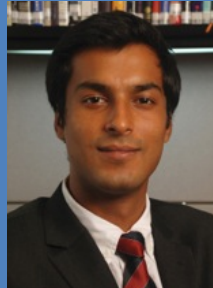
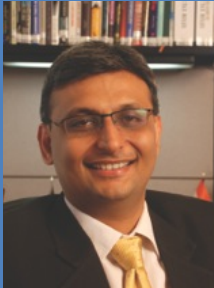




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## SC LIMITS SCOPE OF PUBLIC POLICY IN FOREIGN ARBITRAL AWARDS

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### Introduction

Recent judicial rulings are helping India to shed its anti-arbitration image, and emerge as a favorable jurisdiction for enforcement of international arbitral awards.

The 2012 landmark decision of the Supreme Court of India (“**Supreme Court**”) in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc*<sup>1</sup> (“**Balco**”) marked the beginning of a new chapter in the Indian arbitration regime, bringing it in sync with the international approach.

In *Balco*, a five Judge Bench of the Supreme Court drew a very clear demarcation between Indian and foreign seated arbitrations and provided that Part I of the Arbitration and Conciliation Act, 1996 (“**Act**”) would not be applicable to foreign seated arbitrations. The judgment affirmed that a foreign award was not amenable to challenge under Section 34<sup>2</sup> of Part I of the Act. In essence, *Balco* confirms that the level of judicial interference in a foreign seated arbitration should be limited. The flip side of the judgment though is that no interim relief is available to a party in an arbitration seated outside India.

<sup>1</sup> (2012) 9 SCC 552

<sup>2</sup> Section 34 provides the grounds on which a party may seek to have an arbitral award set aside by the courts. Specifically, section 34(2)(b) provides that a Court may set aside an arbitral award if it is found to be “*in conflict with the public policy of India*”.



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Taking the above proposition further, in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*<sup>3</sup>, (“**Lal Mahal**”) the Supreme Court passed a seminal judgment, whereby it unmistakably established a difference between the scope of objections to the enforceability of a foreign award under Section 48<sup>4</sup> of the Act, and challenges to set aside an award altogether under section 34 of the Act. As a consequence, the Supreme Court has substantially curtailed the scope of the expression ‘*public policy*’, which is a ground available to object to the enforcement of foreign arbitral awards in India and brought it in line with the New York Convention.

### Background

The Supreme Court in *Renusagar Power Co. Limited v. General Electric Company*<sup>5</sup> (“**Renusagar**”), recognized that merely a violation of Indian laws would not suffice to attract the bar of public policy.

Subsequently, the apex court in the 2003 decision of *ONGC v. Saw Pipes*<sup>6</sup> (“**ONGC**”) expanded the test of ‘*public policy*’ to mean an award that violates the statutory provisions of Indian law or terms of the contract. Such an award is considered as ‘*patently illegal*’ and therefore in violation of public policy. This interpretation practically affords the losing party an opportunity to re-argue all the points afresh and prolong the final adjudication of the case.

The judgment in *ONGC* diverged from the interpretation given to the expression “*public policy*” in *Renusagar* on the ground that *Renusagar* dealt with enforcement of an award which had attained finality, whereas the issue before the court in *ONGC* was with regard to the validity of the arbitral award itself, which was under challenge under Section 34 of the Act.

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<sup>3</sup> Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of 2012.

<sup>4</sup> Section 48 provides the grounds on which enforcement of a foreign award in India may be refused. Specifically, section 48(2)(b) provides that enforcement of an arbitral award may also be refused if the Court finds that “the *enforcement of the award would be contrary to the public policy of India*”.

<sup>5</sup> 1994 Supp (1) SCC 644

<sup>6</sup> (2003) 5 SCC 705



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Thereafter, with the advent of the ruling in *Venture Global v. Satyam Computers*<sup>7</sup> (“**Venture Global**”), foreign awards i.e. awards passed in arbitrations seated outside India became amenable to challenge under Section 34 of the Act. This resulted in foreign awards being subject to the broader test of “*public policy*” as enunciated in *ONGC*.

Thus, *ONGC* coupled with *Bhatia International v. Bulk Trading S.A.*<sup>8</sup> (“**Bhatia International**”) and *Venture Global* led to an undesirable situation and opened the floodgates to petitions challenging arbitral awards on the ground of ‘*patent illegality*.’ Any and all arbitral awards involving Indian parties were being challenged before the Indian Courts and were completely re-heard on the merits, defeating the entire purpose of the arbitration in the first place.

In *Phulchand Exports Limited v. O.O.O. Patriot*<sup>9</sup> (“**Phulchand**”), the Supreme Court expanded the meaning of the expression ‘*public policy*’ under section 48 of the Act, and held that the scope and purport of the expression under section 34 and 48 are the same. Thus, even in a scenario where the award attains finality, upon an action for enforcement of the foreign award being instituted, the parties by virtue of the decision in *Phulchand* could apply the extremely broad standard of ‘*public policy*’ in *ONGC* and almost re-open the entire matter.

### Lal Mahal Decision

The decision given in *Phulchand* has now been overruled by *Lal Mahal*. In this matter, an award passed under the rules of the Grain and Feed Trade Association, London and upheld by courts in the UK was sought to be enforced in India. Objection to the enforcement of the award was raised under section 48 of the Act on the ground that the award was contrary to the terms of the contract and thus patently illegal and in violation of ‘*public policy*’.

The Supreme Court held that the expression ‘*public policy*’ as found under Section 48 of the Act would not bring within its folds the ground of ‘*patent illegality*’. Further, such ground is limited to section 34 of the Act where the issue is whether the award should be set aside or not.

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<sup>7</sup> (2008) 4 SCC 190

<sup>8</sup> (2002) 4 SCC 105

<sup>9</sup> (2011) 10 SCC 300



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The Court noted that the applicability of the doctrine of ‘public policy’ is comparatively limited in cases involving conflict of laws and matters involving a foreign element such as a foreign seated arbitration. The court ruled that the expression ‘*public policy of India*’ under Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged, before it becomes final and executable in contrast to enforcement of an award after it becomes final.

The Supreme Court clarified that Section 48 does not offer an opportunity to have a second look at the foreign award at the enforcement stage, or permit review of the award on the merits. Accordingly, the court held that the meaning of the expression public policy under Section 48 is limited to:

1. *Fundamental policy of India;*
2. *Interests of India;*
3. *Justice and morality.*

### Conclusion

The overruling of the decision in *Bhatia International by Balco*, and the subsequent overruling of the decision in *Phulchand by Lal Mahal*, shows that the judiciary has now adopted a favorable approach towards arbitration thereby granting higher sanctity to arbitral awards and arbitration as a dispute resolution process. In fact, *Phulchand* was a 2011 decision which was overruled by the Supreme Court within 2 years. The transformation in the judicial mindset is now quite apparent and foreign seated arbitrations may be considered a preferred option for speedy dispute resolution.

In the context of international commercial arbitration, the global approach such as seen from Singapore<sup>10</sup> or France has been to accord a very narrow interpretation to the expression ‘public policy’, even where an award is sought to be set aside. Thus, it is now to be seen whether a similar approach shall be adopted in India in the context of section 34, in order to truly establish India as an international commercial arbitration destination.

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<sup>10</sup> See for instance, *AJU v. AJT*, [2011] 4 SLR 739; *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, [2007] 1 SLR(R) 597.