumbai Centre for International Arbitration (MCIA) Rules 2017 & the Delhi International Arbitration Centre (DIAC) Rules 2023 both impose secrecy obligations much to Section 42A, but they usually contain specified exceptions. In actuality, these institutional regulations have a greater influence on enforceable secrecy norms in Indian arbitration than the actual law structure.

Confidentiality in International Scenario[8]

The Model Law of the UNCITRAL on International Commerce Arbitration permits both parties to the arbitration to include a confidentiality clause in the contract of arbitration if they so choose, but it does not specifically address confidentiality in the context of arbitration. The UNCITRAL Model Law does not require confidentiality; rather, it places a greater value on party liberty.

Furthermore, aside from Article 32(v), which prohibits publicizing the verdict without the parties' cooperation, the UNCITRAL Arbitration Regulations also contain no explicit provisions pertaining to secrecy. The Singapore International Arbitration Center's Rule 34.6 specifically addresses secrecy.

Since the UNICTRAL Model Law does not mention confidentiality, various nations, including India, have developed their arbitration rules based on it. As a result, the level and scope of secrecy's inclusion in arbitration vary globally.

For instance, there are no explicit regulations pertaining to secrecy in Great Britain; instead, privacy is an unwritten norm based on numerous court rulings. Unlike Great Britain, the US neither has a statute pertaining to confidentiality nor upholds it as an unwritten custom.

Model Law on ICA ["the Model Law"][9] is silent on the subject of secrecy and instead lets the parties determine whether or not to include a confidentiality language in the arbitration agreement. Until 2010, Rule 32 of the UNCITRAL Arbitration Rules stipulated that the arbitral ruling could not be made public unless the parties agreed otherwise. However, Rule 34.5 now acknowledges disclosure among a legal obligation and the safeguarding of a party's legal right

[8] https://www.legalserviceindia.com/legal/article-3752-confidentiality-in-arbitration-proceedings.html
[9] UNITED NATIONS, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1909955_e_ebook.pdf

as certain exceptions to the award's non-publication. Therefore, the Model Law has avoided making confidentiality a requirement in order to embrace the feature of party autonomy in an arbitration hearing.

The Uncertainty around 'Arbitral Proceedings'

Others have already noted that Section 42A of the Arbitrator Act restricts the parties' and the tribunal's secrecy requirements. Many have expressed worry over the lack of third parties, such as witnesses, stenographers, transcription experts, tribunal secretaries, and other individuals who attend and/or participate in the arbitral procedures. However, this discussion is restricted to another, potentially crucial flaw in the Arbitration Act. This is the ambiguity around the definition of "arbitral proceedings" and whether or not it encompasses arbitration-related court procedures. There is uncertainty because this phrase is not defined in the Arbitration Act. In the Board of Control for the Cricket Association in India v. Kochi Cricket Private Ltd. case, Justice Nariman made an attempt at some interpretation.[10] However, he proceeded under the presumption that "arbitral proceedings" are distinct from court proceedings held "in relation to" an arbitration in order to determine the applicability of the Amendment Act as specified in Section 26.

Repercussions of interpreting "Arbitral Proceedings" narrowly

The ramifications of the assumption that was made in the ruling are broad, even though the semantic approach used in BCCI v. Kochi may be discussed at a later time. Confidential information may become public if arbitration-related court procedures are not protected by confidentiality obligations. All documents submitted to a court in order to, for example, get interim relief under Section 9 of the Arbitration Act or the arbitration clause in an agreement submitted to request arbitration or the appointment of an impartial arbitrator under Section 8 and Section 11 of the Arbitration Act, would no longer be subject to the secrecy requirements outlined in Section 42A. A such interpretation would surely be absurd and might compromise the integrity of arbitral proceedings, in violation of both confidentiality and privacy responsibilities.

A useful case study to comprehend the implications of a narrow interpretation of "arbitral proceedings" would be the English instance of the Department of Economics, Policy &

[10] *(2018) 6 SCC 287.*

Economy of the City of Moscow v. Bankers Trust Co.[11] Only the parties (London Bankers Trust Co. & the Moscow Government) were informed of the arbitral award in this instance. The Moscow Government had won the arbitration against London Bankers Trust Co. It submitted a request to have the arbitral award set aside. London Bankers Trust Co.'s application was later rejected as well. The Moscow Government attempted to publish the ruling in light of the English court's dismissal in order to demonstrate to the global financial community that the English courts had likewise thoroughly examined the arbitral award and supported it in its favor. However, because it included a thorough examination of the award and brought up extremely delicate political concerns, the ruling itself expressly said that it should remain confidential to the parties. The English Court of Appeal, which heard the challenge to the ruling, was presented with a conundrum: although the arbitral process is typically carried out due to an assumed duty of confidence, any challenge against a court can hardly be considered consensual. It is a well-established notion that courts must administer justice in public. However, there is a more fundamental premise that states that ensuring justice is done must be the primary goal of courts of justice. As an extension of the consent arbitral process, the appeal mechanism actually serves the public interest. However, by selecting a private forum for conflict resolution, such as arbitration, parties exert their autonomy and anticipate that such arbitral proceedings will be subject to confidentiality obligations. It was noted that when rendering a decision, the courts are able to consider the parties' expectations about secrecy and privacy. A complete prohibition on the publication of court rulings might not be justified, but it is obviously acceptable in situations when a party might actually be harmed by the release. The English Court of Appeals upheld the order requiring the parties to keep the verdict confidential based on this agreement.

It makes sense that in certain situations, where sitting in public would ruin the debate itself, the publicity principle must give way.[12]

Drawbacks of Section 42A[13]

A cursory reading of Section 42A makes it evident that the only parties to the arbitration, the arbitral institution, and the arbitrator are required to uphold the confidentiality concept. However, Section 42A does not address witnesses, stenographers, transcribers, and other individuals who attend and/or participate in the arbitration proceedings and may be witness to

[11] *[2005] QB 207.*
[12] *Scott v. Scott, [1913] AC 417.*
[13] https://www.legalserviceindia.com/legal/article-3752-confidentiality-in-arbitration-proceedings.html

certain information that is confidential in nature. As a result, they would not be subject to the obligation to keep information related to the arbitration proceedings, which alone indicates a clear flaw in the aforementioned principle.

Section 42A does create an exception to the duty of confidentiality and does not apply to disclosures made in order to carry out or enforce the arbitral ruling. It is unclear if the confidentiality provision outlined in Section 42A will also apply to court procedures arising involving the Arbitration Act, such as those under Sections 9, 34, 14, etc.

The Singapore High Court, in the case of International Coal Pte Ltd. vs. Kristle Trading Ltd. & Anr.,[14] had noted that in arbitration, various papers and information should have separate protections.

The aforementioned provision, which is the sole exception to the need to maintain secrecy as outlined in Section 42A of the Arbitration Act, is obviously not what the High-Level Committee report recommended. When it was required by law, to safeguard or uphold a legal right, or in order to enforce or contest an award within a court or other judicial body, the report was meant to provide information about the arbitration procedures.

However, only one disclosure exception was allowed under Section 42A. It is sufficient to say that the limited exception under Section 42A may result in risky or unclear situations, such as when information about such arbitration proceedings must be disclosed in the event of a petition under Section 34 of the Arbitration Act to contest the arbitral award, a proposal under Section 9 of the Arbitration Act for temporary measures, an appeal under Section 14 of the Arbitration Act contesting interim measures granted by the tribunal, an application under Section 14 of the Arbitrator's mandate, etc.

It's also important to note that there are no repercussions for breaking Section 42A's rules, which casts doubt on the law's ability to be effectively followed.

In situations where one of the participants to the dispute is the State, the government can benefit from the privilege of complete protection from disclosure because the public interest is not recognized as one of the exceptions to confidentiality. This has a negative impact on the government's accountability and openness, enabling them to abuse their authority. The Australian High Court further supported this idea in the Esso Australia Resources Ltd. v. Plowman case.[15] The court correctly reasoned that if there had been a duty of confidentiality, "public interest" would have to be a necessary exception to this duty because the public has

[14] International Coal Pte Ltd. vs. Kristle Trading Ltd. & Anr., [2008] SGHC 182.
[15] Esso Australia Res. Ltd. v. Plowman, (1995) 128 A.L.R 391, 183 C.L.R. 10 (Austl.).

proper expectations to know what happened during the arbitral proceedings, even though it denied any implied duty of confidentiality.

Besides, the fact that Section 42-A does not recognize legal right as an exception to privacy may pose serious challenges to the parties to a dispute in situations in which they have to disclose certain details pertaining to the arbitration process in order to establish their constitutional right in a separate conflict. Queens Divisional Bench, being considerate of such conditions, acknowledged legal right as an exemption to secrecy in the case of Hassneh, Insurance Co of Israel vs. Steuart J Mew,[16] since disclosing the award and its specifics aids the party in establishing a defense or using it as the foundation for a lawsuit.

Challenges (though repetitive, however, in points)

1. **Enforcement Mechanism**: The Act's enforcement measures are not well developed. Confidentiality violations lack a defined structure, legislative penalties, and explicit remedies. Rather, parties are left to fight contractual claims or use the sometimes ineffective legal system to seek damages and injunctions.
2. **Judicial Transperancy**: Transparency in the judiciary has its own drawbacks. The open justice principle usually takes precedence over confidentiality when parties come to the court for interim proceedings, to contest awards, and to enforce them. The public can usually view court records and hearings. Although the court has the authority to grant requests for in-camera proceedings and document sealing, these safeguards are uncommon.
3. **Multiplicity of Participants**The complexity is only increased by the engagement of numerous forums and users. Expert witnesses, outside financiers, and occasionally even governmental organizations may participate in arbitration. Maintaining secrecy is made much more difficult by this diversity, particularly because there aren't always clear-cut safeguards for information and disclosures to other parties.
4. **Variation in Institutions**: Every organization, including MCIA, ICA, SIAC, and LCIA, approaches confidentiality, remedies, & procedural safeguards differently. Parties are unable to rely on a consistent norm as a result of this discrepancy, and they may encounter unanticipated protection gaps.
5. **Matters of Public Interest**: Confidentiality frequently suffers when disagreements include matters of public interest or regulations. Matters involving governmental

[16] Hassneh Insurance Co of Israel v Steuart J Mew, (1992), [1993] 2 Lloyd's Rep 243 (QB).

entities, regulatory compliance, and allegations of corruption might trigger statutory requirements for disclosure, such as those under the Right to Information Act and SEBI regulations. Any private agreements and Section 42-A protections are superseded in these situations by legal disclosure responsibilities.

6. **Cross-Border complexity**: Another level of complexity is introduced by cross-border enforcement. A certain amount of disclosure is frequently required while implementing an Indian arbitral award abroad, and the inconsistent norms and patchwork of foreign legislation can gravely jeopardize secrecy, especially in cases involving numerous jurisdictions.[17]

The Public Interest Exception

What happens if someone makes a potentially criminal disclosure during arbitral proceedings? It appears that the exclusion outlined in Section 42A is restricted to award disclosure. Therefore, may transcripts not be made public? It might also be necessary to carve out the public interest exception. The English Court of Appeals previously acknowledged this exception in Emmott v. Michael Wilson & Partners.

[18] Section 18(2) of the Arbitration Ordinance of Hong Kong in Hong Kong, as well as AAY v. AAZ in Singapore,[19] Since the ruling included the most recent case law on the subject of secrecy in arbitration, the court determined that there was a valid reason for in making the verdict from a prior process public, albeit with the proper redaction. In the Australian case of Esso Australia Resources Ltd. v. Plowman, the Supreme Court of Victoria ruled that there was a "public interest" exclusion to the duty of confidentiality in situations where the public may have a legitimate interest in learning the outcome of an arbitration.

The Legislature's intention to prohibit any such disclosure, even in cases where there is a legal obligation, appears to be demonstrated by the deliberate rejection of the three exceptions proposed by the Justice Srikrishna Committee. It is obvious that the duty of confidentiality was meant to be carefully upheld in India.

Analysis and Suggestions

The duty of confidentiality has been one of the most sought-after characteristics by all parties to a dispute in these uncertain and dynamic times. It has turned out to be one of the main factors

[17] http://thelegalquorum.com/balancing-transparency-and-privacy-confidentiality-in-indian-arbitration/#_ftn4
[18] Emmott v. Michael Wilson & Partners Ltd., 2008 EWCA Civ 184.
[19] [2011] 2 SLR 528

contributing to arbitration's quick rise in popularity. Nevertheless, a number of issues in this area continue to go unaddressed, creating a great deal of confusion and skepticism. Therefore, it is imperative that we connect our thoughts and take a cohesive strategy in order to imagine the seamless conduct of arbitration procedures across the sphere.

The general consensus is that transparency shouldn't be hampered by confidentiality. In order to put this idea into practice, state city legislation and arbitration institution regulations must include a common express language regarding to secrecy that acknowledges some significant exceptions to this rule, such as those already described. Holding a meeting on the topic with representatives from top arbitral institutions and specialists from around the globe in order to develop an unbreakable secrecy clause is the most practical way to establish this consistent regulation. This does not, however, mean that the autonomy of the disputing parties is compromised. By enabling the parties to deviate from the suggested procedure and set their own boundaries, the goal should actually be to achieve a balance among the standard secrecy rule and the peculiarities of autonomy for parties in arbitration.

It makes sense that placing an arbitral ruling in the public's domain is unfeasible because it directly endangers the parties' interests. On another hand, the arbitrators' accountability and fairness are crucial to the process & cannot be restricted under the pretense of anonymity. Therefore, it makes sense to transmit only the arbitrator's reasoning in the public's domain rather than the entire ruling in order to balance these competing interests. Without compromising the parties' legitimate interests, this will aid in setting a legal precedent for arbitrations in the future.

In India, even though the legislators attempt to keep pace with the international trends and practices, a simple reading of Section 42-A itself reveals some serious concerns with regard to its practical application. The parties' ability to maintain secrecy is further complicated by the discrepancy between statutory provisions and the regulations of arbitral organizations. The Act's non-obstante clause ignores both the well-established exceptions to secrecy and the concept of party autonomy itself, ignoring widespread worldwide trends. As a result, the parties are forced to abide by the essential requirement of confidentiality. As a result, it is now up to the courts to interpret this clause in a way that clears up any ambiguities and makes its application easier.