

Foreign award against a person not a party to the arbitration agreement is enforceable (Supreme Court of India)

Update by Editor
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Gemini Bay Transcription Pvt. Ltd. v. Integrated Sale Service Ltd. and another

Court: Supreme Court of India | **Case Number:** Civil Appeal Nos. 8343-8344 & 8345-8346 of 2018
Citation: 2021 SCC OnLine SC 572 | **Bench:** RF Nariman & BR Gavai JJ | **Date:** 10 August 2021 | Access court's version [here](#) (references in this Update from SCC) | Read this Update on our website [here](#)

ISS, a Hong Kong company, and DMC, an Indian company, executed a Representation Agreement. Broadly, ISS was to assist DMC in selling its goods and services to prospective customers and receiving a commission in consideration. The (amended) agreement was governed by the laws of the State of Delaware, USA (earlier, it was Missouri). ISS filed a statement of claim before an arbitral tribunal against Arun Dev Upadhyaya, the DMC group's boss; DMC India, DMC Global Mauritius, Gemini Bay British Virgin Islands, and Gemini Bay India. Arun set up the Gemini Bay companies--ISS alleged—to perform work for the customers ISS had introduced and, thus, evade paying to ISS the commission.

The tribunal applied the laws of Delaware, upheld its jurisdiction, and pierced the corporate veil. Accordingly, a joint and several award, among others, of USD 6,948,100.00 was made.

In ISS' enforcement action, a single judge of the Nagpur High Court held that the award could only be enforced against DMC and not the non-signatories. The Division Bench of the High Court examined if the tribunal had correctly applied the Delaware law. Satisfied that it was, it allowed ISS' appeal, paving the way for enforcement against all persons.

DMC, Gemini Bay India, and Arun sought leave to appeal to the Supreme Court. The Supreme Court initially granted leave subject to DMC depositing a sum equivalent to 2.5 million US Dollars within three months. As this was not done, that leave stood revoked, and the award became final and binding on DMC, India. In appeals by Gemini and Arun, given the arguments made by senior counsel Mssrs. Salve and Vishwanathan several questions were examined by the 2-judge bench. Its conclusions and reasons are explained below.

1. **Does the burden of proof lie on the party enforcing a foreign award? And, to discharge that burden, does [Section 47 \(1\) \(c\) ACA](#) require that independent evidence be adduced before the enforcing court to establish that the award covered the non-signatory?** *Answering no, the court held [see paras 30-39]:*
 - a. [Section 47\(1\)\(c\) ACA](#) is procedural. The phrase in [Section 47\(1\)\(c\) ACA](#) “evidence as may be necessary to prove that the award is a foreign award” is a reference to the six ingredients of [Section 44 ACA](#)¹ that defines “foreign award.”
 - b. The burden is on the party resisting enforcement to prove that the case falls within [Section 48 \(1\)](#) or [48 \(2\)](#) ACA. Neither under [Section 47 ACA](#) nor [Section 48 ACA](#), the party enforcing a

¹ The six ingredients are: (1) it must be an arbitral award on differences between persons arising out of legal relationships, (2) the award must be differences in contract or outside of contract, for example, in tort, (3) the legal relationship ought to be considered “commercial” under the law in India, (4) the award must be made on or after the 11th day of October, 1960, (5) the award must be a New York Convention award, (6) it must be made in a territory notified by the Central Government. [see para 30]

foreign award is required to prove by substantive evidence that the foreign award can bind a non-signatory.²

2. **What is the meaning of “proof” in [Section 48 ACA](#)?** [see para 40]

- a. *Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, (2018) 9 SCC 49, held, considering the expression “proof” in [Section 34 ACA](#) and the amendment³ that, “proof” cannot possibly mean the taking of oral evidence as it will otherwise defeat the object of speedy disposal of set-aside petitions. Since foreign awards in convention countries need to be enforced as speedily as possible, “proof” in [Section 48](#) would also only mean “established on the basis of the record of the arbitral tribunal” and such other matters as are relevant to the grounds contained in [Section 48 ACA](#).
- b. The [New York Convention](#) (“NYC”), which the ACA has adopted, has a pro-enforcement bias. So, unless a party shows that its case comes clearly within [Sections 48\(1\)](#) or [48\(2\)](#) ACA, the foreign award must be enforced. Also, the grounds are not to be construed expansively but narrowly.⁴

3. **Does a challenge on the ground relating to non-signatory fall under [Section 48 \(1\) \(a\) ACA](#)?** *Answering no, the court said* [see paras 29 to 38, 40]:

- a. A non-signatory is outside the literal construction of [Section 48\(1\)\(a\) ACA](#). [Section 44 ACA](#) refers to an arbitral award on differences between “persons”, but [Section 48\(1\)\(a\) ACA](#) refers only to the “parties” to the agreement referred to in [Section 44 \(a\) ACA](#). So, to include non-parties by introducing the word “person” would run contrary to the express language of [Section 48\(1\)\(a\)](#) when read with [Section 44 ACA](#).
- b. The grounds under [Section 48 ACA](#) cannot be expansively interpreted to try and fit a square peg in a round hole.

4. **Does [Dallah’s case](#)⁵ justify bringing the objection of a non-signatory under [Section 48 \(1\)\(a\) ACA](#)?** *Answering no, distinguishing Dallah on both facts and law, and following Singapore High Court’s decision in [Aloe Vera of America, Inc v. Asianic Food \(S\) Pte Ltd](#), [2006] SGHC 78, the court said* [see paras 45-51]:

- a. *Dallah*---which considered [Article V \(1\) \(a\) NYC](#) to which [Section 48 \(1\) \(a\) ACA](#) is identical-- fits a non-signatory's objection to a foreign award based on “international practice.”

² Also citing the 2nd edition of Professor Born’s treatise where he notes that national arbitration legislation is not permitted to impose more demanding requirements of proof than those contained in Article IV of the NYC.

³ [F]urnishes proof that” is now substituted by “establishes on the basis of the record of the arbitral tribunal that.”

⁴ Citing *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131; *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1.

⁵ *Dallah Real Estate and Tourism Co. v. Ministry of Religious Affairs of the Government of Pakistan*, [2010] 3 WLR 1472 [“Dallah”]. The tribunal in *Dallah* had held that the Pakistani government was bound by the arbitration clause between *Dallah* and the Awami Hajj Trust set up by the government. The arrangement was that *Dallah* would provide housing in Mecca to Pakistani pilgrims on Hajj. The trust had ceased to exist because the government did not renew it. *Dallah* had brought an arbitration for recovery of costs it had incurred. The tribunal applied French law and concluded that Pakistan was the alter ego of the trust. In enforcement proceedings, the UK Supreme Court reached the opposite conclusion. Then, only months later, the Paris Court of Appeal confirmed the tribunal’s award rejecting Pakistan’s jurisdictional objection under French law. See, Gary B. Born and Michal Jorek, *Dallah and the New York Convention*, [Kluwer Arbitration Blog](#).

Given this court's conclusion on [Section 48\(1\) \(a\) ACA](#) read with [Section 44 ACA](#), *Dallah's case* is distinguished on facts as well as on law.⁶

- b. However, “without delving deep into this problem, it may perhaps be open in an appropriate case for a non-signatory to bring its case within [Section 48\(2\)](#) read with Explanation 1(iii)” as explained in paras 70 and 76 of *Ssangyong*.

5. **Appellants ask a merits-based review in the guise of applying [Section 48\(1\)\(a\) ACA](#)** [see para 59]:

- a. Given that the foreign award gives reasons for applying the alter ego doctrine, it would not be possible to re-appreciate those facts. Thus, the burden lies on the appellants to establish the grounds made out in [Section 48\(1\) ACA](#), none of which go to the case's merits.

6. **Perversity, not a ground to challenge a foreign award** [see paras 60-61]:

- a. The ground of ‘perversity’ to set aside an award in an international commercial arbitration held in India is no longer available after the 2015 Amendment. The “public policy of India” ground under [Section 34 ACA](#) does not include perversity. Instead, it falls under a separate ground, “patent illegality”, but only for domestic arbitrations.
- b. Hence, concomitantly, perversity cannot be a ground to refuse enforcement of a foreign award under [Section 48 ACA](#).

7. **Can a non-signatory's challenge fall under [Section 48 \(1\) \(c\) ACA](#)?** *Answering no, the court said* [see paras 62-64]:

- a. The expression ‘submission to arbitration’ in [Section 48\(1\)\(c\) ACA](#) refers primarily to the arbitration agreement (citing *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*, (1999) 5 SCC 651 and not to whether a person who is not a party to the agreement can be bound. The proviso to [Section 48\(1\)\(c\) ACA](#) makes this even clearer because matters outside submission to arbitration can be segregated.
- b. The scope of [Section 48\(1\)\(c\) ACA](#) is also narrow. [following *Ssangyong* where “this Court narrowed the scope” of the challenge contained in the *pari materia* [Section 34\(2\)\(a\)\(iv\) ACA](#)].

8. **Can a non-signatory mount a challenge to the award under [Section 48 \(1\) \(b\) ACA](#) for breach of natural justice?** [see pars 65-67]

- a. [Section 48\(1\)\(b\) ACA](#) has natural justice grounds anterior to the award's making and must be narrowly construed.⁷ The expression “was otherwise unable to present his case” cannot be given an expansive meaning

⁶ The Australian Supreme Court case in *IMC Aviation Solutions Pty Ltd. v. Altain Khuder LLC*, [2011] VSCA 248 that cited *Dallah* with approval was also held inapplicable “for the same reason as *Dallah* is inapplicable.” Also, per the court, the case was premised on a statute differently worded.

⁷ “[R]elatable to notice of appointment of the arbitrator or of the arbitral proceedings, or that a party was otherwise unable to present its case before the arbitral tribunal, all of which are events.”

9. [Section 35 ACA](#) makes a domestic award final and binding on parties and persons claiming under them. So, given the different language [Section 46 ACA](#), is a foreign award to be treated as binding only on persons between whom it was made? [see paras 73-75]
- First and foremost, [Section 46 ACA](#) does not speak of “parties” at all but of “persons” who may, therefore, be non-signatories to the arbitration agreement.
 - [Section 35 ACA](#) refers to only persons claiming under parties and is more restrictive in its application than [Section 46 ACA](#), which speaks of “persons” without any restriction.
10. In appeal, the High Court’s division bench applied Delaware law to satisfy itself that the alter ego doctrine was followed correctly. Was this the correct approach? [see para 73]
- No, a foreign award cannot be set aside because it violates the substantive law of the agreement.
11. Was grant by the tribunal of damages bad in law because it was given in tort and thus outside the scope of the arbitration agreement? Answering no, the court further held [paras 68 to 72]:
- The arbitration agreement also contemplated “dispute ... in connection with this Agreement ...” such dispute shall be referred to a single arbitrator in Kansas City, Missouri, USA.
 - [Section 44](#) recognises that an arbitrator may decide tort claims provided they are disputes that arise in connection with the agreement.⁸
12. Did the tribunal’s award of damages lack a basis that vitiates the award? Answering no, the court held [see paras 76-82]:
- The argument that damages have been awarded on no basis whatsoever would not fall within any of the exceptions contained in [Section 48\(1\) ACA](#). Only exceptional cases involving basic infraction of justice that shock the court’s conscience attracts the ground of [Section 48\(2\) read with Explanation 1\(iii\)](#).
 - The arbitrator’s ‘guesstimates’ are not a stranger to the law of damages in the US and other common law tradition nations.[citing *Frederick Thomas Kingsley v. The Secretary of State for India*, AIR 1923 Cal 49].
 - There can be no doubt that an actual loss can be said to have been occasioned to ISS on facts as proved before the arbitral tribunal. [distinguishing Delhi High Court’s *Agritrade International (P) Ltd. v. National Agricultural Coop. Mktg. Federation of India Ltd.*, 2012 SCC OnLine Del 896]

Categories: [Section 44 ACA](#) | [Section 46 ACA](#) | [When Foreign Award Binding](#) | [Section 47](#) | [Evidence](#) | [Section 48 ACA](#) | [Section 48\(1\)\(b\) ACA](#) | [Section 48 \(1\) \(c\) ACA](#) | [Conditions for Enforcement of Foreign Awards](#) | [Enforcement](#) | [Enforcement of Foreign Awards](#) | [Foreign Award](#) | [Challenge to Foreign Award](#) | [Recognition and Enforcement of Foreign Award](#) | [Public Policy](#) | [Public Policy of India](#) | [Fundamental Policy of Indian Law](#) | [Perverse Award](#) | [Burden of Proof](#) | [Proof](#) | [Proof of Damages](#) | [Merits Based Review](#) | [Non Signatory to Arbitration](#) | [Binding Non Signatory to Arbitration](#) | [Enforcement Against Non Signatory](#) | [Non Signatory](#) | [Natural Justice](#) | [Damages](#) | [Renusagar](#) | [Vijay Karia](#) | [Dallah](#) | [Aloe Vera](#) | [Ssangyong](#)

⁸ Citing to *Renusagar Power Co. Ltd. v. General Electric Co.*, (1984) 4 SCC 679; *Tarapore & Co. v. Cochin Shipyard Ltd.*, (1984) 2 SCC 680; *Astro Vencedor Compania Naviera S.A. of Panama v. Mabanafit GmbH* [1971] 2 Q.B. 588.