

Indian Supreme Court rules on the enforcement of foreign award against non-signatories (Gemini Bay v Integrated Sales)

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Arbitration analysis: The Supreme Court of India (Supreme Court) refused to interfere with an award issued by a sole arbitrator in an arbitration seated in the USA, holding that a foreign award could be enforced against non-signatories to the arbitration agreement under the Arbitration and Conciliation Act 1996 (the Act). The Supreme Court also narrowed down the scope of resistance under section 48 of the Act (akin to Article V of the New York Convention) by award-debtors to the enforcement of a foreign award. The judgment is consistent with the pro-arbitration approach taken by Indian courts in the last decade. Written by Adimesh Lochan, Alipak Banerjee, Sahil Kanuga and Vyapak Desai, Members of the International Dispute Resolution and Investigations Practice, Nishith Desai Associates.

Gemini Bay Transcription Pvt Ltd v Integrated Sales Service Ltd and others Civil Appeal Nos 8343–8344 of 2018 and 8345–8346 of 2018, [Judgment of the Supreme Court of India dated 10 August 2021](#)

Note: non-UK judgments referred to in this analysis are not reported by LexisNexis® UK.

What are the practical implications of this case?

The ability to arraign non-signatories in an arbitration remains the subject of debate, and the Supreme Court and several High Courts in India have allowed arraignment of non-signatories to an arbitration agreement.

Following the decision of the Supreme Court in this case, parties can now anticipate that it will be extremely difficult to resist enforcement of a foreign award in India against a non-signatory where the tribunal has held that the non-signatory is liable under the award. The ability of a non-signatory to be bound by the arbitration agreement can be certainly raised before the arbitral tribunal, or such award can be challenged at the seat of arbitration; but at the enforcement stage, the Indian courts will not look into such aspects. The judgment of the Supreme Court is particularly relevant for complex transactions involving group entities since the enforceability of a foreign award on non-signatories has now been settled by the Supreme Court.

While holding that a foreign award is binding and can be enforced against a non-signatory, the Supreme Court also discussed the scope of the limited grounds to resist enforcement under section 48 of the Act and opined that such grounds must be construed narrowly.

What was the background?

Integrated Sales Services (ISS), a Hong Kong based company had entered into a representation agreement (Agreement) with an Indian company, DMC Management Consultants Ltd (DMC) on 18 September 2020, under which, ISS assisted DMC in the sales of DMC's goods and services against a fixed amount of commission. At the time of entering into the Agreement, Mr Rattan Pathak signed the Agreement as the managing director of DMC.

The Agreement provided for dispute resolution by way of arbitration seated in Kansas City, Missouri before a sole arbitrator. The governing law of the Agreement was laws of the State of Missouri, USA. The Agreement was amended twice and was executed by Mr Arun Dev Upadhyaya on behalf of

DMC. In the second amendment, the governing law of the Agreement was amended to 'laws of the State of Delaware'.

Disputes arose between the parties pursuant to which ISS initiated arbitration and raised a claim that DMC transferred monies payable to ISS under the Agreement to Gemini Bay Transcriptions Pvt Ltd (GBT), a company owned and controlled by Mr Arun Upadhyay (Arun), by terminating its contracts with certain customers introduced by ISS and subsequently, executing the same contracts through GBT. Arun, DMC, DMC Global, Gemini Bay Consulting Ltd (GBC) and GBT were all arrayed as a party to the arbitration proceeding by ISS.

The sole arbitrator held that Arun used the corporate forms of sister concerns like DMC Global Inc (DMC Global) GBC to cover-up unjust results of eliminating ISS as well as refused to pay commissions payable to ISS under the Agreement. Therefore, the arbitrator directed all the group entities and Arun to jointly and severally pay ISS a sum of US\$6,948,100 along with administrative fees and expense borne by ISS (Award). Only DMC participated before the sole arbitrator and addressed the issue of applicable law governing the arbitration, but the other issues framed by the sole arbitrator, such as the jurisdiction of the tribunal over non-signatory parties, piercing the corporate veil of certain corporations, whether certain non-signatory parties to the original agreement should be excluded from the arbitration were not addressed by DMC. The other parties impleaded in the arbitration, ie DMC Global, GBC, GBT and Arun, did not enter appearance before the sole arbitrator.

The Single Judge of the Bombay High Court (Nagpur Bench) held that the Award was only enforceable against DMC and not against the group entities as they were 'non-signatories' to the arbitration agreement. On appeal, the Division Bench of the Bombay High Court (Division Bench) overturned the decision of the Single Judge holding the Award was enforceable against the group entities. Thereafter, GBT filed an appeal before the Supreme Court against the order of the Division Bench.

What did the court decide?

The appellant group (DMC, DMC Global, GBC, GBT and Arun) submitted their arguments under the following heads, and the Supreme Court held as under:

- section 47(1)(c) of the Act: The provision is limited to adducing evidence by the award holder to establish that the three pre-requisites for enforcement of a foreign award are met (see section 47 (Evidence) of the Act). An award holder is not required to establish that a non-signatory is bound by the foreign award at the stage of enforcement
- section 48(1)(a): A challenge to the enforcement of foreign award on the ground of non-signatory is outside the scope of section 48(1)(a) (see section 48 (Conditions for enforcement of foreign awards) of the Indian Act). Moreover, such a question is likely to involve an analysis into the merits of the case which further renders it outside the scope of enquiry under Section 48 of the Act (relying on *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] SGHC 78—the Supreme Court observed that similar to the New York Convention, the Act promotes a pro-enforcement bias, therefore, the court must not reopen the case on merits especially when the burden lies on an award debtor to establish the grounds under section 48; para [57] of the judgment)
- section 48(1)(c) (see section 48 (Conditions for enforcement of foreign awards) of the Act): This provision only covers circumstances wherein the foreign award covers a dispute that is outside the scope of the arbitration agreement between the parties (relying on *Olympus Superstructures (P) Ltd v Meena Vijay Khetan*, (1999) 5 SCC 651; *Ssangyong Engg. & Construction Co Ltd v NHAI*, (2019) 15 SCC 131; *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another*, [2006] SGHC 78 (Singapore High Court). Para [60] of the judgment)
- section 48(1)(b) (see section 48 (Conditions for enforcement of foreign awards) of the Act): The scope of this provision is restricted to instances prior to making of the award, such as notice of appointment of the arbitrator or of the arbitral proceedings, etc (relying on *Vijay Karia v Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1). Therefore, an absence of reasons or perfunctory reasons in a foreign award is not included as a ground under Section 48(1)(b) (para [63] of the judgment)

- torts outside the scope of arbitration agreement: The words ‘differences arising out of legal relationships, whether contractual or not’ under section 44 make it clear that tort claims can be decided by an arbitrator provided that the dispute arises in connection with the agreement (paras [66]–[67] of the judgment). Moreover, in the present case, the arbitration agreement itself included the phrase dispute ‘in connection with this Agreement’ (para [66] of the judgment)
- award violative of the substantive law of the agreement: The enforcement of a foreign award cannot be refused on the ground that the foreign award violates substantive law of the agreement (paras [71]–[73] of the judgment). Such a question can only be considered by the seat court, and not by an enforcing court
- damages: Nothing under Section 48(1) permits resisting the enforcement of a foreign award on the ground that damages were awarded without basis or reason (para 74 of the judgment). The only possible avenue for such a challenge is under section 48(2) and that too only when there is gross injustice that shocks the conscience of the court (relying on *Ssangyong Engg. & Construction Co Ltd v NHAI*, (2019) 15 SCC 131; Section 48 (Conditions for enforcement of foreign awards) of the Act)

Case details:

- Court: Supreme Court of India
- Judge: Rohinton Fali Nariman and BR Gavai, JJ
- Date of judgment: 10 August 2021

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