Singapore Journal of Legal Studies
[1993] 214 – 225

ILLEGAL CONTRACTS IN THE CONFLICT OF LAWS: SOME RECENT DEVELOPMENTS IN SINGAPORE

This article examines, from the perspective of conflict of laws, a cluster of recent local decisions on illegal contracts. Particular attention will be paid to the *Foster* and (supposed) *Ralli* principles and the manner in which the courts have applied these principles.

INTRODUCTION

ONE infamous, unsettled area in the conflict of laws is the effect of illegality by the law of the country where a contract is to be performed[1] on the validity of the contract. Exception 1 of Rule 184 of *Dicey and Morris,*[2] which has received some judicial affirmation states that such a contract, illegal by the *lex loci solutionis,* would be invalid. However, Exception 1 has not been uncontroverted, for, apart from the equivocality of its principal authority, *Ralli* v *Compania Naviera Sota y Anzar,*[3] the intrusion of *lex loci solutionis* into contractual validity is liable to detract from the governance of the proper law in the area of contract.[4]

This alleged *Ralli* principle must be distinguished from the related and fairly well established *Foster* principle,[5] that the courts will not enforce a contract where the parties' intention and object contemplates performance of some acts in and illegal by the laws of a friendly foreign country. The former is a *self-standing* principle of the conflict of laws employing the place of performance as a connecting factor,[6] as opposed to being a

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1 Hereafter, the *lex loci solutionis.*

2 *Dicey and Morris on the Conflict of Laws* (11 ed, 1987), Vol 2 at 1218. For a helpful reminder of this vexed problem in the conflict of laws, see Reynolds, "Illegality by *Lex Loci Solutionis"* [1992] 109 LQR 553.

3 [1920] 2 KB 287

4 Both difficulties will be elaborated presently.

5 After the case that first established it, *Foster* v *Driscoll* [1929] 1 KB 470; since then, *Foster's* case has been applied in *Regazzoni* v *Sethia* [1958] AC 301 and *Fielding & Platt* v *Najjar* [1969] 1 WLR 357. The distinction between the two principles is well acknowledged by commentators and in the cases, including the fairly recent one of *Toprak* v *Finagrain* [1979] 2 Lloyd's Rep 98.

6 See *Eurodiam* v *Bathurst* [1987] 1 Lloyd's Rep 178 at 190 as accepted by KS Rajah JC in *Overseas Union Bank* v *Chua Kok Kay* [1993] 1 SLR 686 (hereafter the *OUB* case); *Mackender* v *Feldia* [1967] 2 QB 590 at 601; comment to Exception 1 *of Dicey and Morris.*

manifestation of the public policy of the English forum, which is the basis of the latter principle. Further distinctions between the two principles may be enumerated. For the supposed principle in *Ralli's* case to apply, there must be contractually mandated performance in the country,[7] not necessarily a friendly one to the forum, under whose laws performance is unlawful, although no premeditated adventure[8] to break the *lex loci solutionis* is demanded.

One might have thought that what has been set out above are fairly well appreciated difficulties and differences in an area of law still awaiting clarification. However, rather unfortunately, the High Court of Singapore has, in a spate of recent decisions,[9] uncritically adopted the *Ralli* rule of illegality by *lex loci solutionis* and confused (or perhaps conflated) it with the *Foster* principle.

THE LOCAL DECISIONS

The facts of the three decisions in question, *Four Seas Communication Banks* v *Sim See Kee,*[10] *Singapore Finance* v *Soetanto*[11] and *Overseas Union Bank* v *Chua Kok Kay*[12] are remarkably similar. They all involved credit facilities extended by Singapore banks to residents of Malaysia. The loan contracts in question were entered into and performed in Singapore and involved sums in Singapore currency. In both the first and third cases and probably the second as well, the proper law of the contract was Singapore law.

The defences raised in all three cases were that both section 4 of the Exchange Control Act of Malaysia[13] and Article VIII, section 2(b) of the

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7 The preferred language in modern case law is performance must "necessarily involve" doing an act unlawful by the *lex loci solutionis:* see *Toprak* v *Finagrain, supra,* note 5 , *Libyan Arab Bank* v *Bankers Trust* [1989] 1 QB 728.

8 Essentially, *Foster's* principle requires some conspiracy to break laws of a friendly foreign country, but use of the word "conspiracy" has generally been avoided, perhaps because its technical, tortious meaning may raise needless choice of law complications. However, KS Rajah JC in *OUB's* case did adopt a textbook passage which alludes to conspiratorial defiance of foreign prohibition. *Supra,* note 6, at 697.

9 Apart from the three recent cases, *Ralli* was followed matter-of-factly in *Shukor* v *Mohamed* [1968] MLJ 258. There, a contract to bring money into India in contravention of Indian foreign exchange regulations was to be unenforceable. The *Foster* rule was not mentioned even though on the facts, it might have been relevant. *Shukor's* case was not cited in any of the three recent decisions. Apart from value as a precedent (and one not binding on the judges in the recent cases at that), it does not seem to further the analysis here. Completeness, however, compels giving it a mention.

10 [1990] 3 MLJ 226; hereafter, the *Four Seas* case.

11 [1992] 2 SLR 407; hereafter, the *Singapore Finance* case.

12 *Supra,* note 6.

13 Cap 17, 1969 Rev Ed of Malaysian Statutes.

Singapore Bretton Woods Agreements Act[14] had been infringed. Only the first defence is relevant to the subject matter under discussion here. It involves the argument that since the loan was made to a Malaysian resident without the prior approval of the Controller of Foreign Exchange of Malaysia, the loan contract infringed section 4 of the Exchange Control Act and was therefore unenforceable. Since the proper law of these contracts was Singapore law, for the Malaysian statute to have any effect at all, it must be shown either that the *Ralli* principle exists and there was illegality by the *lex loci solutionis* (that is, Malaysian law) or that the *Foster* principle was applicable or that the contract was in some way tainted with the illegality in question; otherwise, the fact that one party would infringe the law of the country in which he resides or of which he is a national is *per se* immaterial.[15] However, in none of the three cases was any one of these defences successful.

ILLEGALITY BY *LEX LOCI SOLUTIONIS*

All three cases accepted that such a form of illegality would invalidate the contract. What is alarming was that this *Ralli* principle was accepted without any discussion of the difficulties associated with it; in fact, in both *Four Seas* and the case that followed it,[16] *Singapore Finance, Ralli* was not even cited. Since in all three cases, the contract was to be performed in Singapore, the Malaysian statute was not part of the *lex loci solutionis* and, hence, was held (rightly though unexceptionally) to be inapplicable under the *Ralli* principle.

But the principle, as aforesaid, is riddled with difficulties; the comment to Exception 1 describes it as doubtful and highly controversial.[17] The case from which it is apparently distilled involves an action for freight payable

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[14] Cap 27, 1985 Rev Ed. In essence, this Act read with the Bretton Woods Agreement Order gives legal effect to the Bretton Woods Agreement and obliges Singapore to respect the currency laws of other member states with similar obligations on a reciprocity basis, one such member state being Malaysia. However, the Act would only apply if the contract is an exchange contract, that is, one involving the exchange of currency of one country for the currency of another. Since in all the contracts in question, only Singapore currency was involved, the Act was held to be inapplicable. Substantive provisions aside, for the Act to even be applicable for the conflict of laws purposes, it must be justified either on the basis that the proper law was Singapore or that the Act, giving effect to an international convention and having the force of law in Singapore, is arguably to be treated as an overriding statute of the Singapore forum.

[15] *Kleinwort Sons* v *Ungarische Baumwoele* [1939] 2 KB 678.

[16] Both in terms of chronology and application.

[17] Rather disappointingly, the modern cases which cite Exception 1 with approval seem to have ignored the grave reservations expressed in the comment to this exception by the editors of *Dicey and Morris.*

in Spain pursuant to a charterparty governed by English law where the agreed rates were beyond the maximum permitted by a supervening Spanish decree. The English Court of Appeal held that the claim for the agreed rates was unsuccessful. All three members of the court cited the above-mentioned Exception with approval but only Lord Sterndale MR came closest to adopting the principle of illegality by the *lex loci solutionis.* Indeed, the decision and in particular, Scruttons LJ's judgment, might be explained on the principle of supervening illegality under English law, the proper law, as an excuse to non-performance. His Lordship as well as Warrington LJ relied on notions of implied terms (an old fashioned way of explaining the doctrine of frustration) and cited as support for their decision such familiar frustration authorities as *Paradine* v Jane[18] and *Metropolitan Water Board* v *Dick, Kerr and* Co,[19] to relieve the charterer's obligation to pay the agreed freight which had since become illegal by Spanish law.

So explained, *Ralli* established no independent conflictual principle and is nothing more than an unexceptional example of the application of the proper law's principles of frustration. In other words, the effects (if any) of *lex loci solutionis* illegality must be left to the proper law. By this is meant the domestic and not the conflicts rules of the proper law, otherwise renvoi would rear its head in contracts where it is not supposed to: *Amin Rasheed* v *Kuwait Insurance.*[20] No case has so far arisen in which there is illegality by the *lex loci solutionis* and the proper law is that of a third country. Should Providence supply one, an English court would be compelled to decide if the *Ralli* rule in its supposed form exists since domestic English rules of frustration would then be unavailable to excuse future performance.[21]

Through the years, a welter of authorities have cited Exception 1 with approval[22] though only in the form of unconsidered *dicta,* and have in turn been garnered, somewhat symbiotically by the editors of *Dicey and Morris* to firm up the basis of Exception 1.[23] In essence then, the initial as well as subsequent authorities for such a principle are suspect. It is unfortunate that the local cases treated the principle as though it were uncontroversial, trite law, which it certainly is not.[24]

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[18] (1647) Aleyn 26.

[19] [1918] AC 119.

[20] [1984] AC 50.

[21] Unless of course domestic frustration rules, if any, of the proper law have similar consequences as in English law, in which case a court could conceivably defer settling the fate of *Ralli.*

[22] Such as *Libyan Bank* v *Bankers Trust, supra,* note 7, *Toprak* v *Finagrain, supra,* note 5, *Mackender* v *Feldia, supra,* note 6, *Kleinwort* v *Ungarische Baumwoele, supra,* note 14, *Zivnostenska Banka* v *Frankman* [1950] AC 24, *De Beeche* v *South American Stores* [1935] AC 148, to name but a few.

[23] See Reynolds, *supra,* note 2.

[24] Staughton J in *Libyan Arab Bank, supra,* note 7 did think the rule is well established. But his Lordship's view is far from universal.

From a conceptual standpoint, accepting the role of the *lex loci solutionis* in the *Ralli* fashion invites problems. It bucks the trend of the decreasing importance of the *lex loci solutionis.* Its control over the mode of performance and excuse for non-performance has for some time already been expunged from English conflict of laws.[25] The *Ralli* rule also emasculates the predominant influence of the proper law on the validity of the contract and ultimately, the principle of contractual autonomy. After all, the impact of *lex loci solutionis* illegality, especially if of a supervening nature and ignored by the domestic contents of the proper law, is to defeat the bargain of the parties.[26] Contracts with obligations that have to be performed in various jurisdictions would be quite vulnerable to the application of the rule.

Furthermore, the impact of illegality is a matter which concerns the substance of contractual obligations and should therefore fall within the purview of the proper law,[27] rather than the *lex loci solutionis.* If, as Rabel[28] points out, most modern laws controlling obligations have some notions of frustration or impossibility of performance, then the matter can be adequately dealt with by the proper law alone.

Conceptual problems aside, the parameters of this supposed principle of *lex loci solutionis* illegality also suffer from ill-definition. Its applicability to initial as opposed to supervening illegality by *lex loci solutionis* is untested and unresolved.[29] Neither has there been uniformity in the effect of *lex loci solutionis* on the contract *as a whole:* Is it to render the latter invalid,[30] unenforceable but not void[31] or to excuse performance?[32] One may further ask which law, the proper law or the *lex loci solutionis,* should govern which of or all the consequences of illegality. For instance, if the *lex loci solutionis* illegality only affects one obligation of the contract, can the rest of it that be severed and if so, according to which of the two alternative laws? The result of *Ralli* itself suggests the illegality pertaining to freight did not infect the rest of the charterparty. However, the judgment is unclear as to whether this severance was allowed under Spanish or English law.

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[25] See Morris' article, "The Eclipse of the *Lex Loci Solutionis* – A Fallacy Exploded" (1953) 6 Vand L Rev 505 at 505-511.

[26] Admittedly, careful contract planning may avoid some of the pitfalls of supervening illegality. But some such devices, *likeforce majeure* clauses, have met with considerable judicial hostility.

[27] As aforesaid, only the domestic rules of the proper law are to be taken into account.

[28] *The Conflict of Laws: A Comparative Study* (1958), Vol 1 at 536-541, especially at 539. See also, Falconbridge, *Essays on the Conflict of Laws,* (2nd ed, 1954), at 391-394.

[29] Viscount Sankey in a *dictum* in the case of *De Beeche* v *South American Stores, supra,* note 22, at 156 seemed to restrict himself to supervenient, *lex loci solutionis* illegality. *Ralli* itself is also one such case. However, Exception 1 is not worded so narrowly.

[30] As *Dicey and Morris's* Exception 1 states.

[31] See Diplock LJ's judgment in *Mackender* v *Feldia, supra,* note 6.

[32] See Staughton J's judgment in *Libyan Arab Bank, supra,* note 7.

The case also suggests that in place of the obligation invalidated, the *lex loci solutionis* can impose its own obligations, in that case, payment according to the maximum rates provided in the Spanish decree. The contest would seem to be between the orthodoxy of leaving substantial matters of the contract to the proper law, a certain conceptual neatness of leaving the consequences of illegality to the law which declares the illegality in the first place or even perhaps, categorisation of the issue as one of remedies and leaving it to the *lex fori*.[33]

THE *FOSTER* PRINCIPLE

It may be recalled that according to this principle of public policy, a contract is unenforceable if the object of the parties is to perform some acts in and illegal by the laws of some friendly foreign nation. The point was dealt with at length by Selvam JC in the *Singapore Finance* case. His Honour's discussion on the part was quoted in the *OUB* case, but without any further comments from the learned judge who decided that case, KS Rajah JC. Neither judge cited an earlier decision of the Singapore Court of Appeal in which the *Foster* principle was applied.[34]

Selvam JC started off by saying that the decision of *Four Seas*[35] was not discordant with the case of *Regazzoni* v *Sethia,* in which the House of Lords approved of and applied the *Foster* principle, even though *Regazzoni* was not considered by the learned judge in *Four Seas.* Selvam JC went on to say that in respect of non-enforceability of a contract on grounds of illegality, a distinction must be drawn between the *lex fori* and foreign law because questions of foreign law are questions of fact to be proved and pleaded and ignorance of fact is excusable. This *dictum* needs qualification. Ignorance of foreign illegality under either the proper law or the *lex loci solutionis* (if the *Ralli* rule exists), is not relevant to the question of enforceability of the contract. The *dictum* has therefore to be read in the context of the *Foster* principle which was discussed in that part of his Honour's judgment where the dictum appeared. When read in context, the dictum is explicable since the *Foster* principle applies only if the parties

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[33] The last possibility is canvassed by Carter who argues that the *lex fori* should decide if damages could be awarded in lieu of the prohibited performance. See (1989) BYBIL 502 at 503.

[34] *Patriot* v *Lam Hong Commercial Co.* [1980] 1 MLJ 135. See also *Dimpex Gems* v *Yusoof Diamonds* [1988] 1 MLJ 87, a decision of the Singapore High Court which applied the *Foster* principle as well. See YL Tan, "Diamonds in Breach of Law" (1988) 30 Mal LR 424 for a commentary on *Dimpex Gems* case.

[35] As aforesaid, this was the first of three decisions in which the defence of illegality under Malaysian exchange control legislation failed to relieve Malaysian borrowers from their liability to Singapore banks.

connive in breaking the laws of a friendly country and that presupposes they are knowing parties to such illegality. But it bears remembering that knowledge of foreign illegality has to be shown because it is part of the rule and not because it is a fact, the ignorance or absence of plea or proof of which is an excuse. That cases which applied the *Foster* principle were cited as support for this *dictum* further supports such a narrow reading.

His Honour then formulated the following two-fold test for the issue of enforceability of an agreement involving breach of foreign law: "Firstly, whether it would be unlawful under the law of the place of performance, and secondly, whether the person seeking the enforcement had, at the time of making the contract, knowledge that foreign law would be breached by performance of the contract." This test appears to have been distilled from an examination of cases applying the *Foster* principle and was in fact applied by Selvam JC to explain the decision of *Regazzoni.*

Yet it is dissimilar to the *Foster* principle in several ways. Conscious violation of *lex loci solutionis by the party seeking enforcement of the contract only* omits the requirement of *conspiracy* to break foreign laws,[36] which the above test does not confine to those of friendly foreign powers. Reference to *lex loci solutionis* suggests a contractually stipulated place of performance (whose laws have been broken).[37] But arguably, the *Foster* principle is not so confined. In other words, it applies so long as the parties contemplate performance of acts in and illegal by the laws of a friendly country, whether or not that is the contractually stipulated place of performance.[38] This is apparent from the rule formulated by Sankey LJ in that case which envisages a situation where the parties' object is to break some foreign laws even though the contract can be performed legally in some other ways. So, for instance, in *Regazzoni* v *Sethia,* where the contract was for sale and delivery of jute in Genoa, Italy, it was not required under the contract that the seller obtain his goods from India nor did the contract disclose the buyer's intention to send the goods to South Africa.[39] But the parties clearly contemplated that jute would be shipped from India and be

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[36] Mere knowledge of just one party by itself does not attract operation of the *Foster* rule. Parties' connivance or conspiracy to perpetrate the illegality has been consistently stated as a requirement for the *Foster* rule in the cases.

[37] At least, this is how later cases have interpreted the *Ralli* rule. In both *Toprak* v *Finagrain, supra,* note 5 and *Libyan Arab Bank* v *Bankers Trust, supra,* note 7, it was held that for the *Ralli* rule to apply, performance must "necessarily involve" or "require" the doing of some acts illegal by the *lex loci solutionis.* Dicey and Morris makes the same point by confining the rule to acts required under the contract. See Comment to Exception 1 to Rule 184, *supra,* note 2, at 1221.

[38] However, in *Fielding & Plan* v *Najjar, supra,* note 5, Lord Denning appeared to think, without articulating any reason, that the illegal act must be a term of the contract.

[39] This was expressly pointed out by Lord Reid and Viscount Simond in *Regazzoni, supra,* note 5.

made available in Genoa for resale to South Africa, in breach of the export laws of India. That was sufficient to render the contract unenforceable under the *Foster* principle. There is a possible third distinction. It is unclear whether the underlying basis of the test formulated by Selvam JC is an independent conflict of laws principle or the public policy of the forum. The *Foster* principle, on the other hand, is clearly based on the *lex fori.*

There are at least three ways of looking at this test. The first possibility is that it is a deliberate reformulation, albeit with modifications, of the *Foster* principle and so owes its source to the public policy of the forum. But this is unlikely. The judge articulated neither intention nor reason to reformulate the principle. Secondly, it could be seen as a conflictual principle that emerges from the coalescence of the *Foster* and *Ralli* principles. Of this, more will be said presently. Thirdly, it could, with respect, be regarded as an erroneous formulation of the *Foster* principle.[40]

KS Rajah JC in the *OUB* case[41] also touched on the *Foster* principle but his formulation of the principle is far more orthodox. However, at one point of the judgment, his Honour confined its application to the endeavours to commit *crimes* in friendly foreign countries.

CONFUSION OR CONFLATION OR SOMETHING ELSE?

The discussion of the *Ralli* and *Foster* principles so far treats them as distinct, as they are generally acknowledged to be, even though they emanate from a common need to maintain comity of nations.[42] However, this distinctness has sometimes been overlooked or challenged. The confusion or conflation of the two principles could be due to their apparent resemblance. After all, both have been explained as arising out of comity and involve illegality under some foreign laws of acts accomplished pursuant to contracts.

Confusion usually takes the form of treating the two principles as one. One example of this failure to distinguish these two principles appears in the *OUB* case. After citing the above-mentioned Exception 1 (that is, the *Ralli* principle), the learned Judge in that case described the rule as "one of public policy, as appears from *Regazzoni* v *Sethia....*"[43] But, *Regazzoni's*

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[40] The judge made no reference to the binding Court of Appeal decision of *Patriot Ltd* v *Lam Hong, supra,* note 34 either where the *Foster* rule formulated in the usual way was applied.

[41] But, at certain points of the judgment, his Honour's employment of the *Foster's* principle creates difficulties, as discussed earlier in this article.

[42] *Toprak* v *Finagrain, supra,* note 5, at 107.

[43] See at 696 of the report, *supra,* note 6. The same sentence can be found in Staughton J's judgment in *Eurodiam* v *Bathurst, supra,* note 6, at 187. However, at a later part of his judgement, KS Rajah JC did state the principles separately. At 697, *supra,* note 6.

case applied the *Foster*[44] and not the *Ralli* principle. Furthermore, the latter is a self-standing conflictual principle which is not *directly* based on the forum's public policy.[45]

Conflation has been suggested before but so far received no judicial approbation. Goff J in *Toprak* v *Finagrain* resisted the temptation of "combining both principles in a proposition that English law will not enforce a contract where performance involves doing in a foreign friendly country an act which is illegal by the law of that country." His Lordship saw no need for it, nor did Staughton J in *Libyan Arab Bank* v *Bankers Trust.* No further explanation was given, but one suspects that a combined rule like the one suggested creates more problem than it solves. The ambiguity of the word "involves" does little to clarify the width of such a rule. If interpreted to mean "involves of necessity", that effectively becomes the *Ralli* rule since the additional requirement of a 'friendly country' is merely cosmetic. But a *Ralli* rule, even of a slightly reduced width, is no less of a potent source of conceptual difficulties of the kind discussed above. On the other hand, the subsumption of the *Foster* principle into the *Ralli* principle robs the court of a rule that is fairly clear, commonly accepted and conceptually less objectionable.[46]

It is of course possible to come up with slightly different versions of a combined rule; how much of an improvement that will be remains to be seen. It is in this context of a possible combined rule that we can re-examine Selvam JC's test in the *Singapore Finance* case.

To reiterate, Selvam JC's test requires proof of knowing violation of the *lex loci solutionis* at the time of contracting by the party seeking enforcement. It draws on both the *Ralli* and *Foster* principles, although differs somewhat from each of them. There are two ways of treating this coalesced formulation: it could be seen either as an independent choice of law principle or one stemming from the public policy of the forum. The ramifications of treating it as the former will first be considered. By referring to illegality by the *lex loci solutionis,* the test also inherits the problems associated with the *Ralli* rule just like the tentative formulation in *Toprak* v *Finagrain,* that is, non-enforceability if contract involves

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[44] Although Viscount Simonds in that case used the *Ralli* reasoning, the other members of the House confined themselves to applying the *Foster* principle.

[45] The contrary view, that it stems directly from the forum's policy, has not been seriously canvassed in the case law. This *dictum* expressed in an unexplained fashion is hardly likely to be an attempt to explain *Ralli* in that way. Hence, it is better treated as a misreading rather than re-reading of *Ralli.*

[46] The argument that if the parties conspire to break the laws of friendly nations, courts should not assist them in their ends seems too self-evident to invite disagreement. With the subsumption of the *Foster* principle, however, the requirement of a common intention to the laws would be removed.

performance by friendly *lex loci solutionis.* The element of knowledge, while distinguishing the test from the *Ralli* rule, raises questions of its own. What kind of knowledge is sufficient and by which law is this to be determined?[47] The *lex loci solutionis* is a plausible, if evidentially cumbersome,[48] choice since the connecting factor is place of performance. On the other hand, if knowledge is part of a choice of law principle, there is a case for control imposed by the *lexfori.* Either way, it would be unusual to have an *animus* component in addition to a connecting factor as part of a choice of law principle.[49]

The test may alternatively be seen as stemming directly from the public policy of the forum. So considered, the knowledge element will have to be governed by the *lexfori,* subject to the refinement that Selvam JC regards ignorance of foreign law as potentially excusable ignorance of fact.[50] How this refinement affects constructive knowledge or rather, ignorance is anybody's guess. In particular, the question (probably a rare one) when would it be reasonable to know or be ignorant of the foreign *lex loci solutionis* may be difficult to grapple with. Perhaps, actual knowledge or ignorance should be all that matters.

Knowledge of illegality may be relevant in domestic contract law[51] but borrowing a domestic principle and putting it in a conflictual setting is often frowned upon.[52] In other words, *ordre public interne* should not encroach upon *ordre public international.* Thus, before accepting this test as emanating from the forum's public policy, we must seriously ask ourselves if knowledge of *lex loci solutionis* illegality is something so disagreeable that the contract should be denied enforcement. If the answer is affirmative, then the potential exists for further judicial development.

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[47] Selvam JC discussed the possibility of there being imputed knowledge though without reference to any particular system of law. See *supra,* note 11, at 412.

[48] Adding as it does to problems of proof of foreign law.

[49] This is not to say that parties' state of mind does not figure at all in contract conflicts. Quite the contrary, since intention underlies the basic doctrine in this area, namely contractual autonomy: *Vita Food Products* v *Unus Shipping* [1939] AC 277. However, this is already factored into the choice of law principle (that is, the proper law), unlike Selvam JC's formulation which seemingly treats the *animus* as a separate component accompanying the connecting factor.

[50] This may perhaps be seen as a refinement of the *lex fori* principle, *ignorantia juris haut excusat.*

[51] See, for instance, *Pearce* v *Brooks* (1886) LR 1 Exch 213.

[52] See, for instance, the criticisms levelled against the case of *Kaufman* v *Gerson* [1904] 1 KB 591. Rather surprising, the court in *Eurodiam* v *Bathurst, supra,* note 6, had little hesitation about extending domestic notions of tainting by illegality beyond a domestic setting.

TAINTING BY ILLEGALITY[53]

A contract may not itself be illegal but it may have "a connection with some other illegal transaction which renders it obnoxious."[54] Such a contract is said to be tainted with illegality and is hence unenforceable. So in *Eurodiam* v *Bathurst,* the argument was made (albeit unsuccessfully) that a contract of insurance was tainted with, *inter alia,* the acts of tax evasion committed in Germany by the buyer of the diamonds which were insured. KS Rajah JC in the *OUB* case sought to apply similar tainting reasoning to the facts. With respect, this is misconceived. Any illegality could only have stemmed from the contract of loan itself under Malaysian law (which was in any event not relevant). There was no other illegal transaction or act which could taint the contract of loan.

His Honour went on to conclude that the contract was not tainted with illegality seemingly on the ground that the case was connected almost entirely with Singapore.[55] Mention was also made of the *Foster* rule but that was held to be inapplicable on the facts. This tainting reasoning is somewhat unnecessary. There being no other illegal transaction which could taint the contract, the case could simply have been disposed of using the decision of *Kleinwort* v *Ungarische Baumwoele.*[56]

Were such a transaction existent, the approach which Staughton J appears to have taken is to ask the contract has the necessary degree of connection with the illegal foreign acts which would render it tainted and therefore unenforceable here. This requires one has to consider "whether applying the appropriate connecting factor, the transaction from which the taint is said to arise would be enforceable here."[57] In this enquiry, reference may have to be made to foreign law. If it is unenforceable, one then considers if there is sufficient connection between the transaction and the contract to amount to tainting under English principles.

This approach was not employed by Rajah JC even though his Honour appeared to have followed the *Eurodiam* decision. Instead, recourse was had to conflict rules which apply when the illegality springs from the contract

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[53] The concept of tainting by illegality is pretty fuzzy along the edges but for our purposes, it is taken to mean, as Staughton J explained in *Eurodiam,* a contract and some other related illegal transaction which infects it, *infra,* note 54.

[54] *Per* Staughton J in *Eurodiam* v *Bathurst, supra,* note 6, at 187.

[55] Singapore was the place where the contract was to be performed, where the property secured for the loan is located; Singapore law was the *lexfori* and the proper law of the contract. The only relevant connecting factor pointing to Malaysia was the defendant's residence and nationality.

[56] *Supra,* note 15.

[57] *Eurodiam's* case, *supra,* note 6 at 192. The three connecting factors Staughton J had in mind are the proper law, place of performance and the forum: see 190-191 of the report.

itself. That being the case, the connecting factors examined by Rajah JC related to the contract rather than the transaction tainting it, which is what the aforesaid approach requires. This departure from the *Eurodiam* approach is perhaps not surprising since there was no transaction tainting the contract, but it only underlines the superfluity of applying tainting principles in the first place.

CONCLUSION

Illegality has never been an easy subject in the private international law of contract. A careful examination of the principles dealing with illegality, in particular those extracted from *Ralli* and *Foster,* is thus indispensable but, somewhat unfortunately, absent in the local cases. What emerges is an uncritical adoption of English principles in this area that is not complemented by correct reformulation or usage. It must be borne in mind that with the enactment of the English Contracts (Applicable Law) Act which implements the Rome Convention, future developments in the English private international law of contract will need even more careful examination before they are to be followed here, if at all. The need to look to other common law jurisdictions and to develop our own jurisprudence in this area has become pressing, rather suddenly. When the opportunity arises for sorting out this area, the following questions, which has been the burden of this essay to raise, could usefully be asked:

(a) Should the adoption of the *Ralli* rule be reconsidered?

(b) Does the *Foster* principle still exist in Singapore in its original form given the somewhat novel test formulated by Selvam JC in *Singapore Finance*?

(c) If the answer to (b) is in the affirmative, what is one to make of the test? Should it instead be seen as a conflation of the *Foster* and *Ralli* principles, which now renders the two parent principles superfluous? If it should be so seen, is it correct?

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