The Viewpoint

Procedural Flexibility vs Substantive Rigidity: Insights on Derogable Provisions in International Commercial Arbitration

The article critically analyses and examines two recent judgments by the High Court of Delhi and their impact on the Indian arbitral landscape and how these outcomes make India a more favourable seat for ICAs.

Khaitan & Co - Abhisaar Bairagi, Milind Sharma, Ausaf Ayyub

Abhisaar Bairagi, Milind Sharma, Ausaf Ayyub

Published on: 17 Mar 2025, 12:27 pm · 5 min read

International Commercial Arbitration **("ICA")** is a preferred method of dispute resolution for cross border disputes as it provides businesses with a more efficient, neutral and expeditious alternative to the conventional Court litigation.

In the Indian context, ICA is defined under Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 **("the Act")** which defines it as an arbitration in which at least one party is a foreign national, a foreign government, an entity incorporated

outside India or an association with its management being outside of India but with the seat of such arbitration in India. It is often confused with foreign-seated arbitration, which means an arbitration with a seat outside of India. On the other hand, ICA is an arbitration involving at least one foreign entity but seated in India.

ICA has recently been a point of discussion in the Indian arbitration landscape due to recent judgments by Indian courts on the issue of derogable and non-derogable provisions in context of ICA. A derogable provision is one which can be waived off by the parties through their conduct or contract. However, a non-derogable provision is one which continues to apply regardless of any such waiver by the parties. A non-derogable provision supersedes the inherent party autonomy that the Act provides.

The developing jurisprudence implies that though the procedural provisions governing ICAs such as the 'appointment of arbitrators' can be waived but more substantive provisions such as the 'grounds for challenging the consequent arbitral award' are non-derogable.

In this article, the authors would critically analyse and examine two recent judgments by the High Court of Delhi and their impact on the Indian arbitral landscape and how these outcomes make India a more favourable seat for ICAs.

Does an error in the appointment of an arbitrator in an ICA invalidate the consequent arbitral award?

A significant question that recently arose before the High Court of Delhi in ***Hala Kamel Zabal v. Arya Trading Ltd***, was whether an arbitral award in an ICA would become invalid if the appointment of the arbitrator was made in contravention of Section 11(6) of the Act. In this case, though an ICA, the appointment of the arbitrator was made by the High Court instead of the Supreme Court as provided under Section 11(6) of the Act. The Court held that though the appointment should ideally be made by the Supreme Court, an error in the appointment procedure would not necessarily render the final award invalid.

The Court held that Section 11(6) of the Act being a procedural provision is derogable in nature, the strict compliance of which can be waived by the parties through their conduct or contract. As arbitration agreement in this case expressly provided for appointment by the High Court, the Court held that such procedural dichotomy did not affect the substantive validity of the award.

The Court also dismissed the argument that such a procedural defect qualify as a ground for setting aside the award under **Section 34(2)(a)(v)** of the Act, which provides for such setting aside of the award if the appointment is not in accordance with the agreement between the parties - provided such agreement must not be in conflict with the non-derogable provisions of the Act. It held that since the appointment was made in terms of the agreement, which only contravened a derogable provision of the Act, such a contravention would not make out a ground under **Section 34(2)(a)(v)** of the Act.

Moreover, the Court opined that any challenge to the appointment of the arbitrator being in contravention of Section 11(6) must be raised before the tribunal itself under Section 16(1) of the Act, failing which, a party is deemed to have waived its right to challenge.

In case a High Court appoints the arbitrator in an ICA, can the award passed in such arbitration be challenged under Section 34 (2A) of the Act?

This issue fell for consideration before the High Court of Delhi in the recent decision of ***Suresh Shah v. TATA Consultancy***, wherein the Court held that merely because the arbitrator was erroneously appointed by the High Court instead of the Supreme Court, as provided under Section 11(6) of the Act, the same would not classify the arbitration as a domestic arbitration (instead of an ICA) as long as the ingredients of Section 2(1)(f) of the Act are met. It held that an award passed pursuant to such an erroneous appointment would still be treated as an ICA award, which cannot be set aside on the ground of patent illegality provided under Section 34(2A) of the Act (applicable only to domestic arbitrations).

The Court held that Section 2(1)(f), being a definition clause, is a *non-derogable* provision. It signifies that even if parties act in a way that contradicts it, the arbitration's status as an ICA is not impacted. The consequent award is to be treated as one passed in an ICA. It held that the key consideration in determining whether an arbitration is an ICA is the foreign nationality, residence or the place of incorporation of at least one of the parties, and the mere contravention of the appointment coram would not alter such nature.

The Court held that that a procedural defect would not expand the grounds of challenge to an ICA award by putting it under the rubric of patent illegality. The ground which solely applies to a domestic arbitration cannot be applied to an ICA for a mere procedural lapse.

Conclusion

The judgment in ***Hala Kamel*** is a step in consolidating India's pro-arbitration attitude, especially for ICAs, by reinforcing the idea that minor procedural errors and violation of derogable provisions of the Act do not undermine the legitimacy of the consequent arbitral award. By upholding the award despite such procedural errors, the Court reaffirmed its commitment towards the principles of *minimal judicial interference* and a limited scope of challenge to arbitral awards.

The judgment in ***Suresh Shah*** is another milestone in strengthening India's arbitration stance for ICAs. It reiterates that procedural oversights do not alter the basic nature of an arbitration or widen the scope of challenge to an ICA award.

These judgments collectively provide the much-needed clarity on the distinction between derogable and non-derogable provisions in ICA under the Act.

Note: The judgments discussed in this article have decided the preliminary issue vis-à-vis the *derogable and non-derogable provisions of the Act in relation to ICAs.* The adjudication of these cases is now pending on merits.

About the authors: *Abhisaar Bairagi is a Partner, Milind Sharma is a Principal Associate and Ausaf Ayyubi is an Associate at Khaitan & Co.*

The views expressed in this article are those of the authors and do not necessarily reflect the views of the firm.

Khaitan & Co | Arbitration and Conciliation Act 1996 | Arbitration in India | The Viewpoint | International commercial arbitration