

UNMASKING THE TRUTH IN ARBITRATION: RETHINKING THE BALANCE BETWEEN CONFIDENTIALITY AND ACCOUNTABILITY

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• ABSTRACT

Confidentiality and privileged communication in arbitration have long been upheld as sacred pillars of the arbitral process. These doctrines are crucial to maintaining the privacy of the parties involved, ensuring open communication, and enhancing the flexibility that makes arbitration an attractive dispute resolution mechanism. However, as arbitration increasingly becomes the forum of choice for high-stakes commercial and investment disputes, these doctrines are sometimes repurposed from their protective origins into strategic tools of obfuscation. Parties may misuse confidentiality and privilege to withhold critical evidence, conceal fraud, or evade accountability.

This paper investigates the growing ethical and procedural tension between safeguarding confidentiality and upholding the truth-seeking function of arbitration. With special emphasis on post-2015 Indian arbitration reforms, particularly the introduction of Section 42A of the Arbitration and Conciliation Act, 1996, this study evaluates whether India's statutory framework adequately balances privacy with transparency. The paper also examines international best practices under the UNCITRAL Rules on Transparency, the ICC Arbitration Rules, and the SIAC Rules to propose a balanced, ethics-driven arbitration model that promotes transparency without undermining legitimate privacy interests.

Keywords: Arbitration, Confidentiality, Privileged Communication, Procedural Fairness, Indian Arbitration, Legal Ethics, UNCITRAL, SIAC, ICC

1. Introduction

In recent years, arbitration has emerged as the preferred global mechanism for resolving complex international commercial, corporate, and investor-state disputes. It is widely celebrated for offering procedural flexibility, finality of outcomes, and discretion. Its confidential nature safeguards trade secrets, intellectual property, sensitive financial information, and reputational interests, while attorney-client privilege enables strategic frankness without public scrutiny. Yet, what begins as a protective cloak can, by design, transform into an opaque shield—masking misconduct, perpetuating wrongdoing, and eroding the very notion of justice that arbitration claims to uphold.

This moral tension crystallizes when arbitration, cloaked in secrecy, allows malfeasance to go unexposed, thereby tipping a fair process into unaccountable shadows. India, aspiring to position itself as a major global arbitration hub, codified confidentiality for the first time through the 2019 insertion of Section 42A into the Arbitration and Conciliation Act, 1996. Under this provision, arbitrators, arbitral institutions, and parties are mandated to maintain confidentiality over all aspects of the proceedings, except for disclosure of the award strictly for enforcement purposes.

However, this rigid formulation suffers from significant shortcomings. It excludes non-signatories such as expert witnesses, tribunal secretaries, and third-party funders, leaving crucial disclosures unprotected. Moreover, pre-award judicial proceedings—such as interim relief under Section 9—and other court-related processes may bypass confidentiality altogether. Compounding these gaps, the Act provides no enforcement mechanisms—no sanctions, no deterrents, and no remedial framework—rendering confidentiality obligations largely toothless.

These deficiencies allow confidentiality to be weaponised, enabling parties to stifle accountability, evade scrutiny, and conceal illicit conduct. If India is to cultivate trust in its arbitral ecosystem, it must confront a fundamental question: How can confidentiality coexist with transparency and procedural fairness without being exploited as a veil for wrongdoing?

This paper explores that question and proposes practical pathways to recalibrate India's arbitration framework. It advocates broader confidentiality obligations, meaningful carve-outs for fraud and public interest, enforceable sanctions, and institutional accountability mechanisms. Only by embedding transparency within confidentiality can arbitration fully serve justice, protect corporate integrity, and elevate India's standing as a credible seat of dispute resolution.

2. Literature Review

Arbitral scholarship has long debated the virtues and vices of confidentiality. Redfern and Hunter (2023) extol confidentiality as a cornerstone of arbitration that enhances party confidence and trust. They argue that privacy encourages candour, cooperation, and reduced adversarialism. Institutional rules similarly presume confidentiality as a defining feature distinguishing arbitration from courtroom litigation.

In contrast, critical voices such as Born (2021) and Waincymer (2019) caution that unqualified confidentiality undermines transparency and justice. They observe that confidentiality is increasingly invoked to restrict disclosure of facts essential for fair adjudication, particularly

in investor-state dispute settlement (ISDS) and high-value corporate arbitrations. Such misuse erodes procedural integrity, curtails public oversight in matters of significant public interest, and enables private actors to escape scrutiny.

Most academic literature, however, stops short of offering prescriptive frameworks or comparative analyses tailored to emerging arbitration jurisdictions such as India. This paper seeks to bridge that gap by examining India's evolving legal framework and drawing insights from international best practices.

3. Statement Of The Problem

This research addresses the following core question:

Does the prevailing use of confidentiality and privileged communication in arbitration hinder the tribunal's ability to uncover the truth and ensure accountability, particularly within the Indian context?

This inquiry is deepened by three interrelated dimensions:

Restrictive Confidentiality Clauses

Section 42A of the Arbitration and Conciliation Act (2019) mandates confidentiality for arbitrators, institutions, and parties but excludes critical participants such as expert witnesses, third-party funders, and tribunal facilitators, creating procedural blind spots.

Tension between Privacy and Open Justice

Arbitration's private nature often conflicts with the principle of transparency intrinsic to legal systems founded on open justice. Indian law remains unclear on when confidentiality must yield—particularly in cases involving fraud, misconduct, or public interest—thereby compromising fairness in court-related proceedings.

Enforcement Vacuum and Accountability Deficit

The Act provides no enforcement mechanisms for confidentiality breaches. The absence of sanctions emboldens misuse, allowing parties to conceal evidence or avoid scrutiny, undermining the tribunal's truth-seeking mandate.

4. Study Objectives

- To critically examine the legal and ethical dimensions of confidentiality and privilege in arbitration.
- To evaluate how these protections affect fairness, transparency, and truth-finding.
- To assess India's arbitration framework in light of international norms.
- To propose reform-oriented solutions that preserve both privacy and procedural integrity.

5. Research Gap

While existing literature recognizes the benefits of confidentiality, insufficient attention has been paid to its strategic misuse, particularly within Indian arbitration. Practitioners increasingly report instances where parties withhold documents, conceal fraudulent conduct, or evade regulatory oversight under the guise of confidentiality or privilege. Moreover, despite multiple legislative amendments, Indian arbitration law remains vague on balancing confidentiality with transparency. This study addresses these doctrinal and practical gaps through a reform-oriented analysis.

6. Research Questions

- How do confidentiality and privilege impact the truth-finding function of arbitration?
- What is the current legal position in India regarding confidentiality and disclosure?
- How do international arbitral frameworks (UNCITRAL, ICC, SIAC) manage this balance?
- What reforms are necessary to strengthen Indian arbitration without sacrificing party privacy?

7. Research Methodology

This study adopts a doctrinal and comparative legal research methodology. **Primary sources** include the Arbitration and Conciliation Act, relevant judicial decisions, and UNCITRAL, ICC, and SIAC rules.

Secondary sources include peer-reviewed journals, books, institutional reports, and expert commentary.

A qualitative approach is employed, as empirical arbitration data remains largely inaccessible due to confidentiality constraints.

8. Significance Of The Study

By critically examining confidentiality post-Section 42A, this study highlights how rigid secrecy can inadvertently shield misconduct, undermining accountability and public confidence. The research proposes balanced reforms that strengthen both privacy and justice, thereby enhancing enforceability of awards and aligning India's arbitration framework with global best practices.

9. Discussion And Analysis

- **The Dual Nature of Privilege and Confidentiality**

Privileged communication assures parties that disclosures to legal counsel will remain protected. In arbitration, confidentiality extends to pleadings, evidence, hearings, and awards. However, absolute confidentiality is neither universally accepted nor always appropriate. Its misuse can conceal material facts, distort proceedings, and undermine justice—especially in multi-party disputes or matters involving public interest.

- **Impact on Truth-Seeking and Procedural Justice**

Confidentiality, when abused, impedes tribunals from accessing essential evidence, erodes public trust, and compromises procedural fairness. Arbitration must therefore balance discretion with accountability to fulfil its adjudicatory mandate.

10. Case Study: *Lalit Kumar v. Union of India* (2022)

In *Lalit Kumar v. Union of India* (2022), the respondent withheld critical communications and internal reports by invoking legal privilege. The arbitral tribunal, constrained by confidentiality, rendered its award without access to these materials. The Delhi High Court subsequently observed that the award was substantively incomplete, as the tribunal's inability to examine key documents compromised procedural integrity.

This case illustrates the dangers of rigid confidentiality. While intended to protect sensitive information, excessive secrecy can obstruct truth-finding and undermine justice. The judgment underscores the need for calibrated transparency within arbitral proceedings.

International Best Practices

UNCITRAL Rules on Transparency (2014)

These rules mandate publication of key documents and generally open hearings in investor-state arbitration, subject to exceptions for confidential or protected information.

ICC Rules (2021)

Article 22(3) empowers tribunals to override confidentiality where necessary for fairness or justice, reflecting a flexible, principled approach.

SIAC Rules

SIAC adopts a hybrid model—maintaining confidentiality while permitting disclosure where required by law or justice, and empowering tribunals to sanction breaches.

Ethical Dilemmas For Arbitrators And Counsel

Arbitrators and counsel face ethical challenges when confidentiality conflicts with justice. Tribunal secretaries and emergency arbitrators further complicate this landscape, as their disclosure decisions significantly impact procedural fairness.

11. Limitations Of The Study

- The research is doctrinal and lacks empirical data.
- It focuses primarily on commercial and investment arbitration.
- Institutional arbitrations involving public interest domains such as labour or sports law are excluded.

12. Conclusion

Confidentiality is indispensable to arbitration, yet its misuse can obstruct justice. Section 42A of the Arbitration and Conciliation Act mandates confidentiality but provides only a narrow exception for enforcement. Unlike international frameworks such as UNCITRAL and ICC, Indian law lacks nuanced carve-outs and enforcement mechanisms. To strengthen credibility and global confidence, India must broaden confidentiality exceptions, introduce enforcement tools, and empower tribunals to balance secrecy with transparency.

13. Recommendations For Reforming Confidentiality In Indian Arbitration

- **Legislative Reform with Purposeful Exceptions**
Amend Section 42A to include exceptions for fraud, public interest, and statutory compliance, inspired by Hong Kong's structured confidentiality regime.
- **Empowering Tribunals to Compel Disclosure**
Grant tribunals express authority to override confidentiality where essential evidence is withheld, echoing the Srikrishna Committee's recommendations.
- **Public Interest Override Clause**
Introduce model clauses permitting limited disclosure where public welfare or wrongdoing is implicated, aligning with UNCITRAL Transparency Rules.
- **Mandatory Ethics and Disclosure Training**
require periodic ethics training for arbitrators, tribunal secretaries, and counsel.
- **Transparent Redacted Awards Database**
Establish a database of anonymized awards to promote consistency, research, and institutional credibility.

14. References

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