CONFIDENTIALITY UNDER THE INDIAN ARBITRATION REGIME

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ABSTRACT

This paper analyses confidentiality obligations via the insertion of Section 42A to the Arbitration and Conciliation Act, 1996. Section 42A imposes data confidentiality obligations upon the arbitrator and parties to an arbitration. However, the extent, scope and exceptions to confidentiality remain contentious and unresolved. The author draws references from cross-border jurisdictions to illustrate the efforts being made for regulating confidentiality concerns and combating practical problems of confidentiality obligations. The author concludes by suggesting a set of legislative and judicial opportunities for India to provide for a comprehensive confidentiality framework for arbitration in the country.

1. INTRODUCTION

The Indian arbitration regime stands at a crucial juncture to regulate and promote confidentiality for *ad-hoc* and institutional arbitrations. The introduction of Section 42A and Section 43K to the Arbitration and Conciliation Act, 1996 ("**ACA, 1996**") signifies India's intent to create a robust data protection framework for the current and prospective arbitral community.

Part I of the paper analyses the duty to maintain confidentiality in arbitration by highlighting cross-border differences between an implied duty of confidentiality and explicit statutory regulations that govern the same.

Part II proceeds to explain the legislative intent for confidentiality obligations within the Indian framework. In this regard, the author analyses the extent, scope and application of the duty of confidentiality

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under Section 42A of the ACA, 1996. Subsequently, the author highlights how Section 42A remains inadequate as it has limited the exceptions of confidentiality to the enforcement and challenge of an arbitral award. Moreover, the section remains ambiguous with respect to its applicability to Court proceedings that emanate at the pre-reference and interim stage of an arbitration proceeding.

In Part III, the author proceeds to review the common law jurisdictions of the United Kingdom and Hong Kong. It is argued that common law jurisdictions do not have a uniform approach in imposing confidentiality obligations. For instance, Hong Kong and Singapore provide for confidentiality in arbitration proceedings through statute and in arbitral institution rules. Pertinent reference is drawn to the Hong Kong Arbitration Ordinance (Cap. 609) ("**HKAO**") and 2018, Hong Kong Administered Arbitration Rules ("**HKIAC Rules**"). The rationale for the consideration of neighbouring common law jurisdictions is to assess how the Indian legislature has sought to adopt a make-shift approach in introducing confidentiality obligations through the recent notification of amendment to the ACA, 1996.

In Part IV, the author argues that in the Indian context, the legislature has failed to account for the principles and exceptions to confidentiality that have emerged in various jurisdictions. The exceptions are broadly categorized as "Balance of Interests", "Court Proceedings" and "Regulatory Obligations".

In Part V, it is argued that confidentiality obligations must be backed by appropriate data protection protocols. The 2015 data breach of the Permanent Court of Arbitration in The Hague is a prime example of an event that has ushered arbitral institutions such as the London Court of International Arbitration ("**LCIA**") to account for data protection protocols. To the contrary, in India, the insertion of Section 43K to establish the Arbitration Council of India ("**ACI**") as the depository of arbitral records signifies the Indian legislature's intent to promote a data protection framework for arbitration in India. It is suggested that the ACI regulations must account for provisions concerning obligations under the Personal Data Protection Bill ("**PDP**").[1]

The author concludes by reflecting upon the vagueness with which Section 42A has been drafted to impose a non-obstante obligation of confidentiality

1. Comments Invited on Draft Rules in Respect of Arbitration Council of India, Department of Legal Affairs, MoL&J, GoI https://legalaffairs.gov.in/actsrulespolicies/comments-invited-draft-rules-respect-arbitration-council-india accessed 21 Jan. 2021.

that is bound to face practical and procedural hurdles in the Indian courts which witness regular court intervention in arbitration proceedings. Lastly, the author argues that Indian courts will have to crystalize the exceptions to confidentiality under the Indian arbitration regime and consider principles that have emerged from neighbouring common law jurisdictions.

2. CONFIDENTIALITY IN ARBITRATION

Arbitration proceedings by their very nature are private proceedings unlike public trials. Therefore, it is natural to assume that parties have a legitimate expectation for proceedings to impose a duty of confidentiality upon all persons present therein.[2] The persons upon whom a duty of confidentiality is to be imposed include the contesting parties, the arbitrator, the arbitral institution and interested parties such as witnesses etc.[3] Needless to say, the parties may seek to impose varied degrees of confidentiality. For example, a party that has succeeded in an arbitration must be allowed to disclose details of the arbitration that are necessary to allow enforcementof the arbitral award.

Since arbitration proceedings are based on the principle of "Party Autonomy" there is always room for parties to include confidentiality clauses within their arbitration agreements. However, in situations, where there is no explicit confidentiality obligation inter-se the parties, it is imperative for any jurisdiction to ascertain an "implied duty of confidentiality". In this process, the policy intent must necessarily at the threshold consider the terms of the arbitration agreement, the interests of parties and the nature of dispute at stake. To ascertain the characteristics of an implied duty, it is necessary to review how arbitration hubs across the world have developed and codified legislations to this effect.

Jurisdictions around the world have codified legislations pertaining to confidentiality in arbitration proceedings. For instance, in Hong Kong, Section 2D[4] of the HKAO provides a statutory right for a litigant to request a court to hear arbitration related proceedings in a confidential manner. Additionally, Section 2E[5] of HKAO allows for a party to restrict the reporting of court decisions concerning arbitral proceedings. Similarly,

2. Weixia Gu, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?* (2005) 15 Am Rev Int'l Arb 607, 1, 2.
3. Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth* (2006) 54 U Kan L Rev 1255, 1260.
4. Hong Kong Arbitration Ordinance (ch. 341), s. 2-D.
5. Hong Kong Arbitration Ordinance (ch. 341), s. 2-E.

Section 22[6] and Section 23[7] of the Singapore International Arbitration Act (IAA) are in essence identical to Section 2D and Section 2E of HKAO.

In the United Kingdom, the legislative policy had a different approach to codification of confidentiality obligations in arbitration proceedings. The debate for regulating confidentiality in arbitration proceedings was discussed in the 1996 report on the Arbitration Bill wherein it was found that codification of qualifications of confidentiality would be "controversial and difficult" in the light of "myriad of exceptions" and "the qualifications that had to follow."[8] It was heavily emphasized by the drafters of the legislation that there has been no statutory guidance regarding confidentiality in the UNCITRAL Model Law. It was also recognized that including a definition would add to the English litigation on the issue since the UK had witnessed excessive court litigation after the mid 1990s.

It was therefore suggested that any statutory statement of general principles in this area would impede the "commercial good-sense of current practices in English arbitration" and that the evolution of such principles was better left to the common law. Hence, the same was left to the discretion of courts to address in an *ad hoc* and *in concreto* basis.[9] Unlike India, the English Arbitration Act, 1996 is silent on the duty of confidentiality. Instead, under English law, parties have an implied duty to keep matters related to arbitration confidential. Despite the acceptance of confidentiality as a characteristic of arbitration, this widely held notion does not actually have statutory support.[10]

Therefore, what emerges is that the legislators face a primary policy hurdle to outline the duty of confidentiality. For example, it is absurd for legislators to impose an absolute duty of confidentiality upon parties to arbitration. If it were to do so, the first obstacle faced is to resolve a party's right to enforce its arbitral award in execution proceedings before a court

6. Singapore International Arbitration Act, s. 22.
7. Singapore International Arbitration Act, s. 23.
8. Departmental Advisory Committee on Arbitration Law 1966 Report on the Arbitration Bill (February 1996) paras 14-15.
9. "To give an accurate exposition of confidentiality at large would require a much more wide-ranging survey of the law and practice than has been necessary for a decision on the narrow issue raised by the appeal, and cannot in my opinion safely be attempted in the abstract." D. (Adoption Reports: Confidentiality), In re, 1996 AC 593 : (1995) 3 WLR 483, 496 (HL).
10. Stephensen Harwood, The Confidentiality of Commercial Arbitration: A Key Exception, Conventus Law (Conventuslaw.com, 2020) https://www.conventuslaw.com/report/the-confidentiality-of-commercial-arbitration-a/ accessed 17 Sept. 2020.

of competent jurisdiction. If one were to juxtapose this situation in the Indian context, it is likely that most arbitral awards are challenged before a court of competent jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996. Once a challenge is made to an arbitral award, it is a matter of practice that the entire arbitral record is mandatorily required to be filed before the competent court of jurisdiction.[11] Therefore, in the interest of justice, the duty of confidentiality cannot be absolute and must be defined in a manner so as to preserve the interests of parties.

3. THE INDIAN FRAMEWORK

In July 2017, a High Level Committee ("**HLC**") chaired by Justice B.N. Krishna, Retired Judge of the Supreme Court of India provided pertinent recommendations for the Indian legislature to codify confidentiality obligations in arbitration proceedings. It was found that the ACA, 1996 did not have any provisions for confidentiality for arbitration proceedings. The recommendation highlighted how common law jurisdictions like Hong Kong provide for confidentiality protection through explicit statutory reference whereas the United Kingdom provides for an implied duty of confidentiality that is read into case laws. On the basis of this observation, the HLC recommended the insertion of a model clause which would provide for confidentiality of arbitration proceedings. Further, the HLC proposed that the exceptions to disclosing confidential information must be required by a legal duty, to protect or enforce legal rights or to enforce or challenge an award before a competent court. In effect, the HLC's model recommendation sought to create an express duty of confidentiality in arbitration proceedings.[12]

Section 42A of the ACA, 1996 contains a non-obstante clause which confines confidentiality obligations to the arbitrator, arbitral institution and parties to the arbitration whilst excluding all interested third parties to arbitration. However, Section 42A also carves out an exception to the obligation of confidentiality in a situation where disclosure is necessary for an arbitral awards challenge and enforcement. Additionally, Section 43K has been introduced to impose obligations upon the ACI to maintain an electronic depository of arbitral awards along with any other records the

11. Practice Direction No. 26 (delhihighcourt.nic.in, 2010) http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_yz3qlkyf.pdf accessed 20 Jan. 2021.
12. Justice B.N. Krishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (30 July 2017) 1,71.

regulations may specify. However, ACI rules have not been notified as yet and, therefore, an opportunity lurks for Indian policy makers to provide a robust statutory scheme under the ACI rules.

Section 42A does not account for the myriad of ways in which parties seek court interference in arbitrations. For example, court intervention relating to arbitration may be initiated by the parties to the arbitration for injunctive relief and interim relief under Section 9 of the ACA, 1996. Moreover, Section 14 of the ACA, 1996 may be invoked for seeking termination of the mandate of an arbitrator. In each of these situations, there is a strong likelihood of parties relying upon confidential data of the arbitration proceedings in the court room.[13] Consequently, parties are at liberty to file and rely upon pleadings of arbitral proceedings before court. In other words, disclosure of information material to the arbitration is not qualified with any exceptions under the ACA, 1996.

It may be argued that parties are at liberty to inter-se agree on terms of confidentiality under the terms of reference of an arbitration. However, the language of Section 42A as a non-obstante provision cuts at the heart of principles of party autonomy and merits judicial clarity. The only exception under which parties to arbitration and the arbitrator are exempt from the duty of confidentiality is for the enforcement and execution of an arbitral award. However, this limited exception, fails to account for multiple situations in which disclosure of material before a court may be necessary - such as seeking directions for interim measures during the pendency of an arbitration under Section 9 of the ACA, 1996 and preferring an appeal against an interim order passed by an Arbitral Tribunal under Section 17 of the ACA, 1996.[14]

4. IMPLIED V. EXPRESS CONFIDENTIALITY

Broadly, the duties of confidentiality may be divided into two types: implied obligations or specific/express obligations of confidentiality. It would be amiss to point out that countries have distinguished their methods of

13. Jaideep Khanna and Abhishek Nevatia, *Data Confidentiality under the Indian Arbitration Regime: Challenges and Opportunities* – IndiaCorplaw (IndiaCorpLaw, 2020) https://indiacorplaw.in/2020/07/data-confidentiality-under-the-indian-arbitration-regime-challenges-and-opportunities.html accessed 2 Oct. 2020.
14. Tejas Karia and others, *NPAC'S Arbitration Review: New Confidentiality Provision in the Indian Arbitration Act* (Bar and Bench – Indian Legal News, 2020) https://www.barandbench.com/columns/npac-arbitration-review-confidentiality-provision-indian-arbitration-act accessed 6 Oct. 2020.

evolving principles of confidentiality. For example, the English Arbitration Act, 1996 is silent on confidentiality; however, courts in England have devised detailed exceptions to confidentiality.[15] On the other hand, South East-Asian countries such as Singapore and Hong Kong explicitly provide for confidentiality of arbitration proceedings in their respective national laws and institutional rules. Therefore, even though there is a lack of uniformity with respect to implementing confidentiality obligations across jurisdictions, the common principles of confidentiality that emanate from arbitration remain absent from Indian jurisprudence.

The English Court of Appeal in Emmott v. Michael Wilson & Partners[16] *("**Emmot**")* articulated an implied obligation as one where no document relied upon in an arbitration proceeding can be disclosed without the consent of the parties or pursuant to an order or leave of the court.[17] On the other hand, a specific duty of confidentiality is one wherein applicable national laws or institutional rules govern the confidentiality of documents in question. Consequently, the English Court of Appeal in *Emmot* settled the juridical basis for the duty of confidentiality and held that the obligation of confidentiality in arbitration is implied by law and arises out of the nature of arbitration.[18] Additionally, the Court in *Emmot* laid down principles that would guide disclosure of confidential material including consent between parties and an order of leave by the Court. Further, *Emmot* placed importance on two exceptions to the implied duty of confidentiality:

(i) It is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and

(ii) the public interest or the interests of justice requires disclosure.[19]

Therefore, even though the English Arbitration Act, 1996 is silent on confidentiality obligations, the principles of confidentiality have been culled out by English Courts. Consequently, English Law recognizes an implied duty for parties to maintain confidentiality of proceedings.[20]

15. Ali Khaled Qtaishat, *Legal Protection of Arbitration Confidentiality: Mapping the Approaches of Prominent Jurisdiction* (2017) 147 EJSR 358,361.
16. John Forster Emmott v. Michael Wilson & PartnersLtd., 2008 EWCA Civ 184.
17. *Ibid.*
18. Michael Hwang S.C. and Katie Chung, *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration* (2009) 26 J Int Arb 5 609, 611.
19. John Forster Emmott (n 16).
20. Chantal Toit, *Reform of the English Arbitration Act 1996: A Nudge Towards Reversing the Presumption of Confidentiality* (Arbitration Blog, 2020) http://arbitrationblog.practicallaw.com/reform-of-the-english-arbitration-act-1996-a-nudge-towards-

However, as alluded to in *Emmot*, English courts have qualified information to determine protection under confidentiality.

On the contrary, Hong Kong is one of the few jurisdictions that explicitly provides for statutory protection over confidentiality in arbitration.[21] The Hong Kong Arbitration Ordinance (Cap. 609) [HKAO] addresses confidentiality concerns and extends its scope of protection to court proceedings that may emanate from arbitration proceedings. Pertinent reference is drawn to Section 18(1) of HKAO which states that unless agreed, parties to the arbitral proceedings cannot publish, disclose or communicate any information relating to the same in their consequent award.[22] Section 18(2)[23] of HKAO provides for the exceptions to the duty of confidentiality and these exceptions become critical for our understanding of defining the scope of confidentiality. Section 18(2) provides that such publication, disclosure or communication of confidential information to an arbitration proceeding can be made for:

(i) "Protection and pursuance of a legal right or interest of a party.

(ii) Enforce or challenge an arbitral award.

(iii) Publication, disclosure or communication to a government body, regulatory body, court or tribunal and if the party is obligated by law to make the said publication, disclosure or communication

(iv) If the publication, disclosure or communication is made to a professional or any other adviser of any of the parties."

Additionally, the HKIAC Rules of 2018 have further strengthened confidentiality for arbitrations subjected to the Hong Kong International Arbitration Centre. In effect, Article 45 of the HKIAC Rules, 2018 imposes

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reversing-the-presumption-of-confidentiality/#:~:text=Under%20English%20law%2C%20parties%20to,ultimately%20rendered%20by%20the%20tribunal accessed 6 Oct. 2020.

21. Joanna Du and others, *Hong Kong: A Listed Company's Duty of Confidentiality in Arbitration and its Duty of Disclosure to the Public* – Kluwer Arbitration Blog (Kluwer Arbitration Blog, 2020) http://arbitrationblog.kluwerarbitration.com/2019/01/12/hong-kong-a-listed-companys-duty-of-confidentiality-in-arbitration-and-its-duty-of-disclosure-to-the-public/#:~:text=Hong%20Kong%20is%20one%20of,the%20arbitral%20proceedings%20and%20awards accessed 6 Oct. 2020.
22. Hong Kong Arbitration Ordinance (ch. 609), s. 18(1).
23. Hong Kong Arbitration Ordinance (ch. 609), s. 18(2).

confidentiality obligations for institutional arbitrations and is largely harmonious with Section 18 of the HKAO.

In effect, the scheme of regulating confidentiality under the Hong Kong model is common to the principles established by English Courts vis-à-vis allowing disclosure of confidential information wherein it is necessary to protect the legitimate interest of a party and which is in public interest.

5. THE EXCEPTIONS TO CONFIDENTIALITY

A. Balance of Interests

The balancing interests are divided into two parts namely "public interest" and "private interests". Disclosure by way of public interest may be mandated by law or in the interest of the public. On the other hand, private interest may justify disclosure to protect a legitimate interest of the parties.

The need to introduce a public-interest exception was succinctly authored by the Supreme Court of Victoria in Esso Australia Resources Ltd. v. Plowman[24] wherein it was held that there may be instances where the public might have a legitimate interest in knowing what has transpired in an arbitration, and in such a case, there exists a "public interest" exception to the duty of confidentiality.[25] The "public interest" in the case of *Esso* involved an arbitration proceeding between a state-owned utility and purveyors of gas.[26] As a result, it was found that the outcome of the dispute was one which would impact the public at large.

In the Indian, context, we have witnessed a rampant growth of construction arbitration cases that involve multiple parties, high stakes for quantum of damages and often projects that are undertaken for public interest.[27] In this context, publication of arbitral awards in such disputes highlights the actions of public utilities and a curb on publication may invite challenge.

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24. Esso Australia Resources Ltd. v. Plowman, (1995) 183 CLR 10.
25. Weixia Gu, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?* (2005) 15 Am Rev Int'l Arb 607, 1,15.
26. Hans Smit, *Case-note onEsso/BHPv.Plowman(Supreme Court of Victoria)*(1995) 11(3) *Arbitration International*, 299–302.
27. Achintya Rawal, *India: The Changing Landscape of Construction Arbitration* – Litigation, Mediation & Arbitration – India (Mondaq.com, 2020) https://www.mondaq.com/india/arbitration-dispute-resolution/860526/the-changing-landscape-of-construction-arbitration accessed 6 Oct. 2020.

It is surprising that Section 42A of the Act qualifies the duty of confidentiality as not applicable when the arbitral award is to be disclosed for the purpose of its implementation and enforcement. In effect, this balancing test of legitimate interest, or public interest, forms the foundation of the exception within the section, and is a testament to the intention of protecting the legitimate interest of a decree/award holder.[28] Indian courts must also consider observations laid down by common law jurisdictions in Ali Shipping Corpn. v. Shipyard Trogir[29] wherein the court stated that one of the exceptions to the implied duty of confidentiality is the protection of "the legitimate interests of an arbitrating party."[30]

The English Commercial Court in Chartered Institute of Arbitrators v. B[31] had to consider an application to produce confidential material for the purpose of conducting disciplinary proceedings against a resigned arbitrator. The application was made in court under Section 24 of the Arbitration Act, 1996 which provides a court with the power to remove an arbitrator. The equivalent provision in the Indian context is Section 14 of the ACA, 1996. In such a situation, the English Commercial Court was able to clarify the balance of a public and private interest to hold that that there was a genuine public interest in maintaining the quality and standards of arbitrators. This public interest would be beyond the private interests of parties and enable the court to issue appropriate directions. Therefore, it is anticipated that Indian courts shall soon have to ensure that Section 42A of the ACA,1996 is read harmoniously with other provisions of the Act that allow for parties to reveal information that may be confidential and travel to the courtroom.

B. Court Proceedings

Section 42A of the Act only accounts for court intervention in the case of an enforcement and implementation of an arbitral award. However, the provision has failed to consider situations wherein parties may approach a court in relation to an arbitration proceeding. In a situation where there

28. Jaideep Khanna and Abhishek Nevatia, *Data Confidentiality under the Indian Arbitration Regime: Challenges and Opportunities* – IndiaCorplaw (IndiaCorpLaw, 2020) https://indiacorplaw.in/2020/07/data-confidentiality-under-the-indian-arbitration-regime-challenges-and-opportunities.html accessed 2 Oct. 2020.
29. Ali Shipping Corpn. v. Shipyard Trogir, (1999) 1 WLR 314 : (1998) 2 All ER 136, 146.
30. Avinash Poorooye and Ron´an Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance* (2017) 22 Harv Negot L Rev 275, 318.
31. Chartered Institute of Arbitrators v. B, 2019 EWHC 460 (Comm).

are multiple arbitrations between the same or similar parties arising from a related dispute, it is plausible for there to be disputes concerning consolidation of arbitration proceedings.

For example, courts in India are often burdened with such litigation, thereby, leading to a situation wherein the Supreme Court in *MTNL* v. *Canara Bank*[32] invoked the 'Group of Companies' doctrine which allows for non-signatories to an arbitration agreement to be bound to an arbitration agreement subject to their role and performance to the original contract under which arbitration proceedings have been initiated.[33] Therefore, in such cases, it is common for parties to rely upon information that is subject to arbitration proceedings in a court room for establishing a case of consolidation.

Indian courts may also have to consider the possibility of having closed court proceedings which rely on information that is confidential in an arbitration proceeding. Pertinent reference may be drawn to the decision of the Singapore High Court in AAT v. AZV,[34] where the court had to weigh the need for open justice against the need to preserve confidentiality of the arbitration proceeding. The court relied upon the test of legitimate public interest to hold that the disputes inter-se the parties were purely commercial and there is no public interest justification for divulging the proceedings to the public.

C. Regulatory Obligations

Section 42A of the ACA, 1996 does not account for impositions of regulatory obligations that may require disclosure of information. For example, publicly listed companies make express disclosures in their annual reports concerning current litigation, including, where relevant, a fairly detailed description of its pending disputes.[35] In the Indian context, this is regulated by Securities and Exchange Board of India listing Obligations and Disclosure Requirements, 2015.[36] Since Section 42A contains

32. MTNL v. Canara Bank, 2019 SCC OnLine SC 995.
33. Gary B. Born, *International Commercial Arbitration* (2009) I,1170-1171.
34. AAT v. AZV, 2012 SGHC 116.
35. Valery Denoix de Saint Marc, *Confidentiality of Arbitration and the Obligations to Disclose Information on Listed Companies or During Due Diligence Investigations* (2003)20(2) J INT'L ARB 214.
36. Rohan Gopal, *Confidentiality: A New Pandora's Box under the Indian Arbitration Regime – Part II* (GNLU Student Research Development Council, 2020) https://

a non-obstante clause, it is likely to conflict with most regulations, proceedings and obligations which require divulgence of confidential information.

6. DATA PROTECTION

Data protection under arbitration is a crucial facet for protecting confidential information that has been deposited to a competent regulator. The regulator may be an arbitral institution in the case of an institutional arbitration or an ad-hoc tribunal. The need for regulating data protection under arbitration was brought to light in 2015, when the website of the Permanent Court of Arbitration in The Hague was hacked. The data breach occurred during a sensitive maritime border dispute between China and the Philippines. At the time, arbitral institutional rules were silent on data protection rules.[37]

The Indian arbitration regime via the 2019 amendment to the ACA, 1996 constituted the ACI as an independent governing body for regulating institutional arbitration in India. Furthermore, Section 43K requires the ACI to maintain an electronic depository of arbitral awards and other records as may be specified by regulations for the ACI which are yet to be framed.

The LCIA has formally adopted its arbitration rules on 11th August 2020 and has stated that they shall come into effect on 1st October 2020. Under the revised 2020 LCIA rules, Article 30A has been inserted to provide the arbitral tribunal with the power to issue directions for regulating information security and data protection which shall be binding upon parties to the arbitration.[38] Additionally, Article 30A states that any personal data processed by the LCIA shall be subject to the applicable data protection legislation.

In comparison, data protection in India is currently taking shape by way of the introduction of the PDP Bill. Since the ACI rules are yet to be

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gnlusrdc.wordpress.com/2020/07/22/confidentiality-a-new-pandoras-box-under-the-indian-arbitration-regime-part-ii/ accessed 6 Oct. 2020.

37. *Cybersecurity in International Arbitration – A Necessity and an Opportunity for Arbitral Institutions* (Arbitrationblog.kluwerarbitration.com, 2017) http://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security/?print=pdf#:~:text=In%20July%202015%2C%20the%20website,page%20devoted%20to%20the%20dispute accessed 21 Jan. 2021.
38. *Keeping Up with the Times: 2020 Update to the LCIA Arbitration Rules* Lexology (Lexology.com, 2020) https://www.lexology.com/library/detail.aspx?g=c2bc8447-e1dd-4b1c-879c-72ab275a86b0 accessed 21 Jan. 2021.

notified, it is important to consider if the provisions of the PDP Bill shall apply to arbitration proceedings. Pertinent reference may be drawn to the applicability of the bill. Section 3(14) of the bill defines a "data principal" as a natural person to whom the personal data relates whereas Section 3(13) defines a "data fiduciary" as a person who determines the purpose and means of processing the personal data. Therefore, since Section 43K of the ACA, 1996 has made the ACI the depository of electronic records, it may be argued that the arbitral institution is a data fiduciary under the PDP Bill. However, as per Section 36(b) of the PDP Bill the disclosure of personal data for enforcement of a legal right shall be exempted. Further Section 36(c) excludes the applicability of the bill to processing of personal data by any court or tribunal in India.

Therefore, if India is to move towards an arbitration friendly regime, it is incumbent upon the legislature to ensure that the PDP Bill is read harmoniously with the ACA, 1996. The LCIA rules provide for a model to allow for the arbitral institution to bind parties to data security norms under appropriate legislation. However, at the moment, the potential applicability of the PDP Bill to arbitration proceedings remains unclear.

7. CONCLUSION

The insertion of Section 42A to the ACA, 1996 reveals legislative intent to codify confidentiality obligations in arbitration proceedings. However, Section 42A has cast a blanket duty of confidentiality without qualifying its exceptions and applicability. In this respect, the author has drawn references to specific legislation in Hong Kong and Singapore to highlight how the legislature may seek to qualify confidentiality obligations in situations where arbitral proceedings are brought under challenge in court.

On the other hand, as an alternative, if the legislature fails to account for such relevant amendments, it is expected that Indian courts shall have to cull out exceptions to confidentiality under the ACA, 1996. The author believes that the exceptions must necessarily encompass the facets of ensuring a balance of private and public interest, the scope of court proceedings under the ACA, 1996 and regulatory obligations that may converge and dispute the blanket obligation of confidentiality.

It can be seen that the Indian arbitration regime has made a step in the right direction by way of introducing a statutory obligation of confidentiality in Arbitration proceedings. However, the language of Section 42A as a non-obstante provision is bound to invite judicial challenge and consequent

interpretation so as to account for multiple situations where disclosure of confidential information is appropriate. As argued, it is anticipated that Indian courts would have to develop exceptions to confidentiality obligations under Section 42A under the broad umbrella of "Balance of Interests", "Court Proceedings" and "Regulatory Obligations".