THE CONUNDRUM OF DATA CONFIDENTIALITY IN ARBITRATION

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ABSTRACT

Arbitration, as one of the arms of ADR achieves its significance and acceptance from the deep-seated need of the society to avoid the tedious processes of the court and to achieve certain confidentiality in the proceedings.

Globally, the creation of GDPR in the EU has triggered the talk with respect to data protection and cyber security. With all these global developments, India is also trying to reach at par with rest of the countries with introduction of *Data protection bill* and then the *Amendment Bill, 2019.*

In this paper, authors try to analyse the importance of legislation for data confidentiality in India while making a comparatively analysis with EU and US. Keeping at pace with the rapid growth in technology and the importance of adapting to the new normal, authors will also articulate upon the future sanctity of data confidentiality via E- arbitration and provide suggestions for the way forward.

Keywords*: E- arbitration; data confidentiality; international commercial arbitration; public interest.*

INTRODUCTION

Massive rate of technological development and farfetched accessibility to data-via-internet has led to tremendous growth in the International commercial business.[1] Markets for players, is now not only accessible offline but, every year huge amount of transactions is recorded through electronic platforms.[2] Nevertheless, the only fact that remains intact is that disputes still arise and social proposition substantiates the fact, that wherever there is socializing via contracts and agreements amongst human minds, the chances of conflicts amplifies.

A paradigm shift has been witnessed when it comes to making choice by the parties between traditional and modern forms of resolving the disputes i.e. to either go for national courts or to take the route of Alternate dispute resolution. Parties take arbitration route due to apparent ingenuity and shortcomings of regular court proceedings. Arbitration perse is a private and intimate setup to which parties submits themselves wilfully, afterwards an arbitrator is appointed or mutually chosen by the parties to settle their claims by hearing testimony and thoroughly examining evidences.[3] Because of commendable efficiency and easy dispute resolution mechanism, it is being outrightly opted by the parties over tedious litigation procedure.[4]

Amongst various other sticking points, confidentiality is a major deal breaker which makes opting for Arbitration a viable choice.[5] Confidentiality in arbitration has been centre for various discussions and debates for a long time.[6] The primary question subsists that whether or not arbitral proceedings may or may not adhere to the confidentiality aspect of the system. There still subsists stains of uncertainty with respect to scope and enforceability of confidentiality agreement.[7] Different jurisdictions have their separate set of legal regimes be it in India, Us or Europe, this

[1] Donggen Xu & Huiyuan Shi, *Dilemma of Confidentiality in International Commercial Arbitration*, 6 FRONTIERS L. CHINA 403 (2011).
[2] Slavomir Halla, *Arbitration Going Online - New Challenges in 21st Century*, 5 MASARYK U. J.L. & TECH. 215 (2011).
[3] Leonard L. Riskin ET AL., *Dispute Resolution and Lawyers*, 3rd ed. 13-18 (2005).
[4] Deborah Karakowsky, *Resolving the Conflict: The Federal Arbitration Act versus the Bankruptcy Code*, HOUSTON LAWYER 34 (January/February, 2010)
[5] Jose Rosell, *Confidentiality and arbitration, Croatian Arbitration*, YEARBOOK, Vol. 9 (2002).
[6] Avinash Poorooye & Ronan Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275 (2017).
[7] Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255 (2006).

necessitates parties to not always have same expectations with respect to confidentiality agreement. Confidentiality is not always absolute, there exists some statutory exceptions to the clause of confidentiality within Arbitration.[8]

This uncertainty which is attached to respecting the confidentiality clause in arbitration further gets blurred due to the recent development wherein Arbitration is being taken onto the online platform. This further aggravates the situation and posses' challenges of its own kind.

UNDERSTANDING SIGNIFICANCE OF CONFIDENTIALITY IN ARBITRATION:

Data confidentiality, prima facie refers to the private nature of Arbitration dispute.[9]In order to understand what significance confidentiality holds in any arbitration proceeding it becomes necessary to understand the social aspect attached to Arbitration proceedings. The Latin saying "*aliud est tacere, aluid celare*" which implies "*to conceal is one thing; to be silent another*" although this saying holds good for any other law, it holds particular importance when it comes to Arbitration.[10] From the enumerated list of advantages which arbitration has to offer, ranging from speedy, effective and flexibility of the process, data confidentiality is one of the major highlights that Arbitration offers to the parties.[11] All this makes more sense when we understand it in a way that Arbitration perse is a private setup where in parties mutually come to settle their disputes. When we use the term 'Private' it implies that parties are against the notion of their sensitive information to be in public domain in howsoever manner it may be.[12] In complete contrast to this, in regular judicial proceedings with frequent media trials and multiple level of interface, it becomes difficult to hold on to the sanctity of parties' autonomy.[13] Usually parties seek protection with respect to documents which might hold trade secrets or any fragile commercial information.[14] To avoid such dissemination of their personal data, its seen that number of parties choosing

[8] NIGEL BLACKABY ET AL., REDFERN AND HUNTER, INTERNATIONAL ARBITRATION, OXFORD UNIVERSITY PRESS, NEW YORK, 2009
[9] A. REDFERN, M. HUNTER, N. BLACKABY AND C. PARTISADES, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, Sweet & Maxwell (2004)
[10] Bernardo M. Cremades & Rodrigo Cortes, *The Principle of Confidentiality in Arbitration: A Necessary Crisis*, 23 J. ARB. Stud. 25 (2013).
[11] *Id.*
[12] A. REDFERN, M. HUNTER, N. BLACKABY AND C. PARTISADES, *supra* note 11.
[13] Bernardo M. Cremades & Rodrigo Cortes, *supra* note no. 12.
[14] John Forster Emmott v. Michael Wilson & Partners Limited, EWCA Civ 184 (2008).

Arbitration as their mechanism to settle their disputes has outnumbered those who prefer regular judicial proceeding.

UNDERSTANDING: PRIVACY *v.* CONFIDENTIALITY

In Arbitration, confidentiality is a highly ambiguous road to tread upon. As the subject matter dictates, it is necessary to articulate that there lies a perfectly thin line between the two terms i.e. privacy and confidentiality which are often used incorrectly. Although both the terms are similar and as such no universally acceptable definition for both the terms exists. The difference between these two terms lies in context of scope and ambit.[15] On one hand "Privacy" refers to concealment of vital information of any particular case from third parties, whereas "Confidentiality" refers to a duty which has been casted upon the parties to not disseminate crucial data to any third party.[16] Privacy is much narrower in terms of its scope and ambit than the term confidentiality, with sole objective to divert any sort of third-party intervention.[17] Confidentiality, on the other hand is much bigger term with respect to the burden it puts on the parties. Confidentiality is more concerned with the information which is related to the proceeding like the documents, evidences or the award. As a matter of fact, both the terms thrive for the same objective of minimal third-party intervention.[18]

Confidentiality primarily implies in any arbitration proceeding, that all the hearings in any session of international commercial arbitration will be held in camera and that arbitral award cannot be disclosed in any public domain without the prior consent of both the parties. There are two contours of confidentiality: (1) Wherein confidentiality is required to be maintained between the parties,

[15] Krrishan Singhania and Alok Vajpeyi, *India: Confidentiality in Arbitration: An Indian Outlook*, (Aug. 29,2020, 10: 04 AM), https://www.mondaq.com/india/arbitration-dispute-resolution/832720/confidentiality-in-arbitration-an-indian-outlook

[16] 1 KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW, 27 (2010).

[17] Christoph Henkel, *The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration*, 37 N.C. J. OF INT'L L. 1059, 1060 (2012).

[18] *Id.*

following the obligation casted upon them; (2) protection with respect to substance of the proceeding which consists of documents, hearings or any other evidences.[19] Further we have confidentiality with respect to 'subjects' and 'objects'. Subjects basically consist of all those persons who are indulged in the mechanism of Arbitration like arbitrators, the parties, any of their other employees, arbitration institution or any third party which may make an effort to be involved. In theory, unless there is consensus otherwise, the arbitrator must not disclose any crucial information and every matter on record should be kept confidential related to Arbitration proceeding. Objects on the other hand, comprises of documents, statements, pleading etc. protection of objects indulged in arbitration proceeding depends upon the substantive as well as procedural law.[20] Normally parties can decide to keep award confidential.

EXCEPTION TO THE RULE OF CONFIDENTIALITY: *ORDRE PUBLIC*

The conundrum caused by confidentiality in the field of international commercial arbitration makes the fraternity questions, whether confidentiality obligation under Arbitration is absolute or not.[21] The subject matter carries with itself a lot of uncertainty. In various English cases it has been reiterated that under Arbitration, confidentiality is an implied clause.[22] In *Dolling- baker v. Merrett case*, the above position was upheld.[23] The position in the following case was further reinforced in the landmark judgement of *Ali Shipping Corp v. Shipyard Trogi*[24], wherein various exception to the rule of confidentiality were laid down. Amongst various exceptions, one was disclosure when necessary in public interest[25]. *Ordre public* i.e. public interest requirements often overrides the data confidentiality in arbitration.[26] Public interest and data confidentiality often clash with each other.[27] Apart from this information needs to be disclosed when it is in interest of justice to do so. Confidentiality clause faces a setback when any legal norm or some other regulatory requirements

[19] Donggen Xu; Huiyuan Shi, *supra* note no. 1.
[20] Donggen Xu; Huiyuan Shi, *supra* note no. 1.
[21] Vijay Bhatia et al., *Confidentiality and Integrity in International Commercial Arbitration Practice*, 75(1) ARB. 2, 11 (2009).
[22] Avinash Poorooye & Ronan Feehily, *supra* note no. 7.
[23] 1 W.L.R. (Eng. C.A. 1990).
[24] (1998) 2 All ER 136 (K.B.).
[25] *Id*. at 147-48
[26] Florentino P. Feiciano, *The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration*, 87 PHIL. L.J. 1, 2 (2012).
[27] *Id.*

makes it necessary to disclose the facts which would otherwise would have been covered by the confidentiality clause.[28] General understanding dictates, that absolute confidentiality does more harm to the development of commercial law. The position, however varies from country to country. [29]

DATA CONFIDENTIALITY IN ARBITRATION THROUGH AN INTERNATIONAL LENS

The advent of Internet sure made everything all sunshine and roses but as it has been rightly said that *power tends to corrupt and absolute power tends to corrupt absolutely.*[30] With this great power that the Internet provided to its users it also gave them the power to misuse. The primary intention behind such a mistreatment was the data of people that was being mishandled by larger corporations for their benefit. This not only later proved to be a mistake of great magnitudes and proportions but also was in violation of the right to privacy of all such people. Governments all over the world tried their best to curb the problematic situation at hand at their own level *for instance*; **GDPR** was introduced in the European Union[31] and for some developing nations like India strengthened their privacy laws by accepting it as a fundamental right.[32]

Back when ICC had prepared its new edition of the 2012 Arbitration Rules, they had decided not to include a general duty of confidentiality. However, under the new rules[33] and Arbitral tribunal may make order if it deems fit to enforce confidentiality obligations provided the legal basis for such obligations is being found elsewhere, *for instance*, it may arise from a consensual expressed agreement between the parties. In the current scenario the parties also fear "*trial by press release*" in case of absence of confidentiality.[34] Where we have some nations along with some arbitral bodies notifying that the concept of implied confidentiality cannot be assumed in the arbitration proceedings on the other hand there are some who have followed the traditional approach to

[28] Id.
[29] Avinash Poorooye & Ronan Feehily, supra note no. 7.
[30] John Emerich Edward Dalberg Acton, first Baron Acton (1834–1902).
[31] Regulation (EU) 2016/679.
[32] K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.
[33] Art. 22(3) ICC Rules 2012.
[34] Stephan Balthasar, *Kingsbridge Capital Advisors v. AlixPartners: What Confidentiality in Arbitration?* (2013)

impose a duty on the parties, arbitrators or at times both. Confidentiality's extent and the nature of arbitration proceeding is highly dependent on:

- The arbitral rules that are applied to the arbitration,
- The seat of the Arbitration. [35]

Well the complexity of this issue increases from hereon; it gets more deeply complexed owing to the involvement of multiple actors including translators, witnesses, officials of the arbitral institution etc. and these potential players aren't even being governed by the arbitral rules or even the arbitration agreement even though they do have access to the confidential information. So the question here arises is who all are to be regulated and how in order to protect the confidentiality of such agreements.[36]

Though there is no uniform pattern adopted by the countries and international arbitral institutions while conforming to the principle of confidentiality[37] yet the there are three rules which are followed faintly:

i. Existence of implied confidentiality in every arbitration, where disclosure is made expressly or in an implied manner with the consent of the party who had originally produced the material;
ii. All arbitration proceedings are to be held in private;
iii. Such grant of confidentiality is subject to certain exceptions which mainly are the court order, parties consent, reasonable necessity and public interest.[38]

The main aim of the English courts has been to protect the sanctity of arbitration by not harming the provision of confidentiality but only till the time it does not enter into a conflict with the delivery of justice system. Emmott has divided all confidential information in two parts:[39]

i. Such an information which is inherently confidential (such as trade secrets);
ii. Then such information which is protected by the implied duty.

[35] Mayank Samuel, *Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?* http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock window dressing#:~:text=Due%20to%20the%20inconsistencies%20in,confidentiality%20provisions%20in%20arbitration%20agreement.
[36] Mayank Samuel, *supra* note 41.
[37] Mayank Samuel, *supra* note 41.
[38] Ali Shipping corporation v. Shipyard Trogir (1998) 1 Lloyd's Rep. 643.
[39] Mayank Samuel, *supra* note 41.

The above discussion makes it clear for us to understand the status quo which is a clear indication of the fact that even though there are no current rules and laws which protect confidentiality yet when it is left to the discretion of the tribunals they generally protect the rights whenever the parties have asked the same from them. But owing to the huge proportion of discrepancies in the domestic laws and institutional laws it becomes the onus of the parties to protect their interests by expressly having the confidentiality provisions in their agreements.

- **Choice of governing arbitral law:** It is suggested that a robust confidentiality protection is preferable in a legal regime.
- **Confidentiality requirement in documents:** Parties at times are conscious of the documents being shared around and it becomes important for the arbitration clause to provide for confidentiality in entirety beginning from exchange of documents to ensuring non-disclosure of business secrets.[40] And in case of a malafide disclosure the defaulting party should be made to compensate to the victim.
- **Confidentiality obligations arising out of third party concerns:** It becomes vital for everyone associated to the arbitration to sign the confidentiality agreement for the privacy to be maintained. The statements, tribunal's deliberations and the final award should be maintained confidential not only by the parties but also by the witnesses, experts and the entire administrative panel.[41]

The author is of firm belief that these provisions can be resorted to when the already existent arbitral rules fail to provide the required amount of confidentiality. Even thought at times when parties do not mention about the confidentiality clause the parties should be allowed to negotiate the same at the very beginning of the proceedings.

[40] Donggen Xu; Huiyuan Shi, Dilemma of Confidentiality in International Commercial Arbitration, 6 FRONTIERS L. CHINA 403, 417 (2011).
[41] Mayank Samuel, *supra* note 41.

WHY DO WE NEED DATA CONFIDENTIALITY IN ARBITRATION?

Confidentiality not only confers ample advantages[42] to the process of arbitration but it also has started acting as an underlying reason for the parties wanting to opt for arbitration. It is a common belief amongst the public at large that confidentiality of arbitration would fetch a better and comprehensive shield to guard their information from any public disclosure than litigation can.[43] The principle of confidentiality has always had its differences with that of public interest[44] along with other ideals such as when an arbitral award is challenged in a court of law and mandatory disclosures to some stakeholders of the dispute like shareholders or insurers.[45] Amongst many of the advantages of confidentiality some of them are: it helps avoiding setting adverse judicial precedents,[46] reduction in possibility of damaging continuing business relations.[47] One of the another very common reason for the parties to prefer arbitral proceedings is the private nature of the arbitral proceedings offering the parties an unbiased platform to express their disputes keeping it away from the intrusive eyes of media and their predatory competitor's.[48] Having said that there exists an absolutely opposite process of thoughts which emphasizes on the fact that for arbitration to become a true alternative to litigation it is vital that the concept of absolute confidentiality is done away with. Absolute confidentiality has been doing more harm than good especially to fields like commercial arbitration, there are businesses opting almost always for the secretive realm of commercial arbitration which keeps the development and interpretation of commercial law totally

[42] Florentino P. Feiciano, *The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration*, 87 PHIL. L.J. 1, 2 (2012).
[43] Michael Hwang & Katie Chung, Defining the Indefinable: Practical Problems of Confidentiality in Arbitration, 26 J. OF INT'L ARB. 609, 610 (2009).
[44] 1 Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis Of The Position Under English, Us, German And French Law*, 27 (2010).
[45] Avinash Poorooye & Ronan Feehily, supra note no. 7.
[46] Christoph Henkel, *The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration*, 37 N.C. J. OF INT'L L. 1059, 1060 (2012).
[47] Charles S. Baldwin, *Protecting Confidentiality and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 453 (1996).
[48] Bernardo M. Cremades & Rodrigo Cortes, *supra* note no. 12.

shrouded.[49] This debate is ongoing yet it is seen that confidentiality in protection of the interest of the parties has become an essential requirement with the developing world.

DATA PROTECTION LAWS AROUND THE GLOBE

EUGDPR-[50] is the latest and by far the most efficient piece of legislation that has been introduced in any country. GDPR is a legal framework which requires the business' being run need to safeguard the personal data and privacy of the citizens of EU for all those transactions which occur within EU member states. These data protection obligations apply to individuals and to legal entities. Therefore, these do no prima facie apply to an arbitration proceeding however; it is understandable that even if one of the participants is a subject of the data protection obligations then in that case it has an impact on the entire arbitral proceedings as a whole. Also the kind of arbitration whether it is a commercial set up or an investor state does not go to determine the application of these data protection laws. Instead the application of the data protection laws is determined by the fact that whether such data processing falls within the material and jurisdictional scope of the relevant provisions of law. Following are the actors who have potential to fall within the territorial scope of GDPR:

- Stakeholders in a proceeding in case administered by an institution based in the EU;
- Any party who does business in the EU and collects data there, irrespective that they are based outside EU;
- Arbitrators residing in any EU member state.[51]

UNCITRAL- and Stockholm Chamber of Commerce have a limited role and hence, they merely provide for private hearings and confidentiality of awards. Unless a party expressly makes a formal request to ICC per se for providing them with confidentiality of award, materials and Tribunal's

[49] Avinash Poorooye & Ronan Feehily, supra note no. 7.
[50] REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[51] Gerald Leong (Herbert Smith Freehills), *How Do You Deal with Data Protection and Cybersecurity Issues In a Procedural Order?* Kluwer Arbitration Blog, (AUG. 31, 2020, 11.00 AM) http://arbitrationblog.kluwerarbitration.com/2020/02/19/how-do-you-deal-with-data-protection-and-cybersecurity-issues-in-a-procedural-order/?doing_wp_cron=1598594124.9254679679870605468750

deliberations. Henceforth, the London Court of International Arbitration creates an obligation on the parties to maintain confidentiality in the following:

i. Award;
ii. All the material and documents presented;
iii. Tribunal deliberations.

WIPO also for that matter maintains strict confidentiality regime by protecting IP and trade secrets.[52] In the year 2018 a working group set up by the New York City Bar association came up with a draft on ***'Cybersecurity protocol for International Arbitration***' and the protocol presents a suitable and useful measure to promote the cyber security and confidentiality in arbitration which are:

- Making use of only the legitimate sources for downloading digital content and programs,
- Usage of end to end encryption for protection of email and other documents,
- Not opening attachments that are received from an unknown sender,
- Usage of secure file transfer to share documents,
- Implementing such policies to reduce data storage period used in arbitration,
- Making routinely secured and redundant data back-ups,
- Using firewalls, antivirus and antispyware and other software patches.[53]

In the international arena it becomes the common responsibility of all the participants to safeguard the confidential information of the parties from any and all kinds of cyber-attacks. We have to begin somewhere and I believe as a nation with no law especially dealing with the same our first step should be to promote awareness amongst the participants regarding the relevance of data protection and then eventually sensitize them towards the need to take measures to avoid cyber-attacks and increase data safety. We live in a world which is evolving by the second hence we need to be proactive to avoid the attack from the also continuously evolving cyber world and understand the associated risks. Therefore, the arbitration community as a unit must closely look at the activity

[52] Mayank Samuel, *supra* note 41.
[53] Mateus Aimoré Carreteiro & Igor Cunha Arantes Castro, *Data Protection in International Arbitration: A Brazilian Perspective.* (AUG. 31, 2020, 12.00 PM), https://www.mondaq.com/brazil/data-protection/819898/data-protection-in-international-arbitration-a-brazilian-perspective

happening between the participants of arbitration and as to how their services can be improves in order to safeguard the data.

STATUS QUO OF DATA CONFIDENTIALITY IN ARBITRATION IN INDIA:

India has recently right tracked itself towards protection of privacy rights of its citizens. In the year 2017 the apex court of the country laid down a landmark judgement affirming right to privacy as a fundamental right.[54] It is important to be aware of the chain of events as this judgement was the torchbearer for development of privacy laws in India. It was during this judgement that the Indian government had set up an expert committee to devise a data protection framework for the country which ultimately gave birth to the Draft on Personal Data Protection Bill.[55] The Bill is said to be similar to that of European Union's GDPR. Way before this Bill in the year 2017 the Government of India had set up another committee of experts to study various issues relating to data protection in India and to make specific suggestion on principles underlying a data protection bill.[56]

Personal Data Protection Bill aims at regulating data confidentiality in India and even outside by having territoriality over those entities which have either a business connection in India or carry certain profiling of individuals in India.[57] PDP applies to all forms of personal data and has also classified it further to sensitive and critical personal data. Just like GDPR fails to expressly make us understand that how data confidentiality issues in other streams of law would be managed just like arbitration here.

This might have given you a brief hint of the idea that India at present has no data protection laws let alone a specialised one for arbitration. As much as the Arbitration Act[58] is for the principle of party autonomy and confidentiality it faces legislative issues at front. Though there has been an

[54] K.S. Puttaswamy, supra note 38.
[55] The Personal Data Protection Bill, 2019.
[56] White Paper, 2017.
https://www.meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf
[57] Privacy In India - Wheels In Motion For An Epic 2020
https://www.mondaq.com/india/privacy-protection/879142/privacy-in-india--wheels-in-motion-for-an-epic-2020#:~:text=The%20much%2Dawaited%20Personal%20Data,India%20on%20December%2011%2C%202019.&text=Passing%20by%20both%20Houses%20of,notification%20in%20the%20Official%20Gazette.
[58] Arbitration and Conciliation Act, 1996.

amendment to the Act[59] which has introduced section 42A and 43K but hasn't been notified yet. Therefore, there is a lot of un-clarity on the fact as to how data security and its confidentiality by extension can be protected in the arbitral proceedings that are being conducted in India.

Section 42A[60] of the amended Act begins with a non-obstante clause and tells us that confidentiality shall maintained by all participants of the proceedings baring the award where its disclosure is necessary for the enforcement and implementation of the award. Now this provision also leaves such an ambiguity as to the obligations of any party seeking to introduce any kind of confidential data from arbitration to a court.[61] Another important aspect to be looked at here is that the intervention of third parties in the arbitral proceedings which might rely on the confidential data from the arbitration proceedings. In India the apex court[62] has allowed third parties to claim their reference in the arbitration proceedings by establishing their degree of involvement which simply indicates that such reference proceedings may require disclosure of confidential information from arbitration proceedings. Henceforth, making it essential for the Indian Courts to establish the contours of divulging confidential data in court proceedings[63] and to balance the interests of the parties seeking an exemption under Section 42A of the Act. This question of law is also in consideration under other jurisdictions as well (*UK and Singapore for instance*). The conflict of interest with disclosing information for public interest keeps arising however, a balancing approach needs to be adopted, as public interest forms an exception within the section.[64]

The 2019 amendment aims at seeking to constitute the Arbitration Council of India as an independent governing body for all arbitrations conducted in India. It also seeks the rules framed by ACI would have to decide data fiduciaries and data principal under the PDP Bill. The PDP bill defines what a data fiduciary is however it yet remains ambiguous as to who is the data fiduciary whether an arbitrator or the arbitral institution.[65]

Even though an attempt at protecting data confidentiality is being made under certain provisions it is under my belief that they are not solving the issue at hand hence it is needleless of saying that

[59] Arbitration and Conciliation (Amendment) Act, 2019.
[60] Section 42A, Arbitration and Conciliation (Amendment) Act, 2019.
[61] Jaideep Khanna & Abhishek Nevatia, *Data Confidentiality under the Indian Arbitration Regime: Challenges and Opportunities.* (SEPT. 1, 2020, 1.00 PM),
[62] Mahanagar Telephone Nigam Ltd. v. Canara Bank, (2004) SLP (C) No. 13573 (SC).
[63] Jaideep Khanna & Abhishek Nevatia, *supra* note no. 70.
[64] Jaideep Khanna & Abhishek Nevatia, *supra* note no. 70.
[65] Jaideep Khanna & Abhishek Nevatia, *supra* note no. 70.

there is a dire need for having a data protection protocol in India. We are currently in an era wherein even the traditional forms of courts have been shifted to the online platform owing to the pandemic the globe is facing and there has also been an increase in online arbitration proceedings with an aim of increasing the efficiency and reducing the costs. The growth of digital economy is at an unprecedented rate and has also expanded the use of data as a critical means of communication amongst people. Not only does India need a robust mechanism to fill in the gaps left by PDP Bill for its data security framework but also do it at the earliest possible. There lies a legislative opportunity with the country to prevent any and all kinds of cyber-attacks and ensure higher standards of compliance.

SANCTITY OF DATA CONFIDENTIALITY VIA ONLINE ARBITRATION: THE WAY FORWARD

Online Arbitration or E- arbitration are the terms which recently have gained importance in the field of ADR. With never-ending internet evolution many professions and facility providers have made space for themselves on the online platforms.[66] Development in Internet have impacted many arenas of human life, this includes law as well. Internet has opened gates for global connectivity and has led to the development of global e- market.[67] This has changed the outlook of processing information, laws related to copyright and press laws.[68] Since dynamism in internet leads to more international and national connectivity via commerce it necessitates to look into the ways of modernising out -of -court settlement disputes.[69]

Current circumstances that have befallen on the global economy via global pandemic of Covid-19, every economy was forced to shut itself up.[70] Tremendous loss is caused not only to an individual but also to economy as a whole. Since the situation has not become any better, efforts

[66] Slavomir Halla, *supra* note no. 2.
[67] Chinthaka Liyanage, *Online Arbitration Compared to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature*, 22 Sri LANKA J. INT'l L. 173 (2010).
[68] Ji Yoon Park, Jae Hoon Choi, *The Issue of The Seat of Arbitration in ODR Arbitration*. Kluwer Law International, 2020.
[69] Ihab Amro, *Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries*., Kluwer Law international, 2020.
[70] Ji Yoon Park, Jae Hoon Choi, *supra* note no. 39.

are made to revive the economy somehow. The major step on this way is to bring economic drivers to the online platforms.

ODR is not a new concept, it existed already.[71] It has four phases of development, first from 1990-1996 which was termed as amateur stage, wherein electronic mechanism was on trial and testing period. Second from 1997 – 1998, ODR developed and first web portal was created to deal with the disputes.[72] Third phase was from 1999- 2000 wherein business man came into play, as many IT services and many companies began projects based on electronic dispute resolution.[73] Year 2001 finally saw some institutional development, during this phase, ODR strategies and techniques were introduced into the courts along with administrative authorities.[74]

This ODR mechanism, however, could not rise to success. There were many factors, that contributed to significantly less usage of this method of dispute settlement. Some of the prominent factors were, usage of licensed technologies demanded high initial cost[75]; constant threat of loss of data and for system to be hacked. Presence of such factors demotivated the parties from opting for ODR.

E- Arbitration

Like ADR, ODR to have components like online mediation and online Arbitration.[76] Online arbitration or E- arbitration being the major component of ODR, which basically means that via e-arbitration parties, can solve their dispute arising out of some contractual agreement on online platform.[77] E- arbitration is usually opted by the parties to solve business to business or cross border commercial disputes. We can say that the major underlying difference between traditional arbitration and online arbitration is the "technology" which is most certainly not present in traditional arbitration.[78] Under E - arbitration, arbitration contract and the entire arbitral process is conducted online. As far as hearing is concerned, in online arbitration, hearings are conducted via internet on an online platform. E – file is created for each case separately and is administered by

[71] Chinthaka Liyanage, *supra* note no. 38.
[72] Ihab Amro, *supra* note no. 40.
[73] Ihab Amro, *supra* note no. 40.
[74] 5. MICHAEL PARK, E-COMMERCE AND ADR: SOME SUGGESTIONS, ADR Bulletin, No. 6 (2002)
[75] Chinthaka Liyanage, *supra* note no. 38.
[76] M. H. M. Schellekens, *Online Arbitration and E-Commerce*, 9 ELEC. COMM'n L. REV. 113 (2002).
[77] *Id.*
[78] Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, *Online Dispute Resolution: The State of the Art and the Issues*, E-COM RESEARCH PROJECT OF THE UNIVERSITY OF GENEVA, 2001.

particular online service provider. [79]All the communications between the parties and the arbitrator(s) and also all the case related documents are recorded in this e- file. Under traditional arbitration online hearing is one of the options if the laws provide for it and parties decide for it.[80]

ONLINE ARBITRATION: THREATS POSED BY TECHNOLOGY.

It is well clear that online arbitration or internet arbitration is dominated by the term technology.[81] Technology in online arbitration can be a game changer.[82] Technology in bad hands can be detrimental to the entire sanctity of the arbitral process.[83] It is necessary to understand that proceedings whether held online or offline are held with the sole motive to provide both the parties a private setup wherein they can without fear of leak of information can settle their disputes.[84] For this it is important to understand the technologies being used and the extent to which they are used.[85] Technologies in terms of online arbitration comprises of video conferencing, emails, management systems to tackle files.[86] There is also the concept of online filing and online case management. Once the information is online, it's difficult to control its dissemination.

Under international commercial regime there are specific players and authorities who takes the responsibility of data transfer.[87] Now this becomes a crucial point for consideration because in presence of different jurisdictional regimes, transfer of data via online platform across the borders in presence of complicated technology becomes quite risky. With multiple layered transfer and heavy penalisation cost for not respecting data protection laws, it becomes necessary to have robust and standard framework for data protection.

[79] *Id.*
[80] A. REDFERN, M. HUNTER, N. BLACKABY AND C. PARTISADES, *supra* note 11.
[81] Ethan Katsh and Alan Gaitenby, *Introduction: Technology as the "Fourth Party"*, 2003.
[82] *Id.*
[83] *Id.*
[84] Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 (1) TULANE LAW REVIEW at p. 43. (1982).
[85] Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, *supra* note no. 52.
[86] Chinthaka Liyanage, *supra* note no. 38.
[87] Arindrajit Basu & Justin Sherman, *Key Global Takeaways From India's Revised Personal Data Protection Bil*, LAWFARE (2020)

CONCLUSION

Principle of Confidentiality under Arbitration was for the very first time introduced in India by way of The Arbitration and Conciliation (Amendment) Act, 2019. The objective behind bringing this Amendment Act was to develop India into a hub of domestic and international arbitration. No doubt, that a ground breaking attempt was made by Indian Legislature by bringing- via- 2019 amendment, section 42A and 43K. Both these provisions where introduced with the hope to the course of confidentiality under arbitration. However, the outline of section 42 A and the exception provided thereunder remains arbitrary and vague in nature. Moreover, the regulations for data security by ACI are yet to see face of the dawn.

Amongst various other shortcomings of section 42 A, some of the glaring lacunas are inclusive of the provision being drafted poorly, leaving ample scope for unreasonableness and irrational interpretation of the provision. Nowhere, does the provision mentions the standards of confidentiality when arbitration is taken into the court. Moreover, the non-obstante clause attached to the provision makes the laws all the more complicated, as it overrides the provisions which are contradictory to it. This provision fails to recognise some standard exceptions like "public interest" and "in the interest of justice". PDP bill as well doesn't expressly talk about arbitration and does little help to fill the gaps created by E- arbitration during this advent of COVID- 19.

Things are still unclear with respect to data confidentiality and perhaps arbitral institutions may prove to be of vital help under such circumstances, by way of ensuring strengthened compliance and by formulating strong data protection protocol. COVID- 19, has bought various new issues with itself, but it also possesses as a great opportunity for arbitration to explore the prospects of Information Technology and the ways by which the two can be merged. Virtual arbitration can be the upcoming status quo. All of this makes a need for specialised legislation governing data confidentiality per say a vital/inevitable requirement of the hour. It is the authors belief that PDP can be amended to include and apply to data confidentiality matters governed by arbitration. As strengthening our domestic roots won't just be beneficial on paper but also make India an attractive seat. It cannot be emphasized much on the fact that with the world shifting to the online platform creates an added responsibility on the government to protect their citizens personal data while honouring the very object for which they brought Arbitration and Conciliation Act into force.