

"Un-force" or enforce: Patent illegality and foreign arbitral awards

In an interesting development, the Supreme Court, in its recent decision dated July 3, 2013 in **"Sri Lal Mahal Ltd vs Progetto Grano SPA"**, has held that the scope for challenge to a foreign arbitral award on the ground of it being contrary to the public policy of India is lesser as compared to a similar challenge against a domestic award. Patent illegality in a domestic award could lead the same to be considered as contrary to public policy of India, and on that ground be set aside by the Court. However, in the case of a foreign arbitral award, mere patent illegality is insufficient to render it unenforceable. The Supreme Court has held that the words "public policy of India" have to be given a narrower meaning in relation to challenge to a foreign award as opposed to a domestic award. In other words, a foreign award will be considered to be contrary to the public policy of India only if it is contrary to (1) the fundamental policy of Indian law; (2) the interests of India; or, (3) justice or morality. It will not be considered to be contrary to the public policy of India where it is patently illegal or is contrary to the terms of the contract. The context in which the above law was laid down is elaborated in the following paragraphs.

The predecessors in interest of Sri Lal Mahal Ltd. ("**Sellers**") entered into a contract with the predecessors in interest of Progetto Grano SPA, Italy ("**Buyers**"), to sell durum wheat. As per the terms of the contract, an Indian agency was to give a certificate as to the weight, quality and packing of the goods and this certificate was agreed to be binding on both parties. On shipment being received by the Buyers, they contended that what had been shipped was soft wheat and not durum wheat, though there was a certificate of the Indian agency to the contrary. Relying on the certificates and testing of certain other agencies, the Buyers sued the Sellers for breach of contract, which dispute was referred to arbitration. The arbitral tribunal, GAFTA (Grain & Feed Trade Association, London) by its award held that the Sellers were liable for breach of contract as what had been supplied was not durum wheat. Challenges to the award by the Sellers before the Board of Appeal and the High Court of Justice, London, both failed. When the Buyers sued for enforcement of the foreign award in the Delhi High Court, the Sellers contended that the award suffered from a patent illegality. It was elaborated that the award was against the terms of the contract in as much as it relied on certificates and testing by certain foreign agencies to hold that the goods supplied was not durum wheat. This was despite the fact the contract specified that the certificate of an Indian agency would be binding on both parties, pursuant to which the Indian agency had certified that the goods shipped were durum wheat.

Reliance was placed by the Sellers on two decisions of the Supreme Court, firstly on, “**ONGC vs Saw Pipes Ltd.**”, ((2003) 5 SCC 705), which had held that an award rendered contrary to the terms of the contract would amount to patent illegality and thus, be contrary to the public policy of India, secondly, on “**Phulchand Exports Ltd. vs OOO Patriot**”, ((2011) 10 SCC 300), wherein it was held that the meaning given to “public policy of India” in *Saw Pipe’s* case pertaining to enforceability of a domestic award would also apply to the same words (“contrary to the public policy of India”) used in Section 48(2)(b) with regard to enforceability of foreign awards. Therefore if a foreign award was patently illegal or rendered contrary to the terms of the contract, it would be contrary to the public policy of India and hence, be liable to be set aside.

Interestingly, Justice R. N. Lodha, who rendered the judgment in *Phulchand’s* case, also presided over the Bench deciding this case and overruled his own decision in *Phulchand’s* case. He noted that as far as enforceability of foreign awards was concerned, the earlier enactment, Foreign Awards (Recognition & Enforcement) Act, 1961 (“Foreign Awards Act”), was repealed and provisions relating to the same had been made in the Arbitration Act. Under the Foreign Awards Act too, a provision was made for rendering unenforceable such foreign awards which were contrary to the public policy of India. This phrase “public policy of India” under the Foreign Awards Act had been given a narrow meaning by the Supreme Court in the earlier case “**Renusagar Power Company Ltd. vs General Electric Company Ltd.**”, ((1994 Supp (1) SCC 644)), where it was held that an award could be said to be contrary to the public policy in India only if it would be contrary to (1) fundamental policy of Indian law; (2) interest of India; or, (3) justice or morality. While dealing with challenges to domestic awards however, the Court in the *Saw Pipes’* judgment gave a broader meaning to the words “public policy of India” under Section 34 of the Arbitration Act to include a case where the award was contrary to the terms of the contract or suffered from a patent illegality.

However, in the present case, the Court held that as regards enforceability of foreign awards, the interpretation in *Saw Pipes* of the words “public policy” cannot be adopted and instead applied the narrower meaning set out in *Renusagar’s* case. However, in case of proceedings for setting aside a domestic award under Section 34 of the Arbitration Act, the wider interpretation of “public policy” as laid down in the *Saw Pipes’* case would continue to be applicable. In view of this, the Apex Court held that even if the submission that the foreign award suffered from a patent illegality or is contrary to the terms of the contract (by ignoring the fact of certification given by the Indian agency) is accepted, it would not render the foreign award contrary to the public policy of India.

Of course, it must be pointed out that on facts, the Supreme Court also noted that the arbitral tribunal and the Board of Appeal had found that the certificate issued by the Indian agency was not in accordance with the terms of the contract, in as much as the sampling and testing had not been done in the manner and at the place required to be done as per the contract and hence the Buyer was not bound by the certificate. This conclusion of the arbitral tribunal and subsequently, of the Board of Appeal could not be interfered with by the Court as this would be merely a matter of appreciation of facts and evidence and Section 48 of the Arbitration Act does not give the opportunity to take a ‘second look’ at the foreign award at the stage of enforcement.

IndusLaw Quick View:

This judgment has restricted the scope of challenge to foreign awards as compared to domestic awards, which will be seen as a welcome change by foreign investors. After the Balco judgment, where the Supreme Court restricted the scope of Indian courts to entertain applications for interim measures in relation to foreign-seated arbitrations, this judgment is another step towards restricting judicial interference in international arbitrations and the awards rendered therein. This would also provide greater certainty to the finality of foreign awards, thus, paving way for their speedier enforcement.

The distinction made between domestic awards and foreign awards could lead to parties preferring foreign law and jurisdiction as their preferred option. This would mean larger number of arbitrations being moved out of the country and governed by foreign laws. Such distinction could also possibly lead to a feeling amongst domestic Indian arbitrators that their awards are being held to a higher standard and are more closely scrutinized than those rendered by their foreign counterparts. The unfortunate implication of this could be to project a picture to foreigners that domestic awards are not considered in India to be rendered with as much competence and efficiency as compared to foreign awards and hence, they are more open to scrutiny. This may not be a fair implication. Of course the reversal by a judge of his own decision rendered not too long ago would also lend support to critics who would bemoan the lack of certainty in decision making by Indian courts. In its defence, it must be said that the Supreme Court seems to have found it incongruous that for a foreign award to be challenged, it had by its judgement in Phulchand's case, opened the doors wider under the Arbitration Act than what was available under the earlier Foreign Awards Act. In view of the Parliament having enacted the Arbitration Act along the lines of the UNCITRAL Model Law, with the avowed object of restricting judicial intervention, the Court has thought it appropriate to overrule its earlier decision and shut the door, which had been opened in Phulchand's case earlier providing for increased intervention in foreign awards. However questions could be raised as to how, on principle, any distinction could be made between domestic and foreign awards when it comes to application or interpretation of "public policy of India". This decision may therefore signal a re-look in the near future at the interpretation of "public policy" as set out in the Saw Pipes' case with regard to domestic awards.



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