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Confidentiality in Arbitration: A Broken Promise

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ABSTRACT

Arbitration has emerged as a leading substitute to litigation for resolving disputes and unlike litigation, arbitration is private in nature. In this paper, we take a brief foray into the emerging challenges to confidentiality in arbitration which have been brought to light in the recent Amazon – Future Group arbitration dispute, analysing the ways in which the principle of confidentiality can be protected in the future. The paper begins by discussing how the law applies to confidentiality in both domestic and international arbitration, followed by the threats it faces in the near future. The paper then proceeds to unfold and discuss constructive suggestions for the implementation of confidentiality in arbitration disputes in such circumstances.

I. INTRODUCTION

At a time when arbitration is steadily emerging as a prime alternative to litigation for resolving disputes, particularly commercial disputes, confidentiality continues to remain its most extenuating feature.[3] Unlike traditional litigation, arbitration is attributed as a private engagement between parties to a dispute, that is to say, the parties by entering into an arbitration agreement, accept a mutual obligation not to disclose anything in relation to the dispute and the arbitral proceedings including documents, transcripts, notes of the evidence in the arbitration and the award.[4]

With an expansion in the business sector and the industrial market, we are bound to witness a surge in disputes between companies, industries and other agencies in the market. In the event of such disputes, confidentiality may be more important to some parties than others. Such parties, particularly renowned companies would prefer to keep their disputes private thereby

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[3] Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 8 AM. REV. INT'L ARB. 275, 316 (1997); Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267 (1996).
[4] David Fraser, Confidentiality in Arbitration, Address in Paris (Oct. 13, 1998), http://www.bakerinfo.com/Publications/Documents/756_tx.htm (hereinafter "**Fraser**")

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evading any publicity that may harm their image or benefit their competitors.[5] Meanwhile, most national court proceedings offer minimal to no confidentiality to the parties involved in a dispute. Consequently, the hearings are predominantly open to the public, competitors, press representatives and regulators in numerous countries[6] which may impede negotiated compromises and result in a "trial by press release".[7]

Arbitration on the contrary, encourages efficient dispute resolution, promoting confidentiality and thereby reducing the risks of damaging disclosure of commercially sensitive information.[8] It can be established that most people are attracted to arbitration because of the name it has earned for ensuring high levels of confidentiality. If we were to assume that the component of confidentiality is ousted from arbitration, would the future of arbitration remain the same? The realities of our present have forced us to eye arbitration from a different perspective, devoid of confidentiality. The recent arbitration dispute between Amazon and Future Group has opened a Pandora's box, uncovering threats that face the future of arbitration.

II. CONFIDENTIALITY: MEANING

Although there exists no specific definition of the term 'confidentiality' it can be defined as the notion of being intrusted with the confidence of another or with a secret matter which must be held in confidence or kept secret.[9] In simple terms, it refers to a situation in which one is expected by another to keep a particular piece of information secret.[10] Confidentiality has been accorded great importance in dispute resolution through arbitration. This is because in dispute resolution, some parties may not wish to declare in public, certain allegations of misrepresentation, incompetence, lack of financial resources, and their trade secrets.[11] In such cases, parties prefer dispute resolution via arbitration, owing to the confidentiality it promises to offer.

Privacy and confidentiality are often used interchangeably. These two concepts, although interconnected, are quite distinct in arbitration. Privacy in arbitral proceedings depicts a situation where no third party can enter or witness the arbitration proceedings as they take place

[5] Philip Rothman, *Please Keep It Confidential: Arbitration Makes It Possible*, 49-SEP DISP. RESOL. J. 69 (1994).
[6] Rogers, *Transparency in International Commercial Arbitration*, 54 Kan. L. Rev. 1301, 1304 (2006); Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek*, 7 DePaul Bus. & Comm. L.J. 499, 502 (2009).
[7] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 88 (Kluwer Law International, 3rd ed. 2009).
[8] 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2251, (2009) (*hereinafter* "**GARY**").
[9] BLACK'S LAW DICTIONARY (4th ed.).
[10] 2 OXFORD ENGLISH DICTIONARY.
[11] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 27 (3d ed.1999).

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in a private setting.[12] On the contrary, confidentiality is a broader concept which purports to protect the content, documents, information presented during the arbitral proceeding and the arbitral award from being published or disclosed. It would thus, suffice to say that while confidentiality is impossible without privacy, privacy is meaningless without confidentiality.[13]

III. IS CONFIDENTIALITY IMPLICIT IN ARBITRATION?

With little uniformity across the globe, the question with regards the scope and ambit of confidentiality in arbitration remains far from settled. Every jurisdiction differs in its views of the same. The courts, thereby view such an obligation of confidentiality as arising out of either the parties' contract or as an obligation implied in law as a vital prerequisite of an arbitration contract.[14]

Some jurisdictions have perceived confidentiality as being implicit in an arbitration agreement.[15] Among others, this approach has been adopted by the English,[16] Swiss and Singaporean Courts.[17] The English law being the oldest standing authority on this subject, highlighted the significance of confidentiality which must inevitably be inherent in the arbitral process, save a few exceptions[18] and in *Hassneh v. Steuart Mew*,[19] the court expanded this implied duty to include with its ambit, arbitral awards. This heavy judicial activism in England on the subject is relatively due to the absence of any express statutory provisions relating to the same. The intention behind it was to regulate flexibility by acknowledging the exceptions to the confidentiality obligation without compromising on commercial interests. Therefore, it was left on the discretion of the courts to determine the degree of confidentiality necessary in each case, on a case to case basis. France also acknowledged this implied duty of confidentiality on certain occasions which can be inferred from its court decisions.[20] Besides, several scholars have reasoned, supporting an inherent expectation that the arbitral proceedings would be

[12] Sophie Napper, *The Privy Council on Confidentiality and The Enforcement of Awards in Associated Electric & Gas Insurance Services Limited v. European Reinsurance Company of Zurich*, 6(2) INT'L A.L. R. 43-44 (2003) (hereinafter "**Napper**").
[13] L Yves Fortier, The Occasionally Unwarranted Assumption of Confidentiality, 15(2) ARB. INT'L 131, 131 (1999) (*hereinafter* "**Yves**").
[14] Charles S. Baldwin, IV, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 456 (1996).
[15] Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16(4) AM. UNIV. INT. LAW REV. 969, 974 (2001).
[16] Emmott v. Michael Wilson & Partners Limited (2008) EWCA Civ. 184.
[17] International Coal Pte Ltd v. Kristle Trading Ltd and Another and Another Suit, (2008) SGHC 182.
[18] Dolling-Baker v. Merrett, (1990) 1 WLR 1205 (K.B.).
[19] Hassneh Insurance Co. of Israel v. Steuart J. Mew, (1993) 2 Lloyd's Rep. 243.
[20] Aita v. Ojjeh, Revue de Arbitrage 583 (1986); Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 ARB. INT'L 303, 312 (1995).

confidential.[21]

On the contrary, there are several jurisdictions which do not uphold the notion of implied confidentiality as endorsed by English courts. These jurisdictions have given importance to the express agreement between the parties, alias the principle of party autonomy. This principle has been described as the cornerstone of arbitration by some scholars, affording great procedural flexibility to the parties.[22] The Australian High Court, while rejecting the implied nature of the duty, gave precedence to the express language of the contract as agreed between the parties.[23] Similarly, in *Nafimco v. Foster Wheeler Trading Co*,[24] the court refused to acknowledge the duty of confidentiality in the absence of an express agreement. The UNCITRAL Model Law on International Commercial Arbitration, has also left the matter of confidentiality at the discretion of the parties.[25] Furthermore, this approach has also been endorsed by the US,[26] and the New Zealand Courts.[27] These jurisdictions as opposed to others, have listed numerous exceptions to the confidentiality principle. It can thus be observed that no uniform rule exits with regard to the presumption of confidentiality. While, some jurisdictions entirely rely on this presumption, others place more reliance on party autonomy.

To sum up, most people are unaware that confidentiality is not always implied in arbitration unless protected by an arbitration agreement between the parties. While, some jurisdictions may interpret confidentiality as an implied obligation in law, others may not and therefore it is always best to include a confidentiality clause in the arbitration agreement if that is what the parties intend.

IV. STATUTORY PROVISIONS GOVERNING CONFIDENTIALITY IN ARBITRATION

Several national and international arbitration associations[28] deal with and have laid down rules pertaining to nearly every aspect of the arbitral process,[29] including confidentiality. However,

[21] M Young and S Chapman, *Confidentiality in International Arbitration, Does the exception prove the rule? Where now for implied duty of confidentiality under English law?* 27(1) ASA BULLETIN 26, 26 (2009); ALEXANDER JOLLES, SONJA STARK-TRABER & MARIA CANALS DE CEDIE CONFIDENTIALITY (Kluwer Law International, Hague, Zurich 2013).

[22] EMMANUEL GAILLARD AND JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 188 (Kluwer Law International, 1999) (hereinafter "**GAILLARD**"); *supra* note 6.

[23] Esso Australia Resource Ltd. v. Plowman, 183 CLR 10.

[24] Nafimco v. Foster Wheeler Trading Company A.G., C.A. Paris 1ère C, Rev.Arb. 2004-646.

[25] GARY, *supra* note 7 at 2779 – 2831.

[26] United States v. Panhandle E Corp 118 F.R.D. 346 (D.Del.1988); American Cent E Tex Gas Co v. Union Pac Res Group (2000) WL 33176064 at 1.

[27] Television New Zealand Ltd v. Langley Productions Ltd (2000) N.Z.L.R. 250 (HC).

[28] Delissa A. Ridgway, *International Arbitration: The Next Growth Industry*, 54-FEB DISP. RESOL. J. 50, 52 at 51 (1999).

[29] David W. Rivkin, *1997: A Year of Rules Changes*, 1(2) INT'L ARBS. L. REV. 9, 91 (1998).

majority of these rules either do not explicitly protect confidentiality at all, or do so inadequately. For instance, The New York Convention,[30] though being one the most significant legislations governing International Arbitration, doesn't provide any specific provision concerning confidentiality.

In commercial arbitration, the UNCITRAL Arbitration Rules are particularly significant considering multiple nations have heavily relied on the UNCITRAL model while framing their local rules.[31] The rules empower the arbitrators to exclude certain persons from the hearings to maintain the privacy of the proceedings.[32] However, while these rules protect the privacy of the parties, they don't ensure any confidentiality. Similarly, the International Chamber of Commerce rules also do not impose a general duty of confidentiality because of the failure of the draft commission to reach a consensus on the subject.[33]

The LCIA Rules, on the other hand, provide confidentiality by placing obligations on the parties not to disclose anything discussed in arbitral proceedings and deliberations.[34] The Rules further subject the publication of awards to the prior written consent of all parties and the Arbitral Tribunal.[35] Similarly the WIPO[36] and the ICSID Arbitration Rules[37] also includes a detailed confidentiality provision in their arbitration rules. A few National Institution Rules for International Arbitration such as the American Arbitration Association,[38] The Japanese Commercial Arbitration Association[39] and The Chinese Arbitration Rules of 1995,[40] also include a confidentiality provision. However, only a few jurisdictions have legislated on confidentiality in arbitration. It is significant to note that some jurisdictions even make it clear that arbitrations are not confidential.[41] While a majority of the countries have failed to codify

[30] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).
[31] Jerzy Rajski, *Arbitration in Central and Eastern Europe*, 2 INT'L ARB. L. REV. 47, 48-49 (1999).
[32] UNCITRAL Rules, Art. 25 (4).
[33] Napper, *supra* note 11.
[34] Arbitration Rules of the London Court of International Arbitration (1998), Art. 30.2, http://www.lcia-arbitration.com/rulecost/english.htm#ad.
[35] Arbitration Rules of the London Court of International Arbitration (1998), Art. 30.3, http://www.lcia-arbitration.com/rulecost/english.htm#ad.
[36] World Intellectual Property Organization Arbitration Rules, Art. 52(a).
[37] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S.159, http://Nvwv.asser.nl/ica./washen.htm.
[38] The American Arbitration Association International Rules, Art. 34 (2000)
http: www.adr.org/rules/international_arb_rules.html.
[39] Japanese Commercial Arbitration Association, R. 42, (1998) http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/shouji4-I-e.html.
[40] China International Economic and Trade Arbitration Commission Arbitration Rules, Arts. 36 & 37 (1998).
[41] GA. DEKALB COUNTY INTERNAL OPERATING P. APP. B R. (8) http://www.co.dekalb.ga.us/superior/index.htm; GA. FULTON COUNTY R. 1000 8(a)(c), http://fultoncourt.org/lawlibrary/pdf/localruIes.pdf.

provisions pertaining to confidentiality, few countries such as Singapore,[42] New Zealand[43] and now India[44] have a comprehensive provision for arbitral confidentiality.

V. CONFIDENTIALITY IN ARBITRATION: DOMESTIC STANCE

Although, the concept of confidentiality had been a part of the Indian Arbitration Act, it only related to conciliation proceedings.[45] It is with the introduction of Section 42A in the Arbitration Act[46] that an express provision relating to confidentiality in arbitral proceedings was added. While the amendment was necessary for the regulation of confidentiality, several shortcomings pertaining to the enactment have surfaced.

One of the major concerns that come to light is the absence of inclusion of third parties to the arbitral proceedings. Section 42A only imposes the duty of confidentiality on the arbitral institution, the arbitrator/s, and the parties involved in the arbitration. It does not however state anything in relation to the witnesses, stenographers, transcribers and other persons who attend and/or are a part of the arbitration proceedings and might come across any confidential information, hence, excluding such persons from its purview. This in itself highlights the discrepancy.

The enactment further offers no clarity on how confidentiality would be ensured in arbitration related court proceedings. This may be a huge threat to confidentiality. More so, because there are numerous occasions where the parties to arbitration may approach the court. For instance, in case of joinder of parties,[47] interim reliefs from the court,[48] application or claim to the court to set aside the award,[49] and the like. Such ambiguity may lead to a delay in justice and even cause a breach to confidentiality.

It is also significant to note that the enactment commences with a non-obstante clause which overrides the provisions opposing it. This is likely to have a negative bearing on the disclosure requirements which have to be compulsorily complied with by the corporations and other agencies. For instance, corporations owe disclosure obligations to various stakeholders who would be strangers to the arbitration but have a legitimate interest in the progress and outcome

[42] Singapore arbitration Act, 2001, § 57.
[43] New Zealand Arbitration Act, 1996, § 14.
[44] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 42A, No. 33, Acts of Parliament, 2019 (India).
[45] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 75, No. 33, Acts of Parliament, 2019 (India).
[46] The Indian Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of parliament (India) introduced by recommendations of the high-level committee that was chaired by Justice B. N. Srikrishna.
[47] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 8, No. 33, Acts of Parliament (India).
[48] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 9, No. 33, Acts of Parliament (India).
[49]The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 8, No. 34, Acts of Parliament (India).

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of the arbitration. Similarly, a company as part of a legal requirement must disclose material information through the board of directors' report and the annual returns.[50] In such circumstances, the clause is likely to cause serious conflict of interests between the pre-existing laws too. The application of Section 42A[51] must be balanced and be in line with other laws already in force.

Furthermore, the enactment in question has simply restricted itself to one exception of disclosure. It will suffice to say that the restricted exemption provided herein might come in conflict when it is necessary to disclose information related to such arbitration proceedings in the case of a petition for challenge to the arbitral award[52] or an application[53] or for interim measures or an appeal[54] challenging interim measures granted by the tribunal or for a termination of the order of the arbitrator, etc. This may lay the ground for a possible confidentiality breach. Another major concern is that there are no consequences to the non-compliance of Section 42A of the relevant act which raises doubts as to its effective adherence. There must be a provision permitting action against such non-compliance of the particular provision to ensure its acquiescence.

Every jurisdiction thus, must with time evolve its law concerning confidentiality in arbitration in line with the changing needs of its people.

VI. AMAZON – FUTURE GROUP ARBITRATION DISPUTE: THREATS TO CONFIDENTIALITY IN ARBITRATION

As we witness a 'flashpoint' in the recent Amazon & Future Group arbitration dispute, the concerns pertaining to confidentiality in future arbitration continue to bedevil us. Despite a confidentiality clause between the parties prohibiting the disclosure of the award, the arbitration order was reviewed by some people. This incident makes us question the efficacy of confidentiality in its entirety which is supposedly ensured either as an implied in law obligation or by way of a contract between the concerned parties in arbitration.

While, an implied duty of confidentiality is assumed and preserved only in a few jurisdictions, judges, practitioners, and arbitrators across the globe seem to agree that parties can at least contract for some degree of confidentiality.[55] However, since there exists no legal obligation

[50] Companies Act, 2013, § 134, No. 33, Acts of Parliament (India).
[51] The Indian Arbitration and Conciliation (Amendment) Act 2019, No. 33, Acts of parliament (India).
[52] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 34, No. 33, Acts of Parliament (India).
[53] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 9, No. 33, Acts of Parliament (India).
[54] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 14, No. 33, Acts of Parliament (India)
[55] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2779 – 2831 (2nd ed. 2009); *supra* note 20.

to agree on confidentiality by way of contract, the parties may prefer more flexibility and suggest that there be no confidentiality obligation at all.[56] Furthermore, because confidentiality is one of the most fundamental aspects of arbitration, the parties at times presume confidentiality as a 'given' aspect of arbitration and thereby not contract for it expressly. Additionally, it is practically difficult to draft an efficient confidentiality clause considering numerous exceptions available to confidentiality. Moreover, as arbitration clauses are usually written into business contracts prior to the emergence of a dispute,[57] parties may feel uncomfortable in negotiating aspects pertaining to possible dispute resolution issues. In other words, parties "may not want to talk about the funeral while negotiating the terms of the marriage."[58] This is the primary reason why arbitration clauses and their confidentiality agreements are often poorly drafted.

The Amazon & Future Group arbitration dispute has brought to light various concerns pertaining to confidentiality in arbitration which have often been overlooked. The foremost concerns the existence of the arbitration itself. The confidentiality clause between Amazon and Future Group prohibits the disclosure of the existence of any dispute or arbitration between the parties. However, it could not prevent the fact of the arbitration dispute being divulged to the public. This makes us question whether it is practically possible to conceal the fact of arbitration. If so, it makes us wonder whether a party can disclose its involvement in an arbitration with another named or unnamed party. Most importantly, it makes us wonder, how in such circumstances this sits with the obligations which may be imposed upon a party to an arbitration to provide information to its shareholders or to the stock exchange or to banks which provide finance. The answers to these questions vary in accordance with the contract entered into between the parties. It can be established that to ensure the highest level of confidentiality, such contingencies which are likely to arise must be thoroughly discussed by the parties beforehand and be included in the arbitration contract to avoid any instances of disclosure. While it is practically not possible to draft the 'perfect' arbitration agreement and ensure continentality in its entirety, an arbitration agreement can in most cases either make or break the confidentiality in the arbitral process.

Another issue, which primarily surrounds the Amazon & Future Group arbitration dispute is pertaining to the duty of confidentiality extending to the arbitral award. An arbitral award once

[56] Nicholas Lingard & Smitha Menon, *Confidentiality in International Arbitration: A Comparative Jurisdictional and Institutional Review*, SINGAPORE ARBITRATION JOURNAL (2020).
[57] W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERL'L-L ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 151 (1997); Stephen R. Bond, *How to draft an Arbitration Clause*, J. INT'L ARB. 65 (1989).
[58] Fraser, *supra* note 3.

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awarded, may require disclosure to a court for enforcement. Furthermore, for the party liable to pay damages, the fact might need to be disclosed to regulatory authorities and perhaps providers of finance. This creates difficulty in maintaining confidentiality as agreed between the parties. Similarly, questions regarding the disclosure of documents or information obtained during the arbitration may arise during or after the proceedings have terminated, for instance in the subsequent arbitral or judicial proceedings. Additionally, there will always be a small crowd that is aware of the award. Thus, if the award is placed into litigation, this crowd could grow and thereafter the award may also become public.[59]

Meanwhile, complex international business transactions often break down into multiple disputes involving several parties, not necessarily linked together by the same arbitration clause.[60] It shall be duly noted that as all the parties may not be bound by the same arbitration clause, more than one arbitration may arise out of the same facts. The reason being that disputes between different parties may arise in a varied manner and with different content.[61] A similar situation has been observed in the Amazon & Future group dispute where Future Retail Limited, even when not a party to the agreement under invoking arbitration, has been dragged into the dispute.

Now let us assume that there has been a confidentiality breach. As per general rule, when a party breaches its duty of confidentiality, remedy can be sought in the form of monetary damages and injunctions against further disclosures. However, obtaining such remedy is pragmatically difficult. For a Party to be awarded damages for a breach of confidentiality, it must prove the breach of that duty committed by another.[62] Here, unless a party openly distributes confidential information, it is difficult to identify the source of a disclosure, making it challenging for the disclosing party to prove the loss which was suffered by him as a resultant of that breach. Amazon may claim that the arbitration order was disclosed by Future group, however without any conclusive evidence it is difficult to determine the party responsible for the breach.

According to the Queen Mary University International Arbitration Survey, approximately 33% of the respondents stating confidentiality and privacy as the compelling reasons, chose to opt for arbitration over litigation.[63] Thus, a failure to warrant confidentiality in arbitration result in

[59] GAILLARD, *supra* note at 188.
[60] Stewart R Shackleton, *Global Warming: Milder Still in England: Part 2*, 2(4) INT'L ARBS. L. REV. 117, 125 (1999).
[61] *Id*.
[62] The Indian Arbitration and Conciliation (Amendment) Act, 2019, § 75, No. 33, Acts of Parliament (India).
[63] White & Case, *International Arbitration Survey: Improvements and Innovations in International Arbitration* (6 October 2015) www.arbitration.qmul.ac.uk/docs/164761.pdf.

fewer persons taking part in arbitration and pose as a hindrance to parties from taking part in arbitration.

Therefore, although confidentiality, in its entirety, can never be realized, efforts can be taken to maintain the highest level of confidentiality in arbitral proceedings so as to avoid any inconvenience which may be caused to parties in the event of a breach.

VII. PRACTICAL SUGGESTIONS

Pragmatically, as stated above, confidentiality is unlikely to be realised in its entirety. However, efforts can be made to mitigate instances of disclosures and maintain the most optimum level of confidentiality possible.

The most vital suggestion would be the inclusion of a well drafted confidentiality clause in the arbitration agreement, provided the parties desire to keep the proceedings confidential. Such provision would provide greater certainty in terms of confidentiality and avoid any inconvenience and delay arising from visits to the court for it to enforce as per its discretion, confidentiality during the arbitral process.[64] In other words, relying on any contractual provision with negotiated exceptions, is always better than to rely on a default rule implied by law, the boundaries of which may be difficult to define. Thus, party autonomy shall be considered i.e., what parties have expressly agreed to in their contract is the most effective protection. Accordingly, parties must reach a decision at the time of formation of contract, as to the extent to which a they prefer confidentiality, scope of confidential information, the security measures that parties are required to take, and the specific parties who are authorized to receive the confidential information and the parties who are entitled to information should sign separate confidential agreement to ensure effective and efficient drafting of the arbitration clause.[65] Further, in order to avoid disclosures after the conclusion of the contractual relationship or arbitral dispute between the contracting parties. They should extend the applicability of confidentiality for an indefinite period so that disclosures don't arise later.

In arbitration proceedings, there are three major parties who are required to participate i.e., the disputing parties, the arbitrator and other third party such as experts or witnesses. Ethics of Arbitrator state that the arbitrator has an ethical duty of confidentiality.[66] Moreover, in order to further strengthen confidentiality, it must be extended to include third parties who often evade responsibility because of their noninvolvement in the contract.[67] Difficulty in confidentiality

[64] Yves, *supra* note 12.
[65] *Id.*
[66] International Bar Association, § 9.
[67] Ajit Kaushal, *The Issue of Confidentiality in International Commercial Arbitration,* 4 IUP LAW REVIEW, 33,

mostly arises in case of multi-party proceedings in the absence of shared privity between parties. The only solution here would be to require all the relevant third parties who may receive any confidential information to sign confidentiality agreements. Confidentiality undertaking shall be signed by every witness and any other person involved or present during proceedings. Further, a good confidentiality clause is characterized by its ability to reach all the persons that may be involved in the arbitral process in some way, while being specific and certain. A confidentiality clause which even if is broad in its application, would be of no good if its vague. As narrower the scope of the arbitration, the narrower the scope of disclosure.[68]

The amazon – future arbitration clause, even if broad in its application, was ambiguous in terms of its application. The question which comes to mind is whether the statement "*party or person involved in any way in the creation, coordination or operation of the arbitration of any dispute"* includes within its purview, Future Retail. In the literal sense of the term, we may say that it might. However, this would be another issue to be decided by the court. Hence, drafting a confidentiality clause is an art in itself, which must define the scope of confidentiality in clear words.

Confidentiality of the proceedings can also be ensured by the parties by way of a protective order[69] which can be obtained either by agreement between the parties or by the arbitrator. A violation of a confidentiality stipulation by a party, can create liability for breach of contract subjecting the party to damages or an order of specific performance.[70] Accordingly, the evidence may be precluded and fees may be assessed against the offending party.[71] Here, the parties may, agree in advance to fees and penalties for breaches thereof, for the sake of convenience.[72] This can therefore be an effective means of deterring unauthorized disclosure of confidential information. Additionally, measures such as injunctions or sequestration are also useful to the arbitrator in ensuring and enforcing confidentiality.[73]

Therefore, the idea is that when arbitration commences then the tribunal should already have parties' consent on the scope of confidentiality. In the event the parties fail to agree, the arbitrator shall pass a protective order deemed to be accepted by the parties. Subsequently, when a party contends violation of the confidentiality agreement or protective order, the

40 (2014).
[68] Yves, *supra* note 12.
[69] *Supra* note 4, at 71.
[70] Yves, *supra* note 12.
[71] *Id.*
[72] Yves, *supra* note 12.
[73] *Id.*

tribunal can simply enforce the same.

The usage of legend paper by the parties in their arbitration document production can be another valuable suggestion for the protection of confidential documents.[74] This is because, whenever documents with legend paper are photocopied, an overlaid 'legend' appears in the form of a black blot preventing use of the documents.[75] This was also used by litigants in the recent tobacco disputes.[76] Parties can also stamp documents as 'confidential' to prevent copying and distribution.[77]

There is currently no uniform code around the globe regulating confidentiality in arbitration. The UNCITRAL Model Law on International Commercial Arbitration has left it to the parties to adopt any code related to confidentiality as parties think accurate. [78] Due to the lack of any specific airtight provision, parties often opt for a generic arbitration clause to avoid focusing on contingent future disputes. Besides, only a few national laws regulate confidentiality in arbitration. Contradictory domestic judicial pronouncements have caused a divide in the understanding of confidentiality. For instance, Hong Kong and New Zealand provide statutory confidentiality protection and privacy in court hearings over the awards. While, England and Singapore believe in implied confidentiality in arbitral proceedings. Sweden and USA, on the other hand, don't enforce any legal duty of confidentiality. As a general suggestion, the enactment of an additional clear provision on confidentiality in international law and its adoption by the national courts, could help remove ambiguity regarding its scope and application. This would also enable speedy justice.

As one of the most attractive features of international commercial arbitration, confidentiality ensures legal complications in one place do not affect the profitable projects at other. To preserve this aspect forming the essence of confidentiality, the above stated suggestions must be put into practice before confidentiality loses its significance as an integral aspect of arbitration.

VIII. CONCLUSION

The realities of current system have made protection of confidentiality a wasted effort. The Amazon – Future arbitration dispute has seen a shocking turn of events as regards confidentiality in arbitration, making us question the future of arbitration. This is because a

[74] Yves, *supra* note 12.
[75] *Id*.
[76] Yves, *supra* note 12.
[77] Francois Dessemontet, *Arbitration and Confidentiality*, 7 AM. REV. INT'L ARB. 299, 310 (1996).
[78] Report of the Secretary-General on Possible Features of a Model Law in International Commercial Arbitration, UN Doc. A.CN.9/207, XII Y.B. UNCITRAL 75, 90 (1981).

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failure to maintain confidentiality in arbitration, may have the effect of people shifting to other forms of dispute resolution over arbitration. However, the dispute with this bad news, has also brought to light the very shortcomings of the confidentiality principle, opening the doors to much needed measures which must be implemented by all. Both, the parties by including extensive confidentiality provisions in their agreement as well as the concerned authorities by ensuring clear legal provisions on confidentiality can mitigate instances of disclosures. Confidentiality is also often undermined by enforcement and challenge proceedings in national courts. The concerns unless addressed properly, would consequently deliver us a promise of confidentiality, inherently broken. It is imperative to address these matters carefully in order to rebuild confidence in arbitration as an effective means of international dispute resolution.

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