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TAINTED CONTRACTS IN THE CONFLICT OF LAWS

In order to prove the non-existence of a tainting rule in the conflict of laws, this article revisits the rules on foreign law illegality, namely the rules in *Foster v Driscoll* [1929] 1 KB 470 and *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287. The results show that they reflect a peculiar and circumscribed rationale of international comity. At the same time, this article considers the implications of recent developments in the law of illegal contracts on the tainting rule. These implications considered together with obligations of international comity show that the tainting rule has either been superseded or is no longer needed to augment or complement the rules on foreign law illegality.

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I. Introduction

1 Difficult questions have been asked about the role of the doctrine of *ex turpi causa non oritur actio* ("*ex turpi causa*")[1] or the defence of illegality[2] in the conflict of laws. This is unsurprising. First pronounced in the judgment of Staughton J as he then was in *Euro-Diam Ltd v Bathurst*[3] ("*Euro-Diam*") and of fairly recent vintage, it lacks the clarifying and purifying advantage of time. Itself a rationalisation of a clutch of cases, it potentially embraces a greater number of foreign law illegalities than the less controversial rules in *Foster v Driscoll*[4] and *Ralli Brothers v Compania Naviera Sota y Aznar*[5] ("*Ralli Brothers*"). Despite this, it is the least well understood. Its cobbling together of foreign and forum penal conduct and private rights under applicable law is as intriguing as it is ambitious.

1 Or *ex dolo malo non oritur actio*. In older equity cases, the courts formulated the doctrine slightly differently in terms of the maxim *nemo allegans turpitudinem suam est audiendus*.
2 These terms are not synonymous and are not used synonymously. The defence of illegality is narrower in predicating claims to otherwise enforceable rights which are defeated by reliance on illegality. The doctrine of *ex turpi causa* is apt to include cases where it is alleged that the contract as a whole is illegal *ex turpi causa*.
3 [1990] 1 QB 1.
4 [1929] 1 KB 470.
5 [1920] 2 KB 287, referred to as principles in *Ispahani v Bank Melli Iran* [1998] Lloyd's Rep Bank 133.

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It creates a vast expansive penal space in which no legal relationship ranging from tort to contract to equity is not implicated. To add to the complications, dissonant developments in both English law and the domestic law of illegal contracts have begun to engender questions about the present form and nature of the rule.[6] In English law, the doctrine of *ex turpi causa* has been transformed in *Patel v Mirza*[7] from a tainting rule into a transcendental "range of factors" standard of weighing policy against injustice in relation to all claims and types of contractual illegality, arguably effectively undercutting the categorical approach to illegality.[8] The domestic law, however, has retained the categorical framework of illegal contracts, while reshaping more flexibly a prominent and notoriously difficult category of contracts entered into with an illegal object. This can be seen in the two prominent cases of *Ting Siew May v Boon Lay Choo*[9] ("*Ting Siew May*") and *Ochroid Trading Ltd v Chua Siok Lui*[10] ("*Ochroid Trading*"), the latter which affirmed the decision in the former. The latter shows that the domestic law has also retained a re-conceptualised reliance principle which will determine the availability of recovery of benefits conferred under a categorically illegal contract. Is there also a choice to be made as to how the domestic doctrine of *ex turpi causa* as to unenforceability of contract should be reshaped? What seems fairly predictable is that such *ex turpi causa* cases will not remain for long as just another category of illegality. The domestic law must sooner than later ask whether a new course is to be charted for its growth.

2 These domestic complications are troubling for private international law rules of foreign law illegalities. Domestic rules seem to have provided the genesis or inspiration for the international rules.

6 One view is that *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 is not different substantially from the majority judgment in *Patel v Mirza* [2017] AC 467. See David Neuberger, "Some Thoughts on Principles Governing the Law of Torts" (2016) 23(2) Torts LJ 89 at 101. *Cf* Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract: a Comparative Perspective" in *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney eds) (London: Routledge, 2018) which states at p 222 that "it represents (or is at least most consistent with) the *minority* view" [emphasis added] in *Patel v Mirza*.

7 [2017] AC 467.

8 "Categorical" refers to the traditional view that an illegal contract is unenforceable as a whole either in relation to both parties to it or in relation to the party committing the illegality. From this may be derived the consequential general rejection of relief or remedies for breach of or refusal to perform the contract. See also Janet O'Sullivan, "Illegality and Contractual Enforcement after *Patel v Mirza*" in *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg eds) (Oxford: Hart Publishing, 2018) at pp 170–171.

9 [2014] 3 SLR 609.

10 [2018] 1 SLR 363.

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In any case and at least superficially, the latter look like extraterritorial replications or extrapolations of the former. So the possibility that changes on the domestic scene also affect the international cannot be ruled out. Taking its cue from the recent admonition in *Teng Wen-Chung v EFG Bank AG, Singapore Branch*[11] ("*Teng Wen-Chung*") against unqualified acceptance of the tainting rule in conflicts law, this article does not purport to reach definite answers as to how it should be reconsidered.[12] It has three more modest aims. The first is to underline the rule's circumscribed parameters and identify its peculiar and circumscribed rationale. The second is to confront the problem and cast doubt on the general *ex turpi causa* principle which Staughton J seemed to have laid down in *Euro-Diam*. The third is to explore the ramifications of extrapolation from *Ting Siew May* and *Ochroid Trading* and to conclude that there is probably no further and separate category of tainted contracts in the conflict of laws. To accomplish these objects, Part II,[13] following upon the short introduction in Part I, reviews the relatively uncontroversial rules in *Foster v Driscoll* and *Ralli Brothers* together with their rationales. Part III,[14] by way of an incursion, discusses and clarifies the domestic tainting rules and their rationale as being to ensure that the public interest objectives of illegality are attained in a consistent and systemic manner, without collateral advantage or prejudice to any pertinent claim or person. Part IV[15] discusses the transition of the tainting rule into the world of private international law and argues that it is either superseded or has outlived its purpose. The conclusions of this reconsideration of the tainting rule are briefly set out in Part V.

II. The foreign law illegality rules

3 The first part is a prologue and concerned with existing foreign law illegality rules other than the controversial tainting rule which purports to complement them. Are these domestic rules or conflicts rules? If the latter, do they have the same or similar or different rationales? These are the first questions for which clear answers are needed for the sake of clarifying and evaluating the tainting rule. The still often-neglected context in which the rules operate must not be missed. So, for

11 [2018] 2 SLR 1145.

12 Earlier publications dealing with the subject include David Chong Gek Siang, "Contractual Illegality and the Conflict of Laws" (1995) 7 SAcLJ 303; Yeo Tiong Min, "Restitution, Foreign Illegality, and Foreign Moneylenders" (1996) 8 SAcLJ 228 and F M B Reynolds, "The Enforcement of Contracts Involving Corruption and Illegality in Other Countries" [1997] Sing JLS 371.

13 See paras 3–40 below.

14 See paras 41–60 below.

15 See paras 61–89 below.

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context, we will begin with an outline of the two essential background propositions about foreign law illegality. The first is that the forum ignores foreign law illegality as a general rule. In *Vita Food Products Inc v Unus Shipping Co Ltd*[16] ("*Vita Food Products*"), bills of lading were issued in Newfoundland for carriage of goods to New York. A dispute arose between cargo consignees and shipowners after the vessel carrying the goods ran aground in Nova Scotia. A great many issues were litigated in Nova Scotia. With respect to the effect of foreign law illegality which was one of them, the Privy Council agreed with the lower courts that the shipowners, by omitting to insert in the bills of lading a clause paramount attracting the operation of the Hague-Visby rules, had not committed an illegality in Newfoundland. Pertinent for the purposes at hand is the following fairly extensive passage in which Lord Wright set out and explained the general irrelevance of foreign law illegality:[17]

> A court in Newfoundland would be bound to apply the law enacted by its own legislature, if it applied, and thus might treat the bills as illegal just as the Supreme Court in the United States treated as void an exemption of negligence in a bill of lading issued in the United States, though in relation to the carriage of goods to England in an English ship: *The Montana*. Such a clause, it was held, was against public policy, and void by the law of the United States, which was not only the law of the forum but was also held to be the proper law of the contract. This decision may be contrasted with *Re Missouri SS Co*, where in similar circumstances the Court of Appeal, holding the proper law of the bill of lading to be English, held that English law did not apply the American rule of public policy, though the shipment took place in America and the bill of lading was issued there, and that the clause, being valid in English law, must receive effect.

4 That quotation signifies, to put it more generally, that the forum court as a general rule is chiefly concerned with upholding an international contract where it is perfectly valid by the parties' chosen applicable law. This result is undergirded by the paramount importance of party autonomy in the forum's choice of law rule for contracts. It is further reflected in the principle that as far as possible, a contract is to be construed as valid rather than invalid[18] and presumed to be legal and enforceable rather than illegal. It follows that if foreign law illegality is relevant at all, as it is under the rules shortly to be discussed, this is by way of derogation from party autonomy.[19] Judge MacKie QC put it this

16 [1939] AC 277.

17 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 285.

18 See Lord Denning MR in *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34 at 44.

19 Giving paramount importance to enforcing freely undertaken contractual obligations. *Cf* American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) § 188, Comment b.

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way in a recent case: "[T]he starting point is that the Court is not directly concerned with any illegality that may be said to arise under [foreign] law. Foreign law illegality is relevant only insofar as it may give rise to a public policy defence as a matter of English law".[20] What he does not say in those remarks is that the derogation is a small one. The public policy defence of foreign law illegality, which Mann in one place described as a stricter doctrine than is followed in other countries,[21] is pretty narrow and comprises only two rules (leaving aside the controversial tainting rule). Some might, of course, suppose that this derogation sufficiently redresses the stronger common law bias in favour of party autonomy which, as Diplock LJ observed in *Mackender v Feldia AG*,[22] is "more liberal in this respect than many Continental systems".[23]

5 The second backdrop proposition is that the forum court will not enforce a foreign penal, revenue or fiscal law or other public law.[24] It is seen as devoid of jurisdiction to adjudicate private disputes in respect of foreign penal, revenue or fiscal laws where judgment in the plaintiff's or defendant's favour would directly or indirectly amount to enforcement of those laws. This rule of non-justiciability is based on considerations of sovereignty.[25] To allow a foreign state to seek to enforce its public laws and for the forum to enforce another's foreign public laws within the territory of the forum would be doubly unacceptable encroachment (sovereignty's external dimension) and abdication of forum sovereignty (its internal dimension). Foreign public laws accordingly are effective only within the territory of the foreign sovereign. However, it will be mentioned in due course that there is no foreign public law exception to the foreign law

20 *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] 2 All ER (Comm) 436 at [32], citing *Tamil Nadu Electricity Board v ST-CMS Electric Co* [2007] 2 All ER (Comm) 701 at [37].

21 F A Mann, "Illegality and the Conflict of Laws" (1958) 21 MLR 180 at 181.

22 [1967] 2 QB 590.

23 *Mackender v Feldia AG* [1967] 2 QB 590 at 602.

24 See *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds) (London: Sweet & Maxwell/Thomson Reuters, 15th Ed, 2012) Rule 3 and Comment at paras 5-020–5-042.

25 See *Relfo Ltd v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 at [53]. See also *Government of India v Taylor* [1955] AC 491; Lord Denning MR in *Attorney General of New Zealand v Ortiz* [1984] AC 1 and *Mbasogo v Logos Ltd* [2007] 2 WLR 1062. Valid criticisms may be made that the description of the rule as one of jurisdiction is a misnomer. Baade considers that the rule renders the pertinent public rights of a foreign state unenforceable while Briggs has trenchantly demonstrated that the rule is one of choice of law. See Hans W Baade, "The Operation of Foreign Public Law" (1995) 30 Tex Int'l LJ 429 and Adrian Briggs, "The Revenue Rule in the Conflict of Laws: Time for a Makeover" [2001] Sing JLS 280. *Cf Shergill v Khaira* [2015] AC 359 at [41] that "are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states".

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illegality rules under examination.[26] If foreign law illegality is relevant under those rules, the rule of non-justiciability will neither bar the forum court from taking cognisance of the illegality nor cause it to dismiss the dispute.

A. The two uncontroversial or less controversial rules

6 Against such a backdrop, it would be surprising if the forum's rules of foreign law illegality were simply an extraterritorial replication or extrapolation of its vast and expansive domestic rules of illegality. The ensuing account of foreign law illegality rules will offer "proof" against extraterritorial replication. Incidentally, it will be convenient in relation to one of them, namely the rule in *Foster v Driscoll*, to refer to English law when English cases are referenced, and Singapore law when Singapore cases are referenced, as the case may be, instead of the *lex fori*.

7 The rule in *Foster v Driscoll*[27] is the first which will be discussed. That was a case where the English Court of Appeal refused to enforce English law contracts entered into with the common intention that their performance should violate or contribute to the violation of the penal laws of the US. It is easy to see from that case that the contracts which the rule contemplates are only superficially similar to contracts which obligate either party to commit a crime, tort or fraud in the domestic jurisdiction. The subject matter of the latter domestic category of illegal contracts is the commission of a crime, tort or fraud.[28] The rule in *Foster v Driscoll* is narrower. First, although it covers contracts which obligate either party to commit a crime, it is in terms directed at and restricted to the intended commission of a crime, not tort or fraud.[29] It has, of course, also been noted that the court in *Foster v Driscoll* itself held "unenforceable (and void) all the contracts (one involving performance in England and two in Scotland) which would have implemented the scheme not just that which would have involved performance in the foreign country, illegal under its laws."[30] However, a joint enterprise or conspiracy whether as

26 See para 17 below.

27 [1929] 1 KB 470. Adopted in *Patriot Pte Ltd v Lam Hong Commercial Co* [1977–1978] SLR(R) 547 (HC), affirmed in [1979–1980] SLR(R) 218 (CA).

28 See *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Singapore: Academy Publishing, 2012) ch 13 at para 13.092. See also *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd* [2008] 1 SLR(R) 375 and *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621.

29 Unless the fraud in question is also a crime. *Cf Adler v Federal Republic of Nigeria* 219 F 3d 869 (Cal, 2000).

30 *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] 2 All ER (Comm) 436 at [41]. See also F M B Reynolds, "The Enforcement of Contracts Involving Corruption or Illegality in Other Countries" [1997] Sing JLS 371 at 372.

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agreement manifested in overt acts or as aiding a completed violation of foreign law illegality is not essential. An intention to participate in a common criminal design (that is, to share in that purpose) is not necessary. "[I]f two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask [the forum] court to give its aid to the enforcement of their agreement."[31] Second, the *Foster v Driscoll* category of contracts is also distinguished from the domestic category of statutorily prohibited contracts which are illegal despite absence of intention to infringe the statute in question. That sufficiently rules out any suggestion that the rule is merely an extraterritorial replication of those domestic rules which have been mentioned.

8 At the same time, it is wider. It also covers contracts which do not require that either party to the contract must commit a crime in order to fulfil the terms of the contract. Indeed, the main subject matter of the rule will likely be a contract the real object or purpose or intention of which is to break the penal law, which if it were domestic would under the domestic law fall within another established domestic rule of illegal contracts. So, in *Regazzoni v KC Sethia (1944) Ltd*[32] ("*Regazzoni*"), a contract for the sale of jute bags *cif* Genoa was held illegal and unenforceable although both parties were not contractually required to breach an embargo which had the force of law in India. It was enough that their real intention was to do so (both parties knew of the embargo and the fact that the amount of jute sold and to be delivered could only be obtained from India). The House of Lords there not only approved of *Foster v Driscoll* but also applied the rule to the contract in question which was not prohibited *per se* but intended to be performed illegally.

9 As a consequence of more recent extensions, the rule arguably will also apply to render a contract unenforceable by a party who makes it with an intention of procuring the other unknowingly to break a penal law of the *locus solutionis*. In *Royal Boskalis Westminster NV v Mountain*[33] ("*Royal Boskalis*"), the plaintiffs entered into an Iraqi law finalisation agreement and became obliged to procure the release of Iraqi performance bonds held at the Netherlands and Switzerland for their benefit under their English law dredging contract with the Iraqi government. The intention of the Iraqi government was to procure the plaintiffs to violate the sanctions law of both countries and it was not disputed that the plaintiffs were an innocent party believing they had acted lawfully in procuring the release of the funds. Stuart-Smith LJ held

31 *Regazzoni v KC Sethia (1944) Ltd* [1956] 3 WLR 79 at 85, *per* Lord Denning LJ.
32 [1958] AC 301.
33 [1999] QB 674.

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that under the rule in *Foster v Driscoll*, a contract made with a unilateral intention on the part of a contractant to procure an innocent party to perform an illegal act in the *locus solutionis* was unenforceable by him.[34]

10 The case of *Brooks Exim Pte Ltd v Bhagwandas Naraindas*[35] ("*Brooks Exim*") properly understood is similar authority, although it may not have stressed that a contract of this character would only be unenforceable by the guilty party. The plaintiff had transferred inherited moneys held in Singapore to the defendants' account in Singapore. Contending that accrued interests on the transferred moneys were exigible to Indonesian tax, the defendants refused to return the moneys claiming that the contract of transfer was illegal and unenforceable, having been made by the plaintiff for the illegal purpose of deceiving the Indonesian tax authorities. The defendants were probably an innocent party who had agreed to the transfer in order to assist the plaintiff to obtain credit facilities for the plaintiff's business in Indonesia. Like Stuart-Smith LJ in *Royal Boskalis* (not cited to the Court of Appeal), however, the Court of Appeal did not suppose that the case would fall outside the rule in *Foster v Driscoll* if only one party, the plaintiff, intended to break the penal law. There was, however, no evidence that the plaintiff was even aware that accrued interests were liable to Indonesian tax. For that reason alone, the defendants' plea of the defence of illegality under the rule in *Foster v Driscoll* failed.

11 There is more than this to indicate that the rule has come to develop a wider scope in another respect. It is possible that the rule will apply to render a contract unenforceable by a party who makes it in order to knowingly receive property in breach of a penal law in the intended *locus solutionis*. In *The Bodley Head Ltd v Flegon*,[36] the plaintiffs who had obtained their English copyright from assignors sued the defendants for its infringement in England. The plaintiffs' assignors were assignees from Heeb, an agent of the Russian author, and the defendants contended that it would be contrary to international comity for the court to lend its assistance to the plaintiffs when the plaintiffs knew that "the author was not entitled under Russian law to give a power of attorney to Heeb, that the export of the text of the novel from Russia to Switzerland was contrary to Russian law, and that the retention by Heeb of royalties for the account of the author would also be contrary to Russian law".[37] The

34 The defendant insurers were therefore entitled to contend by way of defence to a claim to insurance coverage that the insured plaintiffs had suffered no loss since the finalisation agreement was illegal and unenforceable by the Iraqi government, leaving the original obligation under the dredging agreement intact.

35 [1995] 1 SLR(R) 543.

36 [1972] 1 WLR 680.

37 *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680 at 687.

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English High Court was prepared to assume that those allegations of Russian law illegalities were true but held that the defence of illegality would nevertheless fail as none of the illegal acts in question was required by the contract with Heeb to be done within the frontiers of Russia. It is notable that the court did not, however, dissent from the remainder of the submission that a contract to receive property with knowledge that it is to be transferred in violation of a foreign penal law is illegal and unenforceable by the intended recipient.

12 That said, one should hesitate to suppose that mere knowledge of the plaintiff contractant that the counterparty intended to break the penal laws of the *locus solutionis* will attract the rule in *Foster v Driscoll* so as to render the contract unenforceable by him as well. Two prominent authorities, *Fielding & Platt Ltd v Najjar*[38] and *Dimpex Gems (Singapore) Pte Ltd v Yusoof Diamonds Pte Ltd*,[39] which followed it, emphatically deny this. Both cases involved sales by sellers under no obligation to deliver in the buyers' country where illegality was intended by the buyers to be committed. In the first, the sellers did not have knowledge that the buyers were importing the extrusion press without a licence and hence illegally; and Lord Denning MR observed *obiter* that mere knowledge without "active participation" would not satisfy the rule in *Foster v Driscoll*. In the second, the Court of Appeal was prepared to assume that the sellers were aware that the buyers intended to smuggle the goods into Malaysia; and held that mere knowledge without "active participation" was insufficient.[40] Without the benefit of these citations, G P Selvam JC in a subsequent case, *Singapore Finance Ltd v Soetanto*,[41] took the view that *Regazzoni* was decided on "the principle that the performance of the contract would be illegal in India, the place of performance of the contract" and "the appellant/plaintiff had knowledge of the illegality".[42] That the *Foster v Driscoll* principle was not correctly stated by G P Selvam JC is now clear from the Court of Appeal's observations in *Peh Teck Quee v Bayerische Landesbank Girozentrale*[43] ("*Peh Teck Quee*"). Knowledge alone is not enough and "active participation" is required.[44]

38 [1969] 1 WLR 357.
39 [1987] SLR(R) 349.
40 *Cf* Tan Yock Lin, "Diamonds in Breach of Law" (1988) 30 Mal LR 424.
41 [1992] 1 SLR(R) 645. See Yeo Tiong Min, "Restitution, Foreign Illegality, and Foreign Moneylenders" (1996) 8 SAcLJ 228 at 235–238 for a nuanced scrutiny of *Singapore Finance Ltd v Soetanto* [1992] 1 SLR(R) 645.
42 The test he formulated is at *Singapore Finance Ltd v Soetanto* [1992] 1 SLR(R) 645 at [18] and was followed in *Overseas Union Bank Ltd v Chua Kok Kay* [1992] 2 SLR(R) 811.
43 [1999] 3 SLR(R) 842.
44 What constitutes "active participation" may be variable since there is a scale of involvement. It should not be necessary that the "knowing assistant" must have obligated himself to provide substantial assistance so that he can be said to intend

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13 In contrast to what has just been said, if the question is one of illegality under the domestic law, mere knowledge will be enough to render the contract unenforceable by the knowing contractant, without the necessity of active participation on his part.[45] In *Pearce v Brooks*,[46] it was held to be "settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied".[47] So although the rule in *Foster v Driscoll* seems to traverse ground covered by the domestic categorical rule which was the focal point of *Ting Siew May* and described as "a very limited sphere of common law illegality where the contract was not prohibited *per se*",[48] we can also rule out the possibility that the rule in *Foster v Driscoll* is merely an extraterritorial replication of that sphere of domestic illegality.

14 The rule in *Foster v Driscoll* appears to be subject to three or four "limitations".[49] The formulation in terms of breach of the penal laws is ambiguous and could include breach of extraterritorial penal laws without any unlawful performance within the territory of the *lex loci solutionis*.[50] However, as was stated in *Ispahani v Bank Melli Iran*,[51] "the intended commission of prohibited acts within the territory of a friendly foreign country (whose laws prohibit those acts) is an essential and necessary ingredient of the principle in *Foster v Driscoll*".[52] There is abundant authority for this besides the case just cited.[53] In *Brooks Exim*,[54] the plaintiff had allegedly transferred his inheritance moneys intending to deceive the Indonesian tax authorities and without notifying the Indonesian tax authorities that moneys liable to Indonesian tax were being moved. The Indonesian laws he was alleged to have violated were presumably extraterritorial and required the plaintiff presumably resident in Indonesia to notify the authorities of any affected transfer

purposefully to assist in the violation of foreign law illegality. Nor would it seem necessary to predicate that he must know that what he must do under the contract will have a substantial effect in furthering commission of the foreign law illegality.

45 See Lord Somervell in *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 331.

46 (1866) LR 1 Exch 213.

47 *Pearce v Brooks* (1866) LR 1 Exch 213 at 217.

48 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [39].

49 There is no suggestion anywhere that the rule does not apply to contracts made by the Government.

50 *Cf Jones v Chatfield* [1993] 1 NZLR 617.

51 [1998] Lloyd's Rep Bank 133.

52 *Ispahani v Bank Melli Iran* [1998] Lloyd's Rep Bank 133 at 139–140.

53 See also *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678 at 694; *Four Seas Communication Bank Ltd v Sim See Kee* [1989] 1 SLR(R) 285 at [7]; and *Bhagwandas Naraindas v Brooks Exim Pte Ltd* [1994] 1 SLR(R) 932 (HC), affirmed in *Brooks Exim Pte Ltd v Bhagwandas Narainda* [1995] 1 SLR(R) 543 (CA).

54 *Brooks Exim Pte Ltd v Bhagwandas Narainda* [1995] 1 SLR(R) 543.

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of accounts held in Singapore. Dismissing the defendant's defence of illegality to the plaintiff's claim to a return of the transferred funds, the High Court held that there was no doing of any act that amounted to an illegality in Indonesia, the country which created the illegality. It was fatal to the defendant's defence that nothing in the contract of transfer required the plaintiff to do anything in Indonesia to facilitate the alleged deception. Two reasons, incidentally, have been given elsewhere to compel this essential requirement of territorial penal violation;[55] namely, its agreeableness to international comity[56] and to the cognate rule in *Ralli Brothers* that it must be the law of the place of performance that prohibits the act of performance.

15 The second limitation is that the rule is restricted to claims to enforce an English law contract, including seeking damages for breach. The rule thus does not apply to claims for restitutionary relief for benefits conferred under the illegal contract. Nor does it apply to enforcement of a foreign judgment or arbitral award given in respect of a "*Foster v Driscoll*-contract", the enforceability of which would have been refused had a judgment been sought in the first place in proceedings in the forum.[57] More comments on this will be made below in the ensuing discussion of the true rationale of the rule.[58]

55 *Ispahani v Bank Melli Iran* [1998] Lloyd's Rep Bank 133.

56 One might add that international law rejects extraterritorial application of national legislation, except over matters closely related to or with a direct immediate and substantial nexus with legitimate interests of the state.

57 See *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 1 All ER (Comm) 865 and *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm) 146. The fact that the *Foster v Driscoll* rule is not a universal prohibition of illegal contracts is evident in these cases; at the least they show that the rule is not part of truly international public policy.

58 Incidentally, the High Court in *Bhagwandas Naraindas v Brooks Exim Pte Ltd* [1994] 1 SLR(R) 932 should not be taken to have propounded a different rule when it stated its conclusion at [26] that the rule applies "notwithstanding [the contract] is valid under *the proper law* of the contract" [emphasis added]. The context shows that by the proper law the court meant Singapore law. See also *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1993] 2 SLR(R) 842 at [45] where the Court of Appeal stated: "This [*Foster v Driscoll*] principle states that the courts will treat a contract governed by its own law as void where the parties' intention and object contemplated thereby jeopardises relations between its government and another friendly government." In *Omnium de Traitement et de Valorisation SA v Hilmarton* [1999] 2 All ER (Comm) 146 at 149, Timothy Walker J, citing Viscount Simonds in *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 317, said that "in applying this principle it is immaterial whether the contract itself is governed by English or foreign law". But there would appear to be some misunderstanding that Viscount Simonds was stating the law when he was merely recounting counsel's submission.

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16 There is probably a third limitation that the rule will not be applied if the foreign law illegality in question is contrary to English morals.[59]

17 The fourth limitation is that the rule is now accepted as embracing both civil and criminal violations of foreign revenue or fiscal law. The Court of Appeal in *Brooks Exim* said that there was no doubt about this as early as 1995, agreeing with the High Court.[60] Four years on, Stuart-Smith LJ in *Royal Boskalis* likewise applied the rule in *Foster v Driscoll* to breach of sanctions legislation which merely imposed civil prohibitions, saying that he was not impressed that there was no illegality in the criminal law sense in the case.

18 On the other hand, no one supposes that every kind of penal law or violation of penal law is within contemplation. Reynolds would restrict it to penal offences which are *mala in se* or contrary to international morality, seeing an affinity between the rule in *Foster v Driscoll* and that in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*[61] ("*Lemenda Trading*"), to be noted later.[62] There has yet to be affirmation of this but the suggestion may be too narrow.[63] Thus, in *Ryder Industries Ltd v Timely Electronics Co Ltd*[64] ("*Ryder Industries*"), Lord Collins said: "The principle is one of public policy, and these decisions have to be read in the light of the foreign legislation which was involved. … Plainly, it does not apply to every breach of foreign law."[65] A little farther on, citing *Euro-Diam* as illustration, he added:[66]

> There may nevertheless be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state or separate law district may be such that it would be contrary to public policy to enforce a contract. But there is no basis in authority or principle for holding that *every* breach of foreign law would come into this category.

59 See the concurring opinions of Lords Reid and Somervell in *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301. It is possible that some support may be garnered from *Howard v Shirlstar Container Transport Ltd* [1990] 1 WLR 1292, although the reasoning there depended on the superseded test of affront to the public conscience.
60 *Brooks Exim Pte Ltd v Bhagwandas Naraindа* [1995] 1 SLR(R) 543 at [14].
61 [1998] 1 QB 448. Considered in *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1994] 2 SLR(R) 605. See also David Chong Gek Siang, "Contractual Illegality and Public Policy" (1995) 7 SAcLJ 303.
62 F M B Reynolds, "The Enforcement of Contracts Involving Corruption and Illegality in Other Countries" [1997] Sing JLS 371.
63 *Cf United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR(R) 214, which accepted another qualification that the illegality must involve turpitude.
64 [2015] HKCU 3109.
65 *Ryder Industries Ltd v Timely Electronics Co Ltd* [2015] HKCU 3109 at [50].
66 *Ryder Industries Ltd v Timely Electronics Co Ltd* [2015] HKCU 3109 at [57].

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This, as an aside, further confirms that the rule in *Foster v Driscoll* is not a composite domestic rule with extraterritorial application to foreign law illegality. If it were, it would be odd that the rule should be limited to penal laws and not include moral prohibitions, and further only to those penal laws of the *lex loci solutionis*. Further comments on this are reserved for the time being as the more appropriate place to make them is in the ensuing discussion of the true rationale of the rule.

19 Next in this account is the rule in *Ralli Brothers*, which is almost as well-known but more controversial. An English law contract of carriage was partially paid for, the remainder freight to be paid on delivery of the cargo in Spain. Between conclusion of the contract and arrival of the vessel in Spain, a Spanish decree was promulgated making it illegal to pay freight beyond the stipulated amount. The cargo consignee tendered the maximum freight allowable under the decree but the shipowner sued in England for the balance due. The English Court of Appeal held that the cargo consignee was entitled to pay only the maximum freight allowable in judgments which have continued to attract debate.[67]

20 There is a popular view that the decision in *Ralli Brothers* was simply an application of English law as the proper law of the contract; in particular of the domestic rule that a contract is discharged *in futuro* by supervenient illegality, irrespective of where it occurs.[68] This view posits that there was in that case only a substantive question of whether impossibility of contractual performance had occurred on account of supervenient illegality. The dispute was thus concerned with the effect of the foreign law illegality as relevant datum and not as law. There was merely a substantive law matter governed by the proper law to be and which was decided.

67 This was observed in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842, a leading Singapore case on another important rule in *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, which limits freedom of choice of law. The case is also significant for the Court of Appeal's refusal for the time being at counsel's invitation to blend the rules in *Foster v Driscoll* [1929] 1 KB 470 and *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287. One of the reasons given for hesitation was uncertainty as to the nature of the latter rule. The court observed that debate had yet to settle its juridical nature.

68 F A Mann, *Proper Law and Illegality in Private International Law* (1937) 18 BYIL 97 at 111 argued that the decision in *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 turned on the doctrine of impossibility of performance in English law. See also *Dicey, Morris and Collins on The Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds) (London: Sweet & Maxwell/Thomson Reuters, 15th Ed, 2012) at para 32-102 for the view that the rule is best understood as a principle of English domestic law. See also *Ryder Industries Ltd v Timely Electronics Co Ltd* [2015] HKCU 3109 at [43].

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21 The statements of Lord Reid in *Zivnostenska Banka National Corp v Frankman*[69] ("*Zivnostenska*") stand in contrast to the popular view.[70] Lord Reid described the rule in question as well settled by this time. The proper law is immaterial in the sense that the validity of the contract under the proper law is immaterial.[71] The key is that an English court will not require the performance of a contract whatever its proper law where it has become illegal to perform at the *locus solutionis* under the contract. In an earlier case, *Kahler v Midland Bank*[72] ("*Kahler*"), Lord Reid had expressed the proposition in this way:[73]

> The law of England will not require an act to be done in performance of an English contract if such act would be unlawful under English law *or if it would be unlawful by the law of the country in which the act has to be done*. But I know of no authority for the proposition that an English court will not enforce performance in England by a foreigner of an act which is lawful in England merely because the law of the foreigner's country prohibits him from doing that act in England. A foreigner can only get protection in such a case if there is a term in the contract which gives it to him [emphasis added]."

Nothing in those remarks suggested that there was any difference whether the illegality is supervenient[74] or pre-existing at the time of contract.[75]

22 There does not seem to be much doubt that these two cases, *Kahler* and *Zivnostenka*, more than prove the position recognised in more recent English cases that the two rules in *Foster v Driscoll* and *Ralli Brothers* are related "rootstock".[76] The rule in *Ralli Brothers* is no more an extraterritorial replication of the domestic rule than the rule in *Foster v Driscoll*. The concern with *lex loci solutionis* illegality[77] is indistinguishable. The effect is the same. The contract is also deemed illegal and unenforceable in a *Ralli Brothers*-type case. Although a court will not require any illegal performance of the obligation in the *locus*

69 [1950] AC 57.
70 By 1935, in *De Beeche v South American Stores (Gath & Chaves) Ltd* [1935] AC 148, the rule was considered well settled. No elaboration was forthcoming.
71 See *Tamil Nadu Electricity Board v ST-CMS Electric Co Pte Ltd* [2007] 2 All ER (Comm) 701 at [46].
72 [1950] AC 24.
73 *Kahler v Midland Bank* [1950] AC 24 at 48.
74 *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678; *Toprak Mahsulleri Ofisi v Finagrain* [1979] 2 Lloyd's Rep 98.
75 *Toprak Mahsulleri Ofisi v Finagrain* [1979] 2 Lloyd's Rep 98 at 107, approved by the Court of Appeal in [1979] 2 Lloyd's Rep 112 at 117.
76 *Ispahani v Bank Melli Iran* [1998] Lloyd's Rep Bank 133 at 140.
77 Reflecting this view, the term "*lex loci solutionis*" will henceforth be used to refer to both the law of the intended *locus solutionis* (the subject law of *Foster v Driscoll* [1929] 1 KB 470) as well as the *locus solutionis* under the contract (the subject law of *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287).

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solutionis under the contract, it will not overlook the fact that the contract may well be enforceable if the obligation as construed by the proper law does not involve any required performance in the alleged *locus solutionis*. This perfectly explains *Ralli Brothers* itself. As the freight was required to be paid in Spain and payment had been duly made in conformity to Spanish law, no question of requiring any illegal performance in Spain needed to be raised in the proceedings in England. Nor was it. What was to be decided was simply whether under English law as the proper law, the payment of the outstanding amount could be demanded in England under the contract.[78] As to that, there was no act of payment to be enforced in Spain and the proper law had to be, and was applied to the effect, that the payment obligation to be enforced in England had been frustrated under the proper law. So the popular viewpoint that the case was based on the contents of domestic English law reflects the facts on which the actual decision was based. It should not be overlooked, however, that it was possible to apply English law only because the results of frustration through supervenient illegality did not amount to enforcement of the contract involving the doing of an illegal act under the penal law of Spain.

23 So, not only can the rule in *Ralli Brothers* be found in premises which are tied to doing an act illegal under the *lex loci solutionis* and which are common to the rule in *Foster v Driscoll*; its application should also be regarded as premised on the absence of any intended or knowing violation of the *lex loci solutionis* in Spain beyond the limits prescribed by Spanish law. If the cargo consignee had unknowingly violated the Spanish law and paid the full freight in Spain, he could not have afterwards sought and obtained recovery of half of that amount in England. He would in effect and substance be asking the court to enforce his illegal performance in the *locus solutionis* contrary to the rule in *Ralli Brothers*.[79] This therefore reflects the difference that:[80]

> The *Ralli Brothers* doctrine is directed solely at unlawful performance required by the terms of the contract but *Foster v Driscoll* applies where the real object and intention of the parties, at the time of the contract, was the commission of

78 See also *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728.
79 *Cf Prodexport State Co for Foreign Trade v E D & F Man Ltd* [1973] 1 QB 389.
80 *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] 2 All ER (Comm) 436 at [19]. *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, which was mentioned earlier, also helpfully underscores this difference by emphasising that if unlawful performance is not necessarily required (for instance because exemptions may be obtained) the *Ralli Brothers* rule will not be applicable: see *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 at 734, *per* Phillips LJ. On the other hand, Stuart-Smith LJ held that, as the Iraqi government had intended that the agreement should be performed without seeking the requisite exemptions, the agreement was illegal by virtue of the rule in *Foster v Driscoll* [1929] 1 KB 470.

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conduct that would be unlawful in the relevant country, even if that conduct was not necessarily required by the terms of the contract.

B. *The true rationale*

24 Without examining both the stated and unstated rationales of both foreign law illegality rules, one cannot decisively agree that the two rules are truly of the same rootstock. In any case, whether we like it or not, there is a need to trace the complicated design behind those rules which seem to have been hatched out of very scanty materials. The rationale seems at once clear and yet unclear. International comity is the explicit rationale postulated in *Regazzoni*, where, as was said, the House of Lords approved of *Foster v Driscoll*. To cite only three of their Lordships, Lord Reid appealed to public policy with regard to international relations;[81] Viscount Simonds said that comity was the influencing factor;[82] and Lord Keith more explicitly expressed concern about embarrassment to the executive if India should complain about the forum court enforcing a contract with an object of breaking Indian law.[83] Although international comity was common ground, there are several unusual aspects worthy of note. Speaking generally, a common problem is that comity-based rationales have unstable or ambiguous meanings. Many of these are exposed by Briggs, who argues that comity's most comfortable common law meaning is that of forum restraint of a self-abnegating nature.[84] There must be an affirmative something in the nature of the forum's right or duty or privilege or power against which self-restraint is urged. Call it a doctrine if we must; nothing changes the instrumentalist character of a restraint. If there is nothing to be restrained, international comity is devoid of substance.

25 In *Foster v Driscoll*, however, there seemed to be nothing about the forum's right or duty or power that was being restrained. To say that the forum court was restraining itself from deciding a dispute within its jurisdiction does not match what the court there did, which was to decide the dispute.[85] A possible articulation of reverse logic is that while the forum was bound to refuse to enforce the penal laws of a foreign

81 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 323 and 326.

82 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 318–319.

83 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 327.

84 Adrian Briggs, "The Principle of Comity in Private International Law" (2012) 354 *Recueil des cours* ch II. This sits well with what the US Supreme Court in *Hilton v Guyot* 159 US 113 (1895) thought of comity, as "neither a matter of absolute obligation, nor of mere courtesy or goodwill".

85 The court does take cognisance of the foreign law illegality to the extent of its criminality. In *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, the English Court of Appeal considered that it was relevant that the foreign law illegality included the penalty

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state, there was no reason that it should frustrate or undermine that state's penal interest by judicial inaction or abstention.[86] But this notion of international comity as an exception to non-justiciability or self-restraint with respect to the foreign penal laws is a strange one. If it were correct, the rule in substance should apply the foreign law contents so as to give effect to its effects such as the distribution or allocation of losses in consequence of illegality. However, the rule in *Foster v Driscoll* in fact only recognises the intention to commit a foreign crime in the friendly country. The outcome of unenforceability is entirely dictated by English public policy, not foreign law.

26 Perhaps more plausibly, *Ispahani v Bank Melli Iran*[87] could be cited as indicating that the forum court is restraining itself from applying its choice of law rules and, in particular, its duty to decide the case according to English law as the proper law and holding the parties to their bargain. The court refuses to do so for the sake of not jeopardising international relations. The difficulty then is to explain why the rule is not universal but restricted to cases where English law is the proper law and foreign law illegality is that of the *lex loci solutionis*. A related difficulty was pointed out by Mann in his scrutiny of *Reggazoni*.[88] He found it odd that the forum court should be concerned about potential complaints from India while being oblivious of potential complaints from South Africa.[89]

27 In the same place, Mann hinted to another sense to the rationale of international comity, namely the prevention of evasion of foreign law illegality.[90] This recalls the *Vita Food Products* case where the Privy Council laid down the rule that a choice of law for a contract must be bona fide, legal and not contrary to public policy. Where contractual party autonomy in the choice of law is recognised, ease of evasion of foreign internationally mandatory law is a concern. The rule in *Foster v Driscoll* could possibly be supposed to be addressing this concern as follows. The forum court will not enforce a contract to break the penal laws of the *lex loci solutionis* for the sake of preventing evasion of essential foreign

of confiscation of the goods in respect of which the crime of deception of the tax authorities had been committed.

86 As Denning LJ explained in *Regazzoni v KC Sethia (1944) Ltd* [1956] 2 QB 490 at 515–516 (CA), affirmed in [1958] AC 301 (HL), while the:

> … courts will not enforce [revenue or penal] laws at the instance of a foreign country, [i]t is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws.

87 [1998] Lloyd's Rep Bank 133.

88 F A Mann, "Illegality and the Conflict of Laws" (1958) 21 MLR 180.

89 F A Mann, "Illegality and the Conflict of Laws" (1958) 21 MLR 180 at 183–184.

90 F A Mann, "Illegality and the Conflict of Laws" (1958) 21 MLR 130 at 186.

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policies by party choice of law. This rationale against evasion of essential foreign law would appear to have underscored counsel's submissions on behalf of the defendant/appellant in *Peh Teck Quee* inviting the Court of Appeal to avoid the choice of Singapore law on the ground of public policy under the *Vita Food Products* rule. The court acknowledged that "the appellant submitted that, as a matter of public policy, the Singapore court should not uphold a choice of law that clearly had the effect of avoiding Malaysian regulatory statutes which carry penal consequences".[91] But while there were no further comments beyond bare acknowledgement, there seems also to be no doubt that the court proceeded to deal with the rule in *Foster v Driscoll* as a distinct and separate substantive matter of defence to the merits of the plaintiff's case.[92] Counsel's attempted equiparation of the rule with evasion of essential foreign law policies thus seems to be untenable, though not rebuffed.[93] It must be said that no such comprehensive rationale would in any event be discernible in the provenance of the rule in *Foster v Driscoll*. Moreover, the effect of a doctrine of evasion of foreign penal law, whether of the *lex locus contractus*, *lex domicilii* or *lex loci solutionis*, should be limited to rejection of the chosen law with the view to binding the parties to the objective proper law. It would, however, be hard to square this limitational aspect of party autonomy with the rule in *Foster v Driscoll*, which imposes the forum's outcome of contractual unenforceability in relation to *lex loci solutionis* illegality. It would, of course, remain an insuperable challenge for the evasionist protagonist to explain why the *Foster v Driscoll* rule is and should be limited to English law contracts to break foreign penal laws of the *locus solutionis* in the first place[94] (likewise, to explain why the rule is distinguished from the *Vita Food Products* rule which is in

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91 *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [16].

92 See also *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi North Sdn Bhd* [2017] 2 SLR 814 at [57]–[61].

93 There are others who argue that:

> It is not the choice itself which is capable of offending public policy, but the effect of applying that chosen law. It follows that where the public policy limitation is applied, its effect is not to nullify the choice, but to override that part of the proper law which is inconsistent with policy.

Peter Kincaid, "Rationalising Contract Choice of Law Rules" (1993) 8 *Otago Law Review* 93 at 107. *Cf Coast Lines Ltd v Hudig and Veder Chartering NV* [1972] 2 QB 34 at 48–49 and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

94 *Cf Ispahani v Bank Melli Iran* [1998] Lloyd's Rep Bank 133 at 137:

> These principles are, it seems, part of the English law of contract (as opposed to part of the English law of conflict) and as such are unaffected by the Rome Convention (see Dicey & Morris, Conflict of Laws, 12th ed pp. 1245-7). But it is unnecessary to express any final view on that point.

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fact concerned with evasion of foreign internationally mandatory norms (and not foreign law illegality rules as such)).[95]

28 There is more. Reynolds in an illuminating article recounts tersely that the received view is that the rule in *Foster v Driscoll* is one of overriding forum public policy in the conflict of laws sense.[96] He assumes therefore that the rule is not dependent on there being an English law contract but will be applicable whatever may be the proper law. The first point to be noticed is that the received view would appear to be inconsistent with the position that the courts have taken in relation to arbitral awards alleged to have been given without regard to the rule in *Foster v Driscoll*. Courts have held that there is no ground of public policy for refusing to enforce such arbitral awards.[97] The second point is that until this day, there is yet to be authority to that effect that the rule is not dependent on there being an English law contract. The *Royal Boskalis* case would not be such authority. Although Stuart-Smith LJ might seem to have held that the Iraqi law finalisation agreement was illegal and unenforceable by the Iraqi government, it should not be overlooked that that agreement purported to vary the original English law dredging agreement. The question in that case was whether the dredging agreement subsisted unaltered in spite of the finalisation agreement. Arguably, the validity of the finalisation agreement in modifying the dredging agreement depended ultimately not on Iraqi law but English law. That would especially be right on the facts since the finalisation agreement was obtained by shocking duress and the choice of Iraqi law as proper law of the finalisation agreement was obviously not *bona fide* and legal.

29 There is a second problem. Reynolds himself criticised what he called the received view when he concluded tentatively in favour of the rule's being a rule of international law.[98] Since then, there has been greater recognition of what is truly international public policy as distinguished

95 See J J Fawcett, "Evasion of Law and Mandatory Rules in Private International Law" (1990) 49(1) Camb LJ 44 at 55: "The only basis for a national interest [in upholding a foreign law] is that of considerations of comity of nations."
96 F M B Reynolds, "The Enforcement of Contracts Involving Illegality and Corruption in Other Countries" [1997] Sing JLS 371 at 380.
97 See *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 1 All ER (Comm) 865 and *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm) 146.
98 Reynolds reaches that conclusion by considering and dismissing four possible rationales: (a) as a domestic rule; (b) as overriding public policy; (c) as a special connection rule (see now Art 9(2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations replacing Art 7(2) of the Rome Convention on the Law Applicable to Contractual Obligations (19 June 1980; entry into force 1 April 1991)); and (d) as international law.

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from forum public policy. The arbitral case of *World Duty Free Co Ltd v The Republic of Kenya*[99] shows that enforceability by the guilty party who has given a bribe to win the contract is contrary to truly international policy. Such policy is particular and its objective existence must be proved.[100] In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5)*,[101] Lord Steyn also referred to the developing notion of truly international public policy requiring, *inter alia*, states to respect fundamental human rights and to avoid flagrant breaches of public international law.[102] Perhaps Reynolds had this conception of public policy in mind but if he meant something more, such as a general notion of turpitudinous violation of foreign law illegality, we are clearly still very far from that position, even in international arbitration law.[103]

30 The true impulse which shapes the rule, it is submitted, springs from the rudimentary unilateral conflicts rule that the forum will not enforce a foreign law contract intended to break the forum's own penal laws. This clearly appears in Viscount Simond's judgment in *Regazzoni* where he said: "Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity."[104] The forum as a matter of domestic public policy will not enforce any foreign law contractually required act directed at the forum as *locus solutionis* which would knowingly be a violation of its penal laws. That being the case, it will as a matter of international comity extend its domestic public policy to deny enforceability to an English law contract to break or procure or assist in breaking the *lex loci solutionis* illegality of a friendly foreign country. The rationale in this form is obscure but discernible in *Biggs v Lawrence*[105] where a contract made in Guernsey and legal under the law of Guernsey for the purposes of smuggling goods in contravention of English statute law was held to be contrary to English public policy. A similar authority is *Grell v Levy*,[106] where a foreign law champertous contract for litigation

99 ICSID Case No ARB/OO/7, Award (4 October 2006).
100 *World Duty Free Co Ltd v The Republic of Kenya*, ICSID Case No ARB/OO/7, Award (4 October 2006) para 141.
101 [2002] 2 AC 883.
102 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883 at [115].
103 Bribery is an exception. Many treaties oblige or encourage signatory states to provide for avoidance of contracts procured by bribery. See, *eg*, Art 34 of the United Nations Convention against Corruption (2349 UNTS 41) (31 October 2003; entry into force 14 December 2005), which provides that: "States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action."
104 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 319.
105 (1789) 3 TR 454. See also *Pellecat v Angell* (1835) 2 C M & R 311.
106 (1864) 16 CB(NS) 73.

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in England was held to be contrary to public policy to enforce. Another is *Skilling John B v Consolidated Hotels Ltd*,[107] which is discussed below.[108] In a very different case, namely *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*,[109] there is further though more oblique recognition of this. There, for much the same reason, the choice of law rule for torts was modified so that a tort committed in the forum was held to be exclusively governed by the *lex fori*. This invocation of public policy is not the usual exclusionary role that public policy plays in the conflict of laws where it excludes the substantive application of objectionable foreign laws which are contrary to *fundamental* domestic public policy. The difference here is that the domestic public policy, whether fundamental or not, has extended and unilateral application; so that the forum court will not require performance of an English law contract which will others give effect to the intention to break a foreign penal law in the *locus solutionis*. The English law contract is refused enforcement as if it were a contract to break the penal *lex loci solutionis* and as if that were the forum's penal law in the forum. The rule's unenforceability outcome thus does not depend on whether the result is unenforceability according to the contents of the foreign penal law. Even where the foreign law which prohibits the act does not prohibit the contract, the forum court will not enforce the contract, treating the contract as if its purpose had been to commit a crime in the forum. Nor does the unenforceability outcome depend on substantive coincidence in the penal laws of the *locus solutionis* and the forum. It is the "wicked" intention to break the penal law that alone is material.

31 The true impulse is revealed more fully by another consideration. It might seem odd that such assistance in aid of international comity should only be made available in favour of parties who have chosen to make an English law contract. The rule could be criticised along that line of approach for being underinclusive and not embracing foreign law contracts to break the laws of another foreign country which is the *locus solutionis*. But the answer in part is that more general assistance in terms of international comity is to be rendered in another way by striking down the proper law chosen by the parties for the purposes of evasion of foreign law illegality. Where the foreign law is the objective proper law, which is very likely in such cases, the foreign law illegality will be applied as an anti-evasion measure. The *Vita Food Products* rule thus accommodates such cases by applying the objective proper law in the place of the proper law chosen to evade foreign law illegality. This upholds the forum's commitment to freedom of choice of law and the corollary of

107 [1979–1980] SLR(R) 86.
108 See para 82 below.
109 [1991] 1 QB 391.

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general irrelevance of foreign law illegality. The rule in *Foster v Driscoll* is different in applying the *lex fori* consequence of unenforceability of contract to a *lex fori* contract by way of a very limited concession to that commitment. It operates without proof of absence of *bona fides* in the choice of the *lex fori* as governing law, giving rise to obligations of international comity on the basis solely of intention to violate an illegality of the *lex loci solutionis*.[110]

32 Not only do these obligations of international comity distinguish the rule in *Foster v Driscoll*, they likewise undergird the rule in *Ralli Brothers*.[111] If a foreign law contract has become illegal to perform in the forum, it would be contrary to English public policy to enforce it. The authority for this is *Skilling John B v Consolidated Hotels Ltd*,[112] where the Court of Appeal refused to enforce a foreign law contract made with an unlicensed non-resident engineer for professional services to be rendered in Singapore. The contract was prohibited by the Singapore Professional Engineers Registration Act,[113] and it was held to be contrary to forum public policy to enforce it. Absence of intention to commit the illegality was inconsequential. By the same token of international comity, the contract in the *Ralli Brothers* case can properly be said to be unenforceable through extension of the forum domestic public policy by treating the *lex loci solutionis* (Spanish) illegality as if it had occurred in the forum and as if the *lex loci solutionis* were the *lex fori*.

33 There are qualifications to be sure. One qualification accommodates the decision in such cases as *Ertel Bieber & Co v Rio Tinto Co*,[114] where otherwise lawful German law contracts made by an English seller to deliver goods from Spain to specified ports in Europe to German buyers were held to become illegal under the *lex fori* upon the outbreak of war. It was held that it would be contrary to public policy (in view of the Trading with the Enemy Act 1914)[115] to enforce those contracts in the forum. The case, of course, was not straightforwardly a case of a prohibited contract made in the forum and required to be performed in the forum. So it is necessary to add that exceptionally, where statutory

110 The answer in part has some parallel with what may happen where the real conflict is between the public interests of the country of the foreign applicable law and those of the *lex loci solutionis*. A similar obligation of international comity may require the forum court to intervene by staying the proceedings in the exercise of judicial discretion. See *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34 at 49.

111 They "spring from the same root principle of comity": *Toprak Mahsulleri Offisi v Finagrain* [1979] 2 Lloyd's Rep 98 at 107.

112 [1979–1980] SLR(R) 86.

113 Cap 225, 1970 Rev Ed.

114 [1918] AC 260.

115 c 87 (UK).

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prohibition is essential protection against the harmful effects[116] on the forum of extraterritorial penal contracts made by a forum subject, such contracts should be regarded as directed at the forum and deemed as required to be performed in the forum.[117] By the same token of extension of international comity, obligations of international comity will arise if a contract is directed at the foreign *locus solutionis* in the same sense.

34 Another qualification is that the rationale for the rule in *Ralli Brothers* may be wider in two respects. Lord Reid in *Zivnostenska* regarded the rule in *Ralli Brothers* as unilateral and jurisdictional, in terms that the English court will not compel performance of the illegal performance, whatever may be the proper law and not only in respect of an English law contract.[118] In the second place, contracts which are illegal as formed under the *lex loci solutionis* must likewise be illegal as much as contracts which have become illegal as performed. So much also may be gleaned from the reasonings in *Kahler* and also the analysis (though not the result) in *Toprak Mahsulleri Ofisi v Finagrain*.[119] What could explain both additional aspects of this rule? It is again that a contract which cannot be performed legally in the *locus solutionis* is illegal, irrespective of intention to break the penal law. Since the "wicked intention" is immaterial, there are no concerns of evasion of law. There is no need to have one rule for English law contracts, leaving foreign law contracts to be handled by some counterpart of the *Vita Food Products* rule. The extension of the *Ralli Brothers* rule to contracts governed by a foreign proper law also reflects the fact that the proper law has a necessary role in such cases. There are always two questions:

(a) Where are the obligations required to be performed?

(b) Are the obligations incapable of legal performance under the *lex loci solutionis*?

The first question must necessarily be answered according to the proper law. On the second question, the proper law may take a different view from the *lex loci solutionis* as to whether the obligations should be seen as incapable of legal performance or whether the consequence should be unenforceability. In the interests of comity, the forum can neither apply the consequence dictated by the proper law nor that of the *lex loci solutionis*. Regardless of the proper law, these obligations of comity should therefore

116 Of adding to the enemy's resources or crippling the forum subject's resources.
117 This is consistent with international law.
118 This incidentally is consistent with the non-application of the rule to a judgment of a foreign court otherwise entitled to enforcement which is given without regard to similar obligations of international comity.
119 [1979] 2 Lloyd's Rep 98.

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result in application of the forum's consequence of unenforceability of contract.[120]

35 It is highly probable then that the rules in *Foster v Driscoll* and *Ralli Brothers* are conflicts rules with one structural difference.[121] The *Foster v Driscoll* is a unilateral choice of law rule that a contract governed by English law is unenforceable if made knowingly with intention to break the penal *lex loci solutionis*. The *Ralli Brothers* rule is structurally different in being a unilateral choice of jurisdiction rule that the forum court has jurisdiction to refuse enforcement of an otherwise legal contract which is or has become illegal to perform in the *locus solutionis* under the contract. The forum court does not treat the question of unenforceability as non-justiciable and abstain from pronouncing on contractual unenforceability. In both instances, so long as proceedings are begun in the forum, the forum court is competent to declare that the contract is illegal and unenforceable, with *res judicata* effects. The objective is not to achieve uniformity in enforcing the non-criminal or collateral effects of foreign penal laws. Another forum may take a different stance on the matter and its judgment will be respected and enforced if it otherwise fulfils the requirements of the rules of recognition. Nor is it to ensure that the imperative public interest objectives of the foreign *locus solutionis* are met. That is a task for the forum of the *locus solutionis*. Serving a narrower aim of declaring the fact of illegality (not its effects under foreign law) with limited *res judicata* effects, this objective is intermediate between applying the foreign law and enforcing it on the one hand and dismissing the claim for reasons of non-justiciability. Consequently, the judgment which the forum court delivers will preclude re-litigation of the fact of intended commission of foreign law illegality or *de jure* prohibition of contract but not the effects of it, according to the *lex loci solutionis*. There is nothing further than this to preclude the parties seeking such enforcement of their contract or other relief in the *locus solutionis* or any other country.

36 The most interesting and significant result of the circumscribed rationale is that the principle of proportionality laid down in *Ting Siew May* should have no general applicability in cases on foreign law illegality. The *Ting Siew May* case holds that contractual unenforceability is a consequence in the case of contracts with an illegal object only when warranted by the directing (limiting) principle of proportionality. It should be stressed that this principle which has regard to considerations

120 It should not be overlooked that the proper law must be applied to ascertain where the *locus solutionis* is under the contract.

121 *Cf Taylor v Barnett Trading* [1953] 1 WLR 562 and *Prodexport State Co for Foreign Trade v E D & F Man Ltd* [1973] 1 QB 389.

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of overarching proportionality between enforceability of contract and the policies of the illegality in question does not seek to balance or co-ordinate the individual interest and the public interest. The court remains deferential to the unfettered role that public authorities play in defining the public interest as they see it. Does this mean that it would now only be right to refuse to enforce a contract within the rule in *Foster v Driscoll* when refusal is warranted under a limiting principle of proportionality?[122] Two reasons may be given that this would not be right. First, the subject of the principle of proportionality is a contract entered into with an illegal object which is not prohibited *per se*. But the subject of the rule in *Foster v Driscoll* is actually neither a contract to commit a crime, tort or fraud nor a contract entered into with an illegal object as understood under the domestic law. It has been shown that the rule is not exactly a mapping of *Ting Siew May*'s category of illegal object contracts in the international space. The second more significant reason is that the rule in *Ting Siew May* is domestic in character. It is not a rule about enforcing the proportionate collateral effects of breach of the foreign law illegality. The rule in *Foster v Driscoll* in contrast is not a rule about enforcing the proportionate collateral effects of the forum's own domestic illegality. When the forum applies the rule in *Foster v Driscoll*, it is only attributing the consequence of unenforceability of contract.

37 To be contrasted with this result is the apparently different approach in *Damberg v Damberg*,[123] where the New South Wales Court of Appeal considered a number of voluntary transfers of land in Germany allegedly for an illegal purpose of deceiving the German tax authorities. The court intimated that it would be necessary to ascertain not only the nature of the German tax laws but also their objectives and policies in proving the illegal purpose.[124] Heydon JA said: "Where the purpose is allegedly to be characterised as unlawful or illegal by reason of the statute, the policy of the statute as reflected in its provisions must be examined."[125] This was what the majority (comprising Gummow, Deane and McHugh JJ) in *Nelson v Nelson*[126] had decided when they held that a local resulting trust can be enforced despite the illegal purpose of the transferor when a refusal to enforce the trust would be disproportionate

122 Adam Johnson, "Foreign Law Illegality: Where Are We Now?" (2018) 77(3) Camb LJ 475 asks a similar question whether foreign law illegality should be subject to an open-textured approach along the lines of *Patel v Mirza* [2017] AC 467. He makes a pitch for greater flexibility and cites *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 as illustration.

123 [2001] NSWCA 87.

124 The illegal purpose was not proved and the court refused to apply the presumption that German tax laws were similar to Australia's.

125 *Damberg v Damberg* [2001] NSWCA 87 at [109].

126 (1995) 184 CLR 538.

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to the objectives and policies of the statute contravened.[127] Two answers are possible against any suggestion that *Damberg v Damberg* is authority for applying a principle of proportionality in a conflicts case. The first is that the examination of the penal policies intended in the case was limited to ascertaining the nature of the illegality. The court stopped short of performing any proportionality analysis in relation to enforceability or unenforceability as the outcome. The second is that the case was disposed of by agreement of the parties in contention on the basis of local resulting trust law. The court, therefore, did not have to consider whether in a conflicts case a further evaluation of proportionality of refusal of enforcement of the beneficial interest in relation to the pertinent penal policies was called for.

38 Finally, for the sake of bringing into sharper relief the circumscribed rationale, it is useful to add some observations on alternative stronger comity-based approaches which unlike the rule in *Foster v Driscoll* take account of substantive policies and especially mutual agreement on these policies. There are emergent trends of loosening the grip of sovereignty-based thinking in the conflict of laws. This has already happened under the rubric of comity of policies. A co-operative or collaborative doctrine of international comity may be emerging in some quarters with respect to foreign public law which protects cultural or heritage property.[128] Obviously, the rule in *Foster v Driscoll* is far from this. The developing important rule in *Lemenda Trading*[129] calls for greater attention albeit there is no need for substantial detail.[130] This rule states that the forum will refuse to enforce a contract the performance of which is contrary to domestic moral policy in the *locus solutionis* if its performance would also be contrary to English domestic moral policy or that of the proper law if it had been required to be performed in the English forum or the country of the proper law, as the case may be. The rule has some impressionistic parallels to the rule in *Ralli Brothers* which appears to be its partial inspiration. This is perhaps why the rule in *Lemenda Trading* does not require that the contractant should know that his performance is contrary to the local moral policy of the *locus solutionis*. If he intends to do the act and it is in fact contrary to the moral

127 *Nelson v Nelson* (1995) 184 CLR 538 at 564. The pertinent statute which was evaded in terms allowed for cancellation of any subsidies obtained.

128 See *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22. See also Alex Mills, "The Dimensions of Public Policy in Private International Law" (2008) 4(2) JPIL 201.

129 *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1998] 1 QB 448. Considered in *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1994] 2 SLR(R) 605. See also David Chong Gek Siang, "Contractual Illegality and Conflict of Laws" (1995) 7 SAcLJ 303.

130 See also *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549.

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policy of the *lex loci solutionis*, the rule is potentially engaged. There are however several significant differences between this rule and the foreign law illegality rules. Contracts to commit a fraud which is not criminal or tort are not within the foreign law illegality rules but can be dealt with under the rule in *Lemenda Trading*. Another difference is that under that rule, the forum court does not impose the effect of unenforceability *ipso facto*. Upon proof of the effect of unenforceability under the moral laws of the *locus solutionis*, it applies that legal effect of the *locus solutionis*, subject to the condition that if the performance had occurred within the forum or the country of the proper law the contract would be contrary to the forum domestic policy or the domestic policy of the proper law, as the case may be.[131] The fundamental expositional difference here relates to the distinction between legal prohibitions and moral prohibitions. Civilian jurisdictions observe this distinction and the forum court cannot in the interests of comity operate under the wider common law domestic notion of illegality which embraces both legal and moral prohibitions. The rule in *Lemenda Trading* is thus the result of avoiding this domestic distinction for the sake of comity and signifies a more nuanced result in handling moral prohibitions.[132]

39 There is also no need to discuss alternative regional overtures such as Art 7(1) of the Convention on the Law Applicable to Contractual Obligations[133] and Art 9(3) of the Rome I Regulation[134] which supersedes it. The former established a discretion in the forum court to take into account and give effect to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.[135] Article 7(1) was not restricted to illegality of the *lex loci solutionis* but contemplated also illegality of the *lex domicilii* of either party or the *lex locus contractus*. Article 9(3) now

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131 See *Tekron Resources Ltd v Guinea Investment Co Ltd* [2004] 2 Lloyd's Rep 26. Again, although the point has been left undecided for another day, we can expect that the rule of public policy which excludes objectionable foreign law will continue to operate. See *United World Duty Free Co Ltd v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006). Note that this arguably stops short of applying the foreign public law of the proper law.

132 F M B Reynolds, "The Enforcement of Contracts Involving Corruption or Illegality in Other Countries" [1997] Sing JLS 371 at 373 took the view that *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1998] 1 QB 448 is based on the doctrine of *Foster v Driscoll* [1929] 1 KB 470.

133 19 June 1980; entry into force 1 April 1991.

134 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations. Except for Denmark and Overseas countries and territories of European Union member states.

135 See Adeline Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2(1) JPIL 27.

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stipulates more restrictively that "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful."[136] Both the more extensive and the more restrictive articles are like multilateral solutions which require the forum to give effect to specified foreign law illegality as a species of foreign internationally mandatory law, beyond merely attributing the forum's outcome of unenforceability. A more open-textured transnational solution at the other extreme is also offered by Art 3.3.1 of the UNIDROIT Principles of International Commercial Contracts in its 2016 edition. Not only will the effects as expressly prescribed by the mandatory rule that is infringed be applied, but also where no effects are expressly prescribed, contractants are entitled to exercise such remedies as are reasonable in the circumstances, what is reasonable being judged according to a list of enumerated considerations.

40 These harmonised solutions to the problem of foreign law illegality evidently vary considerably. This fact alone proves that there is yet to be a compelling case in the absence of reciprocal or multilateral treatment for departing more aggressively from the present forum attitude of generally ignoring foreign law illegality. So far from relaxing this attitude unilaterally, Dodge has argued that there is reason to maintain it even more resolutely in the face of proliferation of divergent state regulation of commercial activities by way of internationally mandatory norms, including those expressed as legal or quasi-legal prohibitions.[137] Noting that such regulations are marked by irreconcilable differences in the way states define, organise, and advance their regulatory concerns and interests, he suggested that ignoring another country's regulatory interests[138] while aggressively pursuing one's own unilateralist forum assumption of extraterritorial regulatory control over business conduct would avoid under-regulation and encourage more efficient bilateral or multilateral resolution in fields governed by internationally mandatory norms. Inaction in the meantime would not be inimical to international

136 See Michael Hellner, "Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles" (2009) 5 JPIL 447.

137 In the fields of antitrust, banking, securities, insolvency, environmental regulation, export controls, and products liability. For differences between foreign law illegality and foreign internationally mandatory rules, see para 27 above and also para 84 below. *Cf* Trevor C Hartley, "Mandatory Rules in International Contracts: The Common Law Approach" (1997) 266 *Recueil des cours* 337 at 395, where foreign law illegality is seen as a sub-set of foreign internationally mandatory rules.

138 William Dodge thus argues in "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism" (1998) 39 Harv Int'l LJ 101 against circumscribing the ability of states to apply coercive measures against contracting parties.

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contracting. Where there are risks of violating regulatory laws, contracting parties can work around them by making provisions to allocate the risks of loss when unintended violations in fact occur.[139] While Dodge's unilateralist thesis has found law-and-economics justification, *inter alia*, in the field of securities regulation,[140] it is fair to say that generally speaking the thesis is strongest where "the policy of one state may be to defend what it is the policy of another to attack" and weakest when there is substantial agreement on substantive policies.[141]

III. The nature of the tainting rule under domestic law

41 With respect to the domestic tainting rule as a bar to contractual enforceability, this part is a necessary incursion because the rule itself is elusive and in need of clarification and rationalisation. Unless one knows just to what it crucially relates and hence what its true rationale is, the transition to its role in private international law will be too much guesswork. One should face at the outset the complication that references to the domestic tainting rule tend to be obscure and metaphorical, both in contractual and non-contractual contexts.[142] Sometimes the courts speak of the contract being tainted by illegality with another related illegal contract being the tainting act. Sometimes the tainting is by an illegal act of performance of the contract itself or a related act other than performing the contract, such as an act of omitting to obtain a licence or residence permit to carry on business. The rule has not been made very much clearer in more recent judicial clarifications. One fairly persistent strand of thought is that the tainting rule identifies another

139 One may add that consistent with *Waugh v Morris* (1873) LR 8 QB 202, the courts of course accept that "a contract can be rescued if the parties are content to vary it so that it can be performed legally, promptly rectifying the contract as soon as they are apprised of the illegality".

140 By encouraging interjurisdictional competition. See Stephen Choi & Andrew Guzman, "Portable Reciprocity: Rethinking the International Reach of Securities Regulation" (1998) 71 S Cal L Rev 903.

141 Horatia Muir Watt is a prominent dissenting voice. See "Choice of Law in an Integrated and Interconnected Market" (2003) 9 Columbia J Euro Law 383. But policies may converge. In the field of anti-competition disputes, for example, where there is now reasonable consensus that the effects theory is appropriate, a multilateralist solution based on orthodox choice of law principles will optimally allow the extraterritorial mandatory norms and essential policies of the affected market to govern. *Cf* the older view in *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 at 616–617: "It is axiomatic that in anti-trust matters, the policy of one state may be to defend what it is the policy of another to attack".

142 Diplock LJ called it "a picturesque metaphor which invites analysis": *Mackender v Feldia AG* [1967] 2 QB 590 at 600–601.

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"category" of tainted and hence illegal contracts.[143] A contractual claim tainted by illegality is perceived as being a claim on a contract deemed illegal and unenforceable as a whole. Another description emphasising the universal character of the tainting rule as a doctrine depicts either a rule about the effects of illegality on a claim to otherwise enforceable rights or a generalised rule of denial of a claim or relief as a consequence of involvement in an illegal act. This strand of thought has recently been elevated to a unifying thought capable of under-cutting categorical effects of unenforceability. Lord Toulson's speech in *Patel v Mirza* thus re-imagined an effects-on-the-claim approach based on a range of factors as a fundamental restatement of the extent to which there are effects arising out of common law illegality, both of unenforceability and recovery of benefits conferred under an illegal contract.[144]

42 The analysis in *Ting Siew May*, however, indicates that the courts in Singapore have chosen to retain the traditional categorical classification of illegal contracts; albeit injecting flexibility in a notoriously fluid category comprising contracts entered into with an illegal object. It is only in this category that unenforceability of contract is not a matter of course. Unenforceability of contract as a whole will only be manifest if that outcome is proportionate in an overarching sense to the objectives of the illegality. In *Ochroid Trading*, this posture of the Court of Appeal was renewed and reasserted, and, in particular, the relationship between categorical prohibition and relief in respect of or recovery of benefits conferred under an illegal contract was clarified.

43 As a result of this divergence between the domestic law and English law, discussion of the tainting rule in the domestic law has to be more focused on "traditional" notions. This means that the tainting rule as a bar to enforceability must still for the time being be identified, characterised and expressed by either the *Bowmakers* "reliance" principle (after *Bowmakers Ltd v Barnet Instruments Ltd*)[145] or the *Beresford* principle (after *Beresford v Royal Insurance Co Ltd*).[146] The former rejects a claim in which the plaintiff has to rely on his illegality. The latter rejects a claim which would in substance allow the plaintiff to profit from his illegality. Since a firm, general and comprehensive pronouncement on tainted contracts was not forthcoming in *Ting Siew May* and *Ochroid Trading*, its definitive character is open to reconsideration as indicated in *Teng Wen-Chung*. Some observations should nevertheless be less

143 See *Colen v Cebrian (UK) Ltd* [2004] ICR 538, criticised by Alexander Loke, "Tainting Illegality" (2014) 34 *Legal Studies* 560 at 563.

144 Such as the causal test in *Gray v Thames Trains Ltd* [2009] 1 AC 1339, rejecting the procedural reliance test.

145 [1945] KB 65. See *Stones & Rolls Ltd v Moore Stephens* [2008] 3 WLR 1146 at [16].

146 [1938] AC 586.

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controversial. One is that while the tainting rule is a doctrine which has acknowledged applicability outside of contract to tort, proprietary, trust, and unjustified enrichment restitutionary claims,[147] there is no reason to think that its rationale is fundamentally contingent on the type of rights being claimed, whether contractual, tortious, trust, proprietary or restitutional.[148] These are only applicational nuances which take into account the specifics of particular juridical considerations, requirements and policies.[149] Second, the Court of Appeal's reformulation in both *Ting Siew May* and *Ochroid Trading* of the reliance principle as one of normative reliance is of great importance, as will be argued below, in shedding light on how the tainting rule should be reconsidered when the rights claimed are contractual.

44 More than one rationalisation as to how to identify and organise the tainting cases are discernible. One is that the tainting rule has an exclusive external orientation, predicating an external tainting illegality related to but distinct from the tainted contract.[150] Buckley expressed this distinction as follows: "Both transactions are juridically independent of each other and the only ground by which otherwise valid rights can be rendered unenforceable is due to the *effect* of the illegality in one transaction on the other."[151] Incidentally, Toh Kian Sing relied on this rationalisation in a conflicts case when he criticised the decision in *Overseas Union Bank Ltd v Chua Kay Kok*[152] for ignoring the distinction.

45 Also in a conflicts case, Staughton J in *Euro-Diam* distinguished between inherent or direct illegality and tainting illegality where "the contract is not said to be directly affected by illegality but tainted with it".[153] By this tainting, he meant a transactional connection or causal proximity with an illegal contract (not stressing its illegal performance)

147 See *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 at [81].

148 See Lord Sumption, "Reflections on the Law of Illegality" [2012] RLR 1.

149 *Cf* James Goudkamp, "The Law of Illegality: Identifying the Issues" in *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg eds) (London: Hart Publishing, 2018) at p 56: "[T]he wider the terms in which any illegality doctrine is drawn, the more unlikely it will be that the burden of justifying it will be met."

150 A clear instance of extrinsic illegality is where a claim under a related contract is said to be tainted by illegality involving another contract as in *Pye Ltd v B G Transport Service Ltd* [1966] 2 Lloyd's Rep 300 and *Spector v Ageda* [1973] Ch 30.

151 Richard A Buckley, *Illegality and Public Policy* (London: Sweet & Maxwell, 3rd Ed, 2013) at paras 4.13–4.14. *Cf* Richard A Buckley, *Illegality and Public Policy* (London: Sweet & Maxwell/Thomson Reuters, 4th Ed, 2017) at para 4.15. See also Alexander Loke, "Tainting Illegality" (2014) 34 *Legal Studies* 560 at 561.

152 [1992] 2 SLR(R) 811.

153 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 21.

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which renders another contract not itself illegal obnoxious.[154] In the same case, he also spoke of an illegality which is central as opposed to incidental or collateral. This was regarded as a further proximity test of when tainting by an extrinsic illegality will occur (that is, when the tainted contract will be obnoxious) rather than as a further criterion of when illegality is external.[155]

46 Another meaning is discernible whereby any illegality is extrinsic as long as it is not the necessarily illegal performance of a contract which is illegal as formed or an intended illegal performance of a contract which is legal as formed. The context of two juridically independent transactions, one tainting and the other tainted, is unnecessary. *Howard v Shirlstar Container Transport Ltd*,[156] another conflicts case, arguably exemplifies this meaning. The plaintiff had agreed with the defendant to fly the latter's aircraft out of Nigeria for a commission contingent on success. In due course, he removed the aircraft to Lagos without air traffic clearance and, therefore, illegally under Nigerian law. The English Court of Appeal upheld the plaintiff's claim for commission in a judgment predicated on tainting illegality, which is instructive on two relevant points. The first is that the contract was not prohibited *per se* nor was there at the time of contract any intention on the plaintiff's part to perform it illegally. The fact was that the plaintiff subsequently chose to perform it illegally.[157] The second is that the court recognised that the plaintiff's claim was based on and tainted by his illegal, and apparently extrinsically illegal, performance of his contract to fly the aircraft out of Nigeria without clearance.

47 Another meaning conceives that intrinsic illegality exists only where the contract is illegal as formed.[158] Illegality is extrinsic in every

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154 See *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 15, where Staughton J said: "As a metaphor in the context of a contract and illegality I think it means that, while the contract is not itself illegal, it has a connection with some other illegal transaction which renders it obnoxious."

155 See also the rhetorical questions he posed:

> Suppose that a motor car is insured for a calendar year, and is driven in January in excess of the speed limit. Would that be an answer to a claim for a loss by theft or fire or a road accident in June? If a publican insured his stock of glasses and they were stolen in June, would it matter that they had been used for drinking after permitted hours in January?

156 [1990] 1 WLR 1292; [1991] LRC (Comm) 233.

157 It should be noted, however, that the contract was not illegal as performed since air traffic clearance was possible in theory; albeit the plaintiff thought it impossible that he should be given approval.

158 See *Maschinenfabrik Seydelmann KG v Presswood Bros* (1965) 53 DLR (2d) 224 at [16]:

> There is at present a tendency to regulate many activities in modern life by statutes or by Regulations authorized by statutory enactments, and the distinction between a contract inherently illegal because it cannot be performed

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other case, including where although legal performance of the contract itself is possible, the contract was intended to be and is performed illegally, and also where the illegal act is not one of performance.[159] A possible example of this notion of extrinsic illegality is the case of *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*,[160] where a pertinent statute on true construction did not prohibit contracts made by an unlicensed bank from being enforced by innocent depositors. However, it was argued on behalf of the defendant borrower that the principle of *ex turpi causa* barred the bank's claim to enforce the contract of loan against the borrower. The bank could not enforce a contract made in the course of a business which was prohibited as it would be relying on its own illegality.[161] This submission could not have been taken seriously if the High Court of Australia had supposed that illegality must be an act of performance of the contract; since the illegal act in question was clearly not one of performance but of qualification to do business. Mason J held, not that the appeal to the reliance principle was misconceived in relation to providential illegality, but presuming it as applicable, that the same considerations of public policy which explained why the contract of deposit was enforceable by the depositor also rendered inapplicable the borrower's defence of *ex turpi causa*.

48 That is by no means all the complexity there is. In many cases, there is no supposition that tainting means tainting by an extrinsic illegality at all and the tainting language is apt to describe and apply to illegality which on any account must be intrinsic illegality. In *Parkinson v College of Ambulance Ltd*,[162] P made a contract to purchase a knighthood in consideration of making a donation to charity; and when a knighthood did not come about, P sued for the return of his money as money had and received, as well as alternatively damages for deceit or breach of contract. Noticeably the action for breach of contract was resolved in the same terms as the action for the return of his money, in the tainting language of *ex turpi causa*. Lush J held that P "cannot recover damages either against Harrison or the college, because he is disclosing or setting up a contract which is unlawful, and which he had no right to make. For the same

without violating the law and one which can be legally performed but is void on the ground that there was an intention to perform it in an illegal manner cannot be disregarded.

159 See *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [42]–[43].

160 (1978) 21 ALR 585.

161 In the alternative, counsel submitted that the bank had entered the contract with the object of committing an illegal act of omitting to obtain a licence. Mason J did not appear to need to address this submission.

162 [1925] 2 KB 1. Although its authority in relation to restitution for unjust enrichment under English law is now doubtful. See *Patel v Mirza* [2017] AC 467 at [118], *per* Lord Toulson; [150], *per* Lord Neuberger and [254], *per* Lord Sumption.

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reason he cannot recover the 3000*l*. from the college as money had and received".[163] The subsequent case of *Alexander v Rayson*[164] is particularly striking for what was judicially said about a contract made with the intention of one or both parties to make use of the subject matter for an unlawful purpose.[165] "In any such case, any party to the agreement who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*."[166]

49 So that there will be no doubt about the tainting analysis in those cases, reference will be made to a recent statement of the English Court of Appeal in *Colen v Cebrian (UK) Ltd*,[167] which consistently articulates the possibilities of juxtaposition and overlap between contracts entered into with an illegal object and tainted contracts as follows:[168]

> If the contract was unlawful at its formation or if there was an intention to perform the contract unlawfully as at the date of the contract, then the contract will be unenforceable. If at the date of the contract the contract was perfectly lawful and it was intended to perform it lawfully, the effect of some act of illegal performance is not automatically to render the contract unenforceable. If the contract is ultimately performed illegally and the party seeking to enforce takes part in the illegality, that *may* render the contract unenforceable at his instigation. But not every act of illegality in performance, even participated in by the enforcer, will have that effect. If the person seeking to enforce the contract has to rely on his illegal action in order to succeed then the court will not assist him. But if he does not have to do so, then in my view the question is whether the method of performance chosen and the degree of participation in that illegal performance is such as to 'turn the contract into an illegal contract'.

50 The existence of a number of fluid and variable meanings as has been shown strongly suggests that the distinction between intrinsic and extrinsic illegality is merely one of convenience, but there is, of course, a limit to tolerance of convenience when it becomes a source of confusion. *Ting Siew May* had to deal with this unfortunate problem. Counsel had submitted in the alternative that even if it was held that a backdated option to purchase a property was illegal for having an illegal purpose, as long as the plaintiff did not need to rely on his arguably extrinsic illegal act of backdating the option in making his claim to enforce the option, that claim would be enforceable. The Court of Appeal did not hesitate to

163 *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1 at 16.
164 [1936] 1 KB 169.
165 The unlawful purpose was to defraud the rating authority.
166 *Alexander v Rayson* [1936] 1 KB 169 at 182. The tainting language is even more striking in *McCarthy Brothers Pty Ltd v Dairy Farmers' Co-operative Milk Co Ltd* (1945) 45 SR (NSW) 266.
167 [2004] ICR 538.
168 *Colen v Cebrian (UK) Ltd* [2004] ICR 538 at [23].

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reject this submission.[169] The distinction between intrinsic and extrinsic illegality in the court's estimation was merely a convention or tradition for ascertaining whether the court should reject a contractual claim arising out of or in connection with a contract that is illegal. To accept the submission for the purpose of controverting the illegality of the contract which had been proved would be to misuse a convention.

51 To the court, the greater flaw in counsel's submission was that counsel conceived of the reliance principle as a test of procedural reliance and that was to be rejected.[170] As subsequently clarified and reiterated in *Ochroid Trading*:[171]

> [T]he reliance principle [is] a normative or substantive principle which is only engaged when a plaintiff seeks to enforce, and thereby profit from, the illegal contract through his claim. Such a claim is legally impermissible … because it offends the fundamental principle that there can be no recovery under a contract that is prohibited on the basis of illegality.

Both *Ting Siew May* and *Ochroid Trading* then clearly predicate that what is crucial is not whether illegality is intrinsic or extrinsic to the contract in connection to which a claim of enforceability is made. It is whether the claim must be refused or is precluded because it involves normative reliance on an illegal contract.[172]

52 The viewpoint this article would defend is not that extra efforts should be made to sort out which among the variable meanings is the best definition of intrinsic or extrinsic illegality as tainting illegality.

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169 As was said in *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [21]:

> The House [in *Tinsley v Milligan*] did not hold that illegality will never bar a claim if the claim can be advanced without reliance on it. On the contrary, the House made it plain that where the claim is to enforce a contract the claim will be defeated if the defendant shows that the contract was for an illegal purpose, even though the claimant does not assert the illegal purpose in making the claim: see *Alexander v Rayson* [1936] 1 KB 169, approved by Lord Browne-Wilkinson at p 370.

See also *Hewison v Meridian Shipping Services Pte Ltd* [2003] ICR 766, where "*ex turpi causa* defeated a claim albeit that the illegality was not asserted by the claimant".

170 See also a recent statement of procedural reliance made by Lord Sumption in *Patel v Mirza* [2017] AC 467 at [325]: "In a tort or a property case it is generally enough [to satisfy the reliance test] to identify the illegal act and demonstrate the dependence of the cause of action upon the facts making it illegal."

171 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [128].

172 *Cf Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [132]:

> Put simply, in so far as the category of contracts entered into with an illegal or unlawful object is concerned, once the court has concluded that it is contrary to public policy at common law to uphold such a contract, it is no longer relevant whether or not a party needs to 'rely' on the illegality in its plea.

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The answer following the clarifying developments in *Ting Siew May* and *Ochroid Trading* lies in re-conceptualising the reliance principle by reference to what the policy of consistency requires when the principle is invoked in relation to a contract-related claim.[173] This policy of consistency in relation to contract-related claims is the same policy of consistency that is now widely accepted as the real rationale of the general tainting rule.[174] It was described in a fairly recent tort case of the Canadian Supreme Court as "[t]he more satisfactory explanation for [the case law]".[175] "[T]he law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony."[176] In a more recent tort case, *British Columbia v Zastowny*,[177] the Canadian Supreme Court emphatically reasserted its commitment to this policy, although rephrasing it as a policy of preserving the integrity of the legal system with two complementary components: first, the court will not permit a person to profit from his or her wrongful conduct; and second, the court will not allow a person to evade a penalty prescribed by law. The English restatement in *Patel v Mirza* is in broad agreement albeit more expansive with its reference to a trio of considerations to accommodate a wider context going beyond tort claims. Lord Toulson said:[178]

> [O]ne cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.

Differences in details of judicial expression thus seem to be unavoidable, depending on the juridical context.

173 More fundamentally, the court recognises that the policies undergirding the defence of illegality are distinct from those that result in prohibition of contract. See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [143].

174 This is not to deny, as James Goudkamp, "The Law of Illegality: Identifying the Issues" in *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg eds) (London: Hart Publishing, 2018) points out, that the questions of whether there is an illegality doctrine across all private law domains still awaits firm resolution.

175 *Hall v Hebert* [1993] 2 SCR 159 at [17].

176 *Hall v Hebert* [1993] 2 SCR 159 at [17]. This statement was expressly adopted by the High Court of Australia in *Miller v Miller* (2011) 275 ALR 611, where the majority at [15] remarked that "the central policy consideration at stake is the coherence of the law".

177 [2008] 1 SCR 27; 2008 SCC 4.

178 *Patel v Mirza* [2017] AC 467 at [120].

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53 If we should not suppose that what the policy of consistency or integrity requires must be uniform across different liability and remedial contexts, no less should we suppose that the re-conceptualisation of normative reliance in *Ochroid Trading* must be a universal formulation for all claims in contract.[179] *Ting Siew May* and *Ochroid Trading* in terms merely introduced the concept of normative reliance very selectively. The court's attention was solely fixed on recovery pursuant to an independent cause of action of benefits transferred under an illegal contract. Such recovery was previously thought possible only if the cause of action could be proved by the claimant without having to plead or prove his own illegal act as facts; that is, without procedural reliance. The selective re-conceptualisation of reliance as normative reliance in preference to procedural reliance was intended to rationalise and facilitate recovery of contractual benefits under an independent cause of action for unjust enrichment, or vindicating and recovering title which has passed under an illegal contract or under an independent cause of action in tort such as in *Bowmakers*.[180] For this peculiar reason only, the conception of normative reliance was formulated as a principle precluding profiting from an illegal contract, moving thereby from a procedural to a transactional conception as it were and possibly removing the limitation that the illegal contract must be the claimant's.

54 In the present view, while the principle of profiting from an illegal contract is sufficient and appropriate in relation to recovery of benefits conferred under an illegal contract, a broader re-conceptualisation is needed where the reliance principle has the function of barring a claim to enforceability in the core sense of tainting by an illegal act when making or performing a contract not prohibited *per se*. The idea of profiting from an illegal act is not obvious when the act is not itself an illegal contract but an illegal performance or illegal provenance of an otherwise lawful contract. It should not be thought adequate simply to redefine normative reliance in terms of profiting from a contract which has been performed illegally or entered into illegally, removing the limitation to illegal contract. The necessity of eliminating profiting from an illegal contract is obvious since

179 *Ochroid Trading*'s normative reliance, it appears, strongly resembles the clarification adopted by Lord Mance in *Patel v Mirza* [2017] AC 467. However, it is not the same as Lord Sumption's reliance principle. Lord Sumption defined reliance in the way he argued in *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 as a general principle that the claimant's own illegal act must be the basis of his claim subject in exceptional circumstances to judicial discretion rejecting the defence of illegality. The normative reliance of *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 is clearly not subject to judicial discretion in any respect.

180 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65. Without finally deciding the question, the court suggested that the principle of non-stultification could operate as an exception to general recovery. See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [161] and following.

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such profiting can only be a direct profit in view of the doctrine of privity. It goes without saying if recovery of benefits conferred is based on an independent cause rather than the illegal contract, that there will not be a profiting from the illegal contract. This is not the case when the illegal act itself is not the making of an illegal contract. In those circumstances, the profiting may be direct or indirect or may have a simple or singular nexus or be attributable to multiple causes or dependencies. The necessity of removing the profiting in question for the sake of the objectives of the illegality is thus not a redundant consideration of consistency. It should also be noted that the claimant is not invariably seeking to profit from the illegal act. He may be seeking to evade or to impose on another some responsibility or liability of a collateral nature. Only a more fundamental evaluation as to the necessity of barring evasion or imposition of liability for the sake of the objectives of the illegality will provide a true account of normative reliance. The problem of overlap between the principle of proportionality and the policy of consistency underlying the tainting analysis in the situations described in *Colen v Cebrian* and *Ting Siew May* must also be addressed. It should not be countenanced, where the principle of proportionality leads to the conclusion of unenforceability of a contract entered into with an illegal or unlawful object, that the opposite conclusion of enforceability will nevertheless be possible under a policy of consistency. It follows that proportionality must also be relevant in conceptualising normative reliance in relation to profiting from an illegal performance in order to avoid incongruous outcomes in overlapping factual matrices. Thirdly, the impact of illegality in an empirical sense can be both direct and indirect in relation to other related parties once we move beyond profiting from an illegal contract to profiting from an illegal performance or provenance. Indirect impact on related persons may exceed direct impact on persons privy to the illegality. Essential policies may certainly be furthered by the law of illegality directly as well as indirectly, but it should not be countenanced that an indirect impact can be greater than a direct impact. A broader re-conceptualisation is thus also needed so as to avoid discrimination between direct and indirect impact or put positively, to ensure non-discrimination between direct and indirect impact.

55 In the present view, this broader re-conceptualisation must first be prospective in character so as to reflect the *ex ante* nature of contracting. Refusal of a claim for contractual enforcement must depend on an *ex ante* or prospective evaluation of what consistency of policy requires. Consistency of policy in matters of contract cannot be accomplished by allowing *ex post* adjustments according to how the facts have turned out. In the second place, consistency of policy by reference to the impact of coercive sanctions or policies prescribed by or reflected in the pertinent penal law requires that indirect effects on a lawful contract must be limited by the criteria of necessity, proportionality

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and non-discrimination as standards of appraisal. These are appropriate evaluative standards for ensuring that the indirect consequences and effects of coercive sanctions are reasonable and predictable by potential contractants. Not only are reasonableness and predictability core values espoused and to be upheld in contractual enforcement, it is also important that intended contractants be able to predict and calibrate the indirect civil effects of any known illegality, so that they can make informed decisions including evaluating and allocating the risks of loss between themselves should illegality occur. Refusal of a tainted claim for contractual enforcement must therefore be a predictable necessary effect of the objectives of the illegality, foreseeably proportionate to that necessity, and non-discriminatory as between contractants and related parties as well as foreseeable claims. By "necessary", it is meant that refusal of the type of claim must be indifferent to the personal characteristics of the claimant but must be necessary to accomplish the objectives or policies for which the illegality is created. Accomplishment signifies of course disapprobation of any profiting from the illegal act but includes prevention of evasion of the objectives of the illegality in question. To ensure that refusal of the claim is proportionate to the necessary effect of the illegality, there must be a further calibration by reference to the target claimant. Refusal of the claim should not be indifferent to the personal culpability of the claimant since the indirect effects of illegality are not likely to be uniform among potential claimants. Where the claimant is innocent, refusal of the particular claim may be disproportionate to the necessary accomplishment of the objectives. The same refusal in the circumstances may not be disproportionate if the claimant is guilty of the illegality. By "non-discriminatory", it is meant that the refusal must be capable of minimising, if not eliminating, discrimination in the effects and consequences of illegality as between different types of claim such as, for example, between recovery of benefits conferred and claims for expectancy as well as between the several defendants and plaintiffs, if any.

56 Needless to say, this broader re-conceptualisation must be capable of explaining the particular principle of normative reliance applied as a test for recovery of benefits conferred under a contract which is illegal. It is thus also a merit that the suggested framework of standards of consistency easily accommodates the normative reliance conceptualised for the recovery of benefits conferred under an illegal contract. This can be illustrated by testing the conception in a situation which the court in *Ochroid Trading* glossed over, namely, the general rule of no recovery of benefits transferred under an illegal contract in the absence of an independent cause of action. It was the procedural reliance principle which barred such general restitutionary recovery of benefits conferred by the plaintiff under an illegal contract, except where the plaintiff is *non in pari delicto* or withdraws from the illegal contract during *locus poenitentiae*. Describing the rule of no recovery

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as fundamental, the court in *Ochroid Trading* must have assumed that re-conceptualising normative reliance would by no means overthrow the general rule of no recovery. The suggested standards of necessity, proportionality and non-discrimination explain why if the claimant sues for restitutionary damages for the defendant's refusal to perform the illegal contract, his claim would be rejected. First, rejection would be necessary to achieve the objectives of prohibiting the contract. Allowing the claimant to obtain restitutionary damages would allow him to evade the policies of the illegality whenever the defendant refuses to perform his part of the illegal contract. Second, rejection of restitutionary damages would be proportionate to the necessity of preventing evasion of illegality policies since it would only remove the effects of evasion. It would not go beyond that to permit recovery of reliance or expectancy loss. Third, if instead of restitutionary damages, the claimant claims more directly to recover the benefits he has conferred to the defendant under the illegal contract, that claim must also be refused. There would otherwise be discrimination between different claims in respect of the same claimant and contract. Rejection of restitutionary damages would thus ensure non-discrimination between direct claims for recovery and indirect claims for restitutionary damages.[181]

57 It is also worth reiterating that the evaluative standards of proportionality which determine, in conjunction with the other standards of necessity and non-discrimination, whether there is normative reliance more broadly re-conceptualised, establishes an important point of contact with the principle of proportionality, which determines whether a contract entered into with an illegal object is illegal and unenforceable. The presence of this contact means that there should not be any material difference in result between applying the principle of proportionality and the standards of normative reliance in cases where both factual matrices coincide. This was tacitly acknowledged in *Ting Siew May*, when the court said that once the court had determined under a proportionality analysis that a contract was illegal for having an illegal object, the normative reliance principle became "irrelevant".[182]

58 It is finally important to stress that when the standards of necessity, proportionality and non-discrimination are to be applied in

181 Incidentally, another application, not mentioned in the judgments, remains unaltered. This is where the plaintiff claims a declaration that his contract is illegal and unenforceable. While he may seem to be relying on his own illegal act in seeking the declaration, there is no necessity to refuse, refusal would be disproportionate, and as well as discriminatory. Thus, the broader re-conceptualisation perfectly explains why there should be no bar to the court granting the declaration of illegal contract.

182 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [132].

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a claim for enforcement of a contract which is implicated in an illegal act, they are necessarily standards of predictable necessity, predictable proportionality and predictable non-discrimination. That must mean that though a claimant need not be the party who has committed the illegal act, for his claim to be refused he must be one who has in an *ex ante* sense knowledge that an illegal act is intended or very likely to be committed and of the material assistance that his own act to be performed under a lawful contract is apt to have on the accomplishment of the illegal act.[183] First, refusal of his claim for enforcement would not be necessary to achieve the objectives of the illegality unless the claimant has knowledge of the illegality and his procurement or assistance is of a material nature, capable of itself of inducing or advancing any intended illegal act significantly beyond mere potentiality into actuality. Second, refusal of enforcement would not be proportionate to the necessity of removing the element of profiting from the illegal act or evading the objectives of the illegality if there is no knowledge of the illegality and material assistance in its commission. Unless he has knowledge of the illegality, the claimant cannot predict the extent to which his conduct will be material assistance in advancing the illegal act; and it would not be proportionate to deny him his contractual profit. Third, refusal of the claim by a knowing assistant of an illegality would be non-discriminatory of the innocent party. If the party committing the illegal act under instigation of the claimant is unaware that his act is illegal, he will not be barred from enforcing the contract against the claimant.

59 Thus, a broader re-conceptualisation of normative reliance in terms of limiting standards of predictable "necessity, proportionality and non-discrimination" reduces eventually to the normative reliance principle that a claimant profits from an illegality when he knowingly assists or knowingly procures another to commit it in the expectation of gaining some benefit for himself from his own lawful contract or of evading some liability otherwise incumbent on him or otherwise imposing liability on another. This shift from a transactional-expectation conception in *Ting Siew May* and *Ochroid Trading* to a calculative-exploitative-opportunistic conception can be illustrated with two hypothetical examples. Suppose that *A* knows that he must be licensed to do business but intentionally foregoes applying for such business licence and makes a generic business contract with *B*.[184] If *B* is unaware of the licensing prohibition when entering into the contract with *A*, his

183 *Cf Bhagwandas Naraindas v Brooks Exim Pte Ltd* [1994] 1 SLR(R) 932 at [31]: "To be so tainted with illegality … knowledge and assistance on the part of the plaintiff is required."

184 A generic business contract means that B's contract with A is but one of the many contracts A intends to make in carrying on the business.

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claim against *A* on the contract will not constitute normative reliance on *A*'s illegality. Refusing *B*'s claim for enforceability is not necessary to accomplish the objectives of the illegality in the absence of knowing assistance of *A*'s illegality. However, suppose *B* seeks to enforce against *C* a contract of insurance covering risks of loss of property and the property is lost as a result of involvement in a contract with *A* to commit a crime. *B* cannot enforce the insurance contract if he has entered into it in order to facilitate *A*'s carrying out *A*'s intention to commit the crime. Any other outcome would discriminate between *C* as the defendant to the insurance claim and *A*, the putative defendant to the illegal contract.

60 It follows that *B* cannot enforce an otherwise legal contract the performance of which he knows or should know will assist another person *C* to perform that person's illegal contract with *A*. In the pre-existing case law, such situations have often been addressed in terms not of the reliance principle but the *Beresford* principle. The Court of Appeal in *Ochroid Trading* did not expatiate the task to be performed by the *Beresford* principle in light of its re-conceptualisation of the reliance principle as it was concerned chiefly with recovery of benefits conferred under an illegal contract. Neither did the Court of Appeal in *Teng Wen-Chung* do so beyond saying that the public conscience test "has not been revived" following the decisions in *Ting Siew May* and *Ochroid Trading*.[185] If, however, the above explication and application of the framework of standards leading to a generalised normative reliance principle are correct, the *Beresford* principle (which precludes the claimant profiting from the claimant's illegal act) will also be subsumable in the generalised normative reliance principle and irrelevant in purely contractual enforcement and restitutionary cases. This much will be enough for the purposes of this article with its dominant interest in contractual enforcement.

IV. Conflicts rule in *Euro-Diam*

61 In Parts II and III above, we have shown that (a) the Singapore court imputes the consequence of unenforceability to a Singapore law contract where its purpose is to commit or procure or assist the commission of foreign law illegality at the *locus solutionis*; (b) the Singapore court irrespective of a contract's proper law imputes the consequence of unenforceability to a contract which, at inception is or though not illegal as formed, afterwards becomes illegal to perform under the *lex loci solutionis*; (c) domestic tainting policies barring contractual enforcement serve to ensure consistency with the objectives of the pertinent domestic illegality; (d) as clarified, the normative reliance principle overlaps with

185 See *Teng Wen-Chung v EFG Bank AG, Singapore Branch* [2018] 2 SLR 1145 at [23].

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the proportionality analysis performed in cases where a contract is not prohibited *per se* but has an illegal object; but (e) has its own sphere of application outside of those instances. With these extended comments and considerations, we have also set out the complicated background to the main question of this article: What is the tainting rule in the conflict of laws if the conflicts law is only concerned with *lex fori* contracts to break foreign penal laws at the *locus solutionis*? The ensuing discussion aims to show that the tainting rule as formulated by Staughton J in *Euro-Diam* has or should have little or no scope of application in the conflict of laws.

A. The first step according to Staughton J

62 As formulated by Staughton J in *Euro-Diam*, the conflicts tainting rule is in two parts. First, "when an English claim is said to be tainted by foreign illegality, one must first inquire whether, applying the appropriate connecting factor, the transaction from which the taint is said to arise would be enforceable here."[186] If the answer is "no", "one has next to decide whether there is sufficient connection between that transaction and the claim to amount to taint within the *Bowmakers* or *Beresford* principle. If the answer to that second question is yes the claim is unenforceable here".[187] This formulation is a generalised tainting rule, not restricted in terms to claims in contract. A less cited but perhaps more vivid passage inverted the above two questions, framing them specifically by reference to a contractual claim as follows:[188]

> One can divide this question into two parts. First, if the acts concerned had been illegal by English law, would the contract of insurance have been enforceable? Second, if so, do the rules of conflict of laws justify reference to German law, and so produce the same result in this case?

63 Under the generalised rule, the first step of ascertaining whether there is a relevant foreign law illegality is not an unproblematic task when we consider Staughton J's rationalisation of the three key cases. The first case, *Mackender v Feldia AG*,[189] was germane essentially for the succinct but comprehensive analysis of illegality which Diplock LJ articulated. From this, Staughton J extracted the appropriate connecting factors which are to be applied in identifying the relevant tainting illegal transaction. The place of performance under that transaction is an appropriate connecting factor and our immediate focus will be on foreign law illegality under the foreign *lex loci solutionis*.

186 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 23–24.
187 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 23–24.
188 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 15.
189 [1967] 2 QB 590.

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64 Only two other cases were relied on and they made up substantially the case for the tainting rule in the conflicts law. *Re Emery's Investment Trusts*,[190] the second case after *Mackender v Feldia AG*, was a claim by a husband to rebut a presumption of advancement which the English High Court disallowed because the husband had put shares in his wife's name for the illegal purpose of evading New York withholding tax. Wynn-Parry J held that the claimant could not have sought the aid of equity to "recover" those shares by virtue of a resulting trust if the relevant tax had been UK tax (*nemo allegans turpitudiem suam est audiendus*).[191] Accordingly, he could not stand in any different position in relation to the New York tax. In Staughton J's rationalisation, the relevant foreign law illegality was the claimant's illegal act of registration of the stocks in his wife's name in New York (he had thereby committed a New York law illegality in New York, the place of "performance"). This illegal act tainted his claim to the resulting trust interest, in accordance with the *Bowmakers* principle.

65 In *United City (Investments) Merchants Ltd v Royal Bank of Canada* ("*United City (Investments) Merchants*"),[192] the third case, the buyers and sellers agreed to inflate the sale price for the purpose of facilitating the buyer's violation of Peruvian exchange control legislation. The English Court of Appeal held that the letter of credit contract for payment of the sale price in London to the sellers was unenforceable in part being an exchange contract, involving the currency of Peru, and to be performed contrary to Peruvian exchange control regulations. Staughton J's rationalisation of this case was that the sale contract was illegal and unenforceable for contravention of the Bretton Woods Agreement 1945; and that illegality tainted the seller's claim to payment under the letter of credit.

66 Further insights into these rationalisations appear from the very case Staughton J had to decide. This was *Euro-Diam*, where the English plaintiff sellers claimed insurance coverage for loss of their diamonds while on consignment to German buyers. At the request of the buyers, the sellers had furnished false invoices knowing that they would probably be used to deceive the German tax authorities as to the true value of the sale on consignment. Using the invoices, the buyers thereby committed tax evasion and endangerment offences under the German Tax Code. In addition, the middleman who brokered the sale to the buyers and

190 [1959] Ch 410.

191 For this, the court relied on *Gascoigne v Gascoigne* [1918] 1 KB 223 where Lush J held that the plaintiff could not be permitted to rebut the presumption of advancement by setting up his own illegality and fraud.

192 [1982] 1 QB 208.

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himself, acted as the sellers' "on consignment" agent. At all material times the agent was not permitted to reside in Germany to carry on business and thereby committed offences under the German law in conducting business as the sellers' agent. The first step of there being a relevant foreign law illegality was thus satisfied. The sellers had entered into an English law consignment contract[193] with intention to deceive the German tax authorities at the place of performance of the consignment contract and apparently also with intention to procure or assist their agent to violate the business residence laws of Germany.

(1) Problems with step 1

67 There is a small hint in the Court of Appeal judgment that the first step may be an over-rationalisation since nothing explicit was said about Staughton J's two-step analysis. Kerr LJ simply considered that the facts spoke for themselves, saying: "The consequences under German law were that both Euro-Diam and [the buyers] had committed criminal offences and that the diamonds became liable to confiscation. These are the essential points found by the judge, and nothing else matters."[194] The other immaterial matters included the commission of tax enhancement offences by the buyer and the illegal activities of the sellers' agent who did not have a residence permit. In the court's view these "did not affect the outcome of the appeal".[195]

68 It would, of course, be wrong to make too much of the absence of express endorsement of the generalised two-step analysis in the Court of Appeal. However, in a later Court of Appeal decision in *Howard v Shirlstar Container Transport Ltd*,[196] this omission was also conspicuous. Staughton LJ delivering the leading judgment framed a narrower contract-oriented first step as follows: "The first question is as to when an English court will have regard to foreign law in connection with the illegal performance of a contract."[197] He answered in similar contract-oriented language, that:[198]

> … when one is dealing with a contract which is not illegal in itself but involves illegality as performed, or is said to be tainted with illegality … the contract will not in general be enforced by reason of illegality in a foreign country in

193 The court did not actually determine that the contract was an English law contract but having regard to the facts concerning the involvement of the "on consignment" agent who sought out the sellers in London and proposed to carry the sellers' diamonds from there to Germany to sell to the buyers, it could not have been otherwise.

194 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 34.

195 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 34.

196 [1990] I WLR 1292.

197 *Howard v Shirlstar Container Transport Ltd* [1990] I WLR 1292 at 1298.

198 *Howard v Shirlstar Container Transport Ltd* [1990] I WLR 1292 at 1298.

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> the same circumstances as a contract for performance in England will not be enforced by reason of illegality under English law.

These remarks shed the more generalised language of Staughton J, as he then was in *Euro-Diam*. This might not be surprising since the instant case was unlike *Euro-Diam* in lacking an extrinsic tainting illegality in the same sense. There is as a result, however, another ambivalence with the focus shifting to the illegal act of performance as a taint of itself without having to be an illegal performance required under another distinct but related illegal contract or transaction, as presupposed in *Euro-Diam*.

69 The generalised tainting rule and *Re Emery's Investment Trusts*,[199] the chief authority for that, will be considered below. With respect to the narrower contract-oriented formulation, the only authority for its provenance relied on was *United City (Investments) Merchants*, where payment was due under the letter of credit from the confirming bank in London to the English sellers. The Court of Appeal in that case acknowledged that the letter of credit could not be said in isolation to be an English law exchange contract, and hence of itself unenforceable in the territories of any member, by reason of the Bretton Woods Agreement Act 1945.[200] However, the court held that it had to be considered together with the sale agreement as it was in effect a composite exchange contract. This was required by reason of the special rule of comity which was the foundation of the Agreement. The same reason led two members of the court further to conclude that the rules in *Foster v Driscoll* and *Ralli Brothers* had no application alongside the rule of special comity. So the first point casting doubt on Staughton J's rationalisation of the case based on the illegal sale as a tainting illegality is that it is broader than those reasonings warrant. The second is that aside from Bretton Woods cases, the tainting by illegality of the underlying sale as envisaged by Staughton J should have little if any relevance in documentary credit cases generally. Given the pervasiveness of the Uniform Customs and Practices of Documentary Credit ("UCP") and the doctrine of independence of the credit from the underlying sale, the question of illegality is nowadays resolved as a matter of incorporated "transnational law" binding on parties to a documentary credit that is subject to the UCP. There is no need for regard to applicable law or place of performance. According to "transnational law", a letter of credit must be paid on presentation of conforming documents, unless the documentary credit is being used to carry out an illegal transaction and the illegality is of such significance that payment should be denied for reasons of public policy and morality.[201]

199 [1959] Ch 410.
200 See *Wilson, Smithett & Cope Ltd v Teruzzi* [1976] QB 683 at 711–713.
201 See *Re Group Josi* [1996] 1 WLR 1152 at 1164.

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70 As for post *Euro-Diam* authorities, *Howard v Shirlstar Container Transport Ltd*[202] can readily be explained as not requiring or dependent on any tainting analysis for its decision. There were no self-standing rights created by another allegedly distinct and tainted contract as Staughton J in *Euro-Diam* presupposed. The more serious doubt comes from the fact that properly understood, the English law contract of commission was a unilateral contract, in relation to which the right to payment would accrue only upon acceptance by performance. When the plaintiff accepted the unilateral contract, he did so with the intention of performing it illegally. Without more, the contract of commission was, therefore, a contract which was unilaterally intended to break the penal law of the *lex loci solutionis* within the rule in *Foster v Driscoll*. The tainting rule was superfluous.

71 That leaves Staughton J's judgment in *Euro-Diam* as the only instance where the tainting rule was actually applied. The ambivalence of the Court of Appeal in affirming the judgment has already been noted. It led Forsyth to express the view in a fairly contemporaneous short note that Kerr LJ had probably simply applied the common law of tainting to an English law insurance contract to be performed in England, taking the insured's illegal act of deceiving the German customs as datum.[203] But such reasoning ignores the fact that the commission or intended commission of a foreign law illegality is a public act or intended public act implicating overriding penal policies of another country and raising the prospect of engagement with obligations of international comity. The forum court cannot simply ignore the question of extraterritoriality and international comity whenever the tainting rule is engaged in an English law context. If, as has been shown, neither the rule in *Foster v Driscoll* nor the rule in *Ralli Brothers* can be regarded as domestic law applied extraterritorially, it would be incongruous that the tainting rule could be domestic law applied extraterritorially. The case of *Howard v Shirlstar Container Transport Ltd*,[204] previously discussed and which was decided after *Euro-Diam*, certainly gives no warrant to think that there is a by-pass of foreign law illegality when the tainting rule is engaged. Since then,

202 [1990] 1 WLR 1292.

203 Christopher Forsyth "When Can a Foreign Illegality Taint an English Contract?" (1987) 46(3) Camb LJ 404. The concept of a substantive law encompassing extraterritorial elements is a familiar one. A similar approach to extraterritoriality was adopted in *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391, where the Court of Appeal considered that the Misrepresentation Act (Cap 390, 1994 Rev Ed) had extraterritorial application as an application of the domestic *lex fori* when it is the governing law.

204 [1990] 1 WLR 1292.

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continuing ambivalence of judicial reception of *Euro-Diam* has persisted. *Euro-Diam* as a tainting case has either been ignored or marginalised.[205]

72 That is all that this article would say about the authorities. What follows is of greater import because the real question is whether the tainting rule is needed to augment the rule in *Foster v Driscoll* for the sake of consistency with its limited interventionist policy of comity in respect of *lex loci solutionis* illegality. There are also very serious doubts as to this. It has been shown that the domestic tainting rule serves to ensure that the objectives of illegality do not lead to inconsistent indirect effects on contractual claims. Similarly, the tainting rule, if it has any role at all in conflicts law, should guard against inconsistent extension of the limited interventionist policy of comity which underlines the foreign law illegality rules. Had the rule in *Foster v Driscoll* been narrowly formulated in terms of contracts expressly to violate foreign law illegality, recourse to the tainting rule could have been necessary to widen the rule to contracts intended to be performed illegally, but the opposite fact is true. The rule in *Foster v Driscoll* was from inception also designed to preclude contractants from profiting from an illegal contract through making a contract to facilitate performance of the illegal contract. Had the rule also remained applicable only where both parties to the contract join in an endeavour to break the foreign penal law, similar recourse to the wider tainting rule might be justifiable where only one party intended to do so by using the other as instrumentality, whether willingly or otherwise. However, another thing stood out clearly when we reviewed more recent developments in the rule – it has been shown that the rule has likely been extended to cases of unilateral intention to commit or procure the commitment or assist the commitment of a foreign law illegality.

73 The most illuminating light which makes it very doubtful that the tainting rule has any role in augmenting the rule in *Foster v Driscoll* is that cast by the substitution of normative reliance for procedural reliance in domestic tainting law. It was argued earlier that further re-conceptualisation of normative reliance leads to a calculative conception which encompasses knowingly seeking to profit from an illegal act whether by committing it or procuring or assisting in its commission by another. The consequence that follows is that there ceases to be any real residual difference between the tainting rule and the wider terms in which the rule in *Foster v Driscoll* has come to be formulated. It will be recalled that the tainted insurance cases are the only material

205 Lord Collins' rationalisation of the case in *Ryder Industries Ltd v Timely Electronics Co Ltd* [2015] HKCU 3109 is an example of the latter treatment: at [57], he cited *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 as illustration that not every contract to break foreign law would be contrary to public policy to enforce.

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cases where the tainting rule has hitherto found application beyond the rule in *Foster v Driscoll* as then understood. Take then as illustrative an insurance case where the insured smuggles jewellery into Italy after having entered into an English law insurance contract which covers the insured's stock-in-trade worldwide against all risks. The jewellery is stolen afterwards from the insured's courier whilst in transit. If procedural reliance is key to assessment of the impact and effect of *lex loci solutionis* illegality on a claim to the insurance coverage, the question is whether the illegal act is centrally as opposed to being merely adventitiously connected to the insurance contract. Application of a procedural reIiance test which envisages finding a sufficient material, causal, proximate, or constitutional connection with the occurrence of the illegality may not yield coincident results with the rule in *Foster v Driscoll* which is based on knowing violation or knowing assistance of violation of penal laws. Causal or material factual proximity which is objective need not coincide with a state of consciousness that an illegal occurrence will result or a state of desiring such occurrence. If the key is normative reliance, the question is whether the insured knowingly obtained the contract of insurance as a means to lessen his risks of loss and thus advance his premeditated endeavour to smuggle diamonds into Italy.[206] A claim on the insurance contract would then involve normative reliance on his illegal act of smuggling and be unenforceable. However, that is precisely why tainting analysis based on normative reliance would be superfluous since the *Foster v Driscoll* rule already captures a contract which is intended to or made with knowledge that it will facilitate a contract to commit a foreign crime; and already renders it unenforceable. The shift to a broadly conceptualised normative reliance principle in effect leaves the tainting rule with no role to augment the rule in *Foster v Driscoll*.

74 The other situations where the reliance principle has found application in domestic law are those where illegal acts are committed in the course of entering into a contract on preferential or advantageous terms. Is there a need to cater to tainting illegalities which are not illegal acts of performance but corrupt procurement or acts preparatory to making a contract, such as violations of licensing, registration or residence or notification requirements, which are prerequisites of carrying on an intended business in the *locus solutionis*? A more superficial negative answer already emerges from a comparison of the first instance judgment of *Brooks Exim* with the appellate judgment affirming it. The plaintiff had transferred his inheritance moneys in Singapore without notifying the Indonesian tax authorities that moneys liable to Indonesian tax were being moved. The High Court distinguished between the alleged illegal

206 One bears in mind that the insurance contract did not require performance in Italy. It only required payment of the premiums and payment of compensation in England.

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purpose of the transfer (namely to deceive the tax authorities) and the illegal failure to notify the tax authorities. The rule in *Foster v Driscoll* was considered in relation to the former. Having decided that the rule did not apply, the High Court considered further whether the plaintiff's claim to a return of the moneys from the transferee was nevertheless tainted by illegality in the failure to notify. For tainting to occur there had to be "knowledge and assistance" and since the plaintiff was unaware that he had a duty to notify the tax authorities, the tainting submission also failed. On appeal, the same dispositive conclusions were reached as in the lower court as the plaintiff had no knowledge and thus no intention to break the tax laws, but the Court of Appeal in sharp contrast to the lower court saw no difference between the two illegalities (one in performance and the other providential) and considered the rule in *Foster v Driscoll* with respect to both allegations of tax law violation.[207]

75 In the present view, the Court of Appeal was correct to put no difference between them. Nothing material changes in the way non-performance or providential illegalities engage the normative reliance principle. A tainting analysis can produce unenforceability of a *lex fori* contract tainted by providential illegalities. But it is superfluous if the rule in *Foster v Driscoll* already extends to illegal procurement of a contract or can be developed so that a *lex fori* contract procured by breach of the penal law of the *lex loci solutionis* is illegal and unenforceable. Such development seems to be already in place. The rule in *Foster v Driscoll* has been shown to depend on the rejection of foreign law contracts being unenforceable if they had to be performed in the forum. This is not in issue in the kind of providential cases in view. The courts have held in a couple of cases that a foreign law contract to provide professional services in the forum of Singapore without registration under the pertinent forum professional engineers legislation is illegal and unenforceable, being contrary to forum public policy.[208] The case of *PT International Nickel Indonesia v General Trading Corp (M) Sdn Bhd*[209] is in alignment, although as the court in its decision did not highlight the conflictual dimensions, its reasoning requires some elaboration and extension. The Malaysian sellers were

207 Interestingly, although the *Foster v Driscoll* rule was applied, the tainting language was inconsequentially used in the conclusion that the contract of deposit was not tainted by illegality. See *Brooks Exim Pte Ltd v Bhagwandas Naraindas* [1995] 1 SLR(R) 543 at [14].

208 See *Skilling John B v Consolidated Hotels Ltd* [1979–1980] SLR(R) 86. These statutes make it an offence to provide professional services without registration. See ss 18 and 19 of the Professional Engineers Act (Cap 225, 1970 Rev Ed). It is obvious, said the Court of Appeal in one of the cases, that the foreign law factor must be ignored. The participation of the defendant was held in another to be inconsequential. See *Banham Raymond v Consolidated Hotels Ltd* [1974–1976] SLR(R) 491.

209 [1977–1978] SLR(R) 58.

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alleged to have obtained a contract to sell timber to the Indonesian buyers at grossly inflated prices knowing that this had been made possible by the illegal act of their agents who gave a bribe to the buyer's purchasing officer. Refusing summary judgment for the sellers who sued for the price of the timber, the High Court held that if the allegations were proven true, the contract would be illegal and unenforceable as being contrary to forum public policy.[210] The facts would appear to indicate that the contract of sale for shipment from Singapore to Indonesia was an implied Indonesian law contract obtained by bribery of the buyers' employee in Singapore and to be partly performed by shipment out of Singapore. This arguably constitutes the case as authority that a foreign law contract known to be procured by a contractant's agent by giving an illegal bribe in the forum to be performed in the forum is illegal as formed and unenforceable. It follows by dint of obligations of international comity undergirding the rule in *Foster v Driscoll* that a *lex fori* contract procured by breach of the penal *lex loci solutionis* must be illegal and unenforceable.

76 It should also be noted that the reasons for including providential illegalities of the *lex loci solutionis* within the rule in *Foster v Driscoll* by no means predicate that foreign law illegalities other than those of the *lex loci solutionis* are also operative under the rule.[211] Providential illegalities may be operative at the *locus contractus* and can also be attached to a contractant's domicile and thereby purport to affect the contract wherever it may be made by the contractant. These illegalities will be ignored under the narrower formulation of the tainting rule in *Euro-Diam* since they are irrelevant illegalities,[212] but where a contract is formed illegally under the *lex loci contractus* to be performed at the *locus contractus*, the *lex loci contractus* is also the *lex loci solutionis*. Such a contract formed illegally and to be performed in the *locus contractus*

210 There may be a small problem if the prohibition on account of bribery is not a legal but a moral prohibition, since the rule in *Foster v Driscoll* [1929] 1 KB 470 is based on legal prohibition as argued above.

211 See *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] 2 Lloyd's Rep 335. *Cf* David Chong Gek Siang "Contractual Illegality and Conflict of Laws" (1995) 7 SAcLJ 303 at 331: "Thus, it is clear that where parties to a contract knowingly agree to violate the law of the place of performance (the *lex loci solutionis*) *or the overriding mandatory law of the lex loci contractus*, the contract is unenforceable" [emphasis added]. He relied on *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 for the possible view that the contract was made in Basle, Switzerland.

212 In the revised formulation in *Howard v Shirlstar Container Transport Ltd* [1990] 1 WLR 1292, it appears that any foreign law illegality in the *lex loci contractus* and *lex domicilii* is potentially relevant in a tainting case although not an illegality in performance. The arguments made in this article would not support such liberal use of the tainting law, which enlarges the limited comity-based concession to the forum's policies of freedom of choice of law and general irrelevance of foreign law illegalities.

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is also a contract to be performed illegally in the *locus solutionis* and therefore falls within the rule in *Foster v Driscoll*. A tainting analysis is superfluous where this is the case.

77 The implications of this point can be illustrated by reference to the US Foreign Corrupt Practices Act 1977,[213] which makes bribery of foreigners unlawful for, *inter alia*, any "domestic" concern (or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof). A US entity is thus by the *lex domicilii* prohibited from bribing a foreigner whether in or outside the US. An international example of the role that tainting analysis can offer which comes readily to mind is *World Duty Free Co Ltd v The Republic of Kenya*,[214] an arbitral case. The tribunal in that case refused enforceability to the contractant bribe-payer who had given a bribe in Kenya to win the contract in question to be performed in Kenya, relying on the general principles of *ex turpi causa non oritur actio* and *ex dolo malo non oritur actio*.[215] The tribunal reasoned that the bribe was "an intrinsic part of the overall transaction, without which no contract would have been concluded between the parties".[216] Is there, however, a need for such tainting analysis to augment the rule in *Foster v Driscoll*? It already follows that a *lex fori* contract procured by a US entity by giving a bribe in the *locus contractus* and to be performed there (so that it is also the *locus solutionis*) will be unenforceable under the rule in *Foster v Driscoll*. The fact that the contract is illegal as formed by the *lex domicilii* of the US entity is immaterial.[217] What is material is the deliberate giving of a bribe in the *locus solutionis* where the resultant contract, if any, is to be concluded and also performed. The contract will not be unenforceable if the contract is concluded by a bribe given in the US, but to be performed in a *locus solutionis* outside the US. A tainting analysis could lead to a different result of unenforceability in those circumstances, but if this is accepted as necessary augmentation of the rule in *Foster v Driscoll*, it would be against the limited interventionist policy respecting the *lex loci solutionis* illegality. The correct position, in conclusion, is that the rule in *Foster v Driscoll* already gives complete and comprehensive solutions to problems of providential illegalities, admitting no necessity for augmentation by a tainting rule.

213 15 USC (US) § 78 dd-1ff.

214 ICSID Case No ARB/00/7, Award (4 October 2006).

215 *World Duty Free Co Ltd v The Republic of Kenya* ICSID Case No ARB/00/7, Award (4 October 2006) at para 157.

216 *Cf* Lord Mustill's expert opinion on English law stating that in his view, the cases on illegality "shed no light" on the question before him: at 46 ILM 339 (2007) at [164].

217 *Cf Adler v Federal Republic of Nigeria* 219 F 3d 869 (Cal, 2000), where a contract to defraud the Nigerian government was made in California, also the forum.

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B. The second step according to Staughton J

78 The second step which involves applying the English law of tainting to a claim tainted by illegal performance of a contract illegal under the rule in *Foster v Driscoll* merits no more than a brief discussion. There is certainly no need to dwell on the way the two principles, the *Bowmakers* and *Beresford* principles, were assimilated into a discretionary formula when *Euro-Diam* went up before the Court of Appeal. It is doubtful if the test which substituted for the two principles, a discretionary approach and designated the public conscience test, ever became part of Singapore law; in any case, it has not been revived.[218] Similarly in England, after about three years, it was abandoned in *Tinsley v Milligan*,[219] where the House of Lords reinstated the procedural reliance test.

79 It is sufficient to say that the second step is irrelevant if the arguments and conclusion of this article are correct, namely that any relevant augmenting tainting analysis has already been subsumed under the rule in *Foster v Driscoll* as it has evolved. The second step could only be intelligible thereafter in relation to the doctrine of *ex turpi causa* as it applies to the recovery of benefits conferred under the illegal contract by way of unjust enrichment,[220] or tort, trust and property claims for the recovery of property transferred in connection with an illegal contract. If the additional arguments of this article are correct, then since restitution for unjust enrichment, tort, trust and property issues are governed by their own choice of law rules, the question of tainting by illegality should properly be determined by reference to the appropriate governing law.[221] If that is a foreign law, it is the foreign tainting law which should at least potentially be relevant. Only if that is the *lex fori* should the forum's tainting rule be relevant.

C. A generalised tainting rule?

80 Only a further and more obscure question remains to be considered, concerning more directly two further aspects of the

218 See *Teng Wen-Chung v EFG Bank AG, Singapore Branch* [2018] 2 SLR 1145 at [23].

219 [1994] 1 AC 340.

220 Where the law of the place of unjust enrichment will be applied, if it is not the *lex fori*. However, restitution, which is the consequence of nullity or unenforceability, depends on the applicable law of the contract. See *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543. See also *Baring Bros & Co Ltd v Cunninghame District Council* [1997] CLC 108.

221 See *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638, affirmed in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312. See also *Attorney-General for Hong Kong v Reid* [1993] 3 WLR 1143.

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generalised tainting rule. Interpreting Diplock LJ's proposition on illegal contracts to require an internationally relevant illegal transaction by reference to the forum, the proper law, the contractual place of performance, Staughton J added a fourth, the country of the currency of account, to take account of the effect of the Bretton Woods Agreement 1945 in prohibiting exchange contracts. This subsection questions (a) the provenance of the tainting rule in relation to trust claims which are not claims for recovery of benefits conferred under an illegal contract; and (b) the existence of an extended role for *ex turpi causa* in terms of proper law illegality as well as in terms of *lex fori* illegality. It goes on to prove the redundancy of the *lex monetae* as relevant foreign law illegality.

81 The provenance of the tainting rule in relation to general trust claims can shortly be disposed of. The authority relied on for this was *Re Emery's Investment Trust*,[222] but the case was decided at a time when the choice of law for equitable issues was obscure and under-developed. Courts today accept that there is a distinct choice of law rule for issues of enforcement of resulting trust interests.[223] The effect of illegality in a resulting trust scenario will nowadays be determined by the applicable law governing the issue relating to resulting trust. This means that the rationalisation of *Re Emery's Investment Trust* in terms of tainting by an illegal transaction has been superseded. Moreover, although not cited in *Euro-Diam*, the case of *Habershon v Vardon*,[224] never overruled, is instructive that the courts will not enforce an English trust if to do so would be inconsistent with the forum's amicable relations with a friendly country. This would bring *Re Emery's Investment Trust* squarely within the rule in *Foster v Driscoll* as extended to any English law agreement to establish a trust by committing a penal act in a foreign country, without any need for a tainting rule.

82 The existence of an extended role for the tainting rule with respect to connecting factors such as the forum and the proper law calls for more considered evaluation.[225] Beyond the certainty that forum

222 [1959] Ch 410.

223 Although its contents are in a state of development. Adeline Chong, "Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54 ICLQ 855 argues that the existence of a resulting trust depends on the *lex situs* because that is where the provision of the purchase money will be effectual in the acquisition of title. *Cf Damberg v Damberg* [2001] NSWCA 87, where the New South Wales Court of Appeal applied the *lex fori*.

224 (1851) 4 De G & Sm 467.

225 Courts do not see any difficulty in applying the foreign public law illegality as datum on a question of whether a foreign public official or legal person has capacity to make a contract. See *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549. See also *Marubeni HK & South China Ltd v Mongolian Government* [2002) EWHC 2369 (Comm).

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illegality is not a reference to domestic public policy *simpliciter*, there are doubts as to what illegality is positively embraced within a connection to the forum. The conflicts law already deals with applications of applicable law which contravene fundamental forum public policy in a distinct and separate manner. This is so that the court can refuse enforcement where, although the forum is not the place of performance, the foreign law contract is unenforceable being contrary to fundamental domestic public policy. Examples include *Kaufman v Gerson*.[226] Forum illegality would also be unlikely to be a reference to a conflicts rule of fundamental forum public policy, which has for its object a general preclusion based on comparative substantive offensiveness. By elimination, forum illegality very likely is a conflictual concept of a foreign law contract targeted at breaking the penal law of the forum as *locus solutionis*, on which depends the comity-based rules of foreign law illegality. Examples of common law legal prohibitions were mentioned earlier as explaining the rationale of the foreign law illegality rules. Examples of statutory legal prohibitions include the professional engineer registration cases such as *Skilling John B v Consolidated Hotels*[227] and *Banham Raymond v Consolidated Hotels*.[228]

83 Complicating the enumeration of forum illegality, there are Trading with the Enemy Act cases, such as *Boissevain v Weil*.[229] The question in the case mentioned was whether a loan made overseas by a British subject which contravened trading with the enemy legislation was illegal and unenforceable. The House of Lords held that it was illegal since the legislation was extraterritorial and applied to all British subjects, regardless of what was the proper law. The penal law of the forum was thus violated notwithstanding that no act under the loan contract was required to be done in the forum. There are two possible ways to understand this case. One is that the case was a decision on forum illegality. By an exception to the principle of territoriality of crimes, a crime committed overseas by a forum subject is deemed to be triable and committed in the forum of the subject. It follows that a foreign law contract which can no longer be performed legally by a forum subject under those exceptional circumstances will become illegal and unenforceable as a matter of forum illegality.

84 The second depends on a broader reading of the case in terms of the doctrine of forum mandatory statute leading to an argument that

226 [1904] 1 KB 591.

227 [1979–1980] SLR(R) 86. *Cf* Tan Yock Lin, "A Case of Forum Illegality?" (1988) 30 Mal LR 420.

228 The moneylending case, *Vernes Asia Ltd v Trendale Investment Pte Ltd* [1988] 1 SLR(R) 21, is not a forum illegality case because at the time, unlicensed moneylending was not a crime. See the Moneylenders Act (Cap 188, 1985 Rev Ed).

229 [1950] AC 327.

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the contents of forum illegality include the doctrine of forum mandatory statute. In disagreement with the argument, this article would assert that rules of forum illegality should not be seen as coterminous with the developing doctrine of forum mandatory statute. There are many distinctive characteristics about that doctrine which have no parallel with rules of forum illegality. The overriding power of the forum mandatory statute is one. Another is that the forum mandatory statute may or may not create criminal offences; an example where it does not is s 27(2) of the Unfair Contract Terms Act.[230] The important point of both distinctive characteristics is that forum mandatory statute cases focus on overriding the effect of the proper law and are plainly substantive in nature. Rules of foreign law illegality differ in their lack of substantive content. They merely impose the effect of unenforceability of contract. Another distinctive characteristic is that the international reach of a forum mandatory statute clearly depends on the nature and strength of the overriding policy; hence, its scope depends on its own independent characterisation. Rules of forum illegality are less uncompromising. They merely attribute the outcome of unenforceability in relation to a foreign law contract to break a forum legal prohibition, leaving other substantive issues to be resolved by the applicable law.

85 That leaves only a last point to be made. *Lex fori* illegality, of course, seeks to protect forum policy from targeted violation, but in a manner consonant with international comity. Thus, the rules of *lex fori* illegality should be a mirror image of the rules in *Foster v Driscoll* and *Ralli Brothers*. Application of the tainting rule in these circumstances should be just as superfluous as in the other.

86 Considerations of proper law illegality will be of greater interest since one does not suppose that parties will litigate a question of forum illegality in the forum as a matter of course.[231] Even so, proper law illegality is an uncommon phenomenon because in the first place courts not infrequently find commercial justification to avoid it by recourse to an "accepted principle that a contract is, if possible, to be construed so as to make it valid rather than invalid".[232] Where the proper law is one of choice, the parties may be presumed to have chosen it for the sake of expediency of international commerce. The court's role in upholding

230 Cap 396, 1994 Rev Ed.

231 Such parties would likely have submitted any disputes arising in connection with their contract to another non-targeted exclusive forum.

232 See Denning LJ in *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34 at 44. *Cf BNA v BNB* [2019] SGHC 142 at [62]–[64]. The Court of Appeal in *BNA v BNB* [2020] 1 SLR 456, in finding Shanghai to be the seat of arbitration, considered it was inappropriate for the court to decide the question of invalidity of the arbitration agreement.

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party autonomy starts from that basis. Rather than assuming that the parties put their signatures to an illegal contract, the better solution, if possible, is to apply the objective proper law to validate, rather than to strike down the contract for proper law illegality.[233] An alternative more practical solution may be pursued through the presumption of similarity of laws if the parties can agree tacitly not to plead the foreign proper law which renders the contract illegal. Although the contract may be illegal under the proper law, there is no obligation to advance the public interest of the country of the foreign law, unless the parties are seeking to break penal laws in the *locus solutionis*. So there is no policy against the parties' tacitly agreeing to have the *lex fori* apply and thereby validate their contract. Yet another alternative, as was said, is for the parties to agree to excise the illegal parts of their contract and to perform it legally or otherwise change their minds and choose to perform their contract legally. There are, of course, unavoidable situations where for some reason or other, the court is asked to enforce the proper law illegality. One such reason could be that under the proper law, the seemingly lawful contract is tainted by illegality. Then, as Diplock LJ said in *Mackender v Feldia AG*,[234] "an agreement which under its proper law is illegal and inapplicable of giving rise to legally enforceable rights and liabilities under that law" will be void.

87 This must not be taken to approve of applying any conflicts rule of the proper law. The choice of law rules of the proper law will be irrelevant since renvoi is generally rejected in contract cases[235] and the incidental question is severely limited. Short of this, the forum court can or should be able to enforce any extraterritorial proper law illegality since the parties have or must be taken to have consented to this.[236] That was why in *Kahler*, Lords Radcliffe[237] and Simonds[238] regarded the pertinent laws requiring consent of the National Bank in Czechoslovakia in relation to an account held in England as being currency or foreign exchange laws of Czechoslovakia and applied them as part of the proper law which was the law of Czechoslovakia. Lord Normand[239] simply asserted that

233 See also and *cf Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172.

234 [1967] 2 QB 590 at 601. *PT International Nickel Indonesia v General Trading (M) Sdn Bhd* [1975–1977] SLR 226 is probably a rare example of proper law illegality.

235 See *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50.

236 The general question whether mandatory rules should be applied as part of the *lex causae* is still debated among commentators. *Cf* Hans W Baade, *The Operation of Foreign Public Law* (1995) 30 Tex Int'l L J 429 at 462 (citing the 1975 resolution of the *Institut de Droit International* and describing "an emerging consensus in favor of the general application (to the extent compatible with forum public policy) of foreign public law as an incidental but determinative element of the *lex causae*").

237 *Kahler v Midland Bank* [1950] AC 24 at 57.

238 *Kahler v Midland Bank* [1950] AC 24 at 27.

239 *Kahler v Midland Bank* [1950] AC 24 at 36.

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application of the law of Czechoslovakia did not involve the enforcement of penal or revenue laws. It will be recalled that the only limitation is that the choice of the parties of the proper law must be *bona fide* and legal and not contrary to the forum public policy as mandated by the *Vita Food Products* rule.[240] It goes without saying that it would be inconsistent with applying the foreign proper law's determination of contractual illegality to further apply a tainting law of the *lex fori* which, if it has any purpose at all, is to augment the rule in *Foster v Driscoll*.

88 The final consideration of the added fourth connecting factor of the country of the foreign currency which returns us to *United City (Investments) Merchants* only needs a quick recapitulation. Staughton J in *Euro-Diam* thought it necessary to add *lex monetae* illegality as a relevant foreign law illegality in order to accommodate payment on an autonomous letter of credit contract as a step in consummating a sale but in truth a disguised and illegal exchange contract. The problem admittedly is that a contract to pay foreign currency need not necessarily involve performance in the state where the currency is legal tender and despite that state's foreign exchange controls, such a contract might not involve the doing of an illegal act in the place which prohibits the act. However, the Court of Appeal in *United City (Investments) Merchants* held that "[t]he Bretton Woods Agreement lays down the standard – or requirements – of comity in the area of exchange control *which it covers*" [emphasis added].[241] The tainting analysis is thus substantially dispensable since the Agreement creates a special *sui generis* multilateral conflicts rule with foreign currency as a connecting factor. This rule comes with its own independent characterisation, as was also seen in that case, where the autonomous letter of credit contract was characterised as an exchange contract taking its complexion from the underlying sale which was a disguised exchange contract.[242]

89 To sum up, the tainting operation has or should have little or nothing to add to the rule of forum illegality. The tainting function as it applies to proper law illegality is also irrelevant. This is because when applying the proper law, the forum court must apply the rules of the proper law as they pertain to acts occurring within the country of the proper law and these include the foreign tainting rules, if they exist.

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240 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277. See also *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

241 *United City (Investments) Merchants Ltd v Royal Bank of Canada* [1982] 1 QB 208 at 228.

242 If its performance would be illegal under exchange control legislation of the proper law of the contract, then it will also be illegal: see *Re Helbert Wagg & Co Ltd* [1956] 1 Ch 323.

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V. Conclusion

90 This article can be said to have been a study of contrasts. The first is a contrast between party autonomy and foreign public interests. This tension is resolved in favour of the foreign public interests chosen by the parties in their choice of the proper law. This may seem to be an extraterritorial application of another country's public interests, but any reservations should disappear since the chosen country's public interests in the light of party choice clearly bear the closest and most significant relationship to the contractual obligations and rights of the parties. The second is a contrast between party autonomy and state invocations of their foreign penal interests. Conflicts law resolves this tension by abstention. The effects of penal law are recognised but extraterritorial enforcement is rejected by virtue of considerations of sovereignty.

91 The third is a contrast between party autonomy and exercise of that autonomy to violate foreign penal interests of countries other than the chosen country. This has been the preoccupation of this article. On the one hand, party autonomy should require extraterritorial application of the proper law chosen by the parties. If the proper law pays no regard to other countries' public interests, the obligations undertaken under the proper law should be perfectly legal wherever it is performed. On the other hand, this should not be tolerated when the exercise of party autonomy is directed at violating the penal interests of the forum. The contract which has this for its purpose or object will in accordance with the forum's public policy be treated as illegal and unenforceable. The same policy that rejects such exercise of party autonomy directed at the public order of the forum ought to be extended as a matter of comity to the exercise of party autonomy in choosing the *lex fori* as the governing law of a contract with the purpose of violating the penal laws of the *lex loci solutionis*. That has been the position taken in this article.

92 Again, although not directed at violating the forum's penal order, foreign law and *lex fori* contracts which cannot legally be performed in the forum must also be regarded as illegal and unenforceable as a matter of forum public policy. The fact that parties have not set out to violate the penal laws of the forum but are unaware that their contract cannot legally be performed under the *lex fori* is not material. They cannot be given any incentive to perform their contract by reason of public policy. That same policy ought to be extended as a matter of comity when a *lex fori* or foreign law contract cannot legally be performed in the *locus solutionis*.

93 For the sake of consistency of policy, the doctrine of *ex turpi causa* or the defence of illegality is no longer needed to augment the foreign law illegality rules. While it might have been a necessary augmentation in a small number of instances which were previously not covered by

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the rule in *Foster v Driscoll*, any such role has been superseded. The rule has expanded to provide for unilateral unenforceability. More recently, the procedural techniques for identifying *ex turpi causa* have been overthrown. Although the re-conceptualising of a normative reliance principle has thus far been limited to the recovery of benefits conferred under an illegal contract, a case for further and wider re-conceptualisation can be made. To restate the conclusions of the earlier discussion, the substitution of a broader normative reliance for procedural reliance will make the tainting rule even more redundant for international contracts.

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