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# Enforcing Foreign Arbitral Awards in India – is there Really Light at the End of the Tunnel?

Some recent judgments[1] of the Indian Supreme Court were hailed as signs that India finally accepted international standards in interpreting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); many lawyers praised these judgments as a welcome relief to parties involved in foreign seated arbitrations,[2] and as proof that India has an (international) arbitration-friendly judicial system.[3] Sometimes, there is even a regular hype by some commentators trying to create a more favorable picture on arbitration in India.[4] But is this really true? And is it true for all awards which are foreign awards under Art. I (1) of the New York Convention?

## *I. Renusagar categories apply to the enforcement of foreign arbitral awards*

In *Shri Lal Mahal Ltd. v. Progetto Grano Spa [SpA]* [5] (Shri Lal Mahal), a three-Judge Bench of the Indian Supreme Court overruled the decision of a two-Judge Bench in *Phulchand Exports Limited v. OOO Patriot*[6] (Phulchand Exports); the Phulchand Exports decision was based on the decision of the Indian Supreme Court in *Oil and Natural Gas Corporation Limited. v. Saw Pipes Limited*[7] (Saw Pipes). For procedures of setting aside an arbitral award under Section 34[8] of the Arbitration and Conciliation Act, 1996 (Arbitration Act 1996), the Indian Supreme Court in Saw Pipes had expanded the definition of public

[1] Especially *Shri Lal Mahal Ltd. v. Progetto Grano Spa [SpA]*, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40512, and *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services, Inc*,.http://supremecourtofindia,nic.in/outtoday/ac701905p.pdf.

[2] *Sherina Petit* and *Matthew Townsend* with *Sneha Janakiraman,* International arbitration in India, at 2; *Philip Jeyaretnam* and *Vivek Kapoor,* Courts Add Momentum to the Growing Enthusiasms Toward Arbitration in India, at 14.

[3] *Bijoylashmi Das* and *Harsimran Sing,* India: Commercial Arbitation in India – an Update, January 2014, at 1; *Jonathan Choo* and *Shaun Lee,* Analysis: the end of ‚patent illegality' doctrine for foreign awards in India, at 1 and 4; *Divvya Kesaar* and *Mannmohit K. Puri,* India: Pro-Arbitration Trend Continues in India?, at 2.

[4] Among others: *Laurence Lieberman* and *Sami Paracha,* Indian Supreme Court continues pro-international arbitration stance; *Nicholas Peacock* and *Vikas Mahendra*, Shri Lal Mahal Ltd. v. Progetto Grano Spa: Supreme Court of India overrules phulchand and reduces court interference in enforcement of foreign awards; *Sanjeev Kapoor,* Supreme Court restricts scope of public policy challenges to foreign awards. All of these articles let the reader assume that the term foreign award in India corresponds to the term of foreign award under the New York Convention.

[5] Decision of the Indian Supreme Court of July 03, 2013 (Civil Appeal No. 5085 of 2013), http://judis.nic.in/supremecourt/imgs1.aspx?filename=40512.

[6] (2011) 10 SCC 300, http://indiankanoon.org/doc/1049823/

[7] (2003) 5 SCC 705, http://indiankanoon.org/doc/919241/

[8] Section 34 „(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with subsection (2) and subsection (3).
(2) An arbitral award may be set aside by the Court only if – … (b) the Court finds that … (ii) the arbitral award is in conflict with the public policy of India.
(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award…"

policy of India which was introduced in its decision in *Renusagar Power Co. Limited v. General Electric Company*[9] (Renusagar) dealing with an application to enforce a foreign award under Section 48.[10]

In Renusagar, the Indian Supreme Court rejected that the expression public policy under Art. V (2) (b) of the New York Convention meant „international public policy", but held:

*„...in order to attract the bar of public policy in the enforcement of the award must invoke something more than the violation of the law of India."*[11] *To invoke a public policy defense, an award must be „contrary to (i) fundamental policy of Indian law; or (ii) the interest of India; or (iii) justice and morality."*[12]

In Saw Pipes, the Indian Supreme Court expanded the definition of public policy, and introduced a new category; the Indian Supreme Court held that an award is against the public policy of India and could be set aside if it is contrary to (i) fundamental policy of Indian law; or (ii) the interest of India; or (iii) justice and morality, or (iv) in addition, if is patently illegal.[13] Based on a basic concept of justice, the Indian Supreme Court held: „if the award is contrary to the substantive provisions of law or the provisions of the (Arbitration) Act or against the terms of the contract, it would be patently illegal"[14] and can be set aside under Section 34 of the Arbitration Act 1996.[15] Based on *Bhatia International v. Bulk Trading S.A.* (Bhatia International)[16] and *Venture Global Engineering v. Satyam Computer Services Ltd.*, a foreign award may be set aside in India if it is patently illegal and Part I of the Arbitration Act 1996 is not excluded.[17]

In Phulchand Exports, the Indian Supreme Court held that the Saw Pipes' definition of public policy was also applicable as defense against the enforcement of foreign arbitral awards under Sect. 48 of the Arbitration Act 1996, and that even a foreign „award could be set aside, ‚if it is patently illegal'."[18]

In Shri Lal Mahal,[19] the Indian Supreme Court had to decide whether two awards passed by the Board of Appeal of the Grain and Feed Trade Association (GAFTA) in

[9] Decision of October 07, 1993, 1994 Supp (1) SCC 644, Yearbook of Commercial Arbitration, Vol. XX (1995), at 681 et. seq., http://indiankanoon.org/doc/86584/.

[10] Section 48 „(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that – ...
(2) Enforcement of an arbitral award may also be refused if the Court finds that – ... (b) the enforcement of the award would be contrary to the public policy of India. ..."

[11] Yearbook of Commercial Arbitration, Vol. XX (1995), para. 39, at 701 seq.

[12] Yearbook of Commercial Arbitration, Vol. XX (1995), para. 39, at 701 seq.

[13] *Oil and Natural Gas Corporation Limited. v. Saw Pipes Limited,* http://indiankanoon.org/doc/919241/ at 15 et. seq.

[14] *Oil and Natural Gas Corporation Limited. v. Saw Pipes Limited,* http://indiankanoon.org/doc/919241/ at 7; in *Ogilvy & Mather Pvt. Ltd. v. Union of* India, the High Court of Delhi held in a decision of July 3, 2012 that an award is patently illegal if it „omits to notice the evidence on record and erroneously rejects a claim", http://indiankanoon.org/doc/187369826/, at 16.

[15] „An award violating a statutory provision cannot be in the public interest, and is likely to adversely affect the administration of justice" (*Oil and Natural Gas Corporation Limited. v. Saw Pipes Limited),* http://indiankanoon.org/doc/919241/ at 15.

[16] Judgment of the Indian Supreme Court of March 13, 2002, http://indiankanoon.org/doc/110552/; the question was whether Part I, especially Section 9, of the Arbitration Act 1996 was applicable to grant interim measures with respect to an arbitration proceeding held abroad.

[17] *Venture Global Engineering v. Satyam Computer Services Ltd.*, Judgment of the Indian Supreme Court of January 10, 2008, http://indiankanoon.org/doc/75785/, para. 17 at 10, and para. 19 at 11.

[18] *Phulchand Exports Limited v. OOO Patriot,* http://indiankanoon.org/doc/1049823/, para. 11 at 5, and para. 13, at 7. The Indian Supreme Court did not realize that a foreign award is not set aside if enforcement is refused.

[19] Shivnath Rai Harnarain and its successor in interest Shri Lal Mahal appealed against the two awards issued in December 1997 to the Board of Appeal of GAFTA, and challenged the appeal in the High Court of Justice in London. This case is one of these cases where arbitration is only the first stage of the trial and where many courts over 18 years were kept busy; the Indian Supreme Court was even engaged twice in this dispute, first on the challenge on the existence of an arbitration agreement, and later at the enforcement stage. The High Court of Delhi had held that Shri Lal Mahal had no serious defense to the enforcement, and just bought time to somehow postpone enforcement. It held that the award was neither contrary to the contract nor to the public policy of India (http://www.legalcrystal.com/924415, para. 25, at 7).



London applying the GAFTA Rules were enforceable in India. Rule 24 of GAFTA No. 64 provides that the contract shall be construed and take effect in accordance with the laws of England. Shri Lal Mahal opposed the enforcement of the two awards arguing that the awards are contrary to the express provisions of the contract[20] entered into between the parties[21] and, therefore, contrary to the public policy of India. The argument that an award would be against the terms of the contract would have been sufficient under Phulchand Exports to prove a violation of the public policy of India.[22] But the three-Judge Bench of the Indian Supreme Court in Shri Lal Mahal overruled the decision in Phulchand Exports[23] and held that the four Saw Pipes' categories will apply only for procedures setting aside a domestic or a foreign award in India under Sect. 34 of the Arbitration Act,[24] but that the enforcement of a foreign award could be refused by a public policy defense only if the award was contrary to (i) fundamental policy of India; or (ii) the interests of India; or (iii) justice and morality.[25]

Does this mean that India has returned to the internationally acceptable interpretation on the enforcement of foreign arbitral awards under the New York Convention? The short answer is: No. The Shri Lal Mahal decision is applicable only if the arbitral award is recognized as a „foreign award" under Indian law and if such award shall be enforced under Sect. 48 of the Arbitration Act 1996. But this is not the case when a party applies for setting aside a foreign award in India under Section 34 of the Arbitration Act 1996; in such a case, the Indian courts will apply the very broad public policy of India, and review whether the award violated any laws of India or the content of the contract, and, as held by the Delhi High Court, perhaps even whether it is based on a factual error.[26]

## *II. What is a foreign arbitral award in India?*

Not all foreign awards will be treated as foreign awards in India. From an international perspective, four categories of awards rendered abroad have to be distinguished in India: (a) arbitral awards rendered in a country to which under Indian law the New York Convention will not apply; (b) arbitral awards rendered abroad in a country to which under Indian law the New York Convention will apply (Notified Convention Country) which are based wholly or partially on Indian law; (c) arbitral awards rendered in a Notified Convention Country which are wholly based on foreign law but for which Part I of the Arbitration

[20] In *Hindustan Zinc v. French Coal Carbonisation*, the Indian Supreme Court held that an award violated the Public Policy of India if it was contrary to the terms of the contract ((2006) 4 SCC 445).

[21] http://judis.nic.in/supremecourt/imgs1.aspx?filename=40512, para. 15, at 9.

[22] So stated explicitly by the Indian Supreme Court on April 04, 2006 in *Hindustan Zinc Ltd. v. French Coal Carbonisation*, (2006) 4 SCC 445, http://indiankanoon.org/doc/1294876, para. 13.

[23] It is notable, that both decisions were drafted by Judge R.M. Lodha.

[24] http://judis.nic.in/supremecourt/imgs1.aspx?filename=40512, para. 27, at 18 et seq.

[25] http://judis.nic.in/supremecourt/imgs1.aspx?filename=40512, para. 28, at 19.

[26] In *Ogilvy & Mather Pvt. Ltd. v. Union of India*, the High Court of Delhi held in a decision of July 3, 2012 that an award is patently illegal if it „omits to notice the evidence on record and erroneously rejects a claim", http://indiankanoon.org/doc/187369826/, at 16; *Shaun Lee,* Delhi High Court – Error of Fact constitutes Patent Illegality, http://singaporeinternationalarbitration.com/2012/08/23.

Act 1996 is not excluded; and (d) arbitral awards rendered in a Notified Convention Country which are based on arbitral agreements executed after September 06, 2012.

## *III. Awards made in a country which is not a Notified Convention Country*

Under Art. I (1) of the New York Convention, an award is a foreign award if it is „made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ...". Under Section 44 of the Arbitration Act 1996, an award is only a foreign award if it is made on or after the 11th day of October, 1960 „in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which said Convention applies".[27] Already Section 2 (b) of the Foreign Awards Act, 1961 which brought the New York Convention into force in India had contained such provision.[28] 149 countries ratified or acceded to the New York Convention;[29] but India applies the New York Convention only to 47[30] of the 149 countries. The last country included in the list of Notified Convention Countries was the People's Republic of China (including Hong Kong,[31] and Macao).[32]

Awards rendered in countries which are not notified as Notified Convention Countries may be enforced in India as domestic awards under Section 36[33] of the Arbitration Act 1996 and the Indian Code of Civil Procedures,[34] but only if the parties did not exclude (explicitly or impliedly) the application of Part I of the Arbitration Act 1996[35] and if such awards are based on arbitration agreements executed before September 07, 2012; similar arbitral awards rendered in countries not designated as Notified Convention Countries which are based on arbitration agreements executed after September 06, 2012 will not be enforceable in India.[36]

In applying the Indian Arbitration Act 1996, the Bombay High Court held in a decision of May 10, 2013,[37] that a CIETAC award which was rendered in Beijing on August 30, 2011 was not a foreign award because it was rendered prior to March 19, 2012,

[27] Section 44 (b) of the Indian Arbitration and Conciliation Act, 1996. Malaysia had a similar provision; but the Federal Court of Malaysia held that the notification is just conclusive evidence and that the fact whether a State has acceded to the New York Convention could be proven by other facts too (Federal Court of Malaysia, Judgment of November 03, 2009); for details: *Maurer,* The Public Policy Exception under the New York Convention, Revised Edition (2013), at 141 et seq.

[28] India had a similar restriction already stipulated in Section 2 (b) of the Arbitration (protocol and Convention) Act, 1937.

[29] As of April 30, 2014.

[30] For details: *Maurer,* The Public Policy Exception under the New York Convention, Revised Edition (2013), at 243 et seq.

[31] Hong Kong awards were enforced in India until June 30, 1997 when Hong Kong was handed back to the People's Republic of China.

[32] Notification of March 24, 2012 for all awards made on or after March 19, 2012

[33] Section 36: „Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

[34] *Videocon Industries Ltd. v. Union of India,* decision of the Indian Supreme Court of May 11, 2011, http://www.indiankanoon.org/doc/1045460, para. 15.

[35] *Lu. Qin (Hong Kong) Company Ltd. v. Conros Steels Pvt. Ltd.*, Bombay High Court, http://indiankanoon.org/doc/194012216/ para. 16, at 9, para. 32 at 20 and 22.

[36] *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services, Inc.,* http://supremecourtofindia,nic.in/outtoday/ac701905p.pdf, para. 175.

[37] *Lu. Qin (Hong Kong) Company Ltd. v. Conros Steels Pvt. Ltd.*, Bombay High Court, http://indiankanoon.org/doc/194012216/.



the date which was stipulated when the Government of India notified that the People's Republic of China is a Notified Convention Country.[38] Therefore, the Chinese party applied on April 11, 2012[39] for the enforcement of the CIETAC award as a domestic award under Section 36 Indian Arbitration Act 1996 and the provisions of the Indian Code of Civil Procedure.[40] Based on the ruling of the Indian Supreme Court in Balco, that the new law declared in Balco would apply prospectively only to all arbitration agreements executed after September 06, 2012,[41] the Bombay High Court made the award enforceable under Part I of the Indian Arbitration Act 1996 and the Indian Code of Civil Procedure. An arbitration agreement stipulating an arbitration under the CIETAC Rules of Procedure in Beijing was, according to the decision of the Bombay High Court, not an implied exclusion of Part I of the Arbitration Act. Since such awards may be enforced as domestic awards, the Saw Pipe categories including patent illegality, will be applicable.

## *IV. Awards made in a Notified Convention Country which are not solely governed by foreign law*

But the notification requirement is not the only restriction in the definition of foreign awards in India. An award rendered in a Notified Convention Country is only a foreign award if the award is solely governed by foreign law. For awards rendered in a Notified Convention Country, Section 9 (b) of the Foreign Awards Act, 1961 contained a further restriction; such awards were not recognized as foreign awards if they were „made on an arbitration agreement governed by the law of India".[42] The Supreme Court held that this clause did not refer only to the lex arbitri but to substantive law as well.[43] The Arbitration Act 1996 does not contain a similar provision, but the Indian Supreme Court held in *Thyssen Stahlunion GmbH v. Steel Authority of India Ltd.,* that the „definition of foreign award is the same in both enactments"[44] referring to the Foreign Awards Act, 1961 and the Arbitration Act 1996. In its decision in *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services, Inc.* (Balco), the Indian Supreme Court ruled that Section 9 (b) of the Foreign Awards Act, 1961 was intentionally deleted by the Arbitration Act 1996;[45] but the Balco decision applies prospectively only to all arbitration agreements executed after September 06, 2012.[46] Awards which are rendered in a Notified Convention Country which are fully or partially based on Indian law are domestic awards, and can be enforced in India under Part I of the Arbitration Act and the Indian Code of Civil Procedure if the parties

[38] Gazette of India, 24 March 2012.

[39] *Lu. Qin (Hong Kong) Company Ltd. v. Conros Steels Pvt. Ltd.*, Bombay High Court, http://indiankanoon.org/doc/194012216/, at 15.

[40] *Lu. Qin (Hong Kong) Company Ltd. v. Conros Steels Pvt. Ltd.*, Bombay High Court, http://indiankanoon.org/doc/194012216/, at 25 seq.

[41] *Lu. Qin (Hong Kong) Company Ltd. v. Conros Steels Pvt. Ltd.*, Bombay High Court, http://indiankanoon.org/doc/194012216/, at 23.

[42] For details: *Maurer,* The Public Policy Exception under the New York Convention, Revised Edition (2013), at 243 et seq.

[43] *Natural Thermal Power Corporation v. The Singer Company and Others,* http://indiankanoon.org/doc/633347/, at 16 and 17; for details: *Maurer,* The Public Policy Exception under the New York Convention, Revised Edition (2013), at 238 et seq., and at 246 et seq.

[44] www.vakilno.com/judgments/2000.099compcas0383sc.htm, at 27; for details: *Maurer,* The Public Policy Exception under the New York Convention, Revised Edition (2013), at 247 et seq.

[45] *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services, Inc.,* http://supremecourtofindia,nic.in/outtoday/ac701905p.pdf, para. 91.

[46] *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services, Inc.,* http://supremecourtofindia,nic.in/outtoday/ac701905p.pdf, para. 201.

did not exclude explicitly or impliedly the applicability of Part I of the Arbitration Act. Therefore, the narrow interpretation of public policy of India will not apply to such awards either.

## *V. Awards made in a Notified Convention Country solely governed by foreign law only for which the applicability of Part I of the Arbitration Act, 1996 is not excluded*

There is another group of foreign arbitral awards which may not be recognized as foreign awards. Since the decision of the Indian Supreme Court in Bhatia International,[47] all domestic and foreign arbitration proceedings, and all awards, whether or not an Indian Party was involved, fall under Part I of the Indian Arbitration Act 1996 if the parties did not exclude by agreement the application of Part I from their arbitration agreement;[48] such an agreement may be express or implied.[49] The Indian Supreme Court also held that even an arbitral award rendered in a Notified Convention Country which is governed solely by foreign law can be set aside as a domestic award under Part I of the Indian Arbitration Act, 1996 if the parties had not excluded the applicability of Part I of the Arbitration Act 1996.[50] This is still true for all arbitration awards which are based on an arbitration agreement executed prior to September 07, 2012. This decisions in Bhatia International and Venture Global were overruled in the Balco case, but prospectively only for all arbitration agreements executed after September 06, 2012.[51]

If Claimant will apply in India for the recognition and enforcement of an award rendered in a Notified Convention Country which is solely governed by foreign law then Part II of the Arbitration Act 1996 will apply. Part II contains the provisions for the enforcement of foreign arbitral awards. For this type of foreign awards, the public policy exception is limited to the three categories enlisted in the Renusagar and the Shri Lal Mahal cases. However, since Shri Lal Mahal, all aggrieved parties have the option to attack such foreign award by filing a setting aside application with an Indian court using the Saw Pipes categories, especially a broad application of patent illegality.

## *VI. Arbitral awards based on arbitration agreements executed after September 06, 2012*

For arbitral awards which are based on arbitration agreements executed after September 06, 2012 and rendered in a Notified Convention Country, the arbitration law as declared by the Indian Supreme Court in the Balco Case will be applicable. This means, that the territoriality principle will apply. Therefore, for awards rendered abroad which are based on an arbitration agreement executed after September 06, 2012, Part I of the Arbitration Act 1996 will not be applicable. This also means that it is irrelevant for such awards whether

[47] http://indiankanoon.org/doc/110552.

[48] *Bhatia International v. Bulk Trading S.A,* http://indiankanoon.org/doc/110552, para. 21, at 8, and para 32, at 12; for details: *Maurer,* The Public Policy Exception under the New York Convention, Revised Edition (2013), at 286 et seq.

[49] *Bhatia International v. Bulk Trading S.A,* http://indiankanoon.org/doc/110552, para. 21, at 8.

[50] *Venture Global Engineering v. Satyam Computer Services Ltd.*, http://indiankanoon.org/doc/75785, at 11, and at 13; for details: *Maurer,* The Public Policy Exception under the New York Convention, Revised Edition (2013), at 297 et seq.

[51] *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services, Inc.,* http://supremecourtofindia,nic.in/outtoday/ac701905p.pdf, para. 201.



Indian law applied fully or partially because the decision of the Indian Supreme Court in Bhatia International will no longer be applicable. Therefore, only Section 48 of the Arbitration Act 1996 will be applicable and all awards rendered in Notified Convention Countries will be foreign arbitral awards under the Arbitration Act 1996. And for such foreign awards, courts in India will be bound to apply the narrow interpretation of Indian public policy of Renusagar and Shri Lal Mahal.

Part I of the Indian Arbitration Act will not be applicable to such foreign awards; therefore, a setting aside application is no longer maintainable, and only the narrow interpretation of public policy of India will be applicable. Therefore, all parties who have concluded arbitration agreements with an Indian party prior to September 07, 2012 should consider concluding a new arbitration agreement with their Indian contract partner.

## *VII. Some Decisions by the Indian High Courts since September 06, 2012*

The Madhya Pradesh High Court had to decide a setting aside application with respect to an award rendered in Singapore.[52] A Korean and an Indian party had agreed in 2006 that arbitration proceedings were to be conducted in Singapore in accordance with the Singapore International Arbitration Center (SIAC) Rules. An award was rendered in favor of the Korean party. The Indian party applied for setting aside the Singapore award in India. Based on the Balco decision, the Madhya Pradesh High Court held that the Bhatia International decision was still good law. But the SIAC Rules stipulate in Rule 32: Where the seat of arbitration is Singapore, the law of arbitration under these Rules shall be the International Arbitration Act of Singapore. Art. 34 of the First Schedule to the International Arbitration Act provides for an exclusive recourse to a court in Singapore. The court did not find that the parties had read the SIAC Rules or the International Arbitration Act. But based on the fact that the parties had agreed for arbitration proceedings under the SIAC Rules, which includes Rule 32, the parties had impliedly excluded the application of Part I of the Indian Arbitration Act.[53] Therefore, an Indian court could not maintain a case for setting aside a SIAC award.

Less lucky and fortunate was IMAX Corporation (IMAX). IMAX and E-City Entertainment (I) Pvt. Ltd. (E-City) had executed a purchase agreement to be governed by the laws of Singapore with an ICC arbitration clause; the agreement was contingent upon the approval of the Reserve Bank of India because the purchase price was to be paid in USD.[54] IMAX alleged breach of the agreement and filed an arbitration request. The court of ICC fixed London as the seat of arbitration.[55] Two preliminary awards and a final award were rendered. E-City applied to the Bombay High Court for setting aside these awards under Section 34 of the Indian Arbitration Act 1996 three months[56] and 20 days after the service of the third award, e.g. 20 days late.[57] The issue was whether the setting aside application against a foreign award was maintainable under Section 34. The first issue was whether these three awards were foreign awards. Part I of the Indian Arbitration Act was not explicitly excluded, and the court found that it also was not impliedly excluded because the ICC

[52] *Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Co. Ltd.*, http://indiankanoon.org/doc/182682550/.

[53] *Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Co. Ltd.*, http://indiankanoon.org/doc/182682550/, para 16, at 7.

[54] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 5.

[55] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 5.

[56] See Section 36 (3) – footnote 8 above.

[57] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 3, and at 25.

Rules nowhere exclude Part I of the Arbitration Act;[58] therefore, in distinction to the afore mentioned decision of the Madhya Pradesh High Court, the court did not accept an implied exclusion.[59] Surprisingly, with respect to the choice of law clause (the agreement shall be governed by the laws of Singapore) the Bombay High Court held: The agreed Singapore law „just cannot be accepted to overlook the binding effect of the clauses of the terms and the Indian laws. ... All parties are bound by the terms and conditions and the Indian laws.[60] ... Merely because the parties have vaguely agreed that Singapore will be the governing law ..., but considering the contents of the agreement itself and in the present facts and circumstances, I am inclined to hold that the present agreement/contract need to be construed and/or governed by the Indian laws for the purposes of considering the breaches of its terms and conditions and consequential damages and/or compensation, if any.[61] ... The subject matter of the arbitration is in India ... The law which governs the respective statutory obligations, as in the present case is Indian law, should prevail over the procedural law of ICC Rules."[62] The Bombay High Court held that the arbitral tribunal had proceeded to pass an award „by overlooking the Indian laws and the contents of the agreement referring to the Indian law obligations and the fact that the contract was to be performed in India".[63] „The English law or the Singapore law, if utilized and/or made applicable would make the award vulnerable. ... The Singapore law, in no way, can control or govern the contract terms and conditions though it is agreed that the agreement, shall be governed and construed according to laws of Singapore and by the Courts of Singapore'. I am inclined to observe that with regard to the nature of terms and conditions and the governing law so agreed by the parties to govern and construe the agreement, is in conflicts with the Indian laws and the public policies."[64] The court held that the setting aside application was maintainable.[65] Secondly, the Bombay High Court had to deal with the fact that the application was filed 20 days late; the delay was not justified or excused. But the Bombay High Court held that the „delay is required to be condoned in the interest of justice".[66] Applying Indian law, the court could have applied the Saw Pipes and Phulchand decisions and reserved the right to set aside foreign awards under Part I of the Indian Arbitration Act, but observe the 3 months period stipulated in Sect. 34 (3). But it is obvious that the Bombay High Court wanted to achieve a different result and therefore held that the delay which was condoned in the interest of justice.

Referring to the Shri Lal Mahal decision, the Bombay High Court allowed the enforcement of an award rendered in Tokyo in 2009.[67] The Indian Supreme Court had already decided at the beginning of the dispute in 2002 that Japanese law governed the agency

[58] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 15.
[59] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 18, and at 22 et seq.
[60] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 13.
[61] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 18.
[62] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 20.
[63] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 18.
[64] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 21.
[65] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 22, and at 24.
[66] *E-City Entertainment (I) Pvt. Ltd. v. IMAX Corporation*, http://indiankanoon.org/doc/196198238/, at 25.
[67] *Mitsui OSK Lines Ltd. v. Orient Ship Agency Pvt. Ltd. and Adi Marzban Path,* http://indiankanoon.org/doc/36266980/, at 37.



agreement.[68] The Bombay High Court followed the Shri Lal Mahal decision and applied the narrow interpretation of the public policy of India; it held that the wording and the concept of public policy of India in Sections 34 and 48 is the same in nature but its application differs in degree insofar as the two sections are concerned.[69] The Indian party had missed the three months window to apply for setting aside the Japanese award; but the Bombay High Court reasoned that the aggrieved party can elect whether it wants to apply for a setting aside procedure using the Saw Pipes definition of public policy in India or whether it wants to wait and later apply for the refusal of the recognition and enforcement of a foreign award using the narrow Renusagar/Shri Lal Mahal definition of public policy.[70] When the Japanese award was served to the Indian party on May 04, 2009, the Indian party had not filed for setting aside such award in India not assuming that the Saw Pipes definition of public policy in India would be overruled in the Shri Lal Mahal decision with respect to the enforcement of a foreign award. Otherwise, the Indian parties may have applied for setting aside the Japanese award.

## *VIII. Narrow interpretation of public policy of India is applicable only for a few awards rendered in a Notified Convention Country*

The narrow interpretation of public policy of India as declared in Shri Lal Mahal will be applicable by the courts in India only for arbitral awards which are rendered in a Notified Convention Country applying foreign law; however, as was decided in the IMAX case, Indian courts may feel free to stipulate that Indian laws will be applicable instead of the foreign law chosen by the parties. The narrow interpretation of public policy of India should also be applied by the courts in India to foreign awards rendered in a Notified Convention Country if the parties expressly excluded Part I of the Indian Arbitration Act or if the courts in India would accept an implied exclusion. Finally, the narrow interpretation will be applied to awards rendered in a Notified Convention Country if the arbitration agreement was executed after September 06, 2012. But realistically, nothing has changed really. As long as the patent illegality weapon under Saw Pipes can be applied in a setting aside application, the arbitration proceeding will remain to be just the first stage of a litigation[71] and the aggrieved party will try to set aside the foreign award in India if it can find personal jurisdiction.

[68] *Mitsui OSK Lines Ltd. v. Orient Ship Agency Pvt. Ltd. and Adi Marzban Path,* http://indiankanoon.org/doc/36266980/, at 3.
[69] *Mitsui OSK Lines Ltd. v. Orient Ship Agency Pvt. Ltd. and Adi Marzban Path,* http://indiankanoon.org/doc/36266980/, at 34 and 35.
[70] *Mitsui OSK Lines Ltd. v. Orient Ship Agency Pvt. Ltd. and Adi Marzban Path,* http://indiankanoon.org/doc/36266980/, at 14.
[71] *Murali Krishnan,* Unless ONGC v. Saw Pipes is reconsidered, arbitration cannot work – In Conversation with Agarwal Law Associates' Mahesh Agarwal, http://barandbench.com, at 4.