Singapore Journal of Legal Studies
[1997] 371 – 395

THE ENFORCEMENT OF CONTRACTS INVOLVING CORRUPTION OR ILLEGALITY IN OTHER COUNTRIES[1]

In 1929 the English Court of Appeal held an English contract to smuggle whisky into the United States contrary to the prohibition laws unenforceable. The case was unusual in that the English court took note of illegality under a foreign law. The writer argues that the reasoning behind this case requires disentangling, and that a general principle of non-enforcement of contracts which contemplate the breach of foreign laws in a way contrary to international morality should be developed from it.

IN late 1927 a rather curiously assorted group of British people hatched a plan to make money (as they hoped).[2] They were Sir Harry Seymour Foster, a knight, a member of Parliament, the consul-general of Persia in London and a chartered accountant in Victoria St, two shipbrokers called Driscoll and Miller, who were according to Lawrence LJ "admittedly wholly impecunious",[3] an Edinburgh distiller who also traded in London called Lindsay, and a retired schoolmaster called Attfield who lived in Worthing, a seaside town on the south coast of England much favoured by retired people. It involved shipping whisky out of Scotland to the United States, or somewhere nearby (places mentioned being Canada, Halifax, St Pierre or the open sea), with a view to its being imported into the United States contrary to the prohibition laws then in force there. Foster was to provide a considerable amount of the finance, Lindsay the whisky, Driscoll and Miller were not to charter but actually to buy a ship, the 600-ton *Wearhome,* for the purpose (though the goods had first to leave Scotland on a regular line and be transhipped at Dublin or elsewhere). The retired schoolmaster Attfield, with his son Captain Attfield, was to go to New York and (apparently) dispose of the whisky through what are referred to as "special facilities". At one point it was proposed that Sir Harry

1 A revised version of the David Marshall Lecture, delivered at the Singapore Academy of Law on 3 October 1997.

2 See *Foster* v *Driscoll* [1929] 1 KB 470.

3 *Ibid*, at 509.

Foster should accompany Mr Attfield to New York "and see that he did not misapply the proceeds of the whisky" but he ultimately contented himself with sending a telegram to Mr Attfield wishing him "bon voyage". It is not clear what profit Sir Harry Foster (or the others) hoped to make, but as Scrutton LJ said, the services were "not charitable". "I am quite satisfied" he said later in his judgment "that the court has not been told the whole truth, or anything like the whole truth, by anybody concerned."[4]

The arrangement, which had been elaborately contrived and financed by contracts and bills of exchange, went wrong, the whisky was put in a warehouse in Edinburgh and without authority pledged by the two impecunious shipbrokers (by use of a delivery order referring to "wet goods for exportation"). Sir Harry Foster wrote to Lindsay that as matters were "imperilling the whole venture", "I have ... had to take over control". It is difficult to acertain exactly what went wrong. Subsequently however he sued for rescission of two of the constituent contracts, delivery up of one of the bills of exchange and a declaration that he was no longer bound by the agreements and that the bill of exchange was void. Lindsay sued Attfield and Driscoll, largely on bills of exchange. On appeal Scrutton LJ, who presided over the court, would have held that the actions on the bills of exchange failed for technical reasons, but that Lindsay should succeed against Foster for breach of contract. But Lawrence and Sankey LJJ. held that "the object to be attained ...being a breach of international comity, the agreement was contrary to public policy and void":[5] and that was the end of the whole matter. It is worth noting that the actions were not all for enforcement of the contracts but at least in part to set them aside. Scrutton LJ's dissent was on the basis that the contract could have been performed legally or illegally.

This is a famous case, not only in English law but also internationally, and is said to give rise to a rule that English courts will not enforce a contract "made between parties to further an adventure to break the laws of a foreign state".[6] It was emphatically followed on much less strong facts by the House

4 *Ibid*, at 485, 486. This introduction owes much to Dr Lawrence Collins' Graveson Memorial Lecture, *infra*, note 58.

5 This is the wording of the headnote. Their reasonings were actually slightly different: see *ibid*, at 510 (Lawrence LJ: illegal partnership), 521-522 (Sankey LJ: court should not entertain actions of this character).

6 *Ibid*, at 519 *per* Sankey LJ, cited in Dicey and Morris, *Conflict of Laws* (12th ed,1993), vol 2, at 1281 (the text says "*or* breaks the law", but this is surely a mistake.)

of Lords in 1958 in *Regazzoni* v *KC Sethia (1944) Ltd*,[7] where a contract governed by English law by an English company[8] (with an Indian director) to sell Indian jute cif Genoa to a Swiss resident buyer was held unenforceable because the object of one of the parties, known to the other, was to evade Indian restrictions on the direct or indirect export of goods to South Africa (imposed because of the Indian government's inability in the 1950s to obtain redress for treatment of Indians in South Africa). The contract was made by telegram between agents, a Mr Weil in Basel and Mr Raydts in Hamburg: the goods were to be resold in Genoa for retransmission to South Africa. The doctrine of the case was further developed quite recently in a case involving commissions paid to secure business in Qatar, *Lemenda Trading Co Ltd* v *African Middle East Petroleum Co Ltd.*[9]

Foster v *Driscoll* has been considered several times by courts in Singapore, where there is a leading decision of the Court of Appeal in 1980 in *Patriot Pte Ltd* v *Lam Hong Commercial Co*[10] and a fairly recent decision of Selvam JC (as he then was) in *Singapore Finance Ltd* v *Soetanto;*[11] the *Lemenda* decision has been considered by Chao Hick Tin J in *Shaikh Faisal* v *Swan Hunter Singapore Pte Ltd*.[12] It has been discussed exhaustively together with other topics on illegality by Associate Professor David Chong.[13] In London the doctrine of *Foster* v *Driscoll* has very recently been the subject of elaborate but inconclusive discussion before Rix J[14] and the Court of Appeal[15] in *Royal Boskalis Westminster NV* v *Mountain.* It is obvious that the increased amount and sophistication of international commerce (and hence also of international law-breaking) may well lead to this doctrine being invoked with continuing frequency, if its scope can be established.

It does however require careful thought. Three features of it may immediately call for attention. The first is that in general one country does

7 [1958] AC 301. See criticism by Mann, (1958) 21 MLR130 and in *Further Studies in International Law* (1990), at 160-163. See also the same writer on the Court of Appeal decision (1956) 19 MLR 523, unconvincingly answered by Goodhart (not known for expertise in the conflict of laws) (1957) 73 LQR 33.

8 Though it had close connections with an Indian company of a similar name: see [1956] 2 QB 490, at 512.

9 [1988] QB 448.

10 [1980] 1 MLJ 135.

11 [1992] 2 SLR 407.

12 [1995] 1 SLR 394.

13 (1995) 7 SAcLJ 303.

14 QBD, Comm Ct, unrep, 18 December 1995.

15 [1997] 2 All ER 929.

not enforce the policy of another as such – even sometimes if that policy coincides with its own, as was shown in the famous *Vita Food*[16] case of 1939 concerning the Hague Rules. The second is that one country does not enforce the penal, revenue, or perhaps more generally the public laws of another.[17] The third is that the rule thus emerging has been reported as internationally unusual. Thus Wolff, writing in 1950, said that "No such rule seems to exist in other European countries"[18] and Rabel had written in the 1940s "It is a remarkable proposition, despite its vague form and rare application.... We shall contemplate this interesting though isolated regard for foreign law."[19] As late as 1957 it was possible to argue, as did counsel[20] in *Regazzoni* v *Sethia,*[21] that *Foster* v *Driscoll* "stands on its own and is unsupported by any other authority."

The first two objections are fairly easily dealt with. The answer to the first, that one country does not enforce the policy of another, is really what the *Lemenda* case discusses: that is true, but the policy of the first country may involve considerations that take in the policy of another as part of the first country's own policy. The foreign law can be said to be a mere *datum* for the application of forum policy.[22] The second is answered by saying that though one country does not *enforce* the penal, revenue or (perhaps) public laws of another, that does not mean it ignores them completely. There is a difference between taking account of foreign laws and actually enforcing them. The latter, enforcing, involves positive acts to give effect to the prerogative powers of a foreign state outside that state. The first, taking account of, does not: for example, it is undoubted that a contract unenforceable under its proper law is in general unenforceable in a common law forum even though the unenforceability under the foreign law is based on a penal, revenue or exchange control law.[23] Equally (as with the case we are considering) a contract to break foreign penal, revenue or public laws may not be enforceable.[24] Although some old cases, and

16 [1939] AC 277.

17 See, *eg,* Dicey and Morris, *Conflict of Laws* (12th ed, 1993), vol 1, Rule 3.

18 *Private International Law* (2nd ed, 1950), at 175.

19 *Conflict of Laws* (2nd ed, 1960), vol 2, at 585-586.

20 Mr Neil Lawson QC, subsequently Lawson J.

21 *Supra*, note 7, at 306.

22 See Baade, *International Encyclopedia of Comparative Law*, vol III, Chap XII, "Operation of Foreign Public Law", at 19 *et seq.*

23 See in general Mann, 1971 I *Hague Recueil* at 176 *et seq* and Chap VI. The case usually cited is *Kahler* v *Midland Bank Ltd.* [1950] AC 24; though this is itself criticised – see Mann, *The Legal Aspect of Money* (5th ed, 1992), at 422 *et seq:* "leading if disastrous case" (at 422).

24 See *KPMG Peat Marwick* v *Davison* (1996) 104 ILR 526, at 536 (Court of Appeal of New Zealand).

some legal systems, have toyed with the idea that foreign public, especially revenue, laws cannot be taken account of at all, this is now regarded as unacceptable.

The third point, the unusual nature of the doctrine internationally (at any rate as things stood some years back) leads to more general assessment of its merits. Before dealing with these, it is appropriate point out that there are a considerable number of uncertainties surrounding its scope. Many of them were vented, but in fact few solved, in the *Royal Boskalis* case.[25] The doctrine, and the case of *Foster* v *Driscoll* itself, are frequently, including in Singapore, cited without success. Here are some of the uncertainties:

1. Does the contract have to involve something illegal being done actually *in* the foreign country? Statements that it does are not uncommon: indeed that is what Viscount Simonds says more than once in *Regazzoni* v *Sethia*,[26] and *Foster* v *Driscoll* itself would have in the end involved the importation of the whisky into the United States if the plan had succeeded.

   If it does, is the doctrine a manifestation of another, and much more doubtful rule, that of *Ralli Brothers* v *Compania Naviera Sota y Aznar*[27] which is regularly cited for the proposition that English law will not enforce a contract so far as performance of it is illegal by the law of the country where the contract is to be performed (*lex loci solutionis*)? There is high authority that they are connected: for example that of Viscount Simonds in *Regazzoni* v *Sethia*,[28] who was prepared to decide the case on that basis alone; and, with more care, Robert Goff J (as he then was) at first instance in *Toprak Mahsulleri Ofisi* v *Finagrain*,[29] who said that they both "spring from the root principle of comity".

[25] *Supra*, notes 14, 15.
[26] *Supra*, note 7, at 317, 318, 320.
[27] [1920] 2 KB 287.
[28] See esp *supra*, note 7, at 322 ("precisely covered by the decision in *Ralli Brothers*"). But in the Court of Appeal Denning LJ had been clear that the case could not be brought within the *Ralli* doctrine because nothing in the contract required performance in India: [1956] 2 QB 490, at 514. Perhaps this was what moved Viscount Simonds (rather imprudently) to assert the contrary so vigorously.
[29] [1979] 2 Lloyd's Rep 98, at 107.

Despite such authoritative statements that the contract must involve an act performed in the foreign country, no doubt related to the international principle of the territoriality of law, it seems fairly clear that it need not in fact do so. The contract in *Foster* v *Driscoll* may have *led* to acts within the United States, but the conspirators need never have gone there: in fact it is not clear that any of them did, and the whisky never left Scotland. (It was in fact this reason that led Scrutton LJ to dissent and refuse to decide the case on the basis of illegality.) It is not clear in *Regazzoni* v *Sethia* that any illegal act was committed in India at all: the goods were simply shipped from India to Genoa under a sale cif Genoa. As Denning LJ said in the Court of Appeal,[30] the seller might easily have bought goods afloat and out of Indian territorial waters. The *Patriot* case in Singapore[31] involved operations in Singapore to deceive customs authorities in Indonesia as to the value of imports: the scheme would have taken effect in Indonesia, but the activities disapproved of were outside that country. Under international law states not only have territorial jurisdiction, but also (probably) jurisdiction over their own subjects inside and outside the territory, and there may be cases where a contract to break a law legitimately attaching to the subject of a foreign state outside that state should not be enforceable. Suppose I enter into a contract with a foreigner that I will visit him in his country and that he will provide money there for my visit. I shall then repay him in cash in my own country. This may be contrary to exchange control regulations in his country as preventing the import, or achieving the export, of foreign currency. Yet nothing illegal might actually be done in his country. Surely this should in appropriate cases be covered by the doctrine of *Foster* v *Driscoll*.

It seems then that the contract need not involve an act actually done *in* the foreign country, though it is likely to have effect there and be contrary to laws of that country which have legitimate territorial or (perhaps) personal effect. If this is so, it becomes difficult to maintain any connection with *Ralli's* case, which requires illegality by the law of the actual place of performance. The doctrine said to be derived from that case is in any case doubtful: to this I shall return. But if this wider scope for *Foster* v *Driscoll* is agreed it then raises the question, how much connection with the foreign

[30] [1956] 2 QB 490, at 514.
[31] *Supra*, note 10.

country *is* required? There is obviously a limit to the idea, as is shown by various cases concerning contracts of sale, affreightment or insurance preparatory to smuggling, which were held enforceable;[32] and a famous case where an Ontario court enforced a contract to lease a warehouse on the Canadian side of the Detroit River for storing liquor, which was then collected by American vessels.[33] There are also cases on attempts by the United States to impose extraterritorial embargoes, which have not usually been enforced.

2. Next come a series of questions concerning privity to the design. Is it necessary that the parties *conspire* to break the foreign law? or even further, must they intend to *profit* from doing so? Some dicta suggest these, though the second requirement seems to go too far. Or is it sufficient if they agree to do something that unknown to them is illegal under a foreign law having the requisite connection with the facts? It is probably not sufficient: more than one judge, including recently Selvam JC in Singapore[34] and Rix J in London in the *Royal Boskalis* case[35] has said that the presumption as to knowledge of the law does not apply to foreign law (though it is not clear that "unknowing illegality" cases are in fact all based on that presumption). More difficult, what if the parties know the law but are unaware that they are as a matter of fact breaking it, for example because they do not know that packages transported under the contract actually contain forbidden goods? Again, what if one party intends breach of the foreign law, but the other is completely innocent? This question also was argued in the *Royal Boskalis* case. Although such a contract might still be unenforceable in domestic law in such a situation, it is difficult to believe that this internationally oriented doctrine should be extended thus far.

   Another variant is this. The contract is completely innocent, but when it comes to performance, it transpires that it cannot be performed except illegally. Something like this occurred in *Howard* v *Shirlstar Container Transport Ltd*,[36] where a pilot was hired to recover an aircraft detained in Nigeria. When he got there, it became impossible to leave except by breaking aviation laws by

[32] *Eg, Holman* v *Johnson* (1775) 1 Cowp 341; *Pellecat* v *Angell* (1835) 2 CrM & R 311.
[33] *Westgate* v *Harris* [1929] 4 DLR 643.
[34] In the *Soetanto* case, *supra*, note 11, at 410.
[35] *Supra*, note 14.
[36] [1990] 1 WLR 1292.

taking off without authorisation, and this he did (subsequently flying at a height of 15 to 20 feet above the water to avoid heat-seeking missiles from Nigerian MIG aircraft). Having escaped to the Ivory Coast (where the aircraft was in fact impounded) he succeeded, on the terms of the contract, in a claim for his fee. His employer may well have been unaware of the illegality: but removing one problem by assuming that the employer knew of it, does the illegality in performance attract the same rule? Although there is a dictum in *Libyan Arab Foreign Bank* v *Bankers Trust*[37] that it may not, it is arguable that it ought to do so, provided the illegality is participated in by both parties.

3. The scope of the restriction also requires attention. Granted that a contract of the stipulated type cannot be *enforced*, *ie*, that a party cannot sue for breach (or even less, specific performance) of it, if it aborts, can a party sue for money paid, or reclaim property? In domestic English, and I think Singaporean, law, the answer is no if the illegality must be relied on to establish the cause of action (obviously a far from simple, and indeed controversial, principle), and this usually bars at least an action for money paid. There are two narrow exceptions (class-protecting statutes and repentance of the illegal purpose).[38] These are domestic rules. Do they apply to this doctrine? If it is a rule of the conflict of laws there is no reason why they should: there may be special rules.

4. One must next ask what sort of illegality is involved. It would be simplest if the act needs to be criminal, and there are suggestions to this effect. Although in the *Regazzoni* case Lord Somervell of Harrow said that there should be no difference between criminal offences,[39] some degree of seriousness must also be required: a conspiracy to break parking regulations in a foreign state would hardly attract such reasoning. So perhaps the act involved must be a specimen of an internationally recognised type of serious criminal wrong, though by such distinctions we are at once seriously losing precision and predictability. Further, we should probably be willing also to think in terms of the doctrine applying to a

[37] [1989] QB 728, at 745 *per* Staughton J.
[38] See in general Chitty, *Contracts* (27th ed, 1994), vol 1, ss 16-139 *et seq.*
[39] *Supra*, note 7, at 317, 318.

breach of foreign public policy if that concerns something internationally recognised as undesirable, a *malum in se*. For example, actual bribery is a *malum in se*: but lesser situations of influence may create problems of degree, as is shown by the *Lemenda* and *Shaikh Faisal* cases.[40]

5. It is also frequently said (for example by Viscount Simonds in *Regazzoni* v *Sethia*)[41] that the laws (or policy) contravened must be those of a *friendly* foreign state. Soviet copyright law received short shrift in the Solzhenitsyn case *Bodley Head Ltd* v *Flegon,*[42] and German cases have upheld commissions for enabling persons to escape across the Berlin wall (though it is said that there were earlier cases where persons who hired others to smuggle their effects out of Germany in the 1930s successfully relied on the principle of illegality to retain what they had brought out).[43] But how does one tell a friendly state, other than by excluding states with which one is at war?

Now, if we can determine the true juristic basis of this doctrine we might have a guiding light for answering some of the uncertainties to which I have referred. It seems that there are four possibilities which should be considered.

The first is that the doctrine is one of domestic English – here, Singaporean – law. I put "English" first because the two leading cases of *Foster* and *Regazzoni* relate to contracts certainly governed by English law, as does *Lemenda*. No element of the conflict of laws is necessary: this could be a category of domestic public policy only applicable to domestic contracts. Indeed, the cases are usually discussed in books on the English law of contract, which, if they relate to a conflict of laws rule, they arguably should not be.

It seems fairly clear that the rule actually did originate as a rule of English law, *ie,* that *Foster* v *Driscoll* was a case on domestic English law; and that it remains a domestic rule relating to illegal contracts even if it also has also acquired a conflict of laws significance. The cases mention, for example, the domestic case of *Pearce* v *Brooks*,[44] where a person who built

[40] *Supra*, notes 9 and 12.
[41] *Supra*, note 7, at 317, 318.
[42] [1972] 1 WLR 680.
[43] See Mann, *Foreign Affairs in English Courts* (1986), at 156-157.
[44] (1866) LR 1 Ex 213.

a miniature carriage of an intriguing nature for a prostitute to use for professional purposes was held unable to sue on the contract. If this were so, the rule could safely assume a much vaguer character, and for example the problem about the meaning of "friendly state" might not need such principled solution as would be desirable for an international rule. But the *Foster* v *Driscoll* rule has for a considerable time been stated to be a rule of the conflict of laws, applicable whatever law governs the contract itself: and though Lord Reid made an equivocal statement on the point in *Regazzoni* v *Sethia*,[45] it has recently been said in England, both at first instance and in the Court of Appeal in the *Royal Boskalis* case,[46] that that is so.

The second possibility, then, is that the doctrine is (now) an overriding one of public policy in the conflict of laws sense, which the forum will apply to transactions before it regardless of their governing or proper law. This seems, as I have just stated, to be the received view. But it is still a vague one: one may ask, What is its basis? The reason most frequently given is "comity": Viscount Simonds in *Regazzoni* said that "public policy demands that deference to international comity",[47] and Lawrence LJ said in *Foster* v *Driscoll* that the enforcement of such a contract "would form a just cause for complaint by the United States Government".[48] But this is a vague criterion indeed. Dr EJ Cohn, appearing as junior counsel in *Regazzoni*, said:

> "The English courts have often made rash asssumptions about the usage of nations. For instance, they have assumed that, by the usage of nations, judgments are enforced reciprocally by other nations, but this makes very strange reading for anyone who has ever tried to enforce an English judgment abroad."[49]

And Dr FA Mann wrote that "comity" either refers to nothing more than imprecise notions of courtesy, such as the courtesies which ships observe when they salute each other at sea; or else it is meaningless; or it refers to public international law.[50] If the latter, it is the notions of that discipline which should be invoked. *Oppenheim* is to similar effect:

[45] *Supra*, note 7, at 323 ("The real question is one of public policy in English law: but in considering this question we must have in mind the background of international law and international relationships often referred to as the comity of nations").
[46] See [1997] 2 All ER 929, at 956 *per* Pill LJ.
[47] *Supra*, note 7, at 319.
[48] *Supra*, note 2, at 510.
[49] *Supra*, note 7, at 312. His whole argument as reported is of great interest.
[50] See *supra*, note 43, Ch 7, at 134.

> "English and American courts often refer to 'international comity' in situations to which there ought more properly to be applied the term 'international law'. It is probable that many a present rule of international comity will in future become one of international law."[51]

I shall return to this point in a moment. It is next, however, appropriate to refer to another, and fairly new, approach to the problem: the doctrine of "special connection".[52] This is an example of (rather extreme) *dépeçage* (the conflict of laws technique of splitting off of issues within a major topic so as to apply different laws to them), and is often traced to a decision of the Dutch Supreme Court in 1966, the *Alnati* case. In that case the Dutch court, in a dispute on a bill of lading governed by Dutch law, refused to give effect to the law applicable at the port of loading (in Belgium), but said that there might be cases where it would do so:

> "It may occur that compliance, also outside the territory of a foreign state with provisions emanating from that state, involves such important interests of the state in question that the Netherlands judiciary too has to take them into consideration and, therefore, shall have to apply such provisions in preference to the law chosen by the parties and emanating from some other state."[53]

This doctrine is incorporated into the EC Convention on the Law Applicable to Contractual Obligations (the Rome Convention)[54] in Article 7(1):

> "...effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract."

This was a provision to which states were entitled to make a reservation, and the United Kingdom and Germany did, the United Kingdom on the basis that the provision would produce intolerable uncertainty. On the whole the doctrine has not been successful and seems to have been rejected much more than it has been used, usually in connection with United States embargoes

[51] *International Law* (9th ed, 1992 by Sir Robert Jennings and Sir Arthur Watts), vol 1, at 51.
[52] See Baade, *International Encyclopedia of Comparative Law*, Vol III, Chap 12 "Operation of Foreign Public Law", at 31 *et seq*.
[53] Cited by Baade, *ibid,* at 32.
[54] Applicable in the United Kingdom by virtue of the Contracts (Applicable Law) Act 1990.

on particular countries (Libya, Iran) that purport to affect persons acting in third countries. Thus in the *Sensor* case of 1982 a Dutch court enforced a contract by the Dutch subsidiary of an American company to deliver goods in violation of an American "Siberian pipelines" embargo;[55] and untrammelled by the doctrine, English courts have held London branches of American banks liable to repay money to Libyan Bank depositors despite prohibitions on the other side of the Atlantic.[56] The doctrine seems needlessly imprecise and in fact dangerous. Overall, says Professor Baade,

> "It is believed that the 'special connection' doctrine is viable only where it accurately expresses genuine international agreement on a specific substantive result to be achieved irrespective of nationally different choice-of-law rules."[57]

and he cites the Bretton Woods agreement on exchange control as an example, but one specifically agreed upon internationally. I say no more about it.

This leads naturally, then, to the fourth and last possibility, that the basis of the rule should be sought in public international law, or at least in the common understandings of nations. Dr Lawrence Collins QC, the General Editor of *Dicey and Morris*, in a lecture given at King's College London (to which I owe my interest in the facts of *Foster* v *Driscoll* and in this topic) pointed out that (at any rate) "English judges (and the English legal profession in general) are uncomfortable with international law."[58] The inference was that this should not be so. Indeed, few common lawyers have been familiar with both public and private international law: exceptions are the late Dr FA Mann and Dr Collins himself.

It is however not clear what help public international law can give. There have certainly been views put forward, notably by Niboyet,[59] that some sort of international *ordre public* can be identified. But exactly what is to be identified is more difficult. No doubt states are under an international duty not to conduct activities that are subversive or destabilising of other states; or infringe the territorial or personal authority of other states.[60] It

55 See Baade, *supra*, note 52, at 36.
56 *Eg*, the *Libyan Arab Foreign Bank* case, *supra*, note 37.
57 *Supra*, note 52, at 37.
58 The Graveson Memorial Lecture, 1995: (1995-6) 6 King's College Law Journal 20.
59 *Répertoire de Droit International*, vol 10 (1931), "Ordre public", Chap V. See also Batiffol and Lagarde, *Traité de Droit International Privé* (8th ed, 1993), s 365 and material cited.
60 See Oppenheim, *supra*, note 51,vol 1, ss117-119, 122; *De Wutz* v *Hendricks* (1824) 2 Bing 314, at 315-316.

may then be that the courts of one state should not enforce contracts which intend, or have the result of, such subversion or destabilising, *eg,* contracts to employ mercenaries to create insurrections.[61] But if one seeks to go further, it appears that any doctrine of public international law that may exist or be evolving is actually based on private international law, *ie*, conflict of laws, cases such as those which I am discussing; that is to say, there is no external touchstone, but rather, the cases as they evolve can be explained as themselves generating a principle, or at least category, of public international law, a category which cannot be demonstrated already to exist independently of them.[62]

To assist in developing a rule of public international law, we may ask, Can one list any categories of such disregard for other states where such doctrine is or could be applied? The following can be mentioned:

1. Smuggling for the purpose of evasion of revenue laws;

2. Tax evasion (false invoices and declarations: also a revenue matter, but more general and not necessarily involving an act in the foreign state);

3. Evasion or contravention of exchange control (which may take place outside the country concerned);

4. Smuggling of forbidden items and substances, *eg*, drugs, alcohol (in the latter case evasion of tax may also be involved, but where alcohol is forbidden this may also be based on health or religion), or parts of the natural or cultural heritage (ivory, antiques);

5. Bribery and corruption generally;

6. (possibly) Futures contracts and the like, which may be regarded as wagers, or (at present, it seems) generally undesirable in some countries;

7. Money laundering (usually associated with one of the above categories).

[61] *Eg, De Wutz* v *Hendricks, ibid*, (raising loan for Greeks against Sublime Porte (Ottoman Empire)).

[62] See Oppenheim, *supra*, note 51, vol 1, para 17.

As to smuggling, although older cases (including some on contracts preparatory to smuggling into England) were lenient, or saw no reason to protect revenue laws, and might even argue that foreign customs laws were by definition prejudicial to the exporting country, with the result that it need not recognise them, later decisions (among which *Foster* v *Driscoll* is a leader) took a different view. Rabel[63] suggested that there is a "conviction that organised smuggling violates good morals and undermines the mores of the population along the frontiers."

Since smuggling usually involves tax evasion, it is not surprising that contracts to evade other tax laws of other countries have been regarded as unenforceable if both parties are sufficiently implicated in such a plan: this must be the assumption behind some of the Singapore cases touching on Malaysian and Indonesian tax, though the requisite conspiratorial element was not found.

Exchange control is a sufficiently agreed international purpose to have generated an international agreement, the Bretton Woods agreement; and it may be assumed that even though a contract is not caught by this, a contract sufficiently clearly directed to the evasion of the exchange control regulations of another country would be unenforceable. It is in fact smuggling of money.

No one seems to have queried the legitimacy of the prohibition laws of the United States, and their acceptance elsewhere has been justified on the grounds of public health, a justification that would certainly be applicable also to laws against the smuggling of drugs. Where however opposition is religious based, as in the case of alcohol in some Muslim countries, the answer is not so obvious. Freedom of religion is an international value and it would probably be difficult to refuse recognition to laws prohibiting alcohol for religious reasons. The question of the import of laws prohibiting bibles, prayer books and the like, would however raise much more sensitive issues, since the importer also would rely on the value of religious freedom. Niboyet for one thought that such laws were contrary to his international *ordre public*.[64] But restrictions on the export of parts of the natural or cultural heritage may well deserve international recognition, as was accorded in a famous German decision of 1972, in which a contract of insurance of

[63] *Conflict of Laws* (2nd ed,1960), vol 2, at 587-588.

[64] See *supra*, note 59, Chap V. See also Dolinger, "World Public Policy: Real International Public Policy in the Conflict of Laws" (1982) 17 Texas Int Law J 167. Perhaps there is a difference between material required by an existing minority and material for the purposes of aggressive, and conceivably destablising, proselytising.

works of art exported from Nigeria in breach of Nigerian law was not enforced. The court said "The exportation of cultural possessions prohibited by the country of origin is unworthy of legal protection."[65]

As to bribery and corruption, in its clearest and most extreme form it is difficult to see that any nation can support this in its own country or elsewhere. As long ago as 1880 the Supreme Court of the United States refused enforcement of an action by the Turkish Consul General for a commission earned by promoting sales of Winchester rifles to his government.[66] Whatever that government may have thought, said the court, "the services stipulated and rendered were prohibited by considerations of morality and policy which should prevail at all times and in all countries."[67] More recently, the well known Swedish arbitrator Mr Lagergren declined jurisdiction over a claim for commission under a contract governed by Argentine law on the basis that a large part of it was to be used for bribes, holding that the contract involved "such gross violations of good morals and international public policy" that it could "have no countenance in any court either in the Argentine or in France[68] or, for that matter, in any civilised country." "Such corruption" he wrote "is an international evil, it is contrary to good morals and to an international public policy common to the community of nations."[69]

To use this as a reason for actually declining jurisdiction is quite extreme: it could be said that what was involved was a matter of the substantive enforceability of the contract. It can also be said that international arbitrators, having in a sense no *lex fori*, and having an eye to enforceability of their awards, may take positions on public policy which a court might find it difficult to adopt. The matter is certainly a difficult one of degree: different parts of the law may take different positions.[70] Bribes and similar payments seem to be common in international commerce, and it appears that they have been paid by companies with most revered names. Money laid out

65 *BGHZ* 59, 82 (22 June 1972): see account in Mann, *Further Studies in International Law* (1990) at 159-160.

66 *Oscanyan* v *Winchester Repeating Arms Co* (1880) 103 US 261.

67 *Ibid*, at 271-272.

68 This reference is presumably because as an ICC arbitrator he was sitting in Paris.

69 ICC Case No 1110/1963, cited in Lew, *Applicable Law in International Commercial Arbitration* (1978), at 533 *et seq.* I am grateful to Professor M Sornarajah for drawing my attention to this decision.

70 See a valuable discussion by Oppetit, "Le paradoxe de la corruption a l'épreuve du droit du commerce international" ("The Paradox of Corruption against the Background of International Commercial Law"), *Clunet* 1987, 5.

in such payments may be treated as a legitimate company expense,[71] and as a permissible tax deduction, in developed countries. In some cases officials may not draw much by way of salary and be expected to levy a quasi-legitimate charge on those who deal through them. On the other hand, it is common for countries simply to prohibit, or at any rate discourage, the use of agents in the preparation or submission of bids or the obtaining of contracts, and this suggests some sort of anti-curruption policy for such places. In the *Lemenda* case in England[72] Phillips J. was therefore prudent[73] in looking both to English public policy and to that of Qatar before holding an action for commission for services performed there under a contract governed by English law and certainly involving the exercise of influence in Qatar not maintainable. But in the *Shaikh Faisal* case in Singapore[74] (where the *Ralli* principle was in fact considered first), the prohibition by the law of the United Arab Emirates was not so clear, and Chao Hick Tin J. cited in our present context a dictum of Asquith LJ requiring that "the contract is incontestably and on any view inimical to the public interest",[75] which on the facts was not so. A similar American case of 1987 looked for public policy that is "well defined and dominant."[76]

Both export of cultural possessions and bribery are referred to by Baade as examples of what he calls "soft" international law,[77] *ie*, precepts, often emerging from specialist UN organisations, *eg,* UNESCO, which do not lay down specific directly enforceable international obligations but limit themselves to setting out standards of conduct, which may sometimes harden into actual rules of international law.

Problems relating to futures contracts entered into outside, but having effect in, countries where they are illegal are for the future; and money laundering is a subject requiring international agreement.

To generalise on the basis of the above specific instances are however far from easy, and discussions in books usually fall back on statements such as that of Mann,

[71] But see *E Hannibal & Co* v *Frost* (1988) 4 BCC 3 (no authority to draw company money for bribes).

[72] *Supra*, note 9. As to Qatar see further *Sedco International SA* v *Cory* 522 F Supp 254, at 317-321 (1954).

[73] Despite the comment of Collier, [1988] CLJ169, at 171. A similar investigation and decision, in facts involving France and Iran, was given in ICC No 3916/1982, *Clunet* 1984, 930.

[74] *Supra*, note 12.

[75] In *Monkland* v *Jack Barclay Ltd* [1951] 2 KB 252, at 265.

[76] *Northrop Corporation* v *Triad International Marketing SA* 811 F 2d 1265, 1271 (9th Cir,1987). See further Batiffol and Lagarde, *supra*, note 59 at 588 and material cited.

[77] *Supra*, note 52, at 13-14.

> "The legal conscience is shocked by the openly proclaimed and encouraged disregard of a foreign legal order."[78]

or earlier of Rabel,

> "Probably, we have to be satisfied in the near future with a prudent expansion of the idea that violation of foreign law may be immoral."[79]

or of Story,[80] who wrote much earlier than either:

> "Indeed, a broader principle might be adopted, and it is to be regretted that it has not been universally adopted by all nations, in respect to foreign contracts, as it has been in respect to domestic contracts, that no man ought to be heard in a court of law to enforce a contract founded in, or arising out of moral or political turpitude, or in fraud of the just rights of any foreign nation whatsoever."

Now, all this vagueness may make it seem that there is no advantage in seeking recourse to any general principles of international law; and it may then be arguable that the rule would be better left as a rule of (in Singapore) overriding Singapore public policy, to be applied whatever law governs the contract, but as and when the court thinks fit in accordance with the perceived needs and aspirations of the country at the time. But public international law seeks to effect a reconciliation of the different needs and aspirations of sovereign states, and it would surely be better if the policy to be applied under the rubric of *Foster* v *Driscoll* had some general international justification or strategy to it.

There is furthermore another advantage of having recourse to, or at least seeking to establish, more general doctrine. It is that one is thereby spared the subjective problem of identifying friendly states. The necessity for doing this was one of the problems in the famous *Spycatcher* case concerning intelligence secrets of foreign governments. The New Zealand Court of Appeal[81] accepted the necessity of deciding whether a foreign government was friendly or not, saying that its own government could "unlock the door" for the court: but the High Court of Australia fell back on a more general, but imprecise, rule of non-enforcement of foreign laws with governmental

[78] 1971 I Hague *Recueil des Cours* at 196.
[79] *Conflict of Laws* (2nd ed,1960), vol 2, at 590.
[80] *Conflict of Laws* (2nd ed,1841), s 245.
[81] *Att-Gen for UK* v *Wellington Newspapers Ltd* [1988] 1 NZLR 129.

content.[82] If one bases the doctrine of *Foster* v *Driscoll* on international doctrines, one can identify particular *laws* which should not be protected in this context, rather than *states none* of whose laws rank for protection: this seems better. This then provides us with a technique for enforcing contracts to provide assistance in escaping over the Berlin Wall and so forth: the foreign law broken may itself constitute or be part of[83] an international wrong.[84] An argument on such a basis was in fact put forward in *Regazzoni* v *Sethia*, where it was suggested that the Indian law, though of a friendly state, was hostile to another friendly state: indeed, in the dispute between India and South Africa the United Nations found against India. The argument was rejected by the House of Lords without any reasons: perhaps it should have had more attention.[85]

If the view which I have advanced as to the basis of the *Foster* v *Driscoll* doctrine, that it should be attributed to international law and values, is formally adopted, it may provide guidance in some of the uncertain situations to which I have already referred. I have already suggested that it is not necessary for the act contemplated actually to occur in the foreign country. It is however surely necessary that both parties intend the breach of the foreign law, even if one does more than the other to carry it out: as Dr Mann said,

> "it is the collusion between the contracting parties, their common wicked intention which is internationally unaceptable."[86]

I return now to the remainder of the questions I mentioned earlier. If the parties are not aware of the foreign law, I submit that the contract is not sufficiently objectionable to prevent actions on it under this doctrine. The same should probably be the case where the foreign law is known, but the facts making the act illegal are not. What is not enforced must be something like a conspiracy, though it should not be necessary to go further and say that either or both parties seek to make a profit from the breach of the foreign rule. As to illegal performance, I submit that if the contract is unobjectionable but parties agree to perform it in a way that would, if

[82] *Att-Gen (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

[83] See *supra,* note 43, at 156-157.

[84] See in general Mann, "Consequences of an International Wrong" in *Further Studies in International Law* (1990), at 155 *et seq* and Chap VI, esp at 167; also "International Delinquencies before Municipal Courts", in *Studies in International Law* (1973), Chap X.

[85] See Mann (1958) 21 MLR 130, at 133; *Further Studies in International Law* (1990), at 161-163.

[86] *Supra,* note 43, at 156.

it were planned from the beginning, make the contract unenforceable, that also could be sufficient to attract the doctrine. As to the nature of the turpitude required, the contravention need not be a crime; further, it even seems that some minor crimes may not attract the doctrine. But an infringement of foreign policy must be of a policy that is internationally agreed, such as that against corruption; or at least agreed in all relevant states. As to friendly and unfriendly states, except in the case of war, it is should not be necessary to inquire whether the state is a friendly one; but some foreign laws can be refused protection on the basis of general values to be found in public international law.

Finally, as to the type of legal suit to which assistance will not be given, it seems only possible to say that in the absence of further guidance, the Singapore or English rules as to other actions in respect of such contracts – actions to set aside – should be followed as policy of the forum. Indeed, *Foster* v *Driscoll* itself involves in part such an action (to rescind a contract): the court basically said that it would have no part in adjusting disputes arising in the performance of an illegal partnership, including rescinding of the transaction. It is in fact difficult to see what other source there could be for rules applicable to this situation. This is not however to foreclose creative development on the facts. The English common law rules are regularly said to be too blunt and restrictive; the New Zealand Illegal Contracts Act 1970 confers a useful discretion upon the court. In a well-known case of 1973 the Federal Court of Switzerland allowed recovery from an agent of money given to him for the purposes of bribery in connection with a contract in Nigeria which was not used for that purpose.[87] Although the matter is conditioned by statute, there were similar relaxations in English law in respect of money paid for wagering;[88] and in respect of bribes, at least, there may be room for flexibility.

Bearing in mind the extreme dangers of trying to be specific in such a loose context, one might then hazard that the requirements of the *Foster* v *Driscoll* doctrine should be somewhat as follows:

(1) a contract in respect of which both parties intend the breach of the laws or policy of another state than the forum or that of the governing law, or accept (whether from the outset or at some point during performance) that the effect will necessarily follow;

[87] TF 27 November 1973, JT 1974 634.
[88] See Chitty, *Contracts* (27th ed, 1994), vol 2, ss 38-029 *et seq*.

(2) the act or acts required by which contract need not be performed within that foreign state, but nevertheless create effects within it contrary to its law or policy,[89] or (perhaps) contravene with the same effect laws and policies of that other state applicable outside that state to its own nationals;

(3) these facts and these laws or policy being known to both parties to the contract;[90]

(4) the contract involving an act or acts in furtherance, promotion or facilitation of the scheme and not being merely preparatory to activity of the sort referred to above;[91]

nor constituting an independent transaction operative after the transaction objected to;[92]

and (5) the laws or policy concerned being such as relate to a serious wrong that is an accepted *malum in se* or a policy internationally recognised and accepted,[93] or at least accepted in the relevant countries;

(6) and hence are not based on motives or objectives, or effected by techniques, that are contrary to international law or, more generally, internationally regarded as wrong.[94]

Such a contract is not enforceable, whether specifically or by an action for damages, whatever its governing law; and nor (probably) will the court

89 *Regazzoni* v *Sethia, supra,* note 7; but it is submitted below that the actual decision is doubtful.

90 "It is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance": *Waugh* v *Morris* (1873) LR 8 QB 202, at 208 *per* Blackburn J.

91 *Holman* v *Johnson* (1775) 1 Cowp 341 (sale of goods in Dunkirk for illegal import into the United Kingdom); *cf Biggs* v *Lawrence* (1789) 3 Term Rep 454 (goods packed for smuggling from Guernsey to England); *Graves* v *Johnson* 30 NE 818 (1892) (liquor for resale in prohibition state); *International Aircraft Sales* v *Betancourt* 582 SW2d 632, 635 (goods packed for smuggling into Mexico). Reasoning under this head would fit with *Euro-Diam Ltd* v *Bathurst* [1990] 1 QB1 (insurance policy on goods accompanied by false invoice for customs purposes, enforceable).

92 See *Armstrong* v *Toler* 11 Wheat 258 (1826) (Marshall CJ: promise to pay duty on arms illegally imported enforceable); Story, *Conflict of Laws* (2nd ed, 1841), at paras 248-249.

93 See, *eg*, Mann, *Further Studies in International Law* (1990), at 155 *et seq*; Baade, *supra*, note 52, at 14.

94 See, *eg,* Mann, *supra,* note 43, at 156-157.

grant other relief in respect of it where the contract forms an essential basis of the claim made.[95]

On this basis *Regazzoni* v *Sethia* must be regarded as doubtful on its facts, since, as Lord Denning said, the contract could in fact have been performed by buying goods outside India and there was no requirement that the goods shipped to Genoa be there resold for South Africa. As Mann said,[96] "The decision rests of a singularly cursory analysis of the facts and since its promulgation has not gained in persuasiveness."

It must however be admitted that these are vague indications only: small wonder that in *Libyan Arab Foreign Bank* v *Bankers Trust*[97] Staughton J said that "mercifully" he had not been referred to *Foster* v *Driscoll*.

I turn finally to the interconnection with the supposed doctrine of *Ralli* v *Compania Naviera.*[98] Here it is possible to be surer of one's ground. As already stated, the doctrine is to the effect that a contract the performance of which is illegal by the law of the place of performance will not be enforced in the forum whatever the governing law of that contract. It has been condemned by virtually all academic commentators, yet is constantly reaffirmed in passing by judicial dicta which have a long-running snowball effect.

Historically there can be no doubt that the *Foster* v *Driscoll* doctrine was regarded as connected with *Ralli*'s case, which had been decided 8 years earlier. Scrutton LJ sat in both. But *Ralli*'s case antedated the current unitary notion of the proper law of a contract which is to be derived from decisions such as *R* v *International Trustee*[99] in 1937 and the *Vita Food* case of 1939.[100] By modern ideas it attributed too much significance to the law of the place of performance. Indeed, in *Foster* v *Driscoll* Warrington LJ cited[101] a passage from the 1908 edition of *Dicey* referring to an actual presumption that the proper law of a contract was in certain situations be the law of the place of performance.[102] Such reasoning has since been

[95] *Eg, Foster* v *Driscoll, supra*, note 2, itself: but see accompanying main text to *supra*, notes 86, 87.

[96] *The Legal Aspect of Money* (5th ed, 1992), at 406, note 49. See further other criticism listed at *supra*, note 7.

[97] [1989] QB 728, at 745.

[98] [1920] 2 KB 287.

[99] [1937] AC 500 (but *cf* on this point at 574).

[100] [1939] AC 277.

[101] [1920] 2 KB at 295.

[102] Reasoning attributing an excessive effect to the *lex loci solutionis* was still visible in the *Mount Albert* case [1938] AC 224 and was only finally disavowed in *Bonython* v *Commonwealth of Australia* [1951] AC 201. See further Kahn-Freund (1939) 3 MLR 158, at 160 ("The true basis of the *Ralli* rule is still in the dark").

displaced by the idea of one general law governing the contract, the law chosen by the parties expressly or impliedly.

Like *Foster* v *Driscoll, Ralli's* case concerned a contract governed by English law: but it was not a contract to do something illegal in another country, but a perfectly legal contract which would if performed according to its tenor have been affected by supervening illegality under the law of the place of performance.

What happened was that English charterers chartered a vessel to take cargo to Barcelona: part of the freight was unpaid and was to be paid by the bill of lading receivers (or failing them the charterers) at the unloading port. Spanish legislation fixed a maximum freight chargeable on vessels arriving in Spain, and imposed penalties on both those who received sums in excess of the permitted rate and those who paid them, so the receivers only paid the maximum sum exigible. That sum was lower than the contract freight. The shipowners sued the charterers in London for the remainder of the freight and it was held that this could not be recovered. The real basis of this decision was interepretation of the contract by English law. Scrutton LJ even said that there was an implied term that the freight would not exceed that which was legitimately payable at the place of payment, and drew attention to the relaxation of the old cases on strict liability which had occurred not long before.

The decision was also however justified on the basis of a much wider principle regarding illegality by the law of the place of performance (*lex loci solutionis*), and it was this that caught on.[103] But the case has very little similarity to the later facts of *Foster* v *Driscoll*, which involved a contract to smuggle. Although in the *Toprak* case Robert Goff J said that both doctrines "spring from the root principle of comity",[104] even disregarding the vagueness inherent in the supposed principle of comity I respectfully find it very difficult to see how a decision concerning an excuse for nonperformance of part of a duty to pay freight under a charterparty governed by English law springs from any principle that can plausibly be connected to international comity.

It is obviously unlikely that an English or Singapore court would actually by decree of specific performance order a party to do an act which would

[103] It also facilitated the distinguishing of *Jacobs* v *Credit Lyonnais* (1884) 12 QBD 589, where a contract for export from Algeria governed by English was not frustrated by difficulties of carrying it out, even though these would have been an excuse under French law. The export was not (apparently) illegal: just difficult. Falconbridge suggested that the decision on the point was inconsistent with the later decision in *Blackburn Bobbin Co Ltd* v *TW Allen & Sons Ltd* [1918] 2 KB 467.

[104] *Supra,* note 29.

be illegal by the law of the place at which it is to be done.[105] That may well be a rule of overriding policy of the forum, and in a common law country specific performance is discretionary anyway as a matter of procedure: it will be refused, for example, where the defendant cannot perform because he no longer owns the land of which conveyance might have been ordered. The law governing a contract may also accept such excuses for nonperformance in such cases as it thinks appropriate, and one of these may be the actual illegality of rendering the performance. Most legal systems would excuse a contracting party whose performance has become illegal by the law of the place where it is to be rendered. But if the law governing the contract regards the place of performance as being in a different location (and one where there is no illegality) from that designated by English law; or regards one party as promising to perform or pay damages, for example because he warrants that the act is or will be legal, why should not another forum accept a legal result based on such an analysis?[106] In *Kleinwort, Sons & Co* v *Ungarische Baumwolle Industrie AG*[107] du Parcq LJ (who spent some lines of his judgment relating that he had attended Professor Dicey's lectures, and that Dicey had said that one should emphasise rules rather than exceptions) considered the result of a promise to perform in a foreign country whatever the law of that country may say about the legality of the performance. He thought it unenforceable. Obviously such a promise could infringe, not the *Ralli*, but rather the *Foster* v *Driscoll* principle: but otherwise I suggest that otherwise it might amount to a perfectly legitimate warranty that performance would be rendered or damages paid, *ie,* that performance would be legal, or that the contract could be performed lawfully.

The similarity between *Ralli*'s case and *Foster* v *Driscoll* is indeed almost negligible. *Ralli* concerned an unexceptionable transaction followed by supervening laws of a regulatory nature which would have made something that no one tried to do illegal. *Foster* v *Driscoll* concerned a highly undesirable contract involving from the start potential illegality under the law of annother state: indeed one of the judges cited the case where one highwayman sued another for a share of expenses.[108] Despite various dicta, I have submitted that the principle of *Foster* v *Driscoll* does not require illegality at the place of performance, though this may well occur: it is wider. Finally, *Foster*

[105] *Eg, Frischke* v *Royal Bank of Canada* (1977) 80 DLR (3d) 393 (no order to disclose information from bank officers in Panama when such disclosure would be a breach of Panamanian law).

[106] See criticism in Mann, *Legal Aspect of Money* (5th ed, 1992), at 417-418.

[107] [1939] 2 KB 678.

[108] *Supra*, note 2, at 511.

v *Driscoll* attracts fundamental notions of international public order and of relations between states. *Ralli can* be related to some unnecessarily wide principles of illegality by the law of the place of performance, but in reality it simply concerns the question of who bears a loss caused by a change in the law. The principle on which it is in its present context said to be based, while difficult to gainsay in the abstract, is too wide for its context, and stems from thinking that is now outdated. It is also actually too narrow to support *Foster* v *Driscoll* and (even more clearly) *Regazzoni*.

I am far from the first commentator to say this. It was a commonplace of the 1940s, strongly stated by Mann, Falconbridge, Rabel and others.[109] Quite recently it has been reiterated in Singapore by Mr Toh Kian Sing,[110] and I have even said it myself on a previous occasion,[111] for what that is worth. But it is high time that casual references to this case on local control of freight rates were abandoned except where the reasoning is really relevant. Fortunately, we in England are (probably) spared it by the new formulations of the Rome Convention which we now have to use.[112]

All in all the main point I wish to put forward is that problems arising out of contracts involving corruption and/or illegality in other countries require to be addressed, in Singapore and elsewhere, by an articulate development of the doctrine of *Foster* v *Driscoll*, which is an overriding rule of policy that now requires to be related, not to woolly notions of comity, but rather to the notion of common international understandings – understandings which can and should be developed creatively amid the conditions of today.

At the same time I submit that a real effort should be made to separate off the principle of *Ralli's case*. Even if there is some principle of the conflict of laws to be derived from it, which I would dispute, it concerns discharge of contract in a particular place, and not contracts that by their purpose contravene international policy. The *Ralli* principle as currently formulated is beguiling because of its reasonable appearance; but it is too wide for its own case and too narrow for *Foster* v *Driscoll*. The misleading and unnecessary generality of Dicey's words of nearly 100 years ago and employed in the case has been superseded by more refined principles of the conflict of laws.

Both these cases are in different ways curious ones for the establishment of significant legal doctrine. To go further and run them together is to fudge

[109] See the list in Dicey and Morris, *supra,* note 6, at 1245, note 33.
[110] [1993] SJLS 214.
[111] (1992) 108 LQR 553.
[112] See Dicey and Morris, *supra*, note 6, at 1245-1247.

issues. We must treat them separately: and in current conditions development of a coherent philosophy behind *Foster* v *Driscoll* is becoming a priority. The "special connection" doctrine to which I referred some time back is a much more doubtful way of achieving such objectives: to pursue it is to chase a will o'the wisp. So, boosted by the imprecise reasoning in *Regazzoni* v *Sethia*, the curious assortment of the Member of Parliament, the two impecunious ship brokers (whose impecuniosity seems to have been the main reason the venture went wrong), the Scottish distiller and the retired schoolmaster with mysterious "special facilities" in New York, devising schemes, 70 years ago, relating to "wet goods for exportation", provided the starting point for something that in modern times definitely needs further attention.

FMB REYNOLDS*

* QC, DCL, FBA; Professor of Law, University of Oxford and Fellow of Worcester College, Oxford; David Marshall Visiting Professor, National University of Singapore, 1997.