

# Company Secretaries as Arbitrators

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## INTRODUCTION

### COMPANY SECRETARY

**A** Company Secretary is an individual who has qualified for the examinations and completed the required practical and theoretical sessions conducted by the Institute of Company Secretaries of India ('ICSI' for short), a body of registered Company Secretaries founded in 1980. Every Indian company, public or private, with paid up capitals of at least Rs. 10 crore or greater or listed its securities on the stock market needs a full-time Company Secretary who handles legal obligations related to the company.

A Company Secretary may be either in employment or in practice. The Company Secretary in full time in employment is required to perform the following activities, in general-

- Planning and facilitating Board of Director meetings;
- Acting as Registrar for a Company;
- Guiding the formation of new companies, mergers of companies, and liquidations of companies;
- Administration-related tasks as Chief Administration officer;
- Managing secretarial assignments as principal secretary;
- Adhering to regulations on various legal issues;
- Reviewing guidelines on accountancy and audit as Corporate Planner;

- Representing the Company before Registrar of Companies, SEBI, Stock Exchange, etc.;
- Representing the Company in issues related to arbitration.

He is responsible for ensuring that the company, in which he is working, complies with legal and regulatory requirements within the stipulated time. He plays a vital role in the company's compliance with various laws and regulations, including Companies Act, various SEBI regulations, circulars, notifications, etc.. He also assists the company in managing its relationships with stakeholders, such as shareholders, regulators and others.

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- Assisting with the creation and registration of companies, along with associated tasks;
- Acting as a representative for companies and individuals in dealings with the Tribunal;
- Managing corporate restructuring and takeover procedures;
- Overseeing the rehabilitation and revival processes for struggling companies;
- Offering professional support to company liquidators;
- Conducting secretarial audits and providing certification services;
- Signing off on the annual return;
- Pre-certifying and electronically filing different e-forms as may be required.

The importance of Company Secretaries in practical business operations has been steadily increasing, primarily due to the evolving legal landscape and the need for regulatory compliance. Arbitration is one among the areas for the practicing Company Secretary, to provide services.

Arbitrators are appointed by or on behalf of the parties in disputes. Arbitrators have to decide a dispute that has been referred to in the agreement. Arbitration is conducted in accordance with the terms of the parties' arbitration agreement. Arbitrators are usually used to resolve financial or contractual commercial disputes, international or cross-border commercial disputes, sports disputes, such as appeals against disciplinary sanctions or player eligibility, life science matters, in research and development agreements, maritime or shipping disputes and still many more areas.

## ARBITRATION

Arbitration is one among the Alternative Disputes Resolution methods. The need for arbitration is-

- Less time consuming and faster resolution;
- Cost effective and efficient – The parties to the arbitration proceedings can decide the fee of the arbitrator(s) appointed by them as per the prevailing agreement;
- 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;
- 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;
- Arbitration is consensual process and collaborative approach.

As Arbitration is flexible, inexpensive, confidential, fair and final, Arbitration is distinguished from other dispute resolution mechanisms. Arbitrators are appointed by or on behalf of the parties in disputes. Arbitrators have to decide a dispute that has been referred to in the agreement. Arbitration is conducted in accordance with the terms of the parties' arbitration agreement. Arbitrators are usually used to resolve financial or contractual commercial disputes, international or cross-border commercial disputes, sports disputes, such as appeals against disciplinary sanctions or player eligibility, life science matters, in research and development agreements, maritime or shipping disputes and still many more areas.

## HISTORY OF ARBITRATION IN INDIA

India has a rich historical back ground over 2000 years. India has a long history, where people often voluntarily submitted their disputes to a group of wise men of a community called the Panchayats for a binding resolution.

- Indian Arbitration Act, 1899 – The first law in India limited to Presidency Town of Bombay, Calcutta and Madras.
- Civil Procedure Code, 1908 – Arbitration was codified in this Act. These provisions are extended to various parts of British India.
- The Arbitration Act, 1940 – This Act was enacted with effect from 01.07.1940 repealing the previous two acts viz., Indian Arbitration Act, 1899 and Civil Procedure Code, 1908. In this act the arbitration award can be enforced only after the award is made as a decree by filing a petition before the Civil Court, having jurisdiction.
- The Arbitration and Conciliation Act, 1996 – This Act was enacted with an aim and objective to give effect to UNCITRAL. The said Act was amended during the years 2015, 2019 and 2021. This Act provides that the award by the Arbitrator amounts to a decree.

## QUALIFICATIONS OF ARBITRATORS

Initially there is no qualification that has been prescribed for the appointment of arbitrator. According to Section 11(1) of the Act a person of any nationality can be appointed as arbitrator. Section 11(2) of the Act provides that the parties to the arbitration agreement are free to agree on a procedure for the appointment of an arbitrator. Section 11(6) of the Act provides that 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-

- Arbitral Institution designated by supreme court, in case of international commercial arbitration;
- High Court, in case of arbitrations other than international commercial arbitration.

In '**Krishna Kumar v. Union of India**' - 1959 AIR 1390, the Supreme Court held that the Chief Justice is not strictly bound to appoint an Arbitrator who must have a qualification as agreed upon between the parties, and therefore, if the Arbitrator appointed by the Hon'ble Chief Justice does not have the qualification, his appointment would not be rendered invalid.

Section 43J of the Act (after amendment during 2019) prescribed the qualifications, experience and norms for arbitrators as specified in the Eighth Schedule. The Central Government may, after consultation with the Council, by notification in the Official Gazette, amend the Eighth Schedule and thereupon, the Eighth Schedule shall be deemed to have been amended accordingly.

Schedule 8 provides that a person shall not be qualified to be an arbitrator unless he—

- (i) is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an advocate; or
- (ii) is a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949 having ten years of practice experience as a Chartered Accountant; or
- (iii) is a Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959 having ten years of practice experience as a Cost Accountant; or
- (iv) is a Company Secretary within the meaning of the Company Secretaries Act, 1980 having ten years of practice experience as a Company Secretary; or
- (v) has been an officer of the Indian Legal Service;
- (vi) has been an officer with law degree having ten years of experience in the legal matters in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector; or
- (vii) has been an officer with law degree having ten years of experience in the legal matters in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector; or
- (viii) has been an officer having senior level experience of administration in the Central Government or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute;
- (ix) is a person, in any other case, having educational qualification at degree level with ten years of experience in scientific or technical stream in the fields of telecom, information technology, Intellectual Property Rights or other specialized areas in the Government, Autonomous Body, Public Sector Undertaking or a senior level managerial position in a private sector, as the case may be.

According to this schedule a PCS, having 10 years of experience can be appointed as arbitrator. But this schedule has been omitted vide amendment Act, 2021. It is hoped that the Central Government would give effect to the provisions of Schedule 8 to the Act.

Having legal background and on the enormous experience under the various Act applicable to the corporate entities the Company Secretary in employment can appear before the Arbitrator and do all the related work. The Practising Company Secretary can be appointed as arbitrator if the parties to the agreement agree for the same. Even otherwise the Practising Company Secretary may act for the benefit of the company in the arbitration proceedings.

The indirect tax laws, Companies Act, 2013, Competition Act, 2002 etc., authorize practicing Company Secretaries before the Tribunals constituted under the above said

Acts. Now the practicing Secretaries having eligible years of practice are entitled to be appointed as Technical Member of the Tribunal.

## CONTRIBUTION OF PCS IN ARBITRATION PROCEEDINGS

A practicing Company Secretary being corporate legal experts and exposed to various facets of law and the management can-

- Formulate a better strategy in arbitral procedure;
- Possess domain expertise and ethical values with a code of conduct;
- Assist compliance required under arbitration, process documentation, advising on procedural aspects etc.;
- Act as arbitrators, conciliators and mediators in resolution of business and commercial disputes;
- Represent clients before the arbitral tribunals and assist in a reaching a win-win situation;
- Advise on conflict resolution and dispute management to save time, cost and cordial business relationship;
- Enhance satisfaction level of parties by encouraging and helping them to find practical solutions to their disputes; and
- ADR advocacy to empower society, avoid litigation and reducing the burden of judiciary.

The Association for International Arbitration (AIA), International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA) all offer many opportunities. However, when pursuing a career in arbitration the main thing to demonstrate is an interest in the relevant area. General dispute resolution experience is also valuable. Some of them include Investment Arbitration, Securities Arbitration, Commodity Arbitration, IP Arbitration, Domain Name Disputes Arbitration, Space Arbitration, Agriculture Arbitration, Sports Arbitration.

A Company Secretary is definitely specialized in arbitration matters particularly those connected with breach of contracts, insurance claims, loss of profit, securities fraud, Commercial disputes, rights of properties, Lease transactions, etc. and represent their clients in Arbitration Proceedings.

## EMPANELMENT

- In order to create an independent autonomous regime for institutional arbitration, there are several leading arbitral Institutions in India, which, provides services of institutional arbitration, for domestic and international dispute.
- These arbitral institutions have their own rules or governed by the rules based on of 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 service.

### CONTRIBUTION BY INSTITUTE

The ICSI conducted various programs on arbitration for the benefit of the members. It also brought a 'Handbook on arbitration' - A practical guide for Professionals, during the year 2022 which deals 'A to Z' of arbitration.

The ICSI CCGRT-Hyderabad, Madhyastha Ek Vikalp: Professional Training on Commercial Arbitration is organized with the objective to upgrade the professional competencies of members and other professionals in the area of arbitration by undertaking training, and certificate programs. Since the first program in 2019 till date the Centre has successfully conducted 6 Basic Online Certificate Programs on Commercial Arbitration for knowledge enhancement and 4 Residential Advanced Simulation Training Program on Commercial Arbitration for skill building of CS Students, ICSI Members and other professionals. Till date more than 1200 participants from different parts of the Country have participated and successfully completed the programs.

With the intent to facilitate Arbitration, Mediation and Conciliation at National and International level, the ICSI established its first ICSI International ADR Centre at Noida (U.P.) to promote Alternate Dispute Resolution (ADR) methods including Mediation, Conciliation and Arbitration to assist and educate all sections of

Society, Individuals, Corporates, Firms, Institutions and Establishments (Local or international).

### CONCLUSION

Now the practicing Company Secretaries, in addition to their existing practice, move to the judiciary in appearing before the National Company Law Tribunal, National Company Law Appellate Tribunal, Competition Tribunal etc. The implementation of insolvency laws also thrust them to move to the judiciary. Arbitration is one form the same. It is hoped that the Practising Company Secretaries will excel in arbitration proceedings in future. The ICSI will tender its helping hands for the development of Practising Company Secretaries in all the fields including arbitration.

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