

# **Arbitration and Conciliation Act, 1996**

## **Opportunities for Company Secretaries in Arbitration**

G Ramachandran

G Ramachandran & Associates



## Areas Covered

- ❖ What is Arbitration
- ❖ Origin of Arbitration
- ❖ History of Arbitration law in India
- ❖ Need for Arbitration
- ❖ The Arbitration process – a Bird's eye view
- ❖ Arbitration Council of India
- ❖ Arbitral Institutions and their Roles
- ❖ Empanelment as Arbitrator/ Expert
- ❖ Who can be an Arbitrator – qualification & general norms
- ❖ Prerequisite for Company Secretaries to be an Arbitrator
- ❖ Scope for CS under legal framework
- ❖ Online Dispute Resolution (ODR)





# What is Arbitration

- It is One among the Alternative Dispute Resolution (ADR) methods.
- Disputes are settled without getting into the intricacies of the court / an alternative to court room litigation process (BUT NOT A SUBSTITUE).
- Here the parties decide the rules of the process and appoint a neutral third party as their judge (known as Arbitrator) for resolution.
- The process involves hearings, submission of evidences etc.,
- Process is flexible and technical aspects of court proceedings can be dispensed away with by the parties at their discretion.
- The decision of the Arbitral Tribunal herein is referred to as an “Award”, which has the same effect as that of an order of the court.
- In India it is governed under the Arbitration and Conciliation Act, 1996 (‘the Act’)





# Origin of Arbitration

- It has a rich historical background of over two thousand years.
- Especially In India it has a long history, where people often voluntarily submitted their disputes to a group of wise men of a community — commonly called the Panchayats for a binding resolution.
- **Indian Arbitration Act, 1899**
  - the very first codification of arbitration law in India limited to presidency towns of Bombay, Calcutta, and Madras (based on the English Arbitration Act, 1899).
- Further codified in Schedule II of the Code of Civil Procedure, 1908, where arbitration provisions were extended to various parts of British India.
- **The Arbitration Act, 1940**
  - Enacted in India to consolidate and amend the law relating to arbitration - effective from 1<sup>st</sup> July, 1940 (repealing the Arbitration Act of 1899 and relevant provisions of CPC, 1908)
- **The Arbitration and Conciliation Act 1996**
  - After several declarations and ordinances passed by the Government of India to accept the challenges posed by the economic reforms taking place in the country from time to time.
  - **Further modified in with an aim and objective to give effect to the UNCITRAL (United Nations Commission on International Trade Law) framework of laws.**

# History of Arbitration Law in India

**1899**

The first law on arbitration – Indian Arbitration Act, 1899 – introduced on 1<sup>st</sup> July, 1899; limited to Presidency towns (based on the English Arbitration Act, 1899)

**1908**

The Code of Civil Procedure, 1908, Schedule

**1937**

The Arbitration (Protocol and Convention) Act, 1937. It dealt with recognition and enforcement of foreign awards under the Geneva Convention

**1940**

The Arbitration Act, 1940 Consolidated the law relating to domestic arbitration

**2003**

Pursuant to the 176th Law Commission Report, the Arbitration and Conciliation (Amendment) Bill, 2003, was issued.

**2001**

The Arbitration and Conciliation Act, 1996, consolidated all provisions relating to arbitration – both domestic and for enforcement of foreign awards.

**1961**

The Foreign Awards (Recognition and Enforcement) Act, 1961. It dealt with recognition and enforcement of foreign awards under the New York Convention

**1996**

The Arbitration and Conciliation Act, 1996, consolidated all provisions relating to arbitration – both domestic and for enforcement of foreign awards.

**2005**

The 2003 Bill was referred to the Department Related Standing Committee on Personnel, Public Grievances, Law and Justice for a further analysis. The Department concluded that the Bill was insufficient and it was thus withdrawn.

**2014-2015**

The Law Commission's 246th Report and Supplementary Report, recommended amendment of the 1996 Act.

**2015**

The Arbitration and Conciliation (Amendment) Act, 2015, amended the 1996 Act with effect from October 23, 2015

**2017**

A committee was formed under the chairmanship of retired Supreme Court judge, Justice Srikrishna which recommended further changes to the Act and to give impetus to institutional arbitration.

**2021**

The Arbitration and Conciliation (Amendment) Act, 2021, passed by the Parliament in March 2021 to replace previous ordinance

**2020**

The Arbitration and Conciliation (Amendment) Ordinance, 2020, to address the concerns raised by affected parties, after the previous enactment

**2019**

Arbitration and Conciliation (Amendment) Act, 2019 a Government initiative of making India an arbitration-friendly jurisdiction

**2018**

The Arbitration and Conciliation (Amendment) Bill, 2018, proposed further amendments to the Act, based on Based on the Sririshna J. Report.

# Recent Amendments to the Act

## Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016)

- The Arbitration and Conciliation (Amendment) Bill, 2015 was introduced in Lok Sabha on December 3, 2015 by the Minister for Law and Justice, Mr. D.V. Sadananda Gowda. The Bill amends the Arbitration and Conciliation Act, 1996.

## Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019)

- The Arbitration and Conciliation (Amendment) Bill, 2019 was introduced in Rajya Sabha by the Minister for Law and Justice, Mr. Ravi Shankar Prasad, on July 15, 2019

## Arbitration and Conciliation (Amendment) Act, 2021 (3 of 2021)

- The Arbitration and Conciliation (Amendment) Bill, 2021 was introduced in Lok Sabha on February 4, 2021.
- It seeks to amend the Arbitration and Conciliation Act, 1996.
- The Act contains provisions to deal with domestic and international arbitration and defines the law for conducting conciliation proceedings.
- The Bill replaces an Ordinance with same provisions promulgated on November 4, 2020.

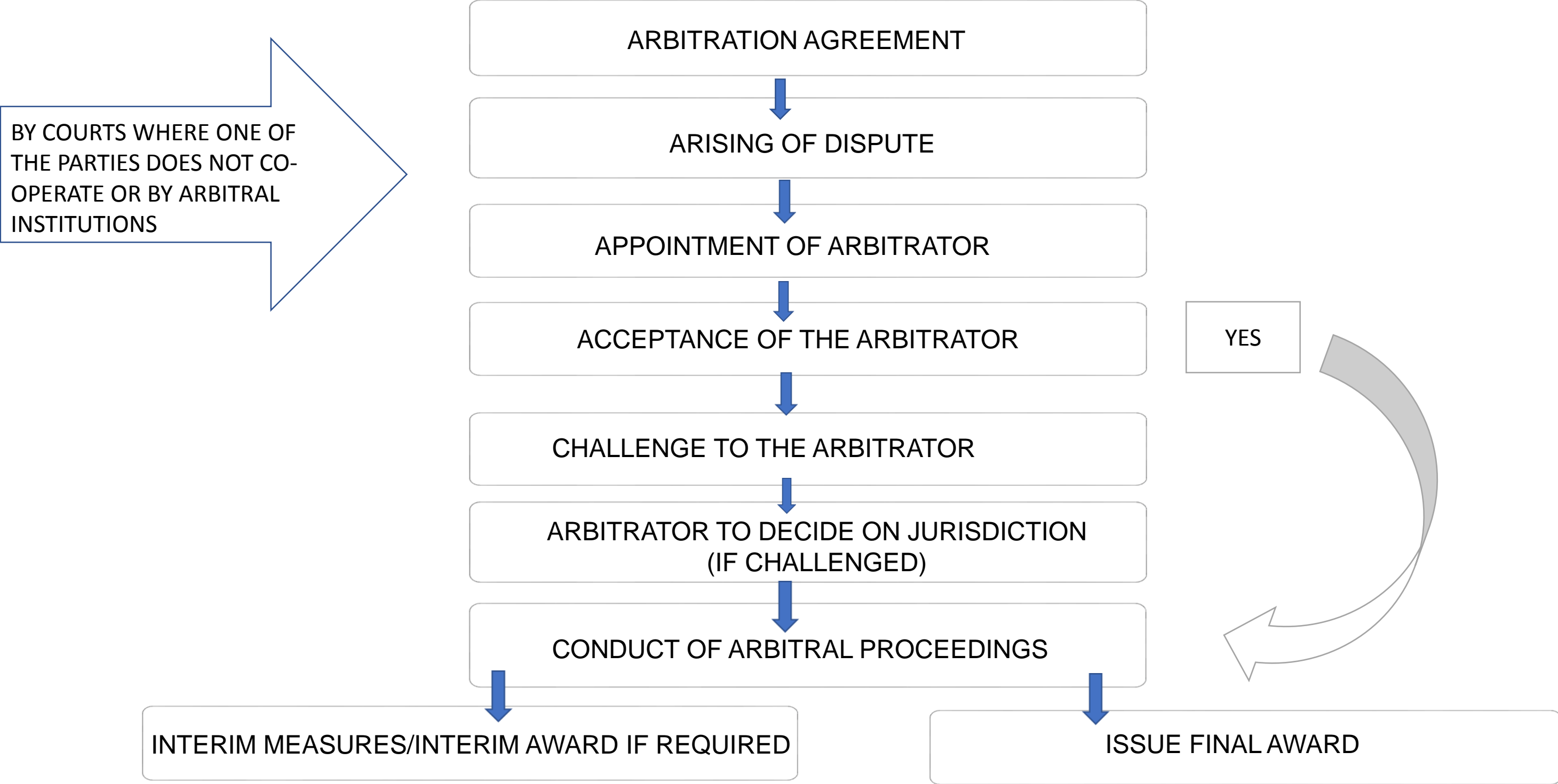


# Need for Arbitration



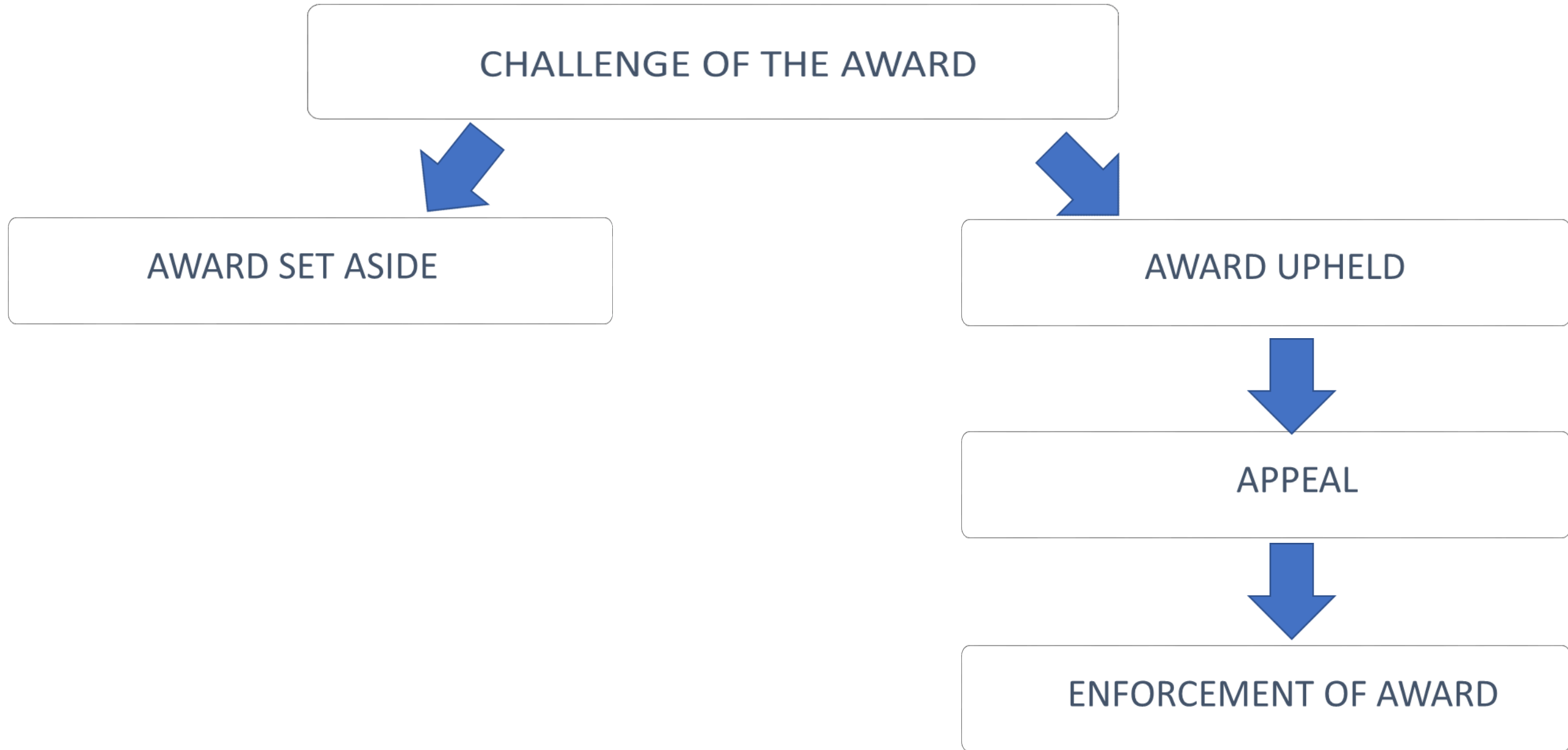
- Less time consuming and Faster Resolution
- Cost effective & Efficient, wherein the parties can even decide the fee of the neutral third party
- Interaction with each other and hearing their concerns directly from them helps parties in maintaining future business relations even if one of the parties loses.
- Autonomy to decide on the procedural aspects of the mechanism and hence, it's convenient.
- Choice of Decision Maker (Arbitrator) and option to appoint experts on the subject matter for better adjudication and settlement of disputes
- Privacy / Confidentiality
- Strict rules of CPC and Evidence Act are not required to be followed, the Arbitrator is free to frame his own procedure to conduct arbitration proceedings
- Consensual Process and Collaborative approach

# The Arbitration Process – A Bird’s Eye view





# Challenge of the Award



# Arbitration Council of India

- Arbitration Council of India – was introduced in the Arbitration and Conciliation (Amendment) Act, 2019, which came into effect on 9<sup>th</sup> August 2019.
- Part 1A of this Act contains a proposal of setting up an Arbitration Council of India along with its duties, functions and composition, to oversee conciliation proceedings in India.
- Central Government shall by notification establish a council to be known as Arbitration Council of India to perform duties and discharge the functions under this Act as listed below;

## **Duties and functions of Arbitration Council of India**

- (a) frame policies governing the grading of arbitral institutions;
- (b) recognise professional institutes providing accreditation of arbitrators;
- (c) review the grading of arbitral institutions and arbitrators;
- (d) hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes;
- (e) frame, review and update norms to ensure satisfactory level of arbitration and conciliation;
- (f) act as a forum for exchange of views and techniques to be adopted creating a platform to make India a robust centre for domestic and international arbitration and conciliation;
- (g) make recommendations to the Central Government on various measures to be adopted to make provision for easy resolution of commercial disputes;
- (h) promote institutional arbitration by strengthening arbitral institutions;
- (i) conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof;
- (j) establish and maintain depository of arbitral awards made in India;
- (k) make recommendations regarding personnel, training and infrastructure of arbitral institutions; and
- (l) such other functions as may be decided by the Central Government.

**However, the setting up of Arbitration Council of India is currently under work in progress**

# Arbitral Institutions

Arbitration proceedings are majorly of two types:

Adhoc Arbitration	Institutional Arbitration
agreed to and arranged by the parties themselves without seeking the help of any arbitral institution.	the arbitration agreement stipulating that in case of dispute or differences arising between the parties, they will be referred to Institutional arbitration.

(However, most of the arbitrations in India are Ad-Hoc Arbitrations)

## Institutions in India

- Frame their own set of rules of arbitration applicable to the proceedings conducted them
- Provide domestic arbitration or international commercial arbitration or both
- Deals with general or any specific natures of disputes

## Role of Arbitral Institutions

- Promoting arbitration as a preferred dispute resolution method
- Focusing on accrediting and training arbitrators
- Instrumental in developing policy reforms and amendments in the existing legal framework



# Services provided by Arbitral Institutions

The following services would come under the head of administrative assistance, and there are arbitral institutions, which provide most of these services and also the parties may choose specific individual or institution for provision of the service.

## **Appointment of Arbitrator**

- maintain a list of arbitrators based on their qualifications, experience and expertise
- provide training to professionals and empanel them upon successfully completing the training

## **Case Management**

- Providing case management by allocating a case-manager for managing the case;
- Collect and file documents; pleadings of the parties; schedule hearings; communicate/coordinate with parties and arbitrators by sending emails, letters etc.
- Effective management of the arbitral proceedings is a difficult task, particularly in complex, international commercial arbitrations.

## **Hearing and Conference Rooms**

- Assisting throughout the process of hearing

## **Virtual Hearings/Digital Platform:**

- Providing a digital platform for e-filings, electronic presentation of evidence, audio-video conferencing, and making online payments.

## Services provided by Arbitral Institutions – contd....

### **Fund Holding Service:**

- Holding deposits for the costs of proceedings particularly in international commercial arbitrations.
- Holding of funds in different major currencies, depending on requirement of parties, at reputable licensed deposit-taking institution.

### **Appointment of Expert:**

- Assistance in having expertise in a particular domain like maritime industry, construction industry, software industry etc.,

### **Provision of auditors or surveyors**

- Providing services of auditors or surveyors in case of any such assistance required for the Arbitrator.

### **Arbitral Tribunal Secretary/Administrative Secretary**

- In large and complex international commercial arbitrations, often a junior lawyer, is appointed for a secretary to assist the arbitral tribunal.

### **Reporting and Transcription**

- The parties may take the assistance of Court reporters for making the record of the arbitral proceedings or the hearing may be recorded and transcriptions are made after the conclusion of the hearing in an asynchronous manner.

### **Translation Service**

- Translation of documents / pleadings / applications in case where the parties are representing different foreign nationals.

**Other miscellaneous services like Clerical Assistance, Travel and Accommodation, Food, Beverages and Snacks etc.,**



# Empanelment as Arbitrator/ Expert

- In order to create an independent and autonomous regime for institutional arbitration, there are several leading arbitral institutions in India, which provide services of institutional arbitration for domestic and international arbitration disputes.
- These arbitral institutions have their own rules or are governed by the rules based on the UNCITRAL Legal framework.
- Company Secretaries who are interested in taking up arbitration may enroll with such arbitral institutions as an empaneled member or as an expert and provide their services.



# Who can be an Arbitrator

An arbitrator is the presiding officer in an arbitration process.

The Cambridge dictionary defines an arbitrator as “A person who has been officially chosen to make a decision between two people or groups who do not agree.”

## **Section 11 of the Act – Appointment of arbitrators:**

Section Reference	Particulars
11(1)	A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
11(2)	The parties are free to agree on a procedure for appointing the arbitrator(s).
11(6)	Where, parties or the appointed arbitrators (including arbitral institutions) fails to reach an agreement expected or fails to perform any function entrusted upon them or in their procedure; The appointment shall be made by - by arbitral institution designated by supreme court, in case of international commercial arbitration - by High Court, in case of arbitrations other than international commercial arbitration

# Qualification Norms for Accreditation of Arbitrator

**Section 43J - Norms for accreditation of arbitrators**: The qualifications, experiences and norms for accreditation of arbitrators shall be such as may be specified by the regulations. (Amended vide Arbitration and Conciliation (Amendment) Act, 2021 w.r.e.f 4<sup>th</sup> November, 2020)

However, **prior to the amendment**, the qualifications and experience of arbitrators shall be specified in Eighth Schedule read with section 43J of the Act. As per the schedule a person shall not be qualified to be an Arbitrator unless he is;

- An Advocates or a Chartered Accountants or a Cost Accountants or **a Company Secretaries** (as defined under the respective Acts), **having ten years of practice experience**.
- Officer with Law degree or Engineering degree or officers at senior level of administration having ten years of experience or person with any educational qualification with degree level in scientific and technical stream.

## **Apart from the above, the following were the general norms applicable to arbitrator;**

- a person of general reputation of fairness, integrity;
- must be impartial and neutral;
- should not involve in any legal proceeding and avoid any potential conflict connected with any dispute;
- should not have been convicted of an offence involving moral turpitude or economic offence;
- conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards;
- possess robust understanding of the domestic and international legal system;
- able to understand key elements of contractual obligations in civil and commercial disputes;
- be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute.

## **Independence of Arbitrator**

### **Section 12 (1)(b) of the Act, read with the fifth schedule**

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

- Arbitrator's relationship with the parties or counsel
- Relationship of the arbitrator to the dispute
- Arbitrator's direct or indirect interest in the dispute



# Prerequisite for Company Secretaries to be an Arbitrator

As a Company Secretary interested to be appointed as an Arbitrator, one should have a broad knowledge on the following areas;

- Understanding on the legal framework and procedures under the following;
  - Indian Contract Act, 1872
  - Code of Civil Procedure, 1908
  - Indian Evidence Act, 1872
  - Information Technology Act, 2000
- Industrial / regulatory standards and general norms
- Observing and deep understanding of the issues presented by the Parties before him as an Arbitrator.
- Understanding the underlying commercial transaction and the legal framework applicable to the situation.
- Formulation of strategies in arbitral proceedings while advising the clients

## Areas of Opportunities for CS

Disputes arising out of agreements / contracts of following nature;

- Business Loan / Loan Against Properties cases under Non Banking Finance Companies
- Joint Venture Agreement / Technical Collaboration agreement
- Commercial Contracts
- Share Purchase and Share Subscription Agreement
- Infrastructure contracts and Construction agreement

# Scope for CS under legal framework

## Under the Arbitration and Conciliation Act, 1996

### Section 26(1): Expert Appointment by Arbitral Tribunal

- The Arbitral Tribunal may appoint expert(s) to report on any specific issue to be determined by it.
- It may also require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection.
- An expert may be examined and cross-examined on request of a party and where the arbitral tribunal considers it necessary.



## Online Dispute Resolution (ODR)

- Online dispute resolution, or “ODR”, a mechanism for resolving disputes through the use of electronic communications and other information and communication technology
- It utilizes information technology to carry out the Alternative Dispute Resolution (ADR).
- ‘Claimant’ is the party initiating ODR proceedings and the ‘respondent’ the party to whom the claimant’s notice is directed, in line with traditional, offline, alternative dispute resolution nomenclature. A neutral is an individual that assists the parties in settling or resolving the dispute.

### ODR in India

- ODR in India is in its very infancy stage and is now gaining prominence day by day.
- Enactment of Information Technology Act, 2000, e-commerce and e-governance have been given a formal and legal recognition in India.
- In order to satisfy the harmonized standards of UNCITRAL Model, the traditional arbitration law of India has been reformulated and the Arbitration and Conciliation Act, 1996 is in place.
- The amendment made in the Code of Civil Procedure, 1908 by introducing section 89 was made to provide methods of alternative dispute resolution (ADR) in India.

## **Benefits of ODR**

- Cost effective
- Convenient and quick
- Allows for customisable processes
- Encourages dispute resolution
- Limits implicit bias caused by human judgment

## **Challenges:**

- Cumbersome and often expensive, since it was intended as an alternative to going to court for certain kinds of disputes
- Lack of enough arbitrators and building trust among consumers.
- Deal with people who are not used to the digital ecosystem
- The main challenge for online arbitration is that if judicial enforcement is required then it partly defeats the purpose of having an online process.

## Fees entitlement of Arbitrator

**Section 11 (3-A) and 11(14) of the Act:** The arbitrator appointed by the parties shall be entitled to such fee at the rate as specified in the Fourth Schedule.

### THE FOURTH SCHEDULE

SUM IN DISPUTE	MODEL FEE
Up to Rs. 5,00,000	Rs. 45,000
Above Rs. 5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs. 5,00,000
Above Rs. 20,00,000 and up to Rs. 1,00,00,000	Rs. 97,500 plus 3 per cent. of the claim amount over and above Rs. 20,00,000
Above Rs. 1,00,00,000 and up to Rs. 10,00,00,000	Rs. 3,37,500 plus 1 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 10,00,00,000 and up to Rs. 20,00,00,000	Rs. 12,37,500 plus 0.75 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 20,00,00,000	Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000

In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent on the fee payable as per the table set out above.



# Grounds for challenge

## **Section 12 (1) of the Act:**

When a person is approached for being appointed as Arbitrator, he shall disclose in writing

- a) existence of either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
- b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

## **Section 12(3) of the Act:**

An arbitrator may be challenged only if—

- (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- (b) he does not possess the qualifications agreed to by the parties.



## ARBITRATION INSTITUTIONS

Some of the prominent institutions which conduct institutional arbitration in India are:

1. Nani Palkhiwala Arbitration centre – Chennai and New Delhi
2. Delhi International Arbitration Centre (DIAC) – New Delhi
3. Mumbai Centre for International Arbitration
4. International Arbitration and Mediation Centre – Hyderabad
5. Indian Council of Arbitration (ICA) – New Delhi
6. Construction Industry Arbitration Council (CIAC)- New Delhi
7. LCIA India – New Delhi
8. International Centre for Alternative Dispute Resolution (ICDAR) – New Delhi
9. ICC Council of Arbitration – Kolkata.

Questions

Thank you