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Drawback of Section 42A: Analyzing the 'Confidentiality' in the Indian Arbitration Regime

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## **Drawback of Section 42A: Analyzing the ‘Confidentiality’ in the Indian Arbitration Regime<sup>6</sup>**

*“When will mankind be convinced and agree to settle their difficulties by arbitration?”*

-Benjamin Franklin

### **INTRODUCTION**

Arbitration as a form of conflict resolution is rising in India and worldwide. The cost-effectiveness, quickness with which conflicts can be resolved, and party autonomy that arbitration offers all contribute to its meteoric rise in popularity in recent years. The other features of arbitration contributing to its popularity are the ‘privacy and confidentiality’ of arbitration proceedings.

To avoid confusion, the terms “privacy” and “confidentiality” must be distinguished when discussing the arbitration procedure. When talking about arbitration, “privacy” refers to the prohibition of disclosure to a non-party of any or all documents, submissions, or the result of the arbitration proceedings; “confidentiality” refers to a broader spectrum, excluding not only attendance of the third party from the arbitration proceedings but also prohibiting disclosure to a non-party of any or all of these elements. As a result, “confidentiality of the arbitral proceedings serves to centralize the parties' dispute in a single forum and to facilitate an objective, efficient, and commercially-sensible resolution” while also preventing the press, public, competitors, and others from learning sensitive [information](#).

### **‘CONFIDENTIALITY’ IN THE INTERNATIONAL FRAMEWORK OF ARBITRATION**

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Due to a lack of international conventions, the current difficulty in ensuring uniformity in disclosing procedures in an arbitration process exists. “[United Nations Commission on International Trade Law \(UNCITRAL\) Model Law on International Commercial Arbitration, 1985](#) or the [European Convention on International Commercial Arbitration, 1961](#) or the [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958](#)” are all silent on the subject of confidentiality of arbitration proceedings. The basis for such absence is the acceptance of parties' procedural independence vis-à-vis the non-disclosure of the arbitration processes' information, a recognized tenet of practically all modern legal systems. The nature and scope of information disclosure concerning an arbitral process recognized and given effect by the national courts are governed by the parties' [agreement](#).

## CONFIDENTIALITY IN INDIAN ARBITRATION LAW

In Indian Law, the problem of confidentiality was addressed under the 1996 Arbitration and Conciliation Act through the [2019 Amendment Act](#). In 2019, the Act was amended by adding Section 42-A, which reads as follows:

Section 42-A: 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 implementation and enforcement of the award.

Indian arbitration organizations tried to include confidentiality in their rules. For example, the Mumbai Centre for International Arbitration (“[MCIA](#)”) Rules, 2016 [Rule 35] state that the parties and the tribunal must keep the arbitral proceedings and award confidential, except disclosures made to enforce a legal duty, to challenge or enforce an award, or by order of a court, etc. The [Delhi International Arbitration Centre](#) (Arbitration Proceedings) Rules, 2018 [Rule 36], followed MCIA's lead by including the same secrecy protection initially envisioned in MCIA Rules, 2016. In 2017, a High-Level Committee was created under the direction of Judge (retired) B.N. Srikrishna to examine the institutionalization of arbitration systems in India. The committee suggested adding a new provision to Part I of the Act that mandates the duty of confidentiality and protects the privacy of arbitral proceedings unless disclosure is required to comply with a

legal obligation, protect or enforce a legal right, or challenge or enforce an award in a court of law. [\[Pg. 6\]](#)

## ***FLAWS IN THE ‘CONFIDENTIALITY’ PROVISIONS IN INDIA***

### ***Failure to take into account Non- parties in Arbitral proceedings:***

Legislators have ignored the need for all participants in an arbitration process to maintain secrecy. Just the obligation of confidentiality on the part of the parties, institutions, and tribunal is considered in this Part. However, other people are involved in the procedures, like witnesses, experts, stenographers, etc. In addition, it does not give any consideration to parties with a legitimate stake in the proceedings and their outcome, like the parent company, insurance company, third-party funder, shareholders of a firm, or corporate auditors.

### ***Impact of Non-Obstante Clause on mandatory disclosure:***

Clause 42-A is a non-obstante clause that take away party autonomy from alternative dispute mechanisms. It ignores the idea that parties to a dispute may either expressly, by incorporating a confidentiality clause in the arbitration agreement, or impliedly, by agreeing to the arbitration institution's confidentiality rules, consent to disclose documents during the proceedings, which this provision has now barred. This non-obstante provision preempts all other laws, making information disclosure laws ineffective. Under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 [\[Rule 4\(a\)\(j\)\]](#) listed companies must "make certain disclosures about their financial situation, performance, ownership, governance, etc., by way of statements, periodic filings, reports and other documents" to allow investors to track their performance and assess the company's current status. This provision will cause a conflict of interest in the following situations. Hence, the requirement must be evaluated against other laws.

### ***Non-recognition of certain other exceptions:***

Section 42-A only allows disclosure necessary for award enforcement and implementation, ignoring worldwide trends, committee recommendations, and institutional regulations. It does

not recognize other exceptions to the subject matter, such as a legal requirement to reveal information, public interest disclosure, or party legal rights disclosure. Sharing information as part of one's legal duty is a well-known exception to confidentiality. Clause 42A's failure to recognize legal right as an exception to confidentiality may also harm parties if they are forced to disclose arbitral proceedings information to demonstrate their legal right in a different [conflict](#).

## CONCLUSION

There is widespread agreement that confidentiality should not come at the expense of openness. Even though Indian legislators attempt to stay up with global trends and practices, a casual perusal of Section 42A reveals several significant practical challenges. Inconsistencies between arbitral institution rules and statutory restrictions make it more difficult for the parties to retain confidentiality.