FOR YOUR (ATTORNEY'S) EYES ONLY? LIMITS TO ARBITRAL CONFIDENTIALITY IN INDIA

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Confidentiality remains one of the cardinal features of arbitration, and parties often assume, when opting for arbitration, that the process is intrinsically confidential. But often, the rewards of confidentiality come with a cost, and this duty of confidentiality comes with an additional burden, a number of exceptions, so as to safeguard the legitimate interests of the parties. These exceptions include but are not limited to the disclosure required by legal duty, disclosure to protect or enforce a legal right and a challenge or enforcement of an arbitral award. The legal landscape has seen a number of such exceptions, and one such recently revived entrant is the 'Attorney's' Eyes Only Regime'. Being a fairly new concept, the AEO Regime possesses similarities to other exceptions of disclosure while holding onto a unique and distinguishable position. AEO protective orders intend to protect against the unauthorised disclosure of sensitive information that might affect the interests of the parties. Despite its theoretical existence, neither the legal sphere nor the arbitration setting has witnessed many instances of the pragmatic application of the same by way of codification or judicial pronouncements. A change in this position was the recent Singapore High Court judgment in the case of China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and another, where the Singapore High Court analysed the AEO Regime in-depth raising points of wider significance and confirmed that AEO orders are a legitimate feature of arbitration. In this context, we decipher how the AEO Regime has been incorporated and applied in arbitration-friendly jurisdictions across the globe and analyse the co-existence and/or clash of the same with the principles of natural justice. Further, while evaluating the pros and cons, we attempt to visualise the application of the AEO Regime in the Indian Arbitration Landscape.

Keywords: AEO, Confidentiality, Disclosure, Natural Justice, Arbitration.

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I. INTRODUCTION

Confidentiality has become a predominant feature of Arbitration. Often, parties and arbitrators are bound to prohibit the disclosure of any document, argument or decision. It is given that Arbitration is a confidential process, and parties in disputes are subjected to that confidentiality during the entire tenure of the proceedings in the form of a confidentiality agreement. This confidentiality agreement designates a document in two levels, one is termed as confidential and one as highly confidential. It applies not only to the duration of the proceedings but also to the production of documents as evidence. Despite this confidentiality, parties are hesitant to share certain documentary evidence with the other parties due to the sensitive nature of these documents, as there is fear of misuse or negligent actions. The hesitancy of the parties to disclose sensitive information has led to the emergence of the "Attorney Eyes Only" Regime (*'AEO Regime'*), which is the designation the document as highly confidential in nature. The AEO Regime is a highly confidential designation, a confidential disclosure protocol that limits access to sensitive or confidential information to only a specified group of individuals, in the general run of things, advocates representing the respective parties in a dispute. This is done to protect the privileged and sensitive nature of the information from unauthorised access and misuse by ensuring that the information is solely used for the purpose it intended. This type of regime is commonly used in legal cases where the information being disclosed is not only subject to attorney-client privilege, and other legal protections and consists of trade secrets *inter alia* but also in instances where the type of information which is to be shared is of a highly sensitive nature that can only be viewed by the counsels of the parties in dispute, in order to curb the misuse of such sensitive information by the other party, which can be used to gain insider knowledge of the operations, day-to-day activities, proposed investment, market strategy inter alia. Hence, it is only the counsel of the parties who can peruse the documents under this regime. The AEO Regime helps maintain the integrity of the legal process and protect the rights of all parties involved using special technology, such as encrypted email, secure file-sharing systems, password-protected websites, or formulating a disclosure protocol pertaining to the documents in question.[1] For designating any document containing the information as an AEO, the designating party must demonstrate with good cause that the information was a highly sensitive trade secret or commercial information, which includes future marketing strategies, pricing, product development and profits which, if disclosed to the opposite party, would lead to significant competitive or other harm that cannot be bypassed.[2]

A simple designation of a document as being confidential in nature does not burden the party to maintain an extra amount of care as compared to a designation of a document as highly confidential. A document termed as confidential in nature can be shared with the client, whereas when it comes to a document being termed as highly confidential under the AEO regime, an extra amount of care and caution has to be exercised as these are the documents which the counsel of the party cannot share with the other party without the prior

[1] *CLL Academy, Inc. v. Academy House Council*, No. 446 EDA 2019, 2020 WL 1671586 (Pa. Super. Ct. Apr. 6, 2020).
[2] *Gerffert Co Inc v. Dean* 2012 WL 2054243 (EDNY).

approval of the party who is sharing these documents under this regime which is unlike the designation of documents as being confidential in nature.

As explained above, AEO Regime is a designation of documents as highly confidential which are only shared with the counsels of the parties. However, the AEO designation of documents hampers the client's access to the evidence tendered. Sometimes in disputes involving complex and sensitive information, which are of the nature wherein a client on the other side of the dispute is the best judge of character and information in order to guide the counsels on the relevancy of documents put before them and accordingly marking them for the convenience of the counsel to use in the proceedings. This designation takes away that right from the parties. More often than not, a client is the best judge of evidence submitted before and against them by the other party and is able to tender the best advice on how to move forward with the same, without which a counsel might not be able to effectively present the case of their client and counter the evidence and claims raised against them. This regime can also encourage dilatory tactics. A party can choose to over-designate documents as highly confidential and share them under the AEO Regime, which can hamper the counsel's effective preparation of the case, as they would have little to nothing to carry on the preparation with. Since this designation can be used at a pre-production stage as well and at a later stage, which is as and when the arbitrator deems it necessary, it has to be used wisely as it is not a cost-effective and time-effective process. AEO designation is a special resource used in extreme and highly sensitive cases and does consume the time and money of the parties involved.

Hence, AEO orders are most frequently used to protect sensitive commercial information, trade secrets, patents or other intellectual property rights.[3] In cases concerning industries such as engineering and construction, manufacturing, technology, and licensing, as well as for specific types of information where unique circumstances require additional protections.[4] It can be a boon or a bane, depending on how it is being used by the parties or the arbitrator. It can be an excellent method of fast-tracking the initial production of documents, therefore curbing the risk of the misuse of sensitive information and disclosure of unwanted evidence before the tribunal, or it can be a very detrimental choice of the process, which might borderline hamper the attorney-client privilege as it restricts the client's access to the documents and forbids the counsel from discussing or showing the same to them. It can also be used to over-complicate the process by the over-designation explained above, wherein every other document is designated as highly confidential, which complicates the process of Arbitration and defence or claimants side preparation.

According to Justice Roussel, the CMJ, an AEO order should be restricted to the following instances:[5]

1. They should be provided in exceptional situations. In the absence of exceptional circumstances, the opposing parties must be allowed to access the AEO-designated documents along with their attorneys.

[3]ibid., Magistrate Cheryl L Pollackm.
[4]Mathew J Skinner, Zachary Sharpe and Jeffrey Jeng, 'Singapore Court Affirms Power of Arbitral Tribunals to Order Attorneys' Eyes Only Disclosure' (*Jones Day*, July 2018) <https://www.jonesday.com/en/insights/2018/07/singapore-court-affirms-power-of-arbitral-tribunal> accessed 14 February 2023.
[5]*Arkipelago Architecture Inc v. Enghouse Systems Limited* 2018 FCA 192.

2. There must be a serious threat to the interest of the designating party. The harm must be real, substantial, and supported by evidence.
3. When the parties are direct competitors, particularly when the evidence indicates that such disclosure could harm the interests of the designating party, it is permissible to prevent disclosure to the opposing party.
4. It is the burden of the party seeking the protection order to demonstrate the need for a limitation that effectively forbids counsel from providing his client with pertinent material in order to get directions.

AEO Regime is a "*serious departure from the ordinary procedures of the Court. These orders must be recognised as such, limited (where possible) and scrutinised for fairness* (*to the parties and to third parties swept into the litigation*)."[6] Under the AEO regime, upon classification, each document's merits should be taken into account. Appropriate safeguards should be applied to protect the highly sensitive information contained within those documents, for it would hardly matter if the records had already been made public prior to the arbitration proceedings.[7]

II. AEO REGIME VERSUS NATURAL JUSTICE DOCTRINE

The principles of Natural Justice serve as a guiding principle for every legal system and/ or administrative action emulating the Rule of Law. In the case of *Kioa v. West*, it was observed that "*What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, in inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting. ... The critical question in most cases is not whether the principles of natural justice apply but the duty to act fairly in the circumstances of the case.*"[8] It is the sense of what is right or wrong.[9] These principles are not embodied rules.[10] According to these principles, any action, be it administrative or any procedure, should be fair and impartial and protect individuals' rights against arbitrariness, unfairness and unreasonableness.[11] These principles serve the purpose of endowing the law with fairness.[12] These principles are derived from the Greeks, who were the first to state that certain principles which are higher, universal and natural and therefore are applicable to every human being.[13] These principles of natural justice are embodied in virtually every jurisdiction and are followed everywhere. They are primarily as follows:

1. *Nemo Judex in Causa Sua:*No one shall serve as a judge in his own case, otherwise known as the Rule against Bias.
2. *Audi Alteram Partem:* Right to a fair hearing, which basically provides for every party shall be given a fair opportunity of being heard in their own case.

[6]*Mitsubishi, Sisvel v. Archos&Ors* [2019] EWHC 3477 (Pat).
[7]ibid.
[8]*Kioa v.. West*, (1985)159 CLR 550.
[9]*Vionet v. Barrett,*(1885) 55 LJQB 39.
[10]*Swadeshi Cotton Mills v. Union of India*, (1981)1 SCC 664.
[11]*Maneka Gandhi v. Union of India* (1978) 1 SCC 248.
[12]A.BeulaChrismak Darius and Ms R.Dhivya, "Applicability of Principles of Natural Justice to The Administrative Proceedings" 120 IJPAM 2015 (2018) <https://acadpubl.eu/hub/2018-120-5/2/181.pdf> accessed 1 April 2023.
[13]M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell 2007).

Serve as standards to interpret other legislations and also uphold the sanctity of proceedings of judicial and quasi-judicial nature. The rule against bias in terms of Arbitration is one of the most important pillars of arbitration. The rule is applicable to proceedings of both judicial and quasi-judicial in nature.[14] In light of the rule against bias, the arbitrator is required to act in an impartial manner; he has to rise above the interest of the parties and, by doing so, uphold the sanctity of arbitration. An arbitrator has to discharge his adjudicatory role in an impartial and fair manner, independent of the parties.[15] It goes without saying that when the case's arbitrator has a stake in its outcome, prejudice will inevitably result. In arbitration proceedings, a bias can take the form of a personal bias, such as when the arbitrator hears their own case or a case against relatives; a financial bias, where the arbitrator partially acts out of self-interest; or a formal bias, where the arbitrator's behaviour becomes biased as a result of the influence of someone in a position of authority.[16] The application of the principle against biases indicates that no evidence of actual bias is necessary; the mere potential of bias is sufficient to invalidate the right to make a choice. It goes without saying that a judge who hears his or her own case is unable to administer justice, endangering society's attempt to uphold law and order.[17]

Now, turning to the principle of Audi Alteram Partem, which means "*listen to the other side"*, is one of the most important principles of natural justice. It allows for a just and fair trial by allowing both the parties in a suit or a dispute or even otherwise to present their case as they would like. This diminishes the chances of having one-sided orders, judgments and awards inter alia. The Arbitration Act of 1996 provides for equal treatment of parties under Section 18.[18] The principles of natural justice not only apply to the representation of the parties in court but also apply to evidence which is led before the judicial and quasi-judicial authorities. A party is to be allowed to be heard and to raise its defence.[19] Hence, it can be deduced that fairness to a procedure is pertinent to diminish arbitrariness in arbitration or otherwise, which allows for good administration.[20]

However, as observed by the appellate in *China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC*,[21] the concept of AEO runs contrary to the principle of Natural Justice. As argued in the China Machine New Energy Corporation case, the AEO regime prevents the parties from arguing their case effectively. The parties are prohibited from the opportunity to acquire adequate evidence against the opposite party. It inhibits the party from successfully responding to the opposite party. This violates natural justice as it *"requires that parties have the right to present their positive case and to respond to the case advanced against them."* Additionally, the primary presumption for an AEO order is that the opposite party might wrongly use sensitive or confidential information to the detriment of the party seeking an AEO order. However, the Tribunals must carefully consider the legitimacy of such a claim. There is a high probability that such cases are frivolous, prohibiting parties from adequately presenting their claim, acquiring information detrimental to the claiming party or harassing the opposite party.

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[14]*VoestalpineSchienen GmbH v. Delhi Metro Rail Corpn. Ltd,* (2017) 4 SCC 665.
[15]ibid.
[16]AMLEGALS, Principles of Natural Justice in Arbitral Proceedings <https://amlegals.com/principles-of-natural-justice-in-arbitral-proceedings/#> accessed on 5 April 2023.
[17]*Bihar State Mineral Development Corporation and Another v. Encon Builders (I) Pvt Ltd* AIR 2003 3688
[18]Arbitration and Conciliation Act 1996, s 18.
[19]*Province of Bombay v. Madhikar,* AIR 1952 Bom 37.
[20]*M/s Bharat Engineering Co. Ltd. v. State of Bihar* 1990 SCR (1) 290.
[21]*China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC* (2020) SGCA 12.

The AEO regime prohibits anyone other than attorneys and external experts from accessing confidential information, contradicting the basic principles of a 'fair and just trial'.[22] Under this regime, the client is prevented from participating meaningfully in the dispute due to a lack of complete information. According to the doctrine of natural justice[23] every party has the right to know the case sought against it and evidence in lieu of it, including the right to respond to such evidence. It would not be possible for the opposing party to respond to the contentions of which it is kept in ignorance.

Additionally, external counsels are prohibited from sharing the AEO-designated information with the clients, thereby violating their ethical obligation.[24] New York is one such nation where The New York Rules of Professional Conduct have proposed a limited use of the AEO regime due to similar concerns.[25] According to the Rules, the regime prevents the counsels from sharing information with their clients, which would affect their case and prevent the attorney and client from communicating smoothly. Interestingly, the New York City Bar Association's Model Protective Order has excluded the AEO option for protective orders due to its time-consuming nature.[26]

The court in *First Department in Gryphon Domestic VI v. APP Int'l Fin. Co.*[27] observed *"that the 'attorney's eyes only' restriction . . . interferes with their counsel's ability to consult with them regarding facts that are essential to their defence,"* and concluded that such a designation and sealing documents was not appropriate because it *"prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defence"*. The court in *Global Material Technologies Inc. v. Dazheng Metal Fibre Co. Ltd.*[28] noted that when a party's counsel is unable to communicate information with the other party, it makes trial preparation and the trial itself more complex and expensive.

Thus, the AEO order breaches the principle of 'fair and just trial'. It not only affects the party's right to have access to adequate information but also impedes the attorney-client relationship. To overcome these shortcomings mentioned above, the AEO designation must be made in good faith. Drawing this requirement of good faith[29] from the beginning of the issuance of protective orders would prevent outright discovery abuses. A counsel must carefully consider the description and form of documents that are entitled to AEO designation in a Protective Order, as well as the possibility of abuse if an AEO arrangement is included in a Protective Order, given the conflicting concerns between protecting a client's sensitive information and full disclosure to an adversary.[30]

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[22]*TQ Delta LLC v. Zyxel Communications UK Ltd* [2018] EWHC 1515 (Ch).
[23]ibid.
[24]John M. O'Connor, Carrie Maylor DiCanio, and Jorge R. Aviles, 'Attorneys' Eyes Only? Confidential? Really?-Reducing Logistical Headaches in Confidentiality Agreements' (2016) 21(2) NYSBA NYLitigator 38, 41.
[25]The New York Rules of Professional Conduct 2021, 22 NYCRR Part 1200.
[26]*Stipulated Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets* Case No C (US Northern District of California).
[27]*Gryphon Domestic VI LLC v. APP Int'l Fin Co BV* 41 A.D. 3d 25, 836 N.Y.S.2d 4 NY, 2007.
[28]*Global Material Technologies Inc v. Dazheng Metal Fibre Co Ltd* No 12 CV 1851 (ND Ill Sep 13, 2016).
[29]*CellTrust Corp v. ionLake LLC* No. 19-CV-2855 (WMW/TNL), 2022 WL 1553558, 3 (D Minn May 17, 2022); *Humphreys v. Regents of Univ of Cal* No C-04-03808 SI (EDL), 2006 WL 3020902, 3 (ND Cal Oct 23, 2006); *Callsome Solutions Inc v. Google Inc* No 652386/2014, 2018 WL 5267147, 5 (NY Sup Ct Oct 23, 2018).
[30]Jr Leo K. Barnes, 'Attorneys' Eyes Only Designations within a Protective Order' (*Barnes & Barnes PC*) <https://www.barnespc.com/news-articles/attorneys-eyes-only-designations-within-a-protective-order> accessed 14 February 2023.

III. ACCESS TO DOCUMENTS IN PUBLIC INTEREST v. PRIVATE INTEREST

The discourse of law and dispute resolution has always witnessed the production of voluminous documents. These documents have also included confidential and sometimes undisclosed information of parties. However, the progression of technology and difference in approach has contributed towards the additional layers of confidentiality in producing such documents. Antecedently, when the concern was of the information contained in the documents being accessible to a third entity that is not a party to the dispute, a confidentiality agreement served as the solution. Maintaining the confidentiality of crucial commercial information requires striking a balance between procedural fairness (a party is allowed to know the case being made against it, be able to respond to it, and test it) and maintaining the confidentiality of highly sensitive information.[31]

But what about the scenarios where the parties don't want the other party of the dispute to be privy to the information being disclosed? A situation where sharing such information without any recourse will cause irreparable harm? This is where AEO Orders find relevance. The main impediment to the implementation of the same arises when it is in direct conflict with the widely accepted and long-practised principles of law.

For the purpose of this paper, we can identify three such prominent principles concerning the public's access to such documents:

(i) The presumptive right of the public to inspect and copy judicial documents and files;

(ii) The duty of Courts to only seal court records when specific interests outweigh the presumption of public access;

(iii) Only the most compelling reasons can justify the non-disclosure of judicial records.[32]

The adjudicating authorities would then be required to pronounce the superiority of either of the sides or strike a balance between both interests of the party and the presumption of public access. Such an approach could be easily applied to certain areas, such as trademarks, where the demarcation of private interest prevailing over public interest can be established. However, it might not be that straightforward coming to other areas of law.

Common Law provides a strong basis to preserve the public's right to inspect judicial records used to render decisions.[33] For instance, in the United States, the reason for denying the public such access to documents must be of a nature that outweighs the larger public interest.[34] Civil law lays down that the proceedings should be open to the public to ensure efficiency, transparency and fairness of the proceedings.[35] Further, even if the parties are to

[31]Jeremy Dickerson, 'Disclosing documents for 'Attorney's eyes only'' (*Burges Salmon*, 25 November 2020) <https://www.burges-salmon.com/news-and-insight/legal-updates/intellectual-property/disclosing-documents-for-attorneys-eyes-only> accessed February 14, 2023.

[32]John M. O'Connor, Carrie Maylor DiCanio, and Jorge R. Aviles, 'Attorneys' Eyes Only? Confidential? Really?-Reducing Logistical Headaches in Confidentiality Agreements' (2016) 21(2) NYSBA NYLitigator 38, 41.

[33]*Danco Lab Ltd. v. Chemical Works of Gedeon Richter Ltd* 711 NYS.2d 419, 423 (1st Dept 2000).

[34]US Const amends V, amend VI.

[35]*In re Conservatorship of Brownstone* 594 NYS.2d 31, 32 (1st Dept 1993).

mutually agree to abide by the AEO principles, the presence of greater public interest might override such an agreement.[36]

In *United States v. Amodeo*, the Second Circuit further added the element of analysing such public interest on a 'sliding scale'.[37] Such a sliding scale recommended the ranking of the documents involved or to be submitted in a proceeding on a scale based on their relevance or proximity to the subject matter. The Second Circuit also suggested considering whether such documents have previously been subjected to public access to determine the scale it is to be placed. Via this proposal, the Second Circuit aimed to strike a balance between both the spheres, the public's right to access and the private party's right to confidentiality.

In *Gerffert Co., Inc. v. Dean*, it was propounded that the party can apply the AEO principles if they can show 'good cause' that the protection deemed to be afforded to such information cannot be provided by less restrictive means.[38] However, the Court here missed to account for the varying and ever-changing 'relevancy' of judicial documents. The ever-changing and evolving matters in the Court of law combined with the nuances accompanying puts forth a dynamic environment where the documents that were then not the 'heart' of the proceedings form the basis for a future dispute. Moreover, specific questions such as the degree and depth of such claims and reasoning for such a requirement of confidentiality and how specific such allegations of confidentiality should raise doubts about the approach laid down by the courts.[39] If not specified, even a broad allegation of harm to confidentiality might find protection under the ambit of the principle leading to misuse.

IV. AEO REGIME AND THE INDIAN LEGAL LANDSCAPE

The AEO regime does not find a place in the Arbitration and Conciliation Act, 1996 (*'1996 Act'*). However, the concept of attorney-client privilege is recognised in Indian law and is normally applied to arbitration proceedings as well. The 1996 Act provides a framework for conducting arbitration proceedings in India and recognises the implied duty of confidentiality envisaged under Section 42 A of the 1996 Act.[40] Under the 1996 Act, parties to arbitration are free to agree on the confidentiality of their communications and can make arrangements for the protection of confidential information. It is up to the parties to decide which communications are to be termed confidential and which are not.[41] Similarly, the arbitrator has the power to decide on their own jurisdiction, which has been derived from UNCITRAL Model Law under Article 16(1), which provides that the *"Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."*[42] and the same has been encompassed in Section 16 of our 1996 Act.[43] The purpose of which is to minimise court intervention[44] and

[36]Mishcon de Reya, 'For your eyes only? Limits to arbitral confidentiality' (*Mischon De Reya*, 31 October 2019) <https://www.mishcon.com/news/for-your-eyes-only-limits-to-arbitral-confidentiality> accessed 13 February 2023.
[37]*US v. Amodeo* 71 F.3d 1044, 1050; *Byrnes v. Johnson Cnty Comm'rs* 2000 US Dist LEXIS 702, 9.
[38]*Gerffert Co Inc v. Dean* 2012 WL 2054243 (EDNY).
[39]Jr Leo K. Barnes. 'Attorneys' Eyes Only Designations within a Protective Order' (*Barnes & Barnes PC*) <https://www.barnespc.com/news-articles/attorneys-eyes-only-designations-within-a-protective-order> accessed 14 February 2023.
[40]Arbitration and Conciliation Act 1996, s 42A.
[41]Arbitration and Conciliation Act 1996, s 3.
[42]UNCITRAL Model Law on International Commercial Arbitration 1985, Article 16(1).
[43]Arbitration and Conciliation Act 1996, s 16.
[44]Tariq Khan, *Everything You Need To Know About Arbitration in India, 2022* at 55.

to empower tribunals to rule on their own jurisdiction as they are the authority, elected or otherwise, to rule on all jurisdictional issues.[45]

Since the AEO Regime does not find its existence in the 1996 Act, it is pertinent to draw parallel attention to what provisions will find relevance in order for an AEO protective Order to make way. The authors will be drawing a parallel from a few sections of the 1996 Act, such as Section 16 and Section 42A, which provide for "*Competence of Arbitral Tribunal to rule on its own jurisdiction' &"Confidentiality of Information"* respectively and additionally on the question of will AEO designation can be termed as an assistive method during pre-production of documents?

A. SECTION 16

The principle of *Kompetenz-Kompetenz* is enshrined in the 1996 Act and provides that an Arbitral Tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement.[46] This means that the tribunal can determine whether it has the authority to hear a dispute and, if so, the scope of its jurisdiction. This principle of *Kompetenz-Kompetenz* is considered an essential feature of modern arbitration and is recognised as a key aspect of the autonomy of the arbitral process. It helps to ensure that the parties can have their disputes resolved in an expeditious and effective manner without having to resort to the courts for interim measures or to determine the jurisdiction of the tribunal. The principle is well established and is widely recognised by the courts as an essential aspect of the arbitration process. The courts have consistently upheld the authority of arbitral tribunals to rule on their own jurisdiction.[47] and the same has also been enshrined under Section 16(1).[48] Recently, in the case of *C. Shamsuddin v. Now Realty Ventures LLP and others*[49] and *Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field Ltd.*[50] the courts have recognised the power of Arbitral Tribunals to rule on the question of their own jurisdiction. They have declined to intervene in disputes concerning the tribunal's jurisdiction unless there is a clear case of fraud or if the agreement does not meet the essentials of Section 10 of the Indian Contract Act, 1872.[51]

In light of the discussion above, should the AEO Regime be implemented by the tribunal in a dispute wherein the subject matter of the dispute is of a sensitive nature, that AEO Regime has to be implemented in order to protect trade secrets *inter alia*? It will not be a side step from the principle of the Arbitral Tribunal to adjudicate on its own jurisdiction and also with regards to the conduct of the proceedings as they deem fit in accordance with the law to impose the highly confidential regime, i.e. AEO Regime. It can be done so that the Arbitrator protects the confidentiality and concerns of the party, which is apprehensive of its document and information being misused. The Arbitrator can at least determine the timeline of document sharing, expert reports to be submitted, and submissions to be made, which can

[45] *Vidya Drolia v. Durga Trading Corporation* (2021) 2 SCC 1.
[46] *NN Global Mercantile Pvt Ltd v. Indo Unique Flame Ltd & Ors.* 2021 SCC Online SC 13.
[47] Ibid; *Uttarakhand PurvSainik Kalyan Nigam Ltd v. Northern Coal Field ltd.* (2020) 2 SCC 455; *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc*, (2013) 1 SCC 641; *DuroFelguera SA v. Gangavaram Port Ltd*, (2017) 9 SCC 729.
[48] *Ibid*; Arbitration and Conciliation Act 1996, s 16(1).
[49] *C. Shamsuddin v. Now Realty Ventures LLP* 2020 SCC OnLineBom 100.
[50] *Uttarakhand PurvSainik Kalyan Nigam Ltd v. Northern Coal Field ltd.* (2020) 2 SCC 455.
[51] *C. Shamsuddin v. Now Realty Ventures LLP* 2020 SCC OnLineBom 100; Tariq Khan, *Everything You Need To Know About Arbitration in India, 2022* at 56.

help streamline the process of arbitration in light of the AEO Regime, as was done in the China Machine Energy Case.[52]

B. SECTION 42A

Section 42A envisages - *Confidentiality of Information*,[53] requiring parties, the arbitrators and counsels involved to maintain the sanctity of the proceedings and conduct themselves in light of the hallmark principle of arbitration, i.e. confidentiality until and unless it is required for them to disclose documents when it comes to the recognition and enforcement of the award. Section 42A was introduced by the 2019 Amendment on the recommendation made by the High-Level Committee Report headed by Justice B.N Sri Krishna back in 2017.[54]

Section 42A not only puts the onus upon the arbitrator to maintain confidentiality but also upon the parties involved in the dispute. The wording of the section is reiterated verbatim:[55]

> *"**[42A. Confidentiality of information.**-- Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution, and the parties to the arbitration agreement shall maintain the confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of the award.**]"***

Even though there is no mention of the applicability of Section 42A on third parties, a valid reasoning devised from this section, even though it is silent on this aspect, can be that wherein a third party is impleaded as a necessary party to the dispute if the subject matter is intricately linked which requires impleadment of a non-signatory party,[56] this section shall automatically apply to them as being part of the proceedings. However, this section does not cobble any exception to that effect.[57]

AEO Regime being a highly confidential mechanism and the tribunal being a master of its own procedure in consonance with law and procedure, is allowed to undertake necessary steps to conduct a smooth arbitration between the parties. Designating documents under this regime will put an ease on the parties, who are apprehensive of the fact that sharing certain documents will put them on the back seat, not just in arbitration but also in the market and the industry.[58]

Introducing AEO Regime could be of assistance since it would allow for the tribunal to undertake expert examination, which in turn allows for a clearer adjudication of the dispute, which further helps everyone involved in an arbitration. Since both parties are allowed to lead evidence and expert reports, not only will this section bind the tribunal, but the parties involved will also be held liable for any breach undertaken with respect to their implied duty

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[52]*China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC* (2020) SGCA 12.
[53]Arbitration and Conciliation Act 1996, s 42A.
[54]Department of Legal Affairs, *High-Level Committee Report to Review the Institutionalisation of Arbitration Mechanism in India* (2017).
[55]Arbitration and Conciliation Act 1996, s 42A.
[56]*Chloro Controls India Pvt. ltd v. Severn Trent Water Purification Inc & Others* (2013) 1 SCC 641.
[57]Waseem I. Pangarkar, Nitin Sharma, Swapnil Srivastava, 'Confidentiality in Arbitration - A Stringent Amendment'<https://www.mondaq.com/india/arbitration--dispute-resolution/1124370/confidentiality-in-arbitration--a-stringent-amendment> accessed 5 April 2023.
[58]*Gerffert Co Inc v. Dean* 2012 WL 2054243 (EDNY); Leo K. Barnes Jr., 'Attorneys' Eyes Only Designation within a protective order' <https://www.barnespc.com/news-articles/attorneys-eyes-only-designations-within-a-protective-order/> accessed on 5 April 2023.

of confidentiality which subserves the purpose of introducing the AEO Regime like it was undertaken in China Machine New Energy Corporation Case.[59]

C. ASSISTANCE IN ADHERING TO THE PROCEDURE OF EVIDENTIARY HEARING (90-DAY TIME LIMIT)?

In most cases, the necessity to enter into a Confidentiality Agreement is originally brought up in connection with the production of documents. It is conceivable for neither the client nor the counsel to be totally certain of the scope of the material that is contained in the documents at the time that they are being produced. This is especially likely in situations in which large volumes of documents are being produced by category.[60] Therefore in such circumstances, a confidentiality agreement is initiated, which would limit access to the documents. Additionally, taking the path of least resistance at this time is likely going to lead to excessive usage of the "confidential" classification.[61] It is very time-consuming and also expensive to stamp all or nearly all of the documents produced with the word "highly confidential" as opposed to examining the content of each document to determine whether it truly is confidential. This is because doing so would require reading through the document. At this point in the proceeding, which involves the production of documents, it is expected that this over-designation would cause substantial complications as any designation which terms a document as highly confidential from that of a normal confidential designation, a party would then again be requesting the other party to de-designate the document from highly confidential to confidential in order to understand the document produced before them and discuss them with their clients. This would end up stretching the timeline of the arbitration and evidence production, which would, in the author's opinion, be detrimental to the speedy, efficaciousness of the arbitration proceeding.

D. ONE STEP FORWARD, TWO STEPS BACK?

To put context into words, India had initially adopted the AEO regime in the form of confidentiality clubs. The courts recognised that in certain cases providing parties with sensitive, confidential information would give competitors an unfair advantage, prejudicing the disclosing party.[62] Therefore, through this regime, Indian judges sought to safeguard the confidentiality of commercially sensitive information. Typically, in India, a confidentiality club consists of external counsels who are identified representatives of the parties and technical experts. These individuals are bound by non-disclosure of information sought through the protective order, except during the proceedings.

A Confidentiality club was set up for the first time in the case of *MVF 3 APS & Ors. v. M. Sivasamy and Ors.*[63] The Delhi High Court in *Telefonaktiebolaget LM Ericsson (PUBL) v. Xiomi Technology & Ors.*[64] Defined the confidentiality club in India. This confidentiality, External Eyes Only ('EEO') club consisted of only external attorneys and external experts;

[59]*China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC* (2020) SGCA 12.
[60]John M. O'Connor, Carrie Maylor DiCanio, and Jorge R. Aviles, 'Attorneys' Eyes Only? Confidential? Really?-Reducing Logistical Headaches in Confidentiality Agreements' (2016) 21(2) NYSBA NYLitigator 38, 41.
[61]ibid.
[62]*MVF 3 APS & Ors v. M Sivasamy&Ors*2012 (52) PTC 552 (Del); *Telefonaktiebolaget LM Ericsson (PUBL) v. Xiomi Technology & Ors.* 2016 SCC OnLine Del 2404.
[63]*MVF 3 APS &Ors v. M Sivasamy&Ors*2012 (52) PTC 552 (Del).
[64]*Telefonaktiebolaget LM Ericsson (PUBL) v. Xiomi Technology & Ors.* 2016 SCC OnLine Del 2404.

litigants could access the documents only through the EEO club. This principle was later incorporated in Chapter VII, Rule 17 of the Delhi High Court (Original Side) Rules, 2018.[65]

However, the court in *Genentech Inc. and Ors. v. Drugs Controller General of India and Ors.*[66] Departs from the former judgments, which limited the EEO clubs to external attorneys and experts. The court, herein, allowed internal experts to access the documents designated under the protective order. Although the decision was made based on the bench's discretion, and its relevance to other issues is uncertain, it will undoubtedly serve as a guide for the courts vis-a-vis the structure of the Confidentiality Clubs. The bench reasoned that even exerts having access to the information have the right to divulge the information to the party concerned. Hence, appointing internal experts would not affect the confidentiality of the information any differently than appointing an external expert. On the brighter side, the decision will aid in preventing unwarranted document withholding by a party under the pretence of confidentiality, thereby balancing the interest of both parties.[67]

Interestingly, the court took a further backward step in *Interdigital Technology Corporation v. Xiaomi Corporation.*[68] The Delhi High Court observed that a Confidentiality Club under its Original Side Rules could not be formed in a way that provides access to information to a party's counsel and experts while keeping it unavailable to the party itself unless the parties mutually agree to it. According to the Court, such a disclosure would be unacceptable and blatantly unfair. In India, the jurisprudence of natural justice, equal opportunity, and fair play have their own unique contour and complexion. The mere fact that foreign courts may have permitted the establishment of these confidentiality clubs cannot be of significant relevance in India with respect to EEO clubs.[69] The court further observed that a civil dispute typically requires each party to be aware of the other party's case that it intended to refute. Excluding these materials from the opposing party's review would be incredibly unjust and *"would provide an unequal balance"*. Citing *Himalayan Coop. Group Housing Society v. Balwan Singh*, the court noted that the advocate must follow the client's instructions and not *"substitute their judgment for that of the client"*. In light of this concept, the court determined that it would be improper for only advocates to participate in a confidential club as this would violate the lawyer-client privilege. Advocates would be forced to replace the client's preferences with their own judgment and what they feel appropriate. Additionally, by interfering in the relationship between an advocate and a client, the court would prevent the advocate from receiving precise instructions from the client.

V. CONFIDENTIALITY UNDER ARBITRATION-FRIENDLY LEGAL SYSTEMS

Confidentiality, often understood as a distinguishing feature of arbitration, creates a general misunderstanding amongst parties that the proceedings automatically become confidential. Although confidentiality provisions are present in some legal systems, they are not applied as a general rule owing to the myriad of exceptions to the general implied duty of confidentiality. Similarly, not all arbitration institutions provide that proceedings shall always

[65]Delhi High Court (Original Side) Rules 2018, Chapt VII Rule 17.
[66]*Genentech Inc v. Drugs Controller General of India* 2020 SCC OnLine Del 1647.
[67]Ankit Tripathi, A case for Confidentiality Clubs in India: Balancing confidentiality with open justice (Bar and Bench) <https://www.barandbench.com/columns/confidentiality-clubs-balancing-confidentialitywith-open-justice> accessed on 5 April 2023.
[68]*Interdigital Technology Corporation v. Xiaomi Corporation* 2020 SCC OnLine Del 1633.
[69]ibid., 11.

remain confidential in their rules. These general and elastic categories of exceptions to confidentiality include but are not limited to the disclosure of documents following the order of the Court, disclosure necessary to protect the legitimate interests of the party, and disclosure in the public interest.[70]

We now turn to a brief overview of some arbitration-friendly landscapes to consider the common features, limits and differences vis-à-vis confidentiality provisions across different legal systems around the globe.

A. UNITED STATES OF AMERICA

Since the American legal system is a dual court decentralised system, even though most States in the United States mirror the Federal Court system, there exists a definite overlap and individual States often retain powers not particularly cited as just Federal. The United States, as a general rule, does not recognise confidentiality in arbitration proceedings.[71] Neither Chapter I of The Federal Arbitration Act[72] nor the uniform model law, i.e. the revised Uniform Arbitration Act, impose any confidentiality requirements or obligations on the parties.[73]

Some states, like Florida and New York, have dealt with the AEO regime in detail. For example, within the meaning of Section 682.08, "*an arbitrator may issue a protective order to prevent the disclosure of privileged information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in the state of Florida*".[74] In New York, the Appellate Division has held that "*documents should not be designated "attorneys' eyes only" when such a designation "prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defence to the action against them*".[75] The New York Rules of Professional Conduct, specifically Rule 1.4(b), mandate counsel to *"explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation*[76] *and reasonably consult with the client about the means by which the client's objectives are to be accomplished, to keep the client reasonably informed about the status of the matter,"* and *"promptly comply with a client's reasonable requests for information".*[77]Although certain Model Confidentiality Agreements are made available by the New York State Supreme Court's Commercial Division and the New York City Bar Association on their websites, they do not include an AEO provision.[78]

[70]Mishcon de Reya, 'For your eyes only? Limits to arbitral confidentiality' (*Mischon De Reya*, 31 October 2019) <https://www.mishcon.com/news/for-your-eyes-only-limits-to-arbitral-confidentiality> accessed 13 February 2023.
[71]*United States v. Panhandle Eastern Corp* 118 FRD 346 (1988); *Contship container lines Ltd v. PPG Industries Inc* 2003 US Dist LEXIS 6857; *Derrick Walker v. Craig Kirin Gore* 2008 US Dist. LEXIS 84297.
[72]United States Arbitration Act 9 USC, s 200 (1947).
[73]US Uniform Arbitration Act (2000).
[74]Florida Arbitration Code (Revised) s 682.08 (2013).
[75]*Gryphon Domestic VI LLC v. APP Int'l Fin Co BV* 28 AD.3d 322, 326, 814 NYS.2d 110, 114 (1st Dept. 2006)
[76]NY Comp Codes R &Regs Tit 22, §1200.1.4(b) (NYCRR).
[77]ibids 1200.1.4(a)(2-4).
[78]John M. O'Connor, Carrie Maylor DiCanio, and Jorge R. Aviles, 'Attorneys' Eyes Only? Confidential? Really?-Reducing Logistical Headaches in Confidentiality Agreements' (2016) 21(2) NYSBA NYLitigator 38, 41.

Federal cases also stress that AEO designations must be used "*as sparingly as possible*".[79] "*The information must be of a type, the disclosure of which would "work a clearly defined and very serious injury" to the party seeking to protect such information, for example, the revelation of trade secrets*".[80] In general, American Courts follow a strict position vis-à-vis confidentiality provisions and stress that AEO orders must be limited to trade secrets or information that may provide business competitors with an advantage.[81] Unless the arbitration agreement or the applicable rules provide otherwise, the American Courts seem to be unbending in accepting an implied duty of confidentiality.[82]

B. ENGLAND AND WALES

Even though the English Arbitration Act, 1996[83] is silent on the provisions of confidentiality, the English Courts have been consistent in imposing a broad and implied duty of confidentiality on the parties and the tribunal vis-à-vis documents disclosed or generated in the arbitration proceedings on a case-by-case basis.[84]

In the course of time, the English Courts have framed three rules on the nature and scope of confidentiality. First, in the absence of parties' consent, the tribunal does not have the power to order concurrent hearings of two arbitrations in which the arbitrators but not the parties were alike and the disputes strictly associated.[85] Second, from the very nature of the arbitration proceedings, there exists an implied duty of confidentiality which is binding upon the parties.[86] Third, the implied duty of confidentiality also extends to documents.[87]

There are some general exceptions to the principle of confidentiality where the Court has ordered the disclosure of documents; has been agreed by the party's consent; is essential to establish or safeguard a party's legal rights, and is necessary for the public interest or in the interest of justice.[88]

Since the English legal system operates on the principle of 'open justice', in the first place, it can be assumed that there exists an obligation prohibiting disclosure or use of documents obtained in arbitration proceedings, and so "*an AEO order at any stage must be exceptional"* as recently held by the English Court of Appeals in *Oneplus v. Mitsubishi*.[89] Therefore, "*A*

[79]*Fendi Adele SRL v. Burlington Coat Factory Warehouse Corp* No. 06 CIV 0085, 2006 US Dist (SDNY Dec 5, 2006).
[80]*HSqd LLC v. Msorinville*3:11-cv-1225 (WWE) (D. Conn. Jun. 8, 2012); *Renaissance Nutrition Inc v. Jarrett*08-CV-800S (W.D.N.Y. Jan. 7, 2012).
[81]John M. O'Connor, Carrie Maylor DiCanio, and Jorge R. Aviles, 'Attorneys' Eyes Only? Confidential? Really?-Reducing Logistical Headaches in Confidentiality Agreements' (2016) 21(2) NYSBA NYLitigator 38.
[82]Ali Khaled Qtaisha, 'Legal Protection of Arbitration Confidentiality: Mapping the Approaches of Prominent Jurisdictions' (2017) 147(3) European Journal of Scientific Research 358, 360.
[83]Arbitration Act 1996.
[84]*Emmott v. Michael Wilson and Partners* [2008] EWCA Civ 184.
[85]*Oxford Shipping v. Nippon Yusen Kaisha* [1984] 2 Lloyd's Rep 373 (Leggatt J: "The concept of private arbitration derives simply from the fact that the parties have agreed to submit to particular arbitration disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course maybe to the parties seeking it and however closely associated with each other the disputes in question may be.").
[86]*Dolling-Baker v. Merrett* [1991] 2 All ER 890 (CA) (Parker LJ).
[87]*Milsom and Ors v. Ablyazov* [2011] EWHC 995 (Ch).
[88]*The Chartered Institute of Arbitrators v. B and Ors.* [2019] EWHC 460 (Comm).
[89]*Oneplus v. Mitsubishi* [2020] EWCA Civ 1562.

balancing act needs to be performed between the protection of confidential information and ensuring that trials are conducted on the basis of natural justice."[90] for reasons that "*A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance*."[91] With a limited exception to this principle, "*when full disclosure might not be not possible if it would render the proceedings futile."*[92] and that "*a party must not be exposed to unnecessary risk in so far as the disclosure of its trade secrets is concerned"*.[93]

C. SINGAPORE

The revised International Arbitration Act of 2002[94] does not codify a general duty of confidentiality and is not specific. However, within the meaning of Sections 22 and 23, a party may apply for arbitration-related court proceedings to be heard otherwise than in open court,[95] including certain restrictions on the reporting and publication of such proceedings and information associated with them.[96]

The Courts in Singapore have followed the position taken by the English Courts in recognising a general duty of confidentiality. The High Court in *MyanmaYaung Chi Oo Co Ltd v. Win Win Nu* acknowledged the implied duty of confidentiality in enunciating that "*parties to the arbitration are under an implied duty to keep documents confidential, but disclosure even without the leave of the court may be permitted in case of reasonable necessity*".[97] The Court also noted that "*the question of whether a disclosure is reasonably necessary can change over time in the course of the same case, and if such a question arises, the leave of the Court is not required for such disclosure*".[98] The High Court in *AAY and Others v. AAZ (AAY)* also held that "*disclosure of certain documents pertaining to arbitration does not violate the implied duty of confidentiality in arbitration*".[99]

Recently, the High Court in *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and another* considered the question of whether the imposition of an AEO Order by the arbitral tribunal amounted to a breach of natural justice and whether there is an implied obligation to arbitrate in good faith. The Court, while rejecting the application for setting aside the arbitral award on the basis that there was a breach of natural justice, addressing the tribunal's power to impose an AEO Order and recognising the implied obligations on parties to arbitrate in good faith, concluded that "*while AEO orders are not entrenched in Singapore jurisprudence, that is not the same as saying it is not an appropriate order in international arbitration*" and that "*AEO orders are appropriate in circumstances where a tribunal is satisfied that such measures are necessary to protect a party's confidential documents*".[100] Kannan Ramesh J's in-depth discussion and analysis of AEO

[90] *Infederation Ltd v. Google LLC and Ors* [2020] EWHC 657 (Ch).
[91] *Al Rawi v. Security Services* [2011] UKSC 34.
[92] ibid.
[93] *Roussel Uclaf v. Imperial Chemical Industries* PLC [1990] RPC 45.
[94] Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (2nd ed, CRC Press 2016) 187-188.
[95] International Arbitration Act 1994 (Cap 143A, 2002 rev ed) s 22.
[96] ibid s 23.
[97] *Myanma Yaung Chi oo Co Ltd. v. Win Win Nu* [2003] 2 SLR 547.
[98] ibid.
[99] *AAY and Ors v. AAZ* [2011] 1 SLR 1093.
[100] *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and another* [2018] SGHC 101.

orders in the very Judgment is a welcoming and progressive step in raising points of wider significance for the arbitration community so far as AEO Orders are concerned.

VI. CONCLUSION

The courts in India have taken several steps backwards while venturing to move forward, erasing the development of the AEO regime. However, despite the hesitancy of the courts, the AEO regime could be practised by Arbitration Tribunals in India considering the primary concern, i.e., its efficiency. Arbitration has gained prominence in India as it is less expensive and less time-consuming. However, the AEO designation, arguably or allegedly, would render the arbitration process lengthy and expensive, negating the very purpose of the arbitration. The AEO designation places an additional burden on parties and tribunals to analyse the documents and determine the legitimacy of the AEO claim. Additionally, an order of AEO designation often leads to further objection and review of the designated material. The entire procedure delays the settlement of a dispute which was intended to be resolved hastily.

Despite its shortcomings, the AEO regime is essential due to the complex nature of disputes. It prevents competitors from gaining unfair advantages, especially with respect to sensitive commercial information and trade secrets. Balancing the benefits and its shortcomings, the AEO designation should be *"limited (where possible) and scrutinised for fairness (to the parties and to third parties swept into the litigation)."*[101] The tribunals should exercise their discretion judiciously, considering the negative impact on natural justice and fair trial. Moreover, it is advisable that parties recognise the AEO regime within their contract by way of a confidentiality clause, for a contract that lacks a confidentiality clause would seldom be afforded an AEO safeguard.

Since a general confidentiality clause does not significantly burden the receiving party, especially at the time of expansion of discovery and the exchange of ever-increasing documentation, such a clause should lay down a three-tier system wherein materials should be designated as ‘confidential’, ‘highly confidential’ and ‘Attorney’s eyes only’. Therein, attorneys who have been duly authorised in writing by the disclosing party, i.e. the designated representatives, shall only get access to the limited access confidential information that would include any extracts, copies, notes or tangible embodiments. The receiving party shall be held accountable for any breach of the confidentiality clause by any of its designated representatives, and the receiving party's obligations shall apply in perpetuity. In the event of the agreement getting terminated or upon the request made by the disclosing party, all the information designated as ‘Attorney’s eyes only’ must be deleted/destroyed permanently with no right of retention given to the receiving party with the only exception of retaining the analysis done by the attorneys of the limited access confidential information in line with any applicable law or Order made by the Court having requisite jurisdiction.

Experts generally agree that the AEO regime is a crucial tool in complex litigation and arbitration cases where the parties may need to share sensitive and confidential information with their attorneys, experts, and consultants. The regime ensures that this information remains protected from disclosure to other parties and the public. The disclosing party must be prepared to demonstrate why it would be fair and appropriate to subject those documents to an AEO club and why the opposing side is unlikely to be affected by such an agreement

[101] *Mitsubishi, Sisvel v. Archos & Ors* [2019] EWHC 3477 (Pat).

for secret records. If the information could be protected through a lesser restrictive measure, the court should restrain from ordering AEO Protective Orders. A lesser restrictive measure, for instance, could be establishing a two-step process wherein documents subject to the AEO regime would be disclosed. The first step would include disclosure of any material designated as 'AEO' to the opposing counsel and expert witnesses but not the party. The second step, however, would expressly entitle the party to file an application to the tribunal for accessing the AEO-designated documents, the necessity of having the access established, coupled with an undertaking as to the confidentiality for the limited purpose of giving instructions and discussing further strategy with the council.

However, it is important to note that the AEO regime is not an absolute privilege and is subject to certain limitations. For instance, the court/tribunal may require the party seeking the AEO order to provide a legitimate basis for claiming confidentiality and establish the need to protect the information from disclosure to other parties.

In conclusion, the AEO regime is an essential tool for protecting confidential information during the course of legal proceedings in India. While its use is subject to the tribunal’s need and limitation to strike a balance against concerns for efficiency and expediency of arbitral proceedings coupled with the Court’s discretion to balance the parties' due process rights and preserve the limits according to the tribunal’s discretion in dealing with the procedural hurdles of the case that it must adjudicate the AEO regime strikes a balance between the parties' interests and the public interest and is particularly useful in complex litigation and arbitration cases.