

## ARBITRAL & JUDICIAL DECISIONS

### JURISDICTION TO SET ASIDE A FOREIGN ARBITRAL AWARD, IN PARTICULAR AN AWARD BASED ON AN ILLEGAL CONTRACT: A REFLECTION ON THE INDIAN SUPREME COURT'S DECISION IN *VENTURE GLOBAL ENGINEERING*

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#### I. PURPOSE OF THIS ARTICLE

In the judgment delivered in January 2008 in the case of *Venture Global Engineering v. Satyam Computer Services*,<sup>1</sup> the Supreme Court of India held that the Indian courts had jurisdiction to set aside a foreign arbitral award, *i.e.* an award rendered outside India.<sup>2</sup> Drawing inspiration from this decision, this article will examine whether setting aside a foreign arbitral award produces any negative effect and will explore what useful purpose, if any, could be served by exercising such jurisdiction.

#### II. JURISDICTION TO SET ASIDE A FOREIGN ARBITRAL AWARD: HOW COMMON?

Before embarking on the analysis, it should be noted that the setting aside of a foreign arbitral award is not a commonly encountered practice.<sup>3</sup> Thus, in *International Standard Electric v. Bidas Sociedad Anonima Petrolera*,<sup>4</sup> the plaintiff invited the U.S. District Court for the Southern District of New York to set aside a Mexican award. The award had been rendered by the application of Mexican law to the procedure and New York law to the substance. In its submission, the plaintiff relied on the New York Convention on the Recognition

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<sup>1</sup> (2008) 4 SCC 190.

<sup>2</sup> There is a precedent at the lower court level: the Gujarat High Court judgment in *Nirma v. Lurgi Energie und Entsorgung*, Dec. 19, 2002, 2 ARB L.R. 241 (2003), XVIII Y.B. COM. ARB. 790 (2003) concerning the setting aside of a London arbitration award.

<sup>3</sup> For details, *see e.g.*, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 757 (2<sup>nd</sup> ed. 2001) and authorities cited therein.

<sup>4</sup> 745 F. Supp. 172 (S.D.N.Y. 1990).

and Enforcement of Foreign Arbitral Awards of 1958.<sup>5</sup> Though the Convention contains no provision enumerating grounds for setting aside an arbitral award, the plaintiff invoked Article V(1)(e), which provides that the recognition and enforcement of an award may be rejected if it has been set aside by a court of the country in which, or under the law of which, it was made. The plaintiff argued that the law under which the award was made referred not to the law governing the arbitral procedure (curial law) but to the law governing the substance. Therefore the New York Convention presupposed, so the plaintiff argued, that an award could be set aside in the country whose law had been applied to the substance of the dispute. The District Court rejected this argument and accordingly declined jurisdiction. It held that the words in question referred not to the substantive governing law, such as the law of contract, but to the law governing the arbitral procedure. The court came to this conclusion on the ground, *inter alia*, that reopening the merits (*révision au fond*) should be impermissible to set aside an award. The governing law of arbitral procedure is, under the New York Convention, supposed to be the law of the country where the arbitration takes place.<sup>6</sup> On that interpretation, Article V(1)(e) would mean that the recognition and enforcement of an award may be rejected if it has been set aside in the country where the arbitration took place, a reading which presupposes that an arbitral award may be set aside in the country where it was made. From this, it might be inferred that the Convention does not approve its contracting states to set aside a *foreign* arbitral award. It cannot be stated unequivocally, though, since the Convention contains no express provision setting forth grounds of vacating an arbitral award.

The position under the UNCITRAL Model Law is clearer: it is only the courts of the place (seat) of arbitration that have the power to set aside an award.<sup>7</sup> Vacating a foreign arbitral award is, therefore, impermissible in the countries which have followed the Model Law in this respect. For example, under the Arbitration Act 2003 (Japan), most of its provisions, including those laying down the grounds for setting aside an award, are applicable only where the place of arbitration is in Japan.<sup>8</sup> It follows that the Japanese courts are empowered to set aside only a domestic award, *i.e.* an award made in Japan.

Turning to India, Part I of the Arbitration and Conciliation Act 1996 (India) largely follows the UNCITRAL Model Law. The Act as a whole, however, does not reproduce the structure of the Model Law, as its Part II contains provisions to implement the New York Convention and the Geneva Convention<sup>9</sup> on the enforcement of foreign arbitral awards. The Indian Supreme Court held in an

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<sup>5</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>6</sup> See *id.* Art. V(1)(d), which also allows the parties to derogate from the law by agreement.

<sup>7</sup> See UNCITRAL MODEL LAW, Arts. 1(2) and 34.

<sup>8</sup> See Arbitration Act 2003 (Jap.), Art. 3(1) and Ch. 7.

<sup>9</sup> Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

earlier case of *Bhatia International v. Bulk Trading*<sup>10</sup> that Part I, which covers Articles 2 through 43, was applicable to foreign, as well as domestic, arbitration when it ruled that Article 9 (provision on interim measures) could be invoked to support foreign arbitral proceedings. The Supreme Court followed that reasoning in *Venture Global Engineering* to arrive at the conclusion that Article 34 (provision on setting aside an award)<sup>11</sup> was also applicable to a foreign arbitral award. Granting an interim measure in support of foreign arbitral proceedings is also permitted under the UNCITRAL Model Law.<sup>12</sup> But the Indian Supreme Court deviated from the Model Law when it extended the reasoning to Article 34.

There may be other countries that, in a deviation from the international norm, will allow their courts to exercise jurisdiction to set aside a foreign arbitral award. Thus, the rest of the present analysis may have relevance beyond the Indian context.

### III. DOES THE SETTING ASIDE OF A FOREIGN ARBITRAL AWARD PRODUCE ANY NEGATIVE EFFECT?

The decision of the Indian Supreme Court in *Venture Global Engineering* has been roundly condemned.<sup>13</sup> Apart from the fact that the decision is unconventional, is there any merit in the criticism?

Under the UNCITRAL Model Law<sup>14</sup> and the national arbitration laws that have adopted it,<sup>15</sup> an arbitral award will generally<sup>16</sup> be denied recognition or enforcement if it has been set aside in the country where the award was made or in the country whose law was applied to the arbitral procedure. This position is derived from the interpretation of the expression “the country . . . under the law of which, that award was made” used in Article V(1)(e) of the New York Convention

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<sup>10</sup> (2002) 4 SCC 105.

<sup>11</sup> It is substantively the same as Article 34 of the UNCITRAL Model Law though it is couched in slightly different wording.

<sup>12</sup> See UNCITRAL MODEL LAW, Arts. 1(2) and 9.

<sup>13</sup> See, e.g., Dipen Sabharwal, *Another Setback for Indian Arbitration (and Foreign Investors)*, WHITE & CASE INT’L DISPUTES Q. 6 (Spring 2008); Nina Nariman, *International Arbitration in the Indian Context: Challenge to Foreign Awards under Section 34 of the Indian Arbitration and Conciliation Act 1996*, 12 VINDOBONA J. INT’L COM. L. & ARB. 195, 200 (2008); Dharmendra Rautray, *India: Venture Global Engineering v. Satyam Computer Services Ltd – Foreign Awards Are Open To Challenge on the Merits as Domestic Awards – Ntpc v. Singer Co Case Revisited*, 11(2) INT’L A.L.R. 29 (2008).

<sup>14</sup> UNCITRAL MODEL LAW, Art. 36(1)(a)(v).

<sup>15</sup> See, e.g., Art. 45(2)(vii) of the Japanese Arbitration Act 2003.

<sup>16</sup> Exceptionally, though, there are cases in which an arbitral award which had been set aside at the place of arbitration was enforced: see, e.g. the decision of the French Cour de Cassation in *Société Hilmarton v. OTV* (Bulletin civil 1994 I N°104, p. 79) and the decision of the U.S. District Court for the District of Columbia in *Chromalloy AeroServices v. Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

and Article 36(1)(a)(v) of the UNCITRAL Model Law, both of which set forth grounds for refusal to recognize or enforce an award. That provision is commonly interpreted as referring to the country whose law is applied to the arbitral procedure, as illustrated by the decision in the *Bridas* case, discussed above. The law applicable to the arbitral procedure is the law of the place of arbitration (*lex loci arbitri*) unless otherwise agreed by the parties.<sup>17</sup> It follows that the setting aside of a *foreign* arbitral award usually does not prevent the award from being recognized or enforced in other countries. Any concern that it may undermine the finality of arbitration is, therefore, largely unfounded. Its only negative effect would be a possible confusion which might be brought about by the unfamiliarity of the measure.

#### IV. WHAT USEFUL PURPOSE COULD BE SERVED BY ENTERTAINING AN ACTION TO CHALLENGE A FOREIGN ARBITRAL AWARD?

Having observed that the setting aside of a foreign arbitral award produces little negative effect, the remainder of the present article will consider what useful purpose, if any, could be served by accepting jurisdiction over a challenge to a foreign arbitral award. It will be concluded that it may serve a useful purpose in a limited situation: Accepting jurisdiction over a challenge to a foreign arbitral award may, if the challenge is made in a country closely connected with the underlying contract, provide the court with an opportunity to make findings under its own legal system as to whether the underlying contract is illegal, how significant the illegality is, and whether such illegality has the effect of rendering the contract unenforceable. Thus, the court in another country seized of proceedings to set aside, recognize or enforce the same award would be able to take notice of such findings and thereby form an accurate view concerning such illegality if that court, in scrutinizing the compatibility of an arbitral award with its own public policy, needed to take into account the illegality of the underlying contract under the law of countries which were closely connected with the contract. This process, then, may serve the further useful purpose of promoting, albeit indirectly, the legal policy of countries closely connected with the underlying contract, which may otherwise be by-passed. To illustrate the point, it will be useful to examine the facts of *Venture Global Engineering*.

##### A. *Facts of Venture Global Engineering*

In this case, an Indian company (“S”) and a Michigan company (“V”) set up a joint venture company (“SV”) in India in which each had a 50% equity shareholding in accordance with their shareholders’ agreement. The agreement was subject to the law of Michigan. S alleged that a default under the agreement had occurred, triggering the obligation of V to transfer its shares to S. To enforce

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<sup>17</sup> See New York Convention, Art. 5(1)(d); UNCITRAL MODEL LAW, Arts. 34(2)(a)(iv) and 36(1)(a)(iv).

the obligation, S filed a request for arbitration in London in accordance with an arbitration clause in the agreement. Upon obtaining an award directing V to transfer the shares to S, S filed a petition to enforce the award in Michigan. V objected to enforcement, arguing that the transfer would violate Indian law, in particular the Foreign Exchange Management Act 1999. V also brought proceedings in India seeking to set aside the award.

The U.S. Court of Appeals for the 6th Circuit,<sup>18</sup> on appeal from the District Court for the Eastern District of Michigan,<sup>19</sup> held that there is an established principle that an arbitral award ordering an act which was illegal under the law of the country of performance could be denied enforcement as contrary to public policy. On the facts of the present case, it affirmed the finding of the District Court that the award did not require the performance of an illegal act under the law of India. This finding was made on the showing by S that the permission of the Reserve Bank of India had been granted on the transfer.

One year later, S filed before the District Court for the Central District of Michigan a motion for contempt of court,<sup>20</sup> contending that V had failed to abide by the judgment of the Court of Appeals. V resisted the motion, arguing that it had in good faith taken the steps necessary under Indian law to transfer the shares. As it would take the court significant time to research and apply Indian law, the court and the parties agreed to appoint a Special Master under Article 53(a)(1) of the Federal Rules of Civil Procedure.<sup>21</sup> The District Court examined and adopted the report and recommendation of the Special Master in which it was found that the failure of V to effect the transfer was not due to the law of India. Upon that finding, the court ordered V to take necessary steps to transfer the shares and imposed a daily fine until V complied with the order.

One week prior to this Michigan judgment the proceedings in India culminated in the judgment of the Supreme Court. The court held, as examined above, that the Indian courts had jurisdiction to set aside a foreign arbitral award and remanded the case to the lower court to decide whether setting aside the award was warranted on the facts of the instant case.

What developments took place thereafter is not known to the author. But it would be possible to make the following observation from the above facts. Throughout the U.S. proceedings, the focal point was the illegality of the transfer under Indian law. After the Indian Supreme Court remanded the case, the lower court, in considering whether to set aside the award, might have made findings as

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<sup>18</sup> *Venture Global Engineering v. Satyam Computer Services*, 233 Fed.Appx. 517, 523; 2007 WL 1544160 (6th Cir. 2007).

<sup>19</sup> *Satyam Computer Services v. Venture Global Engineering*, which is unreported but is available at 2006 WL 2571581 (E.D. Mich. Aug. 1, 2006).

<sup>20</sup> *Satyam Computer Services v. Venture Global Engineering*, 2008 WL 190362 (E.D. Mich.).

<sup>21</sup> A Special Master is appointed to assist the court in exceptional cases where the court does not possess the requisite knowledge to perform its function. Following the 2003 revision of the Rules, he or she is now simply called "Master."

to whether the transfer was illegal under Indian law, whether the illegality was significant, and whether such illegality had the effect of rendering the parties' shareholders' agreement null and void. If, contrary to the actual case, such findings had preceded the suit in Michigan,<sup>22</sup> it would have been easier for the courts in Michigan to form a view on the illegality under Indian law without having to appoint a Special Master or to rely on the evidence submitted by the parties. Furthermore, through such a process, albeit indirectly through the decision of the U.S. courts, the Indian legal policy behind any prohibition against the transfer might have been realized.

### B. *Analysis*

A contract may be tainted with illegality in a variety of ways. Thus, it may require the performance of an illegal act as alleged in *Venture Global Engineering*. It may, on the other hand, simply condone the performance of an illegal act, as in the case of an insurance contract providing for indemnification against any fine which might be imposed for illegal conduct. The types of law which may be infringed by a contract are also diverse: they may include, for example, competition law, anti-corruption law, export/import control law, or foreign exchange control law.

The consequences of illegality, too, are complex. An illegal contract is not necessarily treated as unenforceable<sup>23</sup> and therefore may require a party to perform an illegal act while at the same time being subject to punishment. Some illegal contracts may be enforceable by one party but not by the other. In all cases, it is the governing law of the contract that determines whether the contract is rendered unenforceable by its illegality. It must be noted here that a contract may be illegal under a legal system that is different from its governing law. It is again the governing law of the contract which determines whether illegality under another legal system has any legal consequence. In such a case, illegality under a foreign law will be treated as a fact. Thus, the threat of punishment under a foreign law may constitute "force majeure" under the governing law of the contract. Or, it may make the defaulting party faultless under the governing law which adopts a fault-based liability. Equally, a contract vitiated by illegality under

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<sup>22</sup> What in reality happened was that the District Court handed down the judgment without being aware of the judgment of the Indian Supreme Court which had been delivered one week earlier. See *Satyam Computer Services v. Venture Global Engineering*, 2008 WL 190362 at n. 6.

<sup>23</sup> In Japan, there is a series of Supreme Court judgments holding that illegality had no bearing on the private rights of the parties involved: e.g. judgment on March 18, 1960 (14-4 *Minshu* 483) upholding the enforceability of a contract of sale of foodstuffs concluded by a person without a licence required by the Food Hygiene Act (Jap.); judgment on Dec. 23, 1965 (19-9 *Minshu* 2306) upholding the enforceability of a contract contravening the Foreign Exchange Control Act (Jap.); judgment on March 6, 1975 (29-3 *Minshu* 220) upholding the enforceability of a contract of sale infringing the Protection of Cultural Property Act (Jap.).

a foreign law may be deemed immoral (*contra bonos mores*) and hence unenforceable under its governing law.

If litigation is brought on a contract which is illegal under the law of the forum, the court is likely to take the illegality into account in applying the governing law of the contract.<sup>24</sup> If a contract is illegal under another legal system, there is the possibility that the illegality will be taken into account.<sup>25</sup> For example, an insurance contract covering goods imported from a foreign country without obtaining an export licence may be held *contra bonos mores* and hence unenforceable.<sup>26</sup>

The likelihood that a court will take into account illegality under a foreign legal system will depend on how close is the nexus of that other country with the contract. The nexus is strong if, for example, it is the country where the performance of the contract is to take place entirely or partially. Another relevant factor will be the significance of the illegality, which may be indicated by whether the illegal act is subject to criminal or administrative sanctions. Thus, the Tokyo High Court in its decision of February 9, 2000<sup>27</sup> enforced an insurer's obligation to pay on its insurance policy covering losses arising from the carriage of Iranian carpets from Japan to the United States in circumstances where the insured had omitted to obtain from the U.S. authority a licence required for the import of Iranian carpets. The court held that illegality under import regulations did not necessarily render related contracts null and void, reasoning that the significance of the illegality could be different depending, for example, on the items imported. Observing that the U.S. import restrictions on Iranian carpets, unlike those for weapons and drugs, were only a temporary measure and also noting that it was not clear whether the insurer paying out on the policy would be subject to any criminal sanctions, the court concluded that on the facts of the case, the illegality under the U.S. law was not sufficient to render the insurance policy, governed by Japanese law, unenforceable.

If arbitration is brought on an illegal contract, since the arbitrators are, unlike judges, private persons, they owe no allegiance to any particular legal system. Rather, they may be concerned with preserving the efficacy of their award. More specifically, arbitrators may consider it their responsibility to make sure that their award is not vulnerable to a challenge at the place of arbitration and do their best to ensure that their award can be recognized and enforced in the countries where recognition or enforcement is likely to be sought.<sup>28</sup> Accordingly, the arbitrators

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<sup>24</sup> See, e.g., Art. 9(2) of the EC Regulation No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation).

<sup>25</sup> See, e.g., Art. 9(3) of the Rome I Regulation.

<sup>26</sup> E.g. the judgment of the German Bundesgerichtshof on June 22, 1972. See comment by Kurt Siehr, *International Art Trade and the Law*, 243 (1993) RECUEIL DES COURS 9, 190.

<sup>27</sup> 1749 *Hanrei Jiho* 157.

<sup>28</sup> See, e.g. the RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE (Jan. 1, 1998) Art. 35, which provides that "the Arbitral Tribunal . . . shall make every effort to make sure that the Award is enforceable at law."

may, in the context of applying the governing law of the contract, give due regard to illegality under the law of the place of arbitration since otherwise the award, if challenged there, might be defeated as repugnant to public policy.<sup>29</sup> Equally, they may give due consideration to illegality under the law of the country where recognition or enforcement is likely to be sought in anticipation that the award might otherwise be denied recognition and enforcement as contrary to public policy.<sup>30</sup> It should be noted, however, that neither the country in which the place of arbitration is situated nor the countries where recognition or enforcement is sought necessarily have a close connection with the underlying contract. The place of arbitration could be freely agreed on by the parties<sup>31</sup> and thus may be, for example, a neutral place having no nexus with the underlying contract. The countries in which enforcement is sought may be those in which the defeated party happens to have assets. It means that arbitrators do not necessarily have an incentive to take into account illegality under the law of the countries that actually have a close nexus with the underlying contract, for example, the country where the contract is to be performed. It will be recalled that the Indian Supreme Court in *Venture Global Engineering* took the view that in obtaining an award in England and attempting to enforce it in Michigan, S was motivated by an intent to evade scrutiny under the law of India, *i.e.* the country where the performance had to be effected.<sup>32</sup>

It might be thought that jurisdiction to enforce an award should be declined in countries other than those closely connected with the underlying contract, possibly on *forum non conveniens* grounds, so that arbitrators do not disregard illegality

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<sup>29</sup> See UNCITRAL MODEL LAW, Art. 34(2)(b)(ii). Here, an award giving effect to an illegal contract should be distinguished from an award rendered by a wrongful application of the governing law of the contract. A simple error in the application of the governing law would not constitute a ground for defeating the award since the reopening of the substance (*révision au fond*) is impermissible. The illegality of the underlying contract, on the other hand, could make the award repugnant to public policy, especially where the illegality is considered to be significant, and have the effect of rendering the underlying contract unenforceable. It must, however, be noted that public policy is a wider concept than just illegality as it encompasses values that are not expressly articulated in the form of statutory provisions.

<sup>30</sup> See New York Convention, Art. V(2)(b) and UNCITRAL MODEL LAW, Art. 36(1)(b)(ii).

<sup>31</sup> UNCITRAL MODEL LAW, Art. 20(1).

<sup>32</sup> The Indian Supreme Court held in the prior case of *Oil and Natural Gas Corp. v. Saw Pipes*, (2003) 5 SCC 705 that an award patently illegal under Indian law was contrary to public policy and fell to be set aside. The Court reaffirmed in *Venture Global Engineering* (para. 21) that a foreign arbitral award would be subject to the same principle. Some commentaries are critical of the *Saw Pipes* judgment as undermining the finality of arbitration. See *e.g.*, Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1-2 ASIAN INT'L ARB. J. 105 (2005). Cf. O.P. MALHOTRA & INDU MALHOTRA, *LAW & PRACTICE OF ARBITRATION & CONCILIATION* para. [I]34-56 (2<sup>nd</sup> ed. 2006).

under the law of such countries. The Indian Supreme Court in *Venture Global Engineering* might have been sympathetic with such a view when it opined that S should have sought enforcement in India rather than in Michigan since the award had an intimate and close nexus with India and its law in view of the fact that the shares to be transferred were those of an Indian company and that the transfer would require steps to be taken in India under the law of India. The Court feared that Indian public policy might be by-passed if an arbitral award in respect of properties situated in India (referring apparently to the shares of SV in the instant case) were sought to be enforced abroad (in Michigan in the instant case) and a debtor (V in the instant case) residing in that foreign country were to personally comply with the award for fear of sanctions for contempt of court. The reality is, however, that jurisdiction to enforce an arbitral award may be exercised in the countries where an effective enforcement can be expected by virtue of, for example, the threat of sanctions for contempt of court against the residents there even if such countries have no nexus with the underlying contract. And it should rightly be so. The district court in Michigan in *Venture Global Engineering* did in fact reject V's plea that it decline jurisdiction to enforce the award on the basis of the principle of *forum non conveniens*.<sup>33</sup> In the case of an award ordering payment of money, enforcement jurisdiction will be accepted in countries where the party against whom the award has been rendered has sufficient assets since enforcement can be effective there even if the underlying contract has no connection with those countries.

The consequence is that the legal policy of the countries closely connected with a contract may be flouted if the party seeking to evade the legal hurdles erected by such countries shies away from those countries when deciding the place of arbitration and the place to enforce the ensuing award. There is, however, a remaining possibility that the legal policy of such countries would be safeguarded if the court seized of proceedings to set aside or recognize or enforce the same award takes into account, in the context of public policy scrutiny, not only illegality under the law of the forum but also illegality under the law of other countries closely connected with the underlying contract. That this is not an unrealistic possibility has been demonstrated by the fact that the U.S. Court of Appeals for the Sixth Circuit in *Venture Global Engineering* held that it was "well-settled that in the interest of international comity, this Court should not enforce an award in a country that would result in the violation of the law of that country."<sup>34</sup> It must be pointed out, however, that the authorities cited by the court, *U.S. v. Ross*<sup>35</sup> and *Hilton v. Guyot*,<sup>36</sup> do not seem to lend strong support for that proposition. Query then whether that proposition is accepted in other countries. In

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<sup>33</sup> *Satyam Computer Services v. Venture Global Engineering*, No. 06-CV-50351-DT, 2006 WL 2571581 (E.D. Mich. July 13, 2006) (order granting in part and denying in part VGE's motion for a stay pending appeal), *aff'd*, 233 Fed. Appx. 517 (6<sup>th</sup> Cir. 2007).

<sup>34</sup> *Venture Global Engineering*, 233 Fed. Appx. at 523.

<sup>35</sup> 302 F.2d 831, 834 (2d Cir. 1962).

<sup>36</sup> 159 U.S. 113, 163-64 (1895).

England, for example, it has been established that the courts will refuse to enforce a contract requiring an act which is illegal under the law of the place of performance (*lex loci solutionis*) on the basis that English public policy requires international comity.<sup>37</sup> But where the enforcement of an arbitral award is sought, a tension emerges between two competing concerns of public policy: consideration against giving effect to an illegal contract and consideration in favor of the finality of arbitration. Reflecting this tension, the English authorities are divided on whether the enforcement of an arbitral award should be refused because of the illegality of the underlying contract.<sup>38</sup> Reconciling those authorities is not straightforward.<sup>39</sup> For present purposes, suffice it to say that illegality under the law of a foreign country having a close nexus with the underlying contract may be taken into account, resulting in the award being considered as contrary to public policy, although the precise circumstances in which that may happen will vary depending on the country where the proceedings to set aside or recognize or enforce the award are pending. Apart from the closeness of the nexus, among relevant factors will be the significance of the illegality, which may be indicated by the availability of criminal or administrative sanctions. Another material factor will be whether the illegality would have the effect of rendering the contract unenforceable under the legal system that has been infringed.

By way of a caveat it should be pointed out that if illegality affecting the underlying contract is to be taken into account in proceedings for setting aside or recognition or enforcement, the purpose would not be to rescue the party required to perform an illegal act but to respect the legal policy of the country whose law is violated by the contract. It is true that where an arbitral award requires the performance of an illegal act, the defeated party may be caught in the middle:

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<sup>37</sup> See *Regazzoni v. Sethia*, [1958] AC 301 (H.L.). In that case, an English company entered into a contract to sell a quantity of jute to a Swiss party. The delivery was to be made in Italy. Both parties were aware that the jute could be procured only in India and that the buyer's intention was to tranship it to South Africa. Under Indian law, the export of jute was illegal if the final destination was South Africa. The English court rejected the buyer's claim based on the contract, notwithstanding that the contract was governed by English law.

<sup>38</sup> For an authority in which enforcement was refused, see *Soleimany v. Soleimany*, [1999] Q.B. 785 (CA) (Waller L.J. delivering the judgment of the whole court). For opposite authorities, see *Soinco SACI v. Novokuznetsk Aluminium Plant (No 1)*, [1998] 2 Lloyd's Rep. 337 (CA) (Waller L.J. joined by concurring judgments of Phillips L.J. and Chadwick L.J.); *Westacre Investments v. Jugoimport-SPDR Holding*, [1998] 3 W.L.R. 770, 767 (Colman J.) and [2000] Q.B. 288 (CA) (a majority opinion by Mantell L.J. and Hirst L.J., with Waller L.J. dissenting.); *Omnium de Traitement et de Valorisation v. Hilmarton*, [1999] 2 Lloyd's Rep 222 (Walker J.).

<sup>39</sup> Commentaries differ in detail as to how they fit with each other: see, e.g., Nelson Enonchong, *The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts*, 2000 LLOYD'S MARITIME & COM. L. Q. 495; ROBERT MERKIN, *ARBITRATION LAW* paras. 19.76-19.79 (2004); FAWCETT & CARRUTHERS, *CHESHIRE, NORTH & FAWCETT PRIVATE INTERNATIONAL LAW* 658 et seq. (2008).

either he may have to comply with the award while being punished for performing an illegal act or disobey the award at the risk of being punished for contempt of court. No sympathy may, however, be due him in circumstances where, for example, he was already aware of the illegality at the time of concluding the underlying contract. The opposing party, on the other hand, has a legitimate expectation that the favorable award will be recognized and enforced. The question is, therefore, not one of balancing the private interests of the parties involved. It is rather about respecting the public interest of the country whose legal policy is at risk of being flouted by an award based on an illegal contract. This point is clearer in those cases where the award condones, rather than requires, the performance of an illegal act. In such cases, the only interest at stake is that of the public, since the party against whom the award is made, *e.g.*, the insurer ordered to pay on a policy to indemnify against a fine for an illegal act which has been committed, is not caught in the middle.

For the court seized of proceedings to set aside, recognize, or enforce an arbitral award, it may be difficult to discover whether the underlying contract is illegal under the law of a foreign country. It would be even more difficult to ascertain in the context of that foreign legal system how significant is the illegality and whether such illegality would have the effect of rendering the contract unenforceable. It would therefore be helpful if a court of that foreign country had an opportunity to make findings on those points so that those could be pleaded as evidence of the foreign law. Such an opportunity may present itself if a challenge is made to the award in that foreign country. In the course of hearing the challenge, the court may find, for example, that the underlying contract is not just illegal but is also unenforceable and may further find that the illegality is serious enough to make the award repugnant to public policy. The same opportunity equally arises in the cases where the award has been made outside the country in which the challenge is made, that is to say where a challenge is made to a foreign arbitral award in the country whose legal system has been violated by the underlying contract.

From the forgoing analysis, it could be concluded that accepting jurisdiction over a challenge to a foreign arbitral award may, if the challenge is made in a country closely connected with the underlying contract, serve a useful purpose of providing the court with an opportunity to make findings under its own legal system as to whether the underlying contract is illegal, how significant the illegality is, and whether such illegality has the effect of rendering the contract unenforceable. This would allow the court in another country seized of proceedings to set aside, recognize or enforce the same award to take notice of such findings and thereby form an accurate view concerning such illegality if that court, in scrutinizing the compatibility of an arbitral award with its own public policy, needed to take into account the illegality of the underlying contract under the law of countries which were closely connected with the contract. Through this process may be served a further useful purpose of promoting, albeit indirectly, the legal policy of countries closely connected with the underlying contract, which may otherwise be by-passed.

The forgoing conclusion should not be taken as an endorsement of the ruling of the Supreme Court of India in *Venture Global Engineering*. Though the facts of the case provide a nice illustration of the point made above, the reasoning and conclusion of the Court are unsatisfactory. The Court came to the conclusion that the Indian courts had jurisdiction to set aside a foreign arbitral award simply by following the reasoning of its earlier decision, *Bhatia International*,<sup>40</sup> regarding the scope of Part I of the Indian Act 1996, and not as a result of a conscious quest for an appropriate measure to attain the useful purpose described above. To achieve that purpose, accepting jurisdiction over a challenge to a foreign arbitral award is not a well-targeted measure. It is broader in scope than necessary to cover the situation where that useful purpose may be served, that is to say, where the challenge is brought on the basis that the underlying contract is illegal under the law of the forum and proceedings to set aside or recognize or enforce the same award have been, or are expected to be brought before a court of another country which will take into account, in the context of scrutinizing the compatibility of the award with its own public policy, the illegality of the underlying contract under the law of countries closely connected with the contract.

There are better-targeted procedures to achieve the same purpose, which may also be available in the majority of countries where, as under the UNCITRAL Model Law, no jurisdiction exists over a challenge to a foreign arbitral award. Such procedures must be able to provide a court with an opportunity to make findings under its own legal system as to whether the underlying contract is illegal, how significant the illegality is and whether such illegality has the effect of rendering the contract unenforceable. One such procedure is an action brought by the party defeated in a foreign arbitration to seek a declaration that it owes no obligation under the underlying contract. In such an action, the defendant, in whose favor the award was made, would rely on the award to plead its binding force of *res judicata*. Then, the court would, when considering whether the award is eligible for recognition, have an opportunity to make findings concerning its illegality under its own legal system.

Another possible procedure is an action for a declaration that a foreign arbitral award is null and void. The procedural rules of some countries may not allow a declaratory action merely to solicit a legal consultation from the court, but may allow such an action only if the plaintiff has some legitimate interest in obtaining the declaration. In such countries, an action for a declaration that a domestic arbitral award is null and void may not be admissible since an alternative procedure, namely the procedure for challenging the award, is available to set aside such an award.<sup>41</sup> No equivalent procedure is available, however, for a

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<sup>40</sup> (2002) 4 SCC 105.

<sup>41</sup> Neither may an action for a declaration that a domestic judgment is null and void be admissible since alternative procedures, namely the procedures for ordinary and extraordinary appeals, are available to set aside such a judgment. It was so held in Japan: the Supreme Court judgment on Feb. 26, 1965 (19-1 *Minshu* 166) and the first instance decision of the same case by the Kushiro District Court on July 6, 1962 (19-1 *Minshu* 172).

foreign arbitral award at least in the Model Law compliant countries, as has been discussed above. Accordingly, an action for a declaration that a foreign arbitral award is null and void may be admissible if it is shown that the plaintiff has some legitimate interest in requesting such a declaration. Such interest may be deemed to exist<sup>42</sup> if, for example, it has been shown that the forum country has a close nexus with the underlying contract and that the court in another country seized of proceedings to set aside, recognize or enforce the same award would, in scrutinizing the compatibility of an arbitral award with its own public policy, take into account the illegality of the underlying contract under the law of countries having a close nexus with the contract.

## V. CONCLUSION

The courts do not have jurisdiction to set aside a foreign arbitral award under the UNCITRAL Model Law. But the Indian Supreme Court's judgment in *Venture Global Engineering* has demonstrated that a deviation from the position under the Model Law can occur in those countries that have not faithfully adopted the Model Law. That ruling has attracted critical commentaries. Instead of simply echoing them, this article has ventured to suggest that any concern that the setting aside of a foreign award may undermine the finality of arbitration is largely unfounded and that its only negative effect would be a possible confusion that might be brought about by the unfamiliarity of such a measure.

This article has further endeavoured to show what useful purpose, if any, could be served by accepting jurisdiction over a challenge to a foreign arbitral award. It has come to an affirmative conclusion, albeit in a limited situation. Thus, accepting such jurisdiction may, if the challenge is made in a country closely connected with the underlying contract, serve the useful purpose of providing the court with an opportunity to make findings under its own legal system as to whether the underlying contract is illegal, how significant is such illegality, and whether the illegality has the effect of rendering the contract unenforceable, so that the court in another country seized of proceedings to set aside, recognize or enforce the same award would be able to take notice of such findings and thereby form an accurate view concerning such illegality if that court, in scrutinizing the compatibility of an arbitral award with its own public policy, needed to take into account the illegality of the underlying contract under the law of countries which were more closely connected with the contract. This process may serve the further

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<sup>42</sup> With respect to a foreign judgment, such interest may be deemed to exist if it has been shown that the judgment pretends to have an *erga omnes* effect and, therefore, a declaration affirming or denying its effect and binding all interested parties would promote legal stability. Thus, in Japan, there have been cases in which an action for a declaration that a foreign divorce decree is null and void was held admissible. *See, e.g.*, Tokyo District Court judgment on Nov. 30, 1973 (26-10 *Kasai Geppo* 83); Utsunomiya District Court judgment on Feb. 28, 1980 (34-1~4 *Kaminshu* 201). *Cf.* Tokyo Family Court judgment on Sep. 11, 2007 (60-1 *Kasai Geppo* 108).

useful purpose of promoting, albeit indirectly, the legal policy of countries closely connected with the underlying contract that may otherwise be by-passed. The facts of *Venture Global Engineering* provide a nice illustration of the point, although the reasoning and conclusion of the Indian Supreme Court are not satisfactory. Accepting jurisdiction over a challenge to a foreign arbitral award could serve the above-mentioned purpose but is not a well-targeted measure. There are a few better-targeted procedures that could achieve the same purpose.

In the course of clarifying the ramifications of setting aside a foreign arbitral award, this article has brought into focus the issue of how to deal with the evasion of law in arbitration, in particular the law of countries which are closely connected with the underlying contract but which are not the country where the seat of the arbitration is situated nor the countries in which recognition or enforcement is likely to be sought. This issue forms part of a wider question on the application of mandatory rules in arbitration.<sup>43</sup> It is hoped that this article has been useful in shedding some light on that notoriously difficult question.

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<sup>43</sup> For various views on that wider question, see the articles contained in a special issue of this *Review* containing the papers presented at a Colloquium on Mandatory Rules of Law in International Arbitration held at Columbia Law School in June 2007: 18 AM. REV. INT'L ARB. (2007). See also views canvassed in Daniel Hochstrasser, *Choice of Law and "Foreign" Mandatory Rules in International Arbitration*, 11(1) J. INT'L ARB. 57 (1994).