Singapore Journal of Legal Studies
[2021] 254–266

BORDER PROBLEMS BETWEEN STATUTE, POLICY AND PRIVATE INTERNATIONAL LAW

The Star Entertainment QLD Ltd v Wong Yew Choy

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The enforcement of foreign gambling debts and related foreign judgments has long troubled Singapore law. Although courts generally agree that their enforcement through the common law conflict of laws rules should be refused, the legal doctrines and concepts they invoke to justify that conclusion—procedural characterisations, forum mandatory rules and public policy—are unsuited for that purpose. This note argues that the use of those doctrines and concepts sits at odds with their underlying purposes as well as a principled understanding of the broader relationship between common law, statute and policy in private disputes with foreign elements. A prohibition on the enforcement of foreign gambling debts, if desired, should therefore be secured through legislative tools rather than the continued contortion of existing common law rules.

I. INTRODUCTION

The borderland between the common law, statute law and public policy is a treacherous place for courts: there, conflicts abound between various norms of differing formal importance and practical relevance, ultimately implicating questions of normative authority and institutional competence among different organs of state, as well as concerns of internal consistency within a legal system. This is equally so when the common law rules in question are private international law rules. While courts have developed rules that determine when private international law's ordinary rules should give way to statute and policy, their proper application in difficult cases relies heavily on a principled understanding of the relationship between these sources of norms.

The law on the enforceability of foreign gambling debts[1] and related foreign judgments brings into stark contrast the challenges courts face in this difficult legal grey area. 15 years ago, Yeo Tiong Min argued that the contrasting decisions of *Star City Pty Ltd v Tan Hong Woon*[2] and *Liao Eng Kiat v Burswood Nominees*,[3] concerning the enforceability of such gambling debts and related judgments, created problems for three doctrines and concepts at the border between private international law, statute

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1 This term is defined in Part II.

2 [2002] 1 SLR(R) 306 (CA) [*Star City*].

3 [2004] 4 SLR(R) 690 (CA) [*Burswood Nominees*].

and policy: procedural characterisations, forum mandatory rules and public policy.[4] Unfortunately, while opportunities to address those problems arose subsequently in *Poh Soon Kiat v Desert Palace Inc*[5] and *The Star Entertainment QLD Ltd v Wong Yew Choy*,[6] courts left them unresolved. Instead, courts have continued to stretch these doctrines and concepts to justify the non-enforcement of foreign gambling debts and related foreign judgments, at the expense of neglecting their underlying principles and rationales. This note traces these developments, and argues that the doctrines and concepts which currently bar the enforcement of foreign gambling debts and related foreign judgments are principally unfit for those purposes, and should be substituted with legislative or regulatory tools better suited for the task.

II. Foreign Gambling Debts: an Overview

Gambling is heavily regulated in Singapore, and often criminalised outside Government-established avenues.[7] The *Betting Act*[8] and *Common Gaming Houses Act*[9] together criminalise the setting up and visiting of physical betting or gaming houses in Singapore. The *Remote Gambling Act 2014*[10] criminalises the setting up of online gambling services in Singapore, as well as the use in Singapore of online gambling services set up outside Singapore. However, the act of gambling at *physical* gaming houses *outside* Singapore is left untouched by criminal law.

Singapore's civil law also takes a generally prohibitive tone toward gambling. This is reflected in section 5 of the *Civil Law Act*,[11] which reads:

> (1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.
> (2) No action shall be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.

Section 5 clearly applies to disputes involving either gamblers in Singapore or gambling transactions governed by Singapore law: gambling contracts are void, and gambling debts are unenforceable. However, section 5's relevance to disputes involving gamblers who incur gambling debts at *physical* gaming houses *outside* Singapore, under agreements governed by *non*-Singaporean law—hereafter referred to as "foreign gambling debts"—is far less clear. It appears that section 5(1) is irrelevant,

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4 Yeo Tiong Min, "Statute and Public Policy in Private International Law: Gambling Contracts and Foreign Judgments" (2005) 9 SYBIL 133 [Yeo, "Gambling Contracts"]. See also Ebenezer Adodo, "Enforcement of Foreign Gambling Debts: Mapping the Worth of the Public Policy Defence" (2005) 1:2 J Priv Intl L 291.

5 [2010] 1 SLR 1129 (CA) [*Desert Palace*].

6 [2020] SGHC(I) 15 [*Star Entertainment*].

7 See *eg*, *Casino Control Act* (Cap 33A, 2007 Rev Ed Sing).

8 (Cap 21, 2011 Rev Ed Sing).

9 (Cap 49, 1985 Rev Ed Sing).

10 (No 34 of 2014, Sing).

11 (Cap 43, 1999 Rev Ed Sing).

applying only to gambling contracts governed by Singapore law.[12] Section 5(2), however, may potentially apply to bar proceedings to enforce foreign gambling debts and related foreign judgments, for three reasons. First, section 5(2) may be a procedural rule, applicable as part of the *lex fori*. Second, section 5(2) may be a forum mandatory statute, which ousts private international law's rules in proceedings to enforce foreign gambling debts. Third, section 5(2) and related legislation may evince the existence of a public policy which justifies an exception to private international law's processes. These three reasons recur throughout the reasoning employed in *Star City*, *Burswood Nominees*, *Desert Palace* and *Star Entertainment*.

In *Star City*, a New South Wales ("NSW") casino sued a gambler for gambling debts he incurred and dishonoured in NSW. Although the debts were governed by NSW law, the Court of Appeal nevertheless found them unenforceable, for three reasons. First, "[i]f [a] provision regulates proceedings rather than affects the existence of a legal right, it is a procedural provision."[13] Since section 5(2) affected the "enforceability" of a right rather than its "essential validity", it was procedural and applicable regardless of the governing law.[14] Second, courts should "not enforce a foreign cause of action that is contrary to local public policy."[15] In this regard, "what is objectionable is courts being used by casinos to enforce gambling debts",[16] because "[v]aluable court time and resources that can be better used elsewhere are wasted on the recovery of such unmeritorious claims."[17] Third, section 5(2)'s "clear and peremptory words. . . make clear that it is intended by the Legislature to be a forum mandatory provision which parties cannot avoid by contracting out of."[18]

Burswood Nominees, following shortly after, questioned the adequacy of public policy as the rationale for refusing the enforcement of foreign gambling debts. A Western Australian casino sought to enforce an Australian judgment against a gambler for debts incurred and dishonoured at its premises. The gambler argued that public policy precluded enforcement, and the Court of Appeal held that a "higher standard of public policy" applied in private international law disputes,[19] under which only foreign laws or judgments which "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"[20] should be denied recognition.[21] The Court then held that "gambling *per se* is not contrary to the public interest in Singapore", especially since "Singapore's societal attitudes towards gambling ha[d] evolved even further"—in

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12 *Star City*, *supra* note 2 at para 14.

13 *Ibid* at para 12.

14 *Ibid* at paras 12-14.

15 *Ibid* at para 28.

16 *Ibid* at para 31.

17 *Ibid* at para 31.

18 *Ibid* at para 29.

19 Although the parties' dispute utilised the registration process contained in the *Reciprocal Enforcement of Commonwealth Judgments Act* (Cap 264, 1985 Rev Ed Sing) ("RECJA"), and so implicated the public policy defence in section 3(2)(f) thereof, the Court of Appeal saw no distinction between this statutory public policy defence and the common law's; see *Burswood Nominees*, *supra* note 3 at paras 32, 41. For a criticism of this reasoning, see Yeo, "Gambling Contracts", *supra* note 4 at 136-140; but *cf Desert Palace*, *supra* note 5 at para 120, *Star Entertainment*, *supra* note 6 at para 57. This point, being specific to RECJA, does not concern us here.

20 *Burswood Nominees*, *supra* note 3 at para 29.

21 *Ibid* at paras 26-32.

particular, "serious consideration" was then being given to the establishment of casinos in Singapore.[22] As such, any policy against gambling in Singapore did not meet the "higher standard" applicable in private international law, and so could not foreclose the enforcement of foreign judgments for gambling debts.

Desert Palace, however, backpedalled on *Burswood Nominees*. A Nevadan casino obtained various US judgments against a gambler for debts incurred and dishonoured at its premises, and then obtained another judgment from California to set aside the gambler's transfer of assets to avoid the enforcement of the initial judgments. When common law proceedings to enforce the Californian judgment were brought in Singapore, the Court of Appeal refused recognition on grounds that it was not a money judgment.[23] Nevertheless, the Court remarked in lengthy *obiter* that enforcement would also have been barred by public policy. Disagreeing with *Star City* and *Burswood Nominees*, the Court noted that all "gambling unregulated by statute"[24], and not merely the collection of gambling debts by courts, was contrary to public policy.[25] This policy was "evident from the retention of [section 5]",[26] and existed to prevent "the incidence of organised gambling being controlled by syndicates, and the attendant law and order problems",[27] in particular "crimes, such as loan sharking, money laundering and prostitution".[28] The Court then held that, although a "higher standard of public policy"[29] was applicable in private international law disputes, the policy against unregulated gambling met and exceeded that standard. In doing so, however, the Court relied on language more reminiscent of the application of forum mandatory rules rather than public policy. It held that the policy against unregulated gambling was "statutory public policy" that was "more fundamental" than the policies which private international law's processes rested on, since "statute law takes precedence over the common law."[30] In support, the Court also distinguished Canadian and Straits Settlement decisions, which saw provisions identical to section 5(2) as no bar to foreign judgments for gambling debts, on grounds that those decisions had mistakenly read those provisions as having "no extraterritorial effect."[31] The upshot was that all foreign judgments for gambling debts were unenforceable.

Most recently, *Star Entertainment* brought things full circle for the enforcement of foreign gambling debts in Singapore. A casino in Sydney sued a gambler for gambling debts he incurred and dishonoured there. The debts were governed by Queensland law, but Jeremy Lionel Cooke, an International Judge of the Singapore International Commercial Court, struck out the casino's claims for the same three reasons relied on in *Star City*. First, section 5(2) was a "procedural statute" which "applies to the bringing of proceedings in the Singapore Court regardless of the proper law which

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22 *Ibid* at para 45.
23 *Desert Palace*, *supra* note 5 at para 34.
24 *Ibid* at para 93.
25 *Ibid* at paras 97, 98, 110.
26 *Ibid* at para 97.
27 *Ibid* at para 93.
28 *Ibid* at para 104.
29 *Ibid* at para 113.
30 *Ibid* at para 112.
31 *Ibid* at paras 77, 78, 125. For the link between the presumption against extraterritoriality and the interpretation of forum statutes as having mandatory effect in Singapore, see Part III.B below.

governs the claim."[32] Second, a "dominant public policy"[33] against "unregulated gambling"[34] existed, which "prevails over any other public policy considerations relating to enforcement of foreign judgments by registration"[35] and the enforcement of foreign laws.[36] Third, it was evident from the regulatory scheme for gambling in Singapore that Parliament intended to leave foreign casinos within the ambit of section 5(2), which meant that "the clear words of s 5(2) must take effect"[37] over the choice of law process.[38]

III. Questioning the Justifications

The authorities thus suggest that foreign gambling contracts and related foreign judgments are unenforceable in Singapore. Yet, courts have used a confusing mixture of three doctrines and concepts—procedural characterisations, forum mandatory rules and public policy—to justify that conclusion, without properly distinguishing between them. More troublingly, as I show below, the use of these doctrines and concepts in such a manner is incompatible with their true rationales, and contrary to a principled understanding of the relationship between statute, policy and the common law conflict of laws.

A. *Procedural Characterisations*

The first reason apparently justifying the non-enforcement of foreign gambling debts involves characterising the issue of enforceability as a procedural issue, to be governed strictly by rules of the *lex fori*, including section 5(2). We saw this only in *Star City* and *Star Entertainment*, which is unsurprising given that the procedure-substance distinction is only pertinent to the choice of law process.

The application of section 5(2) through a procedural characterisation of rules[39] relating to the enforcement of contractual rights, however, is immediately controversial. It relies on the traditional procedure-substance distinction (which considers the existence of rights a substantive concern but the availability of remedies a procedural one) that has long fallen out of favour in most common law states. Instead, as Yeo noted, at least by the time *Burswood Nominees* was decided, most states had adopted a procedure-substance distinction which characterises as procedural only foreign rules which courts would find manifestly inconvenient or inefficient

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32 *Star Entertainment*, *supra* note 6 at para 36.
33 *Ibid* at para 57.
34 *Ibid* at para 50.
35 *Ibid* at para 57.
36 *Ibid* at paras 48-58.
37 *Ibid* at para 55.
38 *Ibid* at paras 53, 55.
39 Although *Star City* and *Star Entertainment* operationalised the procedure-substance distinction using rule characterisation rather than issue characterisation (*cf Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 (CA) at para 20 [*Goh Suan Hee*]), nothing turns on this—the Court's reasoning would have been equally indefensible if they instead held the "enforcement" of rights to be a procedural issue governed by the *lex fori*.

to apply.[40] Things have only progressed further since: not only do Australian and Canadian courts eschew the traditional distinction in favour of a standard focused on inconvenience or inefficiency,[41] English courts, giving effect to the European Union's *Rome Regulations*, no longer apply it either.[42]

Importantly, the common law's revolt against the traditional procedure-substance distinction was compelled by principle rather than mere convenience. The traditional distinction was abandoned because it reflected no real values, which means that its maintenance threatened international decisional uniformity for no good reason.[43] Indeed, in *Goh Suan Hee v Teo Cher Teck*, Singapore's Court of Appeal approved of these developments in *obiter* and suggested that the traditional distinction might give way to a distinction that did not "separate remedy from rights", but instead subjected both to the *lex causae*.[44] *Star Entertainment*'s approach, of utilising the traditional distinction to apply section 5(2) despite the common law at large having condemned that distinction as unprincipled, is thus unsatisfactory to say the least.

But a procedural characterisation of section 5(2) is problematic not only because the traditional substance-procedure distinction is indefensible: it is also troubling because the new defensible distinction, focused on procedural inconvenience or inefficiency, would not justify a procedural characterisation of section 5(2) either. After all, section 5(2) is concerned with the enforceability of debts, and it cannot plausibly be maintained that it would be inconvenient or inefficient for courts to deal with such enforcement matters, since courts do so every day. It follows that section 5(2), which involves only such matters of enforcement, cannot possibly be classified as procedural.

This obvious point may have been somewhat obscured by the observation made in *Star City*,[45] that section 5(2) was meant to prevent the "waste" of "[v]aluable court time and resources" by barring enforcement of "unmeritorious" gambling debts.[46] Certainly, as Yeo argued, a serious waste of court resources would surely inconvenience the administration of justice in Singapore, and so any rule enacted to combat such waste may be classified as procedural.[47] However, one must caution against reading *Star City*'s statement as anything more than a rhetorical flourish used to hide an implicit value-judgment about the normative worth of gambling debts. Since it is surely not a waste of court resources to enforce debts in general, it is puzzling why it should be any more of a waste of resources to enforce gambling debts in particular, unless one takes the position that gambling debts are inherently unworthy of judicial attention for normative or moral reasons. And whatever one might think of the

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40 Yeo, "Gambling Contracts", *supra* note 4 at 145, citing *Harding v Wealands* [2005] 1 WLR 1539 (UKHL); *John Pfeiffer Pty Ltd v Rogerson* (2003) 203 CLR 503 (HCA) [*Pfeiffer*]; *Tolofson v Jensen* [1994] 3 SCR 1022 [*Tolofson*].

41 *Pfeiffer*, *ibid* at 543; *Tolofson*, *ibid* at 1071-1072.

42 Even under the *Private International Law (Miscellaneous Provisions) Act (UK) 1995*, the traditional decision has been doubted; see *Cox v Ergo Versicherung AG* [2014] 2 WLR 948 (UKSC) at para 46, per Lord Mance.

43 See *supra* note 41; see also Richard Garnett, *Substance and Procedure in Private International Law* (UK: Oxford University Press, 2012), ch 2.

44 *Goh Suan Hee*, *supra* note 39 at para 21, see also *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] SGCA(I) 1 at para 71.

45 Albeit later downplayed in *Desert Palace* (see *Desert Palace*, *supra* note 5 at paras 97, 98, 110).

46 See *Star City*, *supra* note 2 at para 31 and accompanying text.

47 Yeo, "Gambling Contracts" *supra* note 4 at 145.

latter position against enforceability, it patently has nothing to do with procedural inconvenience or inefficiency—it is based on purely substantive considerations, and courts must treat it as such.

B. *Forum Mandatory Rules*

We thus turn to the second apparent justification for the non-enforcement of foreign gambling debts: the idea that section 5(2) is a forum mandatory rule, which overrides private international law's processes. While this ground was only explicitly referred to in *Star City*, it was strongly implicit in the reasoning in *Desert Palace*, where the Court of Appeal referenced section 5(2)'s "extraterritorial effect"; and *Star Entertainment*, where Cooke IJ relied on Parliament's intent to justify giving effect to section 5(2).

The question of when forum statutes should override private international law's processes remains a complex one, especially when the statute in question does not expressly state whether it overrides existing private international law rules. Here, courts and commentators are divided between what Maria Hook calls the "traditionalist" and "statutist" camps.[48] While traditionalists refer questions involving ambiguously-worded forum statutes to private international law, with such statutes applicable only through private international law's processes, statutists refer such questions to statutory interpretation, with ambiguously-worded statutes overriding private international law's processes whenever that would further legislative intent.

As between the two, the statutists' position is sounder as a matter of constitutional principle: it recognises that, in a democracy, Parliament's will must prevail over the policies underlying judge-made common law, no matter how important the latter might be.[49] However, the statutists' position remains weak to the criticism that reliance on legislative intent may be artificial, because Parliament often never actually considers the overriding potential of statutes it passes.[50] Against this, however, modern statutists like Michael Douglas argue that ambiguously-worded statutes can and should always be interpreted purposively, in line with Parliament's objectively manifested rather than subjective intentions, and that purposive interpretation can determine a statute's overriding potential as much as it can determine any other aspect of a statute's application.[51] The question, then, simply becomes: what is the mischief the statute in question is aimed at, and would applying it over private international law's processes help it better address that mischief?[52] This purposive statutist position resonates with Singapore's approach toward forum mandatory statutes: in

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48 Maria Hook, "The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes" in Michael Douglas *et al*, eds. *Commercial Issues in Private International Law: A Common Law Perspective* (Oxford: Hart Publishing, 2019) at 178-182 [Douglas *et al*, eds. *Commercial Issues*].

49 Adrian Briggs, "A Note on the Application of the Statute Law of Singapore within Its Private International Law" (2005) Sing JLS 189 at 194-196.

50 See *eg* Mary Keyes, "Statutes, Choice of Law, and the Role of Forum Choice" (2008) 4:1 J Priv Intl L 1 at 18.

51 Michael Douglas, "Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation after *Valve*" in Douglas *et al*, eds. *Commercial Issues*, *supra* note 48 at 219.

52 *Ibid* at 223.

JIO Minerals FZC v Mineral Enterprises Ltd,[53] the Court of Appeal held that there was a general presumption against statutes operating extraterritorially, but this could be rebutted if Parliament intended the statute to perform a "regulating or protective function"[54] which would be "advanced" were the statute "applied without strict regard to territorial links".[55]

However, even on the purposive statutist approach endorsed in *JIO Minerals*, it is hard to understand why section 5(2) should operate as a forum mandatory rule. Parliament certainly did not expressly intend section 5(2) to have that effect, contrary to what *Star City* and *Desert Palace* suggest. In both decisions, the Court of Appeal traced section 5(2)'s underlying purpose to its Victorian English predecessor, section 18 of the United Kingdom's *Gaming Act 1845*. And admittedly, England's Parliament in 1844 did enact section 5(2) to preclude the "evasion" of section 5(1), which merely rendered gaming or wagering contracts void. However, the particular "evasion" section 5(2) targeted was the situation where parties entered not only into a gambling contract, which was caught by section 5(1), but also a collateral contract to hold gamblers accountable for losses incurred in gaming houses, which remained uncaught by section 5(1).[56] England's Victorian Parliament, therefore, enacted section 5(2) to prevent the "evasion" of section 5(1) through the use of collateral contracts, and *not* through the choice of law process. From a historical perspective, this is entirely unsurprising. Since the modern contract choice of law rule which gives effect to party autonomy on a contract's governing law rose to prominence only in the late-19th century/early-20th century,[57] a mid-19th century English Parliament could not have been concerned about parties themselves using choice of law rules to "evade" English statutes.

More importantly, Parliament also cannot be taken to have impliedly or objectively intended section 5(2) to operate as a forum mandatory rule in disputes involving foreign gambling debts. This is because, in *JIO Minerals*' terms, the "protective function" of section 5(2) would not be "advanced" by applying it in such disputes. It is obvious that section 5(2) was not meant to protect gamblers from their gambling debts, since this is merely the "unhappy consequence" of the section operating extraterritorially.[58] Rather, as noted in *Desert Palace*, section 5(2)'s purpose is to prevent "organised gambling being controlled by syndicates, and the attendant law and order problems"[59] like "crimes, such as loan sharking, money laundering and prostitution".[60] The "class of persons"[61] the section seeks to protect, therefore, is the Singaporean public at large, and the dangers it seeks to protect them from are criminal activities which increase when gambling syndicates increase in Singapore.

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53 [2011] 1 SLR 391 (CA) [*JIO Minerals*].
54 *Ibid* at para 104.
55 *Ibid*.
56 *Star City*, *supra* note 2 at paras 9, 10; *Desert Palace*, *supra* note 5 at paras 79, 80.
57 See Alex Mills, *Party Autonomy in Private International Law* (UK: Cambridge University Press, 2018) at 44-57.
58 *Star City*, *supra* note 2 at para 32.
59 *Desert Palace*, *supra* note 5 at para 93.
60 *Ibid* at 104.
61 *JIO Minerals*, *supra* note 53 at para 91.

This "protective function", however, is not at all "advanced" by applying section 5(2) in proceedings involving foreign gambling debts incurred at physical gaming houses *outside* Singapore. Because the gambling occurs in a foreign country, it is hard to see how this will encourage the formation of gambling syndicates, or increase the "law and order problems" they might bring, *within* Singapore. The only connection these foreign gambling debt proceedings had with Singapore was that the gambler in question may have been Singaporean,[62] but this fact alone surely does not contribute to the formation of gambling syndicates within Singapore. Instead, applying section 5(2) to foreign gambling debt proceedings would only prevent "law and order problems" related to gambling in those *foreign* countries, but it has nothing to do with the preservation of law and order *within* Singapore.[63] Thus, section 5(2) is not a forum mandatory rule: its function of protecting the Singaporean public from public order threats within Singapore is not furthered by its application in proceedings involving foreign gambling debts.

C. *Public Policy*

Finally, we turn to the third and main reason courts have relied on to refuse the enforcement of foreign gambling debts—public policy—which has consistently been invoked from *Star City* through to *Star Entertainment*. However, the invocation of public policy rests on a different logic than the other two reasons: the question here is not simply whether section 5(2) prohibits enforcement, since in relying on public policy courts necessarily concede that the provision itself does not demand that conclusion. Instead, as the High Court recently noted in *UKM v Attorney-General*,[64] courts must confront two questions before resting their decision on public policy: does a legitimate policy against the enforcement of foreign gambling debts *exist*? And if so, should courts give effect to that policy by prohibiting the enforcement of such debts?

The determination of the *existence* of public policy is crucial to the legitimacy of policy-based judicial reasoning. Without a defensible empirical method, judges invoking policy arguments essentially engage in policy speculation, which exposes them to charges of illegitimate judicial activism on account of their lack of democratic credentials and subject-matter expertise.[65] As the Court in *UKM* noted, courts resting their decisions on policy must identify policies in a forensic manner, and here there are two main criteria:[66] a criteria of authority, requiring courts to look

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62 Only in *Star Entertainment* was this confirmed (*Star Entertainment*, *supra* note 6 at para 3).

63 An analogy may be drawn here to *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 (CA). There, the Court of Appeal refused to interpret section 30 of the *Criminal Law (Temporary Provisions) Act* (Cap 67, 2000 Rev Ed Sing), empowering the Minister to detain individuals involved in organised crime syndicates without trial to protect "public safety, peace and good order", as justifying the detention of individuals in a match-fixing syndicate which fixed matches outside Singapore. This was because there was no evidence that such match-fixing activities would "have a bearing on the public safety, peace and good order *within* Singapore" (at para 146, emphasis in original).

64 [2019] 3 SLR 874 (HC) [*UKM*].

65 See John Bell, *Policy Arguments in Judicial Decisions* (UK: Oxford University Press, 1983) at 185-194; James Plunkett, "Principle and Policy in Private Law Reasoning" (2016) 75 Cambridge LJ 366 at 381-382.

66 *UKM*, *supra* note 64 at paras 138-145.

only to constitutionally authoritative sources for policy, such as legislation or public ministerial statements;[67] and a criteria of clarity, requiring courts to determine the scope of the policy with accuracy and precision, to avoid overstretching its scope and thereby inadvertently making policy.[68] These concerns are pertinent to the case-law on foreign gambling debts: the Court of Appeal in *Star City*, *Burswood Nominees* and *Desert Palace* all reached different conclusions on the existence and content of the relevant public policy, because they took inconsistent approaches on the sources considered authoritative and pitched their enquiries at different levels of generality. Among them, the conclusion reached in *Desert Palace* is the most defensible, drawing as it did from legislation and ministerial statements to specifically note that only "unregulated gambling" in particular was against public policy in Singapore.

But though correct in identifying a specific policy against unregulated gambling, the Court in *Desert Palace* erred in the manner it gave *effect* to that policy in the circumstances. The Court categorically applied that policy in preference to private international law's rules simply because it was "statutory public policy"[69], much like how courts apply statutes in preference to common law rules applicable to identical facts. This, however, is problematic: since section 5(2) is not a forum mandatory rule,[70] there are in fact *no* statutes directly applicable on the enforceability of foreign gambling debts. A policy like that against unregulated gambling, which is merely *derived* from rather than enshrined in statutes, is still *not* a statute, and so courts should not use it to oust existing common law choice of law rules like it would use a statute.[71] To do otherwise would be the epitome of judicial legislation: courts would be appropriating the guise of legislative authority while going further than what Parliament itself objectively intended.

Of course, this is not to say that policies derived from but not enshrined in statute should have *no* effect on common law rules[72]—only that such effect cannot, constitutionally speaking, be one of absolute hierarchical superiority. Properly understood, the effect which policy should have on existing common law rules differs depending on the kind of policy at stake. As Ross Grantham and Darryn Jensen note, the term 'policy' commonly refers to two different things: first, "public policies", which are "factors. . . concerned with the socio-economic effect of a decision on the community"[73]; and second, fundamental "societal values", which are "moral and political values and ideologies that constitute the relevant society and give it its distinctive character or nature".[74]

Importantly, courts give effect to these two different conceptions of policy in different ways. Courts may comfortably give effect to fundamental societal values by categorically excluding or curtailing private rights which infringe upon them, since

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67 *Ibid* at paras 138-143.

68 *Ibid* at paras 144, 185.

69 *Desert Palace*, *supra* note 5 at para 113.

70 See Part III.B above.

71 Andrew Burrows, "The relationship between common law and statute in the law of obligations" (2012) 128 Law Q Rev 232 at 236-240; Jack Beatson, "The role of statute in the development of common law doctrine" (2001) 117 Law Q Rev 247 at 259.

72 *Cf* PS Atiyah, "Common Law and Statute Law" (1985) 48 Mod L Rev 1 at 6-12.

73 Ross Grantham & Darryn Jensen, "The proper role of policy in private law adjudication" (2018) 68 UTLJ 187 at 192 [Grantham & Jensen, "Private law"].

74 *Ibid* at 192; see *ibid* at 191-194.

those fundamental values themselves constitute the legal principles that shape the law and legitimate it in the eyes of the public.[75] This is reflected in *Burswood Nominees*' enunciation of private international law's public policy exception—that foreign laws and judgments which "violate some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal" may be denied recognition[76]—which protects only norms fundamental to the legal system as a whole.[77] However, the Court of Appeal in *Desert Palace* all but admitted that the policy against unregulated gambling was not such a "fundamental principle of justice".[78] While the Court did call this policy "fundamental", this followed simply from the fact that the policy had a statutory provenance, and not because the policy embodied any "fundamental. . . ideas of morality, decency, human liberty or justice" in Singapore.[79]

It thus follows that the policy against unregulated gambling must be the first form of public policy listed above, or what the Court in *UKM* called "socio-economic policy".[80] The effect which socio-economic policies should have on judicial reasoning, however, is controversial. Among commentators who take an accommodating view toward such policies in judicial reasoning,[81] there are two camps: those who believe that policy reasoning should operate within the confines of coherence-seeking reasoning methods;[82] and those who believe that policy reasoning should be consequential, reflecting a proportionate balance of the concerns which arise on the circumstances of particular disputes.[83]

Under a coherence-seeking approach, however, it is hard to see how the policy against unregulated gambling can be used to justify a rule barring the enforcement of foreign gambling debts, since that rule is not a good "fit" for that policy.[84] If one takes the policy against unregulated gambling at face value (*ie* that gambling should be regulated), a legal rule against the enforcement of all foreign gambling debts is surely an ill fit because it is over-inclusive. Instead, a rule based on such a policy should be sensitive to the existence and content of gambling regulations in the state where the foreign casino is located, and should ask whether the content of the relevant foreign state's regulatory laws achieve a function comparable to

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75 *Ibid* at 193.

76 *Burswood Nominees*, *supra* note 3 at para 29.

77 Kenny Chng, "A theoretical perspective of the public policy doctrine in the conflict of laws" (2018) 14:1 J Priv Intl L 130 at 151-155.

78 *Desert Palace*, *supra* note 5 at paras 70, 74, 80.

79 *Desert Palace*, *supra* note 5 at paras 111-113.

80 *UKM*, *supra* note 64 at para 111.

81 *Cf* those who believe socio-economic policies should play no role whatsoever in judicial reasoning; see *eg* Ernest Weinrib, *The Idea of Private Law*, 2d ed (UK: Oxford University Press, 2012).

82 See *eg* Andrew Robertson, "Constraints on Policy-Based Reasoning in Private Law" in Andrew Robertson & Wu Tang Hang eds. *The Goals of Private Law* (Oxford: Hart Publishing, 2009); Hanoch Dagan, "The Limited Autonomy of Private Law" (2008) 56 Am J Comp L 809.

83 See *eg* Hugh Collins, "Utility and Rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalization" (2007) 30 Dal LJ 1; Tan Zhong Xing, "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (2020) 33:1 Can JL & Jur 215.

84 Ronald Dworkin, *A Matter of Principle* (USA: Harvard University Press, 1985) at 160-162. More specifically, this requirement of "fit" may be termed "deductive coherence", where rule formulation is constrained by relevant principles and policies; see Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Oxford: Hart Publishing, 2015) at 495-497.

Singapore's regulations, instead of barring the enforcement of all gambling debts incurred in foreign casinos by default. Alternatively, if one looks past the form of the policy against unregulated gambling and towards its underlying purpose, a rule rendering foreign gambling debts unenforceable is also ill-fitted to achieve such a purpose because the rule is under-inclusive. As mentioned above, since the policy's underlying purpose is to prevent gambling syndicates forming and causing public order problems *within* Singapore, it is unclear how preventing foreign casinos from enforcing gambling debts incurred in foreign jurisdictions could further this purpose at all.[85]

Against this, one might argue that the need to achieve the policy against unregulated gambling is so important that it must be achieved at all costs, so even rules ill-fitted to achieve it are desirable. This argument, however, takes us squarely beyond coherence-seeking approaches to policy-based reasoning, because the criteria of 'fit' is discarded—it is replaced by consequence-based criteria, focused on outcomes. But consequence-based criteria cannot simply be unrestrained, since a result favouring one policy over another value at all costs, especially in circumstances where the former is *not* hierarchically superior to the latter,[86] would be irrational.[87] Instead, as the Court in *UKM* noted, a "rational, reasoned" approach to public policy[88] requires courts to balance private rights and countervailing policies "with a sense of proportion."[89] Under this consequentialist criteria of "proportionality", no matter how important a socio-economic policy might be, curtailing private rights to give effect to that policy would only be defensible if (a) doing so would actually further that policy's underlying purpose; and (b) the curtailment of that right is not wholly disproportionate to the losses the right-holder would suffer.[90] This approach toward socio-economic policy also finds traction in private international law adjudication, where, as Alex Mills notes, courts likewise "cannot be entirely free to give effect to discretionary public policy without undermining other public policies and values."[91] Thus, in *BAZ v BBA*, Belinda Ang J, in setting aside an arbitration award issued against minors on grounds of a policy in favour of protecting the welfare of minors, applied *UKM*'s framework to determine the existence of that policy and its applicability in the circumstances.[92]

Applying the consequence-based criteria of proportionality to the rule against the enforcement of foreign gambling debts, we are led inevitably to the conclusion that the posited rule is undesirable. First, non-enforcement does not actually further the policy against unregulated gambling, and in fact it is counterproductive. If the goal is to prevent gambling in foreign casinos, surely allowing gamblers to escape

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85 See *supra* notes 58-63 and accompanying text.

86 See *supra* notes 70-72 and accompanying text.

87 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (UK: Cambridge University Press, 2012) at 458-460.

88 *UKM*, *supra* note 64 at paras 120, 121.

89 *Ibid* at para 156.

90 *Ibid* at paras 153-161. For a detailed discussion of how this framework operates, see Marcus Teo, "The dawn of proportionality in Singapore" [2020] Public Law 631.

91 Alex Mills, "The Dimensions of Public Policy in Private International law" (2008) 4:2 J Priv Intl L 201 at 206.

92 [2018] 5 SLR 266 (HC) at paras 154-187. Here, I accept for the purpose of argument that there are no problems with importing such a balancing framework from domestic to international litigation. For a contrary view, see Marcus Teo, "Foreign law illegality: *Patel*'s new frontier?" [2021] 80(1) Camb LJ 32.

their gambling debts scot-free only *encourages* them to gamble even more.[93] The discussion above, on how non-enforcement of foreign gambling debts is ill-fitted to the policy against unregulated gambling,[94] is also relevant here: a rule ill-fitted to achieve a policy because it is very over-inclusive or under-inclusive is by definition ill-tailored to achieve its purpose. Second, on the other end of the scales, non-enforcement severely impacts the legitimate private rights of foreign casinos and broader values of interpersonal justice which private law rests on. As Cooke IJ noted in *Star Entertainment*, it "stick[s] in the gullet" and "appear[s] unconscionable for a wealthy man to avoid. . . debt[s] of honour".[95] In the final analysis, denying the enforcement of foreign gambling debts to attempt to further a policy against unregulated gambling would sacrifice weighty concerns of interpersonal justice, but would not substantially further the policy against unregulated gambling and may even be counterproductive to that end. It is hard to understand how such a use of public policy could be defensible.

IV. Conclusion

Although courts have generally maintained that foreign gambling debts and related foreign judgments should be unenforceable because of procedural characterisations, forum mandatory rules and public policy, neither of these three justifications, by themselves or together, justify that conclusion. Instead, Singapore law, in its current state, does not preclude the enforcement of foreign gambling debts and related foreign judgments. This, of course, is not to deny that the Government may have good reason to enact statutes or proclaim policies against enforcement—a whole host of reasons, ranging from protecting financially vulnerable Singaporeans and their families, to furthering international norms against gambling, are imaginable. The argument here is simply that, because such policy rationales remain uncodified and insufficiently articulated through constitutionally authoritative channels, non-enforcement in the absence of further statutory or policy action is, on the current state of the law, unsound. If the problem of foreign gambling debts is a pressing one, legislative or regulatory intervention is imperative, both to clarify and optimise the Government's policy stance and to avoid further contortions of existing doctrines and concepts.

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93 One would have thought that over time foreign casinos might begin rejecting gamblers who only have bank accounts in Singapore, but since this evidently has not happened in the two decades since *Star City*, a change in tack is sorely needed.

94 See *supra* notes 84-85 and accompanying text.

95 *Star Entertainment*, *supra* note 6 at para 60.