

PUBLICATION OF ARBITRAL AWARDS: BALANCING CONFIDENTIALITY AND TRANSPARENCY IN ARBITRATION

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ABSTRACT

With the passing of the recent amendments to the Arbitration and Conciliation Act, 1996, the Indian legislature has turned its focus to strengthening institutional arbitrations and bringing India at par with other established arbitration friendly jurisdictions. The Arbitration and Conciliation (Amendment) Act, 2019 also incorporated a widely worded confidentiality provision under Section 42A, which only encompasses limited exceptions. Evidently, with arbitration becoming a popular mode of dispute resolution in the commercial world, there are compelling reasons to statutorily recognize and adopt the practice of publication of arbitral awards, while balancing the needs of confidentiality and improving predictability and transparency in arbitration procedures.

Though some arbitration institutions in India do prescribe rules for publication of awards, there is no uniformity and consistency in the manner in which awards are published. Furthermore, in the absence of any formal framework of arbitral rules, ad hoc arbitration, which is the preferred mode of arbitration in India, also lacks any mechanism that would allow for publication of awards. The article proposes that India should consider giving statutory recognition to publication of arbitral awards and formulate a robust mechanism for its implementation, without compromising the interests of the parties to maintain confidentiality. In doing so, this article analyses the rules of leading national and international arbitration institutions regarding publication of awards. The article proposes certain legislative amendments and solutions to adopt and statutorily recognize the practice of publication of arbitral awards. The

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aim of the article is to reconcile confidentiality obligations and the need for transparency in arbitral jurisprudence by publication of redacted awards.

1. INTRODUCTION

In 2017, the Department of Legal Affairs, Ministry of Law and Justice set up a high-level committee under the Chairmanship of Justice B.N. Srikrishna (“**Srikrishna Report**”) to review the institutionalization of arbitration mechanism in India.¹ The Srikrishna Report noted that one of the advantages of institutional arbitration is its potential for the development of arbitral jurisprudence by publication of redacted awards.² However, despite these observations, no amendments were recommended to the Arbitration & Conciliation Act, 1996 (“**Arbitration Act**”) regarding publication of arbitral awards. The Committee’s report became the foundational basis of the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Amendment**”).³

Therefore, there is neither any formal recognition of the concept of publication of awards in the Arbitration Act, nor prescription of any mechanism for publication of redacted arbitral awards. There are only certain arbitral institutions that prescribe rules for publication of redacted arbitral awards. However, these rules differ and are not consistent. For instance, while some arbitral institutions like International Chambers of Commerce (ICC)⁴, London Court of International Arbitration (LCIA)⁵, Indian Institute of Arbitration and Mediation⁶ require the consent of parties before publication of redacted awards, other arbitral institutions like Mumbai Centre for International Arbitration and Indian Council of Arbitration are silent on the issue of express consent by the parties. Further, arbitral institutions, which provide rules for the publication of redacted awards, do not publish them in practice as there is no prescribed mechanism or statutory law recognizing the publication of redacted awards. Furthermore, there is a complete absence of a database where these redacted awards may be published. In the absence of any uniformity in the rules of institutions, it

1. Committee Report, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (20 July 2017) <https://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 3 October 2021.

2. *Id.*, 27.

3. The Arbitration and Conciliation (Amendment) Act 2019.

4. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2021) part IV(c), r. 59.

5. LCIA India Arbitration Rules 2016, r. 30.3.

6. Indian Institute of Arbitration & Mediation Rules 2021, r. 34(5).

is entirely up to the parties to submit their dispute to an institution, which may or may not allow for the publication of redacted awards.

While arbitral institutions provide for a well-defined set of rules to administer proceedings, *ad-hoc* arbitrations have to resort to the Arbitration Act for all procedural aspects. Where procedures are not specifically provided for in the Arbitration Act, it is for the parties⁷ and the arbitral tribunal⁸ to agree and formulate the procedure to be followed in the conduct of arbitration proceedings. In the absence of any express provision under the Arbitration Act, even if parties were to agree to the publication of redacted arbitral awards, *ad-hoc* arbitral tribunals are inherently incapable of publishing such redacted awards. This is because there are no corresponding statutory provisions, rules for redaction, mechanism, or a recognized depository to store and publish redacted awards issued by *ad hoc* arbitral tribunals, under the Arbitration Act.

There is no consensus even amongst the members of the arbitral community in relation to the practice and mechanism of publication of arbitral awards. While some give more weightage to maintaining confidentiality in arbitration,⁹ others recognize the benefits of striking a balance between confidentiality and promotion of arbitral jurisprudence through publication of redacted awards.¹⁰ Even at a global level, the issue of publication of arbitral awards is far from settled.

This article argues in favour of giving statutory recognition to the publication of redacted arbitral awards and laying down uniform and consistent rules for its implementation. In doing so, the article analyses the rules and mechanism of leading national and international arbitration institutions containing confidentiality provisions (**Section 2**), with particular focus on Section 42A of the Arbitration Act, which deals with similar confidentiality obligations (**Section 3**). The article next discusses the advantages and benefits of publication of redacted arbitral awards,

7. Arbitration Act 1996, s. 19(2).

8. Arbitration Act 1996, s. 19(3).

9. Jane Parsons, 'Publish and be Damned: Should we Embrace the Systematic Publication of Arbitral Awards?' (Thomson Reuters, Practical Law Arbitration Blog) <http://arbitrationblog.practicallaw.com/publish-and-be-damned-should-we-embrace-the-systematic-publication-of-arbitral-awards/> accessed 3 October 2021.

10. M Florencia Villaggi, *International Commercial Arbitral Awards: Moving from Secrecy towards Transparency?* (Young ICCA Blog) http://www.youngicca-blog.com/wp-content/uploads/2013/01/Villaggi-confidentiality-vs-publication-of-awards-edited05_01_13.pdf accessed 27 October 2021.

and how it will contribute to the overall development of arbitration jurisprudence in India (**Section 4**). Lastly, the article proposes appropriate statutory amendments and solutions to adopt, recognize, and formulate uniform rules for publication of redacted arbitral awards in India (**Section 5**) before the concluding remarks (**Section 6**).

2. LAW WITH RESPECT TO PUBLICATION OF AWARDS

A. Under the Arbitration Act

The insertion of Section 43K¹¹ pursuant to the 2019 Amendment¹² requires the Arbitration Council of India to maintain an electronic depository of arbitral awards made in India. This need not be confused with the idea of having a centralized depository for the purpose of publication of arbitral awards. This new provision was inserted in light of the difficulty faced by courts in accessing authentic copies of arbitral awards in challenge proceedings.¹³ The proposed centralized depository is where all arbitral institutions as well as *ad hoc* arbitral tribunals would be required to submit a copy of their respective arbitral awards. The courts would have limited access to the centralized depository only in cases of challenge proceedings. Furthermore, there is no provision for practitioners to access these awards.

The insertion of Section 42A to the Arbitration Act casts strict confidentiality obligations on the arbitrator, arbitral institutions, and the parties to the arbitration agreement. It mandates that all stakeholders shall maintain confidentiality of arbitral proceedings and the arbitral award may only be disclosed for the purpose of its implementation and enforcement. The provision is overarching and does not envisage any exception. Ironically, it does not contain any corresponding provision setting out the consequences of failure to abide by the confidentiality obligation. The newly introduced and widely worded Section 42A provides no leeway for the publication of redacted arbitral awards, and acts as an impediment to the publication of awards.

11. Part IA of the Arbitration Act which relates to the establishment of the Arbitration Council of India has not been notified and therefore, not in force yet.

12. Please note that Chapter IA (Arbitration Council of India) of the Arbitration and Conciliation Act, 1996 is not in force yet as these amendments have not been notified.

13. Committee Report, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (20 July 2017) <https://legalliaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 3 October 2021, 77, para 18.

B. Rules of Arbitration Institutions

Some arbitral institutions permit the publication of redacted awards. The rules of these domestic arbitral institutions, which allow for the publication of redacted awards, have not been subsequently amended in light of Section 42A of the Arbitration Act.

Rules of these arbitral institutions regarding the publication of redacted awards are not consistent and set out divergent mechanisms. These arbitral institutions may be classified into three categories:

1. *Arbitral institutions which do not require any express consent of parties*

The Mumbai Centre for International Arbitration (MCIA),¹⁴ Indian Council of Arbitration (ICA),¹⁵ Construction Industry Arbitration Council (CIAC),¹⁶ Delhi International Arbitration Centre (DIAC),¹⁷ and Nani Palkhivala Arbitration Centre (NPAC)¹⁸ are some of the arbitral institutions that do not require or prescribe any express consent of the parties before publication of redacted awards. These institutions presume parties' consent to publish redacted awards, once parties agree to submit the disputes for resolution under their arbitration rules.

2. *Arbitral institutions which require express consent of parties*

The London Court of International Arbitration, India (LCIA India),¹⁹ Indian Institute of Arbitration & Mediation, Delhi (IIAM),²⁰ PHD Chamber of Commerce and Industry (PCIAC),²¹ and International

14. Arbitration Rules of the Mumbai Centre for International Arbitration ('MCIA Rules') (2nd edition, 15 January 2017) r. 30.13.

15. Rules of Domestic Commercial Arbitration and Conciliation ('ICA Rules') (as amended on and with effect from 1st January 2021) r. 68(d).

16. Construction Industry Arbitration Council Arbitration Rules ('CIAC Rules') (2nd revised edition, 2013) rule 44.11(d).

17. Delhi International Arbitration Centre Arbitration Proceedings Rules ('DIAC Rules') (2018) r. 32.4.

18. Rules of Arbitration for Nani Palkhivala Arbitration Centre ('NPAC Rules'), r. 40(b).

19. LCIA India Arbitration Rules (1 June 2016) r. 30.3.

20. Indian Institute of Arbitration & Mediation Rules. 15 May 2021) r. 34(5).

21. Rules of Arbitration and Conciliation of PHDCCI Centre for International Arbitration & Conciliation ('PHDCCI Rules'), r. 30.1.

Chamber of Commerce (ICC)²² are some of the arbitral institutions that require express consent of parties to publish redacted awards. For instance, the LCIA India generally prescribes that all awards in the arbitration proceedings are to be kept confidential.²³ Under the Rules of Arbitration of the LCIA India, the publication of award or any part thereof is therefore, an exception to the confidentiality provision, which can only be carried out with the written consent of all parties.²⁴

The Singapore International Arbitration Centre (SIAC) Rules²⁵ were amended in 2016, and require express consent of parties and the arbitral tribunal before publishing of redacted awards. Prior to 2016, the 2013 SIAC Rules²⁶ allowed the SIAC Secretariat to publish redacted awards without the consent of parties or the arbitral tribunal.²⁷ The Rules of the Arbitration Institute of the Stockholm Chambers of Commerce (SCC)²⁸ provide an exception in their confidentiality provision,²⁹ whereby parties can agree on the publication of redacted awards. Furthermore, SCC has recently published 12 anonymized and redacted awards rendered under its Rules between May 2016 and November 2019 in the ICCA Yearbook³⁰ and Kluwer Arbitration database.³¹ The Arbitration Rules of Hong Kong International Arbitration Centre (HKIAC),³² Swiss Chambers,³³ and Asian International Arbitration Centre

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22. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2021) part IV(c), r. 59.
 23. LCIA India Arbitration Rules 2016, rr. 30.1 & 30.2.
 24. LCIA India Arbitration Rules 2016, rule 30.3.
 25. Benson Lim and Kent Phillips, *SIAC's Retreat from Publication of Awards without Consent Strikes the Right Balance* (Kluwer Arbitration Blog) <http://arbitrationblog.kluwerarbitration.com/2016/10/05/siacs-retreat-from-publication-of-awards-without-consent-strikes-the-right-balance/?print=print> accessed on 3 October 2021.
 26. SIAC Rules (5th edition, 1 April 2013).
 27. *Id.*, r. 28.10.
 28. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2017.
 29. *Id.*, art. 3.
 30. *ICCA Yearbook, Commercial Arbitration* (2020) vol. XLV.
 31. *SCC Awards Now Released Online* (Arbitration Institute, Stockholm Chamber of Commerce, October) <https://sccinstitute.com/about-the-scc/news/2020/scc-awards-now-released-online/> accessed on 3 October 2021.
 32. Hong Kong International Arbitration Centre Administered Arbitration Rules 2018, r. 45.5.
 33. Swiss Rules of International Arbitration 2021, art. 44(3).

(AIAC)³⁴ are some of the other arbitral institutions, which require express consent of parties before redacted awards can be published.

On the other hand, while the Rules of Arbitration of ICC (“**ICC Rules**”) do not expressly stipulate a provision regarding publication of arbitral awards, the note to parties and arbitral tribunal published by the ICC³⁵ lays down an extensive procedure for the publication of redacted awards. The ICC goes a step ahead in terms of the requirement of consent of parties to publish redacted awards. It mandates that before the publication of redacted awards, the ICC Secretariat will send all the documents to the parties and the parties will have the opportunity to object to the publication of any part of the award, or any related document.³⁶ It also gives the parties the flexibility to either mutually formulate and agree on the redaction or accept the proposed redaction of the ICC Secretariat. In addition, the parties can at any time, convey to the ICC Secretariat, that they do not wish to publish the redacted award or any part thereof.³⁷ The ICC, therefore, gives complete autonomy and control to the parties, and they can raise their objections, request for appropriate redaction, pseudonymisation and anonymization, and can even withdraw their consent at any point of time before the publication of the redacted award. The ICC also recently announced its collaboration with *Jus Mundi* to publish ICC arbitral awards, which would now be freely available.³⁸ In a sense, the mechanism of publication of redacted ICC awards is now well balanced and gives complete autonomy to the parties.

3. *Arbitral institutions which do not allow publication*

There are certain arbitral institutions, which do not allow publication of arbitral awards in any form, like the International Centre for Alternative Dispute Resolution (ICADR), New Delhi.³⁹ Furthermore, the Bangalore International Mediation, Arbitration

34. Asian International Arbitration Centre Rules 2018, art. 34(5).

35. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (1 January 2021) part IV(c).

36. *Ibid.*, 10 [58].

37. *Id.*, 10 [59].

38. *ICC & Jus Mundi Launch Partnership to Publish ICC Arbitral Awards* (Jus Mundi, 1 April 2021) <https://blog.jusmundi.com/icc-and-jus-mundi-launch-partnership-to-publish-icc-arbitral-awards/> accessed 15 September 2021.

39. The International Centre for Alternative Dispute Resolution Arbitration Rules (‘ICADR Rules’), 1996.

and Conciliation Centre (BIMACC) completely rules out the possibility of publication of redacted awards, as its rules expressly provide that an arbitral award is to be treated as private and confidential and not open to public or media.⁴⁰

3. CONFIDENTIALITY IN ARBITRATION VIS-À-VIS SECTION 42A OF THE ARBITRATION ACT

The limited carve-out from the rule of confidentiality⁴¹ provided in the Arbitration Act applies only when the disclosure of the award is necessary for its implementation and enforcement. The non-obstante⁴² clause imposes strict confidentiality obligation on the arbitral tribunal, arbitral institution and the parties to the arbitration agreement. It also undermines party autonomy, as it does not envisage a situation where parties may voluntarily consent to publish arbitral awards or disclose any document, by submitting their disputes to an arbitral institution, which permits publication of redacted awards.⁴³

The provision fails to take into account the various possible situations where the disclosure of arbitral proceedings may be necessary for effective adjudication of the dispute. For instance, if parties wish to seek assistance from Indian courts in taking evidence,⁴⁴ or challenging an arbitral award,⁴⁵ or in obtaining interim reliefs⁴⁶ pending arbitral proceedings, the same would mandatorily require disclosure of arbitral proceedings.

Additionally, arbitral awards issued in India are, in any event, susceptible to becoming a part of the public record as they are routinely challenged by parties in court.⁴⁷ Thus, they eventually become a part of the court's record and the relevant paragraphs of the arbitral award (without any redaction) are often reiterated in judgments. It is important to highlight that the

40. Bangalore International Mediation, Arbitration and Conciliation Centre Rules ('BIMACC Institutional Arbitration Rules'), r. 34.01.

41. Arbitration Act 1996, s. 42A.

42. *Ibid.*

43. Gopal Subramaniam, *Confidentiality under the Indian Arbitration & Conciliation Act of 1996* (International Bar Association), <https://www.ibanet.org/article/015535e1-e477-42e7-a7cc-d6dc978975d5> accessed 9 September 2021.

44. Arbitration Act 1996, s. 27.

45. Arbitration Act 1996, s. 34.

46. Arbitration Act 1996, s. 9.

47. Nicholas Towers, *Expanding Horizons in Commercial Arbitration: The Case for the Default Publication of Awards* in Michael O' Reilly (ed), (2015) 81(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*.

Srikrishna Report also suggested the “*challenge [to] an award before a court or judicial authority*”⁴⁸ as an exception to Section 42A; however, it was eventually not adopted in the final text of the provision.

The UNCITRAL Rules on Transparency in Treaty based Investor State arbitration⁴⁹ seek to strike a balance between the access to key documents prepared during the course of arbitration proceedings and the adequate protection and redaction of confidential information.⁵⁰ India could also adopt and statutorily recognize a similar model, where arbitral awards can be published after due sanitization and redaction of all confidential and business sensitive information. In order to achieve this, legislative amendments would have to be carried out along with the recognition of publication of redacted awards as an exception to the confidentiality provision.

4. ADVANTAGES OF PUBLICATION OF ARBITRAL AWARDS

The arguments in favour of the publication of arbitral awards and the need for statutory recognition to this obligation, as set forth in the foregoing paragraphs, are equally relevant in the context of Indian arbitration law for the following reasons.

A. Development of arbitral jurisprudence

Confidentiality of arbitration proceedings is like a double-edged sword. Since arbitration is a private and a consent based system of dispute resolution, confidentiality, without a doubt, qualifies as one of its most standout features.⁵¹ On the other hand, it poses limitations in the development of arbitral jurisprudence.⁵² A systematic way to publish awards, where the

48. Committee Report, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (20 July 2017) <https://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 3 October 2021, page 6.

49. United Nations, UNCITRAL Rules on Transparency in Treaty- based Investor- State Arbitration (Resolution 68/109 adopted by the General Assembly on 16 December 2013).

50. *Id.*, art. 3, 7.

51. Srishti Kumar and Raghvendra Pratap Singh, *Transparency and Confidentiality in International Commercial Arbitration*, in Stavros Brekoulakis (ed), (2020) 86(4) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 463, 470.

52. Paul Comrie-Thomson, ‘A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards’,

award is appropriately redacted to remove all confidential, sensitive, and commercial information, would benefit the arbitration community at large. Furthermore, it would help in the development of jurisprudence on many important issues of law, particularly commercial and contract laws.⁵³

In the last decade, there have been substantial amendments to the Arbitration Act, with the objective of vesting wide powers in arbitral tribunals and bringing them at par with court proceedings. This begs the question, that when orders and judgments passed by courts are regularly published, why should there be any restriction on publication of appropriately redacted arbitral awards. Furthermore, unlike courts, where there is an appellate mechanism to review or rectify any misapplication of law, the scope of court's jurisdiction in challenge proceedings is limited. The court in a challenge proceeding cannot meddle with the award if the arbitrator has taken a possible view, even if not a plausible one.⁵⁴ Therefore, a court in a challenge proceeding cannot substitute its own interpretation⁵⁵ and can only either uphold or strike down the arbitral award.⁵⁶ Publication of redacted awards would therefore, deter arbitral tribunals from any misapplication of law. It would thus instil confidence⁵⁷ in parties and enhance transparency of the system.

As there is no formal system of binding precedents in arbitration, redacted awards would be helpful in guiding arbitral tribunals and even courts in case of similar disputes.⁵⁸ Furthermore, disputes arising out of most modern-day commercial contracts are usually resolved by way of arbitration. Therefore, it is important that awards are acquainted with, so that the public at large and particularly arbitration practitioners are acquainted with the wisdom of arbitrators and their interpretation of complex questions of commercial

(2017) 34(2) Journal of International Arbitration.

53. *Ibid.*

54. *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* (2012) 5 SCC 306 [29]; *Leo Activation v. 49th All India Congress of Obstetrics and Gynecology* 2020 SCC OnLine Ker 3737.

55. *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656 [13].

56. *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.* 2021 SCC OnLine SC 157.

57. Stefan Pislevik, *Precedent and Development of Law: Is it Time for Greater Transparency in International Commercial Arbitration?* in William W Park (ed), (2018) 34(2) *Arbitration International* 241, 249.

58. Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, in William W Park (ed), (2012) 28(3) *Arbitration International* 447, 463.

laws.⁵⁹ It would also promote consistency in arbitral decisions and uniform interpretation and application of law to similar disputes.⁶⁰

B. Grading of arbitral institutions and accreditation of arbitrators

The 2019 Amendment has proposed the insertion of Section 43I⁶¹ and Section 43J,⁶² which provide for norms for grading of arbitral institutions and accreditation of arbitrators, respectively. These amendments have been made in light of the increasing transparency and reliability of the system, so that parties are well informed while choosing arbitral institutions or while nominating their arbitrators. Barring a few exceptions, most arbitral institutions in India do not contain a depository where these redacted awards are saved or a database on which these redacted awards can be accessed.

If publication of redacted awards was statutorily recognized, arbitral institutions would be bound to publish redacted awards in a particular format and in a time-bound manner. It would then be possible to analyse the time taken by an arbitral institution for the disposal of domestic or international arbitration. It would also enable parties and arbitration practitioners to better assess the efficacy of an arbitral institution and make an informed decision while choosing an arbitral institution to administer their disputes. This could also possibly assist the Arbitration Council of India in the grading of arbitral institutions.

As far as nomination and appointment of arbitrators are concerned, there is no database or any source of information, which contains details of arbitrators including their experience and qualification. There is no way that a party can find out, (i) if its proposed nominee arbitrator is well versed with the subject area of the dispute; or (ii) what are the arbitrator's core or

59. Douglas S Jones, *Arbitrators as Lawmakers* (2017) VI (2) Indian Journal of Arbitration Law, 18, 19.

60. Alexis Mourre, *Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions* (Kluwer Arbitration Blog, 28 May 2009) <http://arbitrationblog.kluwerarbitration.com/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions/> accessed 3 October 2021.

61. Arbitration Act 1996, s. 43I.

62. Arbitration Act 1996, s. 43J.

principal area of specialty or practice; or (iii) if an arbitrator has adjudicated similar disputes in the past.

Publication of redacted awards with the arbitrator's name would also enhance the reputation, credibility and integrity of arbitrators. Parties will then have the opportunity to analyse redacted awards passed by a particular arbitrator and assess the capability and suitability of the arbitrator for their disputes.⁶³ It would also presumably enhance the quality of arbitral awards, as arbitrators would be more careful about giving detailed reasons and justifications for their decisions.⁶⁴

C. Transparency and legitimacy

Lord Hewart once rightly observed that “*Justice should not only be done but should manifestly and undoubtedly be seen to be done*”.⁶⁵ Therefore, the publication of redacted awards would make the system more transparent and acceptable to the public at large. It would also enhance the legitimacy of arbitration as a mode of dispute resolution. Access to redacted awards would also be helpful for education and training purposes,⁶⁶ where practitioners and students would be able to get an insight into how arbitrators interpret law and apply those principles.⁶⁷

If there are publicly available redacted awards on similar disputes or issues of law, parties would be able to evaluate the tenability of their success in a dispute depending on the foreseeability of outcome.⁶⁸ They would be in a better position to do a cost-benefit analysis of pursuing their claims (or not). This is likely to promote other methods of alternative dispute resolution like mediation once parties have made an informed assessment of their chances of success.

63. Kenji Tashiro, *Quest for a Rational and Proper Method for the Publication of Arbitral Awards*, (1992) 9(2) *Journal of International Arbitration*, 97, 102.

64. Chang-fa Lo, *On a Balanced Mechanism of Publishing Arbitral Awards*, 1(2) *Contemp Asia Arb J*, 235, 243.

65. *R. v. Sussex Justices* (1924) 1 KB 256 (ex parte MCCarthy J).

66. Philip Wimalasena, *The Publication of Arbitral Awards as a Contribution to Legal Development – A Plea for more Transparency*, in Matthias Scherer (ed), (2019) 37(2) *ASA Bulletin* 279, 285.

67. Elina Zlatanska, *To Publish, or Not to Publish Arbitral Awards: That is the Question*, (2015) 81(1) *The International Journal of Arbitration*.

68. Philip Wimalasena, *The Publication of Arbitral Awards as a Contribution to Legal Development – A Plea for more Transparency*, in Matthias Scherer (ed), (2019) 37(2) *ASA Bulletin* 279, 287.

Furthermore, there is no consistency or clarity in the rules of arbitral institutions, and the manner in which confidential or sensitive commercial information is required to be redacted from arbitral awards. Statutory recognition of arbitral awards, along with some criteria or guidelines for redaction and publication, can bring about uniformity and consistency in the rules of arbitral institutions. It would also provide a statutory framework for *ad hoc* tribunals to publish redacted awards. It is important that the issue of publication of arbitral awards be addressed at the national level by statutorily incorporating and recognizing it in the Arbitration Act, irrespective of the mechanisms stipulated by different arbitral institutions.⁶⁹

5. PROPOSED MECHANISM OF PUBLICATION

In light of the aforementioned, the article proposes the following amendments to the Arbitration Act:

A. Amendment to Section 42A:

- (i) The *non-obstante* clause, i.e., “*notwithstanding anything contained in any other law for the time being in force*”, should be replaced with “*unless otherwise agreed between the parties or provided for in the rules of the arbitral institution governing the arbitration proceedings.*”
- (ii) The exceptions for disclosure of arbitral awards should also include challenge proceedings; and
- (iii) The provision should also set out exceptions for disclosure of arbitral proceedings.

B. Insertion of a separate provision recognizing publication of arbitral awards:

- (i) A new provision may be inserted recognizing the publication of arbitral awards after allowing for redaction of all identifying information, including any confidential and business sensitive information. However, the names of the members of arbitral tribunal and the arbitral institution should not be redacted.

69. Paul Comrie-Thomson, *A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards* (2017) 34(2) *Journal of International Arbitration*, 275, 300.

- (ii) All arbitral tribunals, either constituted pursuant to the rules of an arbitral institution or in an *ad hoc* arbitration proceeding, would be required to issue two awards:
 - a) One, which would be the regular award containing everything, including names of parties, identifying information, confidential and other business sensitive information; and
 - b) The other one, which would be a redacted award, for the purpose of publication after removing names of parties and all confidential and business sensitive information. The redacted award should be limited to the issues involved, identification, application and analysis of relevant laws, and the dispositive section containing the conclusion and summary of findings.
- (iii) After the issuance of redacted award, and within a period of three-months, parties will have the option to provide their consent to the publication of the redacted award. Parties may also review the redacted award and give their comments on the redaction/sanitization of confidential or business sensitive information to the arbitral tribunal. During the three-month period, parties can mutually agree not to publish the redacted award and convey the same to the arbitral tribunal.
- (iv) The arbitral tribunal should encourage parties to agree on the publication of the redacted awards. The arbitral tribunal shall address and incorporate parties' comments on the issue of sanitization and redaction of confidential and business sensitive information in the redacted award.
- (v) The redacted award would only be published when all the parties agree or give their consent for publication of the redacted award. Even if one of the parties does not give its consent for publication of the redacted award, then in such a situation, the redacted award would not be published and the arbitral tribunal would intimate the same to the Arbitration Council of India.
- (vi) In case all parties agree on publication of the redacted award, but there is a dispute between the parties and arbitral tribunal on the redaction/sanitization of the arbitral award, the parties may jointly or individually address their concern and file a representation with

the Arbitration Council of India, who shall be the final authority to adjudicate upon the issue of redaction/sanitization of arbitral awards.

- (vii) The arbitral tribunal, after the expiry of three months, would be bound to submit both version(s) of the award in the depository maintained by the Arbitral Council of India.

C. Insertion of a separate schedule containing a template of a redacted arbitral award:

A separate schedule should be inserted which would set out a template for publication of redacted arbitral awards. *Ad hoc* arbitral tribunals would be required to follow the template while submitting redacted awards to the Arbitration Council of India. Arbitral institutions would continue to maintain their autonomy to formulate its own format or template of a redacted arbitral award. However, these arbitral institutions would also be mandatorily required to submit the redacted awards to the Arbitral Council of India.

D. Amendment to Section 43D of the Arbitration Act:

Section 43D should be amended and the Arbitration Council of India be given powers to regulate the storage of redacted arbitral awards; decide on the issue of redaction/sanitization of arbitral awards in case of a dispute between parties and arbitral tribunal; and also frame guidelines for publication of redacted awards.

6. CONCLUDING REMARKS

As recognized by Lon Fuller in ‘principles of legality’,⁷⁰ the consistency, publicity, predictability, and congruence are some of the essential conditions that all purported legal rules must comply with. In that light, publication of arbitral awards would surely be a welcome step. It would promote transparency, contribute in the development of arbitral jurisprudence, and also bring India at par with other established arbitration friendly jurisdictions. A systematic way to publish redacted awards will not only be in harmony to the confidentiality obligation, but it will also promote arbitration as a preferred mode of dispute resolution, increase confidence of parties and transparency of the system as a whole.

70. Lon L Fuller, *The Morality of Law* (rev. ed. New Haven CT, Yale University Press, 1969) 33-38.