

Changing Trends in Legislative Scheme for Arbitration

Legislative Milestones for Arbitration

1870

1940

1937, 1967

1996

2015

2018

First Major Transition

From 1940 to 1996 in wake of globalisation with the objectives:

- Efficiency
- Cost
- Party Autonomy
- Minimal Court Intervention

The Transition

The transition meant-

Embracing UNCITRAL Model Law 1985

Applicable for both Domestic and International
Arbitration (Part I and Part II)

Within a Decade

Important Change- but objectives Not met

Arbitration just another layer in dispute resolution

Exorbitant costs

Spirit of Section 5 of minimal court intervention could not be maintained

(two major culprits: *Bhatia International, 2002 SC*
SBP v Patel Engineering, 2005 SC)

Bhatia International for applicability of Part I to foreign seated arbitration

SBP Engineering, for giving more power to the supreme court under section 11

Rising demands for amendment

2002

2005

Ultimately in 2015 (in wake of
246th law commission report)

Three categories of changes

Efficiency Related

Role of Courts

Independence and Impartiality of
Arbitrators

I. Efficiency Related

Section 2(1) (e)

Definition of Court: High Courts for International Commercial Arbitration

Time Limits: for disposal of applications: section 11, 34

Section: 29-A

II. Role of Courts

Minimise court intervention and restore sanctity of Section 5 of the Act

Important changes in:

Section 8 (reference)

Section 9, 17 (interim measures)

Section 11 (appointment)

Section 34 (setting aside)

Section 36 (enforcement)

Applicability of Part I

Territoriality Principle

Section 8: Reference to Arbitration

Courts must refer the matters to arbitration, courts inquiry limited to

*“unless it finds that **prima facie** no valid arbitration agreement exists”*

Two other changes:

Objection to court's jurisdiction (*not later than the date of submitting his first statement*)

Copy of the arbitration agreement

Section 9

Role of Courts restricted to the stage-
before constitution of the arbitral
tribunal

Order under s 17, enforceable

Section 11

Chief Justice replace by the Court- Supreme Court and the High Court

Sections 6-A and 6-B

Inquiry limited to existence of arbitration agreement- *“confine to the examination of the existence of an arbitration agreement”*

Power of appointment- Not a judicial power

Time period of sixty days

Section 34

Explanation to Public Policy:

Making of award induced by fraud or corruption

Contravention with the fundamental policy of law in India (not merits of the dispute)

Conflict with basic notions of morality and justice

Section 34

2-A: possibility to set aside an award on the grounds of patent illegality (domestic awards??)

Section 36

Setting aside application- not an automatic stay

Requirement of separate application and an order from the court for grant of stay

III. Independence and Impartiality Related

Section 11 and 12: Regulatory
Framework for the Arbitrators
Schedules: IV to VII

Amendment Bill 2018: key Features

Creation of an Arbitration Council of India

Appointment of Arbitrators

Exclusion of International Commercial Arbitrations from the purview of Section 29A

Confidentiality in Arbitral proceedings

Immunity for the Arbitrator

Applicability of the 2015 Amendment: proposed sec 87

(BCCI v Kochi Cricket, 2018 SC)