

ENFORCEMENT OF FOREIGN AWARDS AGAINST  
NON-SIGNATORIES UNDER THE NEW YORK  
CONVENTION IN INDIA: A CRITIQUE OF  
THE DECISION IN *GEMINI BAY*

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*This article examines questions that may arise in proceedings for enforcement of foreign awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*<sup>1</sup> (“New

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I. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, was adopted by a United Nations Diplomatic Conference on 10 June 1958 and entered into force on 7 June 1959. India acceded to the New York Convention and became a signatory on 13 July 1960 with two reservations i.e., (1) India would apply the Convention to the awards made in the contracting States notified by the Government of India (note that India only

*York Convention*”) in India in light of the recent decision of the Supreme Court of India in *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. (“Gemini Bay”)*<sup>2</sup>: (1) whether foreign awards can be enforced against non-signatories or third parties to an arbitration agreement in India?; (2) whether a non-signatory can resist enforcement under any of the grounds provided under Section 48(1)(a)–(e) or Section 48(2) of the Indian Arbitration and Conciliation Act, 1996 (“A&C Act”)?

## I. INTRODUCTION

The New York Convention is without doubt the single most important convention in the field of international commercial arbitration.<sup>3</sup> At present, 168 countries have ratified the New York Convention. Nowadays, it is a common phenomenon that enforcement of arbitral awards under the New York Convention is sought in ratifying States against non-signatories to an arbitration agreement. In certain scenarios, the non-signatory is made a party to the arbitration proceedings, and in other scenarios, the award is sought to be enforced against the non-signatory directly at the enforcement stage.<sup>4</sup> This occurs

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enforces binding awards from 48 New York Convention notified territories even though there are currently 164 contracting states to the Convention) and (2) that the Convention would be applicable only to disputes which are commercial under the national law. For reference to these two reservations see the Arbitration and Conciliation Act, 1996, §44.

2. *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.*, (2021) SCC OnLine SC 572 (India).

3. J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT'L ARB. 91, 93 (1990) (describing the New York Convention as “the single most important pillar on which the edifice of international arbitration rests”).

4. For such scenarios where the award is sought to be enforced against the non-signatory directly at the enforcement stage, *see e.g.*, *Carte Blanche Pte. Ltd. v. Diners Club Int'l Inc.*, 2 F.3d 24, 29 (2d Cir. 1993) (holding that the arbitral award against a subsidiary can be enforced directly against the parent company at the stage of enforcement). *See also* *Toho Towa, Ltd. v. Morgan Creek Prods.*, 159 Cal. Rptr. 3d 469, 478 (Cal. Ct. App. 2013) (stating that it has long been recognized that a court has the authority to amend a judgment to add a nonparty alter ego as a judgment debtor); *Edmund Burke et al. v. Carlos Sobral and Illusion Acessorias de Modas Ltd.*, 44 Y.B. Comm. Arb. 473 (Sup. Ct. of Justice 2019) (Braz.) (refusing to grant recognition (homologation) of a foreign award with respect to the second defendant (non-signatory) at the enforcement stage as it had not been impleaded as a defendant in the arbitration).

because, depending upon the law applicable to the contract, persons may be bound by an arbitration agreement without being named in the contractual document through common law equitable principles of agency, estoppel, or subrogation, or by the application of doctrines such as the group of companies doctrine, incorporation by reference, piercing of the corporate veil/alter ego doctrine, etc. The New York Convention, however, is silent on such issues and scenarios. This comment examines both whether enforcement of foreign awards against non-signatories is permitted in India and the burden of proof that lies on the award holder in both scenarios discussed above. The comment further examines whether a non-signatory can resist enforcement under any of the grounds provided under Section 48 of the A&C Act, the equivalent of Article V of the New York Convention.

## II. THE PROCEDURE FOR ENFORCEMENT OF NEW YORK CONVENTION AWARDS IN INDIA

The New York Convention has been substantially incorporated in Part II, Chapter I of the A&C Act which deals with the enforcement of New York Convention Awards. Section 47 replicates Article IV of the New York Convention, which pertains to the procedure for enforcement of foreign awards, while Section 48 mirrors Article V of the Convention with respect to the conditions for enforcement of foreign awards. The party against whom the enforcement is sought may resist enforcement by furnishing proof of one or more of the grounds enumerated in Section 48(1)(a)–(e) of the Act. Further, Section 48(2) vests the court with the ex officio power to refuse enforcement if it finds that the subject matter of the dispute is not amenable to settlement by arbitration under the law of India or the enforcement of the award would be contrary to the public policy of India.

The overall scheme of the New York Convention is to facilitate enforcement of foreign awards. The grounds for refusing enforcement enumerated in Article V are considered exhaustive, and judicial decisions of various jurisdictions support this proposition.<sup>5</sup> The grounds do not contemplate a review of

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5. *See* *Renusagar Power Co. v. General Electric Co.* (1994) 1 SCC Suppl. 644, 672 (India) and *Shri Lal Mahal Ltd. v Progetto Grano SPA* (2014) 2

the merits of the foreign award by the courts where enforcement is sought. Moreover, the enforcement court cannot set aside a foreign award, even if the conditions under Section 48 are made out.<sup>6</sup> The power to set aside a foreign award vests only with the court at the seat of arbitration, since the supervisory or primary jurisdiction is exercised by the curial courts at the seat of arbitration. The enforcement court may refuse enforcement of a foreign award if the conditions contained in Section 48 are made out. This is evident from the language of the Section itself, which provides that enforcement of a foreign award may be refused only if the applicant furnishes proof of any of the conditions contained in Section 48 of the Act. Once the court is satisfied that the award is enforceable as a New York Convention award, it shall be deemed to be a decree of that court under Section 49. The award holder will be entitled to seek enforcement by coercive sanctions of seizure and attachment of the properties, bank accounts, and other assets situated within its jurisdiction.

### III. THE INDIAN SUPREME COURT'S DECISION IN *GEMINI BAY*

The Indian Supreme Court in *Gemini Bay* has settled the law on the enforceability of foreign awards against non-signatories, albeit with some shortcomings discussed later in this comment. In the said case, a Representation Agreement dated 18 September 2000 (“RA”) was entered between Integrated Sales Services Ltd. (“ISS”), a Hong Kong corporation, and DMC Management Consultants Ltd. (“DMC”), an Indian company. Under the RA, ISS was to assist DMC in selling its goods and services to prospective customers and in consideration thereof was to receive a commission. The (amended) agreement was governed by the laws of the U.S. state of Delaware. While it was disputed that only DMC had signed the RA which contained the arbitration agreement, ISS filed a statement of claim before an arbitral tribunal seated in Delaware against DMC, its Chairman, Mr. Arun Dev Upadhyaya (“Chairman”), and three other companies, *i.e.*, DMC Global, Gemini Bay Consulting Limited (“GBCL”) and Gemini Bay Transcription Private Limited (“GBT”). ISS alleged that the Chairman had

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SCC 433, 448 (India) (both endorsing the view that the listed grounds for refusal are exhaustive).

6. Government of India v. Vedanta Ltd., (2020) 10 SCC 1, 54.

incorporated GBCL and GBT to perform work for the customers ISS had introduced to DMC in order to evade the contractual obligations and the commissions due to ISS under the RA. It was alleged that the Chairman used GBCL and GBT as alter egos of himself and ignored the corporate forms of both DMC and DMC Global to achieve his improper purpose of breaching the RA. The tribunal applied the laws of Delaware, upheld its jurisdiction with respect to the non-signatories, and applied the alter ego doctrine to pierce the corporate veil of the DMC group of companies. Accordingly, a joint and several award, among others, of USD 6,948,100 was made against all the Respondents (including the non-signatories).

ISS then approached the Bombay High Court to enforce the foreign award under Part II (New York Convention Awards) of the A&C Act, 1996. While the Single Judge of the Bombay High Court held that the foreign award was not enforceable against non-signatories to the arbitration agreement, the Division Bench of the High Court reversed the judgment of the Single Judge and held that the award was enforceable (as a decree of a civil court) against the signatories as well as the non-signatories.

When the matter reached the Supreme Court, the Court held that the award was enforceable against all award/judgment debtors without requirement of any additional proof or evidence at the enforcement stage by the party seeking enforcement. The Supreme Court rejected the argument raised by the non-signatories that the burden of proof is on the person enforcing the award to show that a non-signatory to an arbitration agreement can be bound by a foreign award. The Court concluded that the objection that the “award-debtor was not a signatory to the arbitration agreement” does not fall under any of the grounds for resisting enforcement under Section 48 [the equivalent of Article V of the New York Convention] and that the grounds under Section 48 of the A&C Act cannot be expansively interpreted “to try and fit a square peg in a round hole.”<sup>7</sup>

The Supreme Court’s reasoning can be broadly categorized under three groupings: pro-enforcement bias, requirement of proof, and persons vs. parties.

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7. *Gemini Bay*, *supra* note 2, at ¶ 44.

a. *Pro- Enforcement Bias*

The Court held that the New York Convention, which the A&C has adopted, has a pro-enforcement bias,<sup>8</sup> and unless a party is able to show that its case comes clearly within Sections 48(1) or 48(2), the foreign award must be enforced. Further, the burden of proof is placed on the party resisting/objecting to the enforcement, and only if that party furnishes to the court proof that one of the grounds for refusal of enforcement are met, shall the Court deny enforcement of the award. The threshold for refusal of enforcement is therefore high, and can be met only in very exceptional circumstances.<sup>9</sup> Foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties under the guise of public policy of the country involved. The challenge procedure in the courts of the seat of arbitration gives more leeway to courts to interfere with an award than the narrow and restrictive grounds contained in the New York Convention when a foreign award's enforcement is resisted. Therefore, the grounds contained in Sections 48(1)(a)–(e) are not to be construed expansively but narrowly.

b. *Requirement of Proof*

The Court held that the term “proof” appearing in Section 48 cannot possibly mean the taking of oral evidence at the enforcement stage as it would otherwise defeat the object of speedy disposal of enforcement petitions.<sup>10</sup> As such, the Supreme Court concluded that there is no burden of proof on the award holder to establish that the foreign award binds the non-signatory to the arbitration agreement. The Court, applying *Emkay Global*,<sup>11</sup> held that the proof required under Section 47 is only in respect of demonstrating that the award is a foreign award on “the basis of the record of the arbitral tribunal.”<sup>12</sup> The procedure does not envisage the production of

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8. *Id.*, ¶ 42.

9. *Id.*, ¶ 76 (citing *Ssangyong Engg. & Construction Co. v. NHAI*, (2019) 15 SCC 131, 199 (India)).

10. *Id.*, ¶ 40 (citing *Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, (2018) 9 SCC 49, 63 (India)).

11. *Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, (2018) 9 SCC 49, 63.

12. *Gemini Bay*, *supra* note 2, at ¶ 41.

substantive evidence to prove that a non-signatory to an arbitration agreement can be bound by a foreign award.

c. *Persons vs Parties*

The first part of Section 46 of the A&C Act (which has adopted the purport of Article III of the New York Convention) provides that any foreign award which is held to be enforceable “shall be treated as binding for all *purposes on the persons as between whom it was made.*”<sup>13</sup> The Supreme Court distinguished between Section 35 (which deals with domestic awards) and Section 46 of the A&C Act and noted that while Section 35 referred to “parties and persons claiming under them,” Section 46, dealing with circumstances under which a foreign award is binding, referred to a broader group of persons, who may also be non-signatories to an arbitration agreement. The Court thus observed that Section 35 was more restrictive in its application as compared to Section 46, which referred to persons without any restrictions and could include non-signatories to the agreement. As a sequitur to the above, the Supreme Court found that a non-signatory would be outside the literal construction of Section 48(1)(a) which uses the phrase “parties to the agreement,” and to include non-parties by introducing the word persons would run contrary to the express language of Section 48(1)(a) when read along with Section 44 of the A&C Act. Therefore, the Supreme Court held that Section 48(1)(a), which permits objections to the enforcement of an award on the ground of invalidity of the arbitration agreement or incapacity of the parties thereto, restricts itself to parties to the agreement, thus, excluding non-parties (mere persons) from making objections.

IV. SHORTCOMINGS IN THE DECISION IN *GEMINI BAY*

A. *No Right to Resist Enforcement for a Non-Signatory under Section 48(1)(a)*

The decision in *Gemini Bay* is undoubtedly in line with the pro-enforcement attitude of the Supreme Court in the past decade. However, the decision essentially curtails the right of a

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13. Arbitration and Conciliation Act, 1996, §46 (India) (emphasis added).

non-signatory to raise an important defense—that it was not a party or signatory to the arbitration agreement—at the enforcement stage as this defense does not fall under any of the grounds for resisting enforcement under Section 48(1)(a)–(e).

A non-signatory's objection to enforcement would fall under Section 48(1)(a) of the A&C Act. Section 48(1)(a) provides that enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, if that party furnishes to the court proof that the "parties to the agreement" were, under the law applicable to them, under some incapacity, or the said "agreement is not valid under the law to which the parties have subjected it" or, failing any indication thereon, under the law of the country where the award was made. Given the language of Section 48(1)(a), the objection that a party was not a signatory to the arbitration agreement goes to the root of the validity of the arbitration agreement and may reasonably fall under Section 48(1)(a).

A similar view has been taken by courts around the world. For instance, the Supreme Court of the United Kingdom in *Dallah Real Estate and Tourism Co. v. Ministry of Religious Affairs of the Government of Pakistan* held that although section 103(2)(b) of the English Arbitration Act (the equivalent of Article V(1)(a) of the New York Convention) dealt expressly only with the case where "the arbitration agreement is not valid," the consistent *international practice* shows that the provision also covers situations where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement.<sup>14</sup> The U.K. Supreme Court relied on the decision in *Dardana Ltd. v. Yukos Oil Co.* wherein it was accepted by the Court of Appeals that section 103(2)(b) applied in a case where the question was whether a Swedish award was enforceable in England against Yukos on the basis that, although it was not a signatory, it had by its conduct rendered itself an additional party to the contract containing the arbitration agreement.<sup>15</sup> This case, therefore, justifies the bringing of a non-signatory's objection that it was not a party to the arbitration agreement under Section 48(1)(a) of the A&C Act.

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14. [2010] UKSC 46, [77] (appeal taken from Eng.).

15. [2002] 2 Lloyd's Rep. 326.



The Indian Supreme Court's distinguishment of *Dallah* raises some questions. The Supreme Court, after making extensive references to *Dallah*, failed to explain why the approach adopted in *Dallah* should not be applied to the *Gemini Bay* case. It merely stated that “. . .we cannot follow what is stated to be ‘international practice’ in trying to fit a non-signatory’s objection to a foreign award being binding upon it under Section 48(1)(a). We therefore distinguish *Dallah*’s case on facts as well as on law – a non-signatory’s objection cannot possibly fit into Section 48(1)(a).” The Supreme Court, however, left the question open to be decided in an appropriate case if the non-signatory were to bring its case within Section 48(2) read with Explanation 1(iii), *i.e.*, the foreign award is in conflict with the most basic notions of morality or justice, as understood in the decision of the Supreme Court in *Ssangyong Ssangyong Engg. & Construction Co. Ltd. v. NHAI*.<sup>16</sup>

Another example is the decision of the Supreme Court of Victoria, Australia in *IMC Aviation Solutions Pty. Ltd. v Altain Khuder LLC*.<sup>17</sup> In that case, the Supreme Court of Victoria, after citing *Dallah*’s case with approval, held that the foreign award in that case cannot be enforced against a party who was not a signatory to the arbitration agreement. This decision was premised on the reasoning that the words “the arbitration agreement is not valid” appearing in Section 8(5)(b) of the Australian International Arbitration Act, 1974 (which is equivalent to Section 48(1)(a) of the Indian Arbitration Act, 1996) includes the ground that the “award-debtor was not a party to the arbitration agreement.”<sup>18</sup> The Supreme Court observed that the ordinary and natural meaning of the expression “the arbitration agreement is not valid” is that the “arbitration agreement is of no legal effect under the relevant law.”<sup>19</sup> The Supreme Court thus concluded that section 8(5)(b) may be taken to include the ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made.<sup>20</sup> The Indian Supreme

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16. (2019) 15 SCC 131, 194, 199 (India).

17. [2011] 38 VR 303 (Austl.).

18. *Id.*, ¶ 166.

19. *Id.*

20. *Id.*

Court in *Gemini Bay*, however, stated that the decision in *IMC Aviation* was inapplicable when construing Section 48(1)(a) of the Arbitration Act, 1996 for the same reason that *Dallah* was inapplicable.<sup>21</sup>

There is no justification for adopting a different approach for signatories and non-signatories. If a “party to the agreement” is allowed to raise an objection that the agreement is not valid or is allowed to take the plea of incapacity, fraud, forgery, or corruption under Section 48(1)(a), then even an award debtor who was not a party to the agreement should be allowed to raise an objection that the arbitration agreement is not valid under Section 48(1)(a). Thus, the non-signatory should be given at least a reasonable opportunity to resist enforcement as it never consented to the arbitration in the first place and was made a respondent/defendant in the arbitral proceedings/enforcement proceedings (as the case may be) by virtue of common law principles such as the group of companies doctrine, piercing of the corporate veil, etc. Thus, the reasoning and analysis in *Dallah* and *IMC Aviation* wherein the non-signatory was permitted to resist enforcement of a foreign award under their national legislation adaptations of Article V(1)(a) of the New York Convention seems to align with the *international practice* of the New York Convention.

#### B. *Failure to Uphold the “First Principle of Arbitration”*

It is worth mentioning that enforcing a foreign award against a non-signatory without giving the non-signatory an opportunity to object to the award before the enforcing court is harsh and entails severe due process and natural justice consequences. Mutual consent is the foundation or “first principle” of arbitration.<sup>22</sup> While non-signatories are regularly made defendants in arbitrations, the debate on non-signatories remains largely unsettled and has become one of the most pervasive issues in the field of international commercial arbitration.<sup>23</sup> Generally, if a third party cannot be regarded as being bound by an arbitration clause, then no award against such

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21. *Gemini Bay*, *supra* note 2, at ¶ 54.

22. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019).

23. For works discussing the treatment of non-signatories *see generally*, Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories*, 8 J. INT’L DISP. SETTLEMENT 610 (2017);

party should be enforceable without giving an opportunity to the third party to object to its enforcement. This is because of the lack of consent to arbitration on the part of the third party, which is a threshold requirement for the legitimacy of the arbitration.<sup>24</sup>

## V. CONCLUSION

Generally speaking, the courts should refrain from assessing the merits of the award at the enforcement stage and should enforce the foreign award without having a second look at it unless one of the circumstances or grounds under Article V of the New York Convention are proved by the objector. While courts have increasingly applied the group of companies doctrine, the principles of agency, estoppel, etc. to enforce awards against non-signatories, courts have also been equally fair to non-signatories by giving them an opportunity to object to the enforcement of the foreign award. In *Gemini Bay*, the Supreme Court has failed to follow the international practice and held that the non-signatory cannot object to the foreign award under Section 48(1)(a) and can raise the objection that it was not a party to the arbitration agreement only before the court at the seat of arbitration. The Supreme Court further failed to carve a necessary distinction between when the enforcement is sought against a non-signatory to the arbitration agreement who is not a party to the proceedings and one who is a party to the proceedings. In the former case, the enforcing court should be cautious and such foreign awards against non-signatories should be carefully scrutinized. The enforcing court should, at the minimum, permit the non-signatory to raise the objection that it was not a party to the arbitration agreement as the nature of such objections goes to the root of the “validity of the arbitration agreement,” which is a ground to resist enforcement under Section 48(1)(a).

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Bernard Hanotiau, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE, AND CLASS ACTIONS* (2d ed. 2020).

24. *See e.g.*, X v. Y, 34 Y.B. Com. Arb 688 (Ct. of Appeal, Putrajaya 2009) (Malaysia) (holding that it is a fundamental principle of arbitration law that it remains a consensual form of dispute resolution and that the award must be based on an arbitration agreement). *See also* Austin Ignatius Pulle, *Enforcing Foreign Arbitral Awards against Non-Signatories: A Plea for Strict Scrutiny*, 16 ASIA PACIFIC L. REV. 177, 178 (2008) (recognizing the fundamental principle of consent and arguing for scrutiny of enforcement against non-signatories).