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THE APPLICABILITY OF PROPORTIONALITY IN FOREIGN ILLEGALITY DISPUTES

The conflict of laws rules on foreign illegality are well established but mired in doctrinal controversy. This article is concerned with the rule in *Foster v Driscoll* [1929] 1 KB 470 ("*Foster v Driscoll*") and the rule in *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 ("*Ralli Brothers*"). These rules are conceptually distinct from the domestic illegality framework outlined in *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 ("*Ochroid Trading*") and *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*"). As a matter of Singapore law, this article argues that the proportionality test in *Ting Siew May* and *Ochroid Trading* should be applied to determine whether the rule in *Foster v Driscoll* is engaged to render the contract unenforceable. However, the principle of proportionality has no role to play for cases falling within the rule in *Ralli Brothers*, which this article argues is properly understood as an application of the doctrine of frustration by supervening illegality.

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I. Introduction

1 Foreign law illegality is governed mainly by two common law rules. First, there is the well-established rule in *Foster v Driscoll*[2] which provides for non-enforcement of a contract where the real object and intention of the agreement is to perform an illegal act in a foreign and friendly country.[3] Second, there is the more controversial rule in *Ralli Brothers v Compañia Naviera Sota y Aznar*[4] ("*Ralli Brothers*"). There are two competing understandings of this rule. It has been interpreted as a conflict of laws rule relating to the unenforceability of contracts which are illegal by the law of the place of performance. It has alternatively been

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2 [1929] 1 KB 470.

3 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [163]; *Foster v Driscoll* [1929] 1 KB 470 at 521–522; *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 at 323.

4 [1920] 2 KB 287.

stated as an application of domestic contract law principles relating to the frustration of contracts by supervening illegality.[5]

2 This article is concerned with the relationship between these conflict of laws principles on foreign illegality and the framework on domestic illegality.[6] At the outset, it is noted that the two serve different objectives. While the domestic law framework is based on the principle of *ex turpi causa* and is focused on maintaining the integrity of the domestic legal system,[7] the rule in *Foster v Driscoll* is based on the principle of comity. Nevertheless, it is argued that there should be greater uniformity in legal rules on foreign law and domestic law illegality. After all, both are concerned with forum public policy, a complex area of law that is better suited for judicial discretion rather than inflexible rules.[8] In the UK, from which the Singapore rules on foreign illegality originated, a series of cases have emerged where the courts have in effect applied the range of factors test from the *Patel v Mirza*[9] domestic illegality framework to situations involving foreign illegality.[10] In the Singapore context, this raises the question of whether the proportionality framework elucidated in *Ting Siew May v Boon Lay Choo*[11] ("*Ting Siew May*") has any role to play in adjudicating disputes involving foreign law illegality.

3 It is argued that the illegality framework in *Ochroid Trading Ltd v Chua Siok Lui*[12] ("*Ochroid Trading*") and the *Ting Siew May* proportionality test should be applied to determine whether the rule in *Foster v Driscoll* is engaged. This would provide doctrinal consistency between the rules on domestic and foreign illegality without representing a drastic upheaval in the law. In its current formulation, the *Foster v Driscoll* rule already provides judges with the discretion to determine whether the breach of foreign law is sufficiently serious such that the non-enforcement of the

5 *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [44]; *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1 at [176]; *Ryder Industries v Chan Shui Woo* [2015] 18 HKCFAR 544 at [42]–[43].

6 The effect of foreign illegality on non-contractual claims such as unjust enrichment is beyond the scope of this article.

7 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [23]; *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ch 13, at para 13.135.

8 Kenny Chng, "A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws" (2018) 14 JPIL 130 at 146.

9 [2016] 3 WLR 399 at [93].

10 *Magdeev v Tsvetkov* [2019] EWHC 1557 (Comm); *El Haddad v Al Rostamani* [2021] EWHC 1892 (Ch); *Jones v McCarthy* [2022] EWHC 2186 (Ch).

11 [2014] 3 SLR 609 at [70].

12 [2018] 1 SLR 363.

contract is an appropriate response to the illegality.[13] That is a question of forum public policy. In deciding how best to further forum public policy, it is inevitable that the court will need to ascertain the seriousness of the infringement of the foreign law from the perspective of the fundamental public policy of comity.[14] In this regard, the *Ting Siew May* proportionality test can help to elucidate some of the factors that might be relevant for courts faced with this inquiry.

4 However, for the *Ralli Brothers* rule, the need for a proportionality test does not arise. Properly understood, the *Ralli Brothers* rule is an application of the domestic contract law principles of frustration.[15] The sole inquiry is whether the supervening foreign illegality has rendered contractual performance essentially and radically different from what was envisaged during contract formation.

II. Proportionality test in *Ting Siew May* should be applied to determine whether rule in *Foster v Driscoll* is engaged

5 It is argued that applying the *Ting Siew May* proportionality test would help to ascertain whether the value underlying the rule in *Foster v Driscoll* is engaged. The underlying value of the rule in *Foster v Driscoll* is comity, and the forum's interest in upholding friendly relations with foreign states.[16] While comity mandates respect for the laws of another state, the end goal has always been to protect the interests of the forum by preventing any harm to the forum's friendly foreign relations. This explains why the rule in *Foster v Driscoll* occupies the elevated status of forum fundamental public policy. It is a recognition that the forum regards the maintenance of friendly relations with foreign states as an objective so important that it must be upheld regardless of the governing law of the contract.[17] While the rule was initially restricted to breach of

13 *Foster v Driscoll* [1929] 1 KB 470 at 521; *Ryder Industries Ltd v Chan Shui Woo* [2016] 1 HKC 323 at 341; Adam Johnson, "Foreign Law Illegality: Where Are We Now?" (2018) 77 CLJ 475 at 477–478.

14 Yeo Tiong Min SC (*honoris causa*), *Commercial Conflict of Laws* (Academy Publishing, 2023) ch 12, at para 12.084.

15 F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 392.

16 *Foster v Driscoll* [1929] 1 KB 470 at 510; *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 at 325–326; *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds) (Sweet & Maxwell, 15th Ed, 2012) ch 32, at para 32-191; Lawrence Collins, "Foreign Relations and the Conflict of Laws" (1995–1996) 6 KCLJ 20 at 23; C C Turpin, "Contract Illegal by Foreign Law" (1956) 73 *South African Law Journal* 331 at 333; *cf*, Tan Yock Lin, "Tainted Contracts in the Conflict of Laws" (2020) 32 SAcLJ 1003 at paras 28–29.

17 *Royal Boskalis Westminster NV v Mountain* [1998] 2 WLR 538 at 555.

a foreign provision attracting criminal liability, criminal liability in the foreign state is no longer a prerequisite for the application of the rule.[18] In its current form, the rule in *Foster v Driscoll* is stated broadly, such that an intentional breach of any foreign law could potentially result in an unenforceable contract.

6 It is argued in this article that the approach to foreign law illegality in Singapore should, ideally, be one aimed at differentiating the cases where this underlying value is at stake from the cases where it is not. Apart from comity and the maintenance of friendly foreign relations, the forum also has an interest in upholding party autonomy in selecting the proper law of the contract. In cases of foreign law illegality, these two values can be in conflict.[19] Ultimately, the goal is to apply *Foster v Driscoll* in a manner that strikes an appropriate balance between these two forum values.

A. Addressing objections to application of proportionality

7 It has been argued that the forum is ill-placed to ascertain the seriousness of breaches of foreign law. This concern is valid given that the forum may not be familiar with what constitutes serious acts of moral turpitude in foreign legal systems.[20] But the fact that the forum is not best placed to weigh the seriousness of foreign law should not in principle preclude any attempt to do so as long as the forum court remains cognisant of the inherent limitations of such an attempt.[21] From its inception, the rule in *Foster v Driscoll* has always been applied in cases involving breaches of foreign law that the forum considers to reflect serious and important policies of the foreign state.[22] This is sensible, given that the public policy behind the rule in *Foster v Driscoll* is comity and the need to maintain the forum's friendly relations with foreign states. The concept of public policy in the conflict of laws has traditionally been municipal in character, involving the defence of internal interests.[23] It follows that the

18 *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301; F A Mann, "Illegality and the Conflict of Laws" (1958) 21 TMLR 181 at 186.

19 Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier" (2021) 80(1) CLJ 32 at 34–35; Adam Johnson, "Foreign Law Illegality: Where Are We Now?" (2018) 77 CLJ 475 at 477.

20 Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier" (2021) 80(1) CLJ 32 at 34; *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2022] 5 SLR 915 at [291].

21 Rennie Whang, "The Tainting Doctrine in Singapore Conflict of Laws" [2020] Sing JLS 726 at 739; Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.135.

22 *Foster v Driscoll* [1929] 1 KB 470; *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301.

23 Jacob Dolinger, "World Public Policy: Real International Public Policy in the Conflict of Laws" (1982) 17 TILJ 167 at 169.

forum court should have the discretion to differentiate the cases in which its friendly foreign relations are at stake from the cases where it is not.

8 It has also been argued that a proportionality inquiry in foreign law illegality disputes is unworkable because it involves the weighing of incommensurables.[24] The incommensurability objection assumes that in foreign illegality disputes, the forum court is made to weigh the value of freedom of contract, including the freedom to choose its proper law, which comes from the forum, against the value underlying the law breached which comes from the foreign state.[25]

9 This objection appears less forceful in light of the value underlying the rule in *Foster v Driscoll*, which has always been concerned with international comity and the forum's relations with friendly foreign states. The forum has an important interest in upholding the freedom of contract, but a proportionality analysis would not necessarily require the forum to weigh its own values against the value embodied by the foreign law. Instead, the forum's interest in upholding freedom of contract must be weighed against *the forum's* interest in maintaining friendly relations with a foreign state. There is nothing inherently unworkable in the forum applying a discretionary approach to determine where the balance between these two forum values lies on a case-by-case basis. The end goal is to determine where the balance lies between the forum's interests in maintaining friendly foreign relations and in upholding the freedom to select the proper law of the contract. Being rooted in public policy, these values are, by their very nature, hard to precisely quantify,[26] but that does not mean that they cannot be estimated and weighed against each other. Since these are two values which emanate from the forum, the issue of incommensurability is not as severe as it may initially appear. It is acknowledged that it will still be necessary to ascertain the value underlying the foreign law, which will often be difficult in practice. There are also legitimate concerns that the court should not overstep the judicial function by devising foreign policy, but this is not an unworkable inquiry provided that the end goal is to determine the relevance of the foreign law to the forum's fundamental public policy. At the end of the day, it seems inevitable that the court must address the seriousness of the breach of foreign law from the perspective of the fundamental public policy of protecting friendly foreign relations.[27]

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24 Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier" (2021) 80(1) CLJ 32 at 35.
25 Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier" (2021) 80(1) CLJ 32 at 35.
26 Kenny Chng, "A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws" (2018) 14 JPIL 130 at 146.
27 Yeo Tiong Min SC (*honoris causa*), *Commercial Conflict of Laws* (Academy Publishing, 2023) ch 12, at para 12.084.

B. Move towards applying a balancing exercise in English case law involving foreign law illegality

10 The above analysis attempts to show that applying a proportionality or balancing analysis to foreign law illegality disputes is not inherently illogical or unworkable; but is it necessary or desirable? There is a trilogy of recent cases that have arisen before the English courts that suggests that it is so, in certain circumstances.

11 The first is the case of *Magdeev v Tsetkov*[28] ("*Magdeev*"). This case involved a loan by Magdeev to a company called Equix Dubai, which was controlled by Magdeev's friend, Tsetkov. The contract was governed by English law. In exchange for the loan, the contract required Equix Dubai to employ Magdeev, to allow him to get a Dubai employment visa. This transaction was illegal, as it involved a scheme to dress up the loan as an interest-free investment when in reality, the "salary" payments under the employment agreement were to function as interest for the loan.[29] This constituted an act of forgery under Art 216 of the UAE Penal Code.[30]

12 The judge found the rule in *Foster v Driscoll* inapplicable, as the employment contract was not "central to the adventure".[31] This part of the judgment merits further thought because the concept of the centrality of the illegality seems to have been applied in a different way than what was envisaged in *Foster v Driscoll*.[32] The court in *Foster v Driscoll* appears to have applied a less stringent approach to centrality than the court in *Magdeev*, where the issue of centrality was more closely scrutinised. In *Magdeev*, the employment agreement was illegal as it involved the commission of visa fraud under UAE law. Yet, the judge found that the employment contract was merely a "pleasant add-on or fringe benefit".[33] This conclusion is difficult to square with the finding that the employment agreement was designed to "dress up" the loan as an interest-free investment, and to enable Magdeev to obtain a UAE visa.[34] Seen in this light, the illegally-forged employment agreement was clearly designed to enable visa fraud.

13 The finding of a lack of centrality was influenced by the fact that "it was possible also to give Mr Magdeev something which he valued"

28 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm).
29 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [285] and [293].
30 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [293].
31 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [329].
32 *Foster v Driscoll* [1929] 1 KB 470.
33 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [329].
34 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [285].

other than the employment agreement.[35] But it is difficult to see why this should matter, given that it is immaterial that the parties could have performed the contract legally. In *Foster v Driscoll*, the court found that the contract was a joint adventure to profit off the breach of the Prohibition law by exporting alcohol to the US. Scrutton LJ's dissenting view that the contract should have been enforced because the parties could have legally performed it in Canada was rejected.[36] Similarly, in *Regazzoni v K C Sethia (1944) Ltd*[37] ("*Regazzoni*"), the plaintiff's submission that the contract for the export of jute from South Africa to India should be enforced because the contract was not "necessarily illegal by Indian law" was rejected.[38] The point is that the requirement for the centrality of the illegality is a matter of discretion, upon which judges may reasonably differ. It should also be noted that the requirement that the foreign illegality be "central to the adventure"[39] is analogous to factor (c) of the proportionality test laid out in *Ting Siew May*, which relates to the "remoteness or centrality of illegality to the contract".[40]

14 Apart from the lack of centrality, the court in *Magdeev* was also influenced by the lack of seriousness of the breach of UAE law. Despite recognising that visa fraud is a crime which has the capacity to affect not just the economy of a state but also its national security,[41] there had been no prosecution or enforcement proceedings by the UAE authorities.[42] The evidence showed that UAE authorities might not take this kind of breach too seriously, given Magdeev's contribution to the UAE as an affluent investor in the country.[43] Although the court stated that it was not invoking the concept of proportionality,[44] the decision is best understood as a value judgment that the risk of jeopardising the forum's friendly relations with the UAE did not outweigh the forum's interest in upholding the freedom of contract. This inquiry into the seriousness of the foreign law breached is analogous to factor (a) in *Ting Siew May*, *ie*, the question of whether allowing the claim would undermine the purpose of the prohibiting rule.

35 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [329].
36 *Foster v Driscoll* [1929] 1 KB 470 at 497.
37 [1958] AC 301.
38 *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 at 492.
39 *Foster v Driscoll* [1929] 1 KB 470 at 509; *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [329].
40 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].
41 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [337].
42 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [338].
43 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [339].
44 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [332].

15 This approach was applied again in *El Haddad v Al Rostamani*[45] ("*El Haddad*"), where the court cited *Magdeev* in holding that a flexible balancing exercise is appropriate to determine whether public policy requires the English court to refuse to enforce a contract entered into with the intention of breaching a foreign law. In the court's view, this approach was justified given that foreign illegality and domestic illegality disputes both involve public policy, albeit different types of public policy.[46] In this case, Haddad and Khulood entered into a partnership which contravened restrictions under UAE law on foreign nationals owning more than 49% of the shares in Dubai-incorporated companies and owning an interest in real estate in Dubai. When the commercial relationship between the parties soured, Haddad sought an order from the court for the dissolution and winding up of the partnership and all necessary accounts. Notably, the court found that even if the partnership was entered into with the sole intention of breaching UAE restrictions on foreign ownership of shares, it was nevertheless a contract giving rise to certain legal consequences under English law. Like the court in *Magdeev*, the court in *El Haddad* was influenced by the fact that the consequences of a breach under UAE law were not severe. Under UAE law, the partnership agreement would not have been treated as a legal nullity, and the assets of the company would have nevertheless been distributed to the shareholders according to their true agreement.[47]

16 This approach was applied again most recently in the case of *Jones v McCarthy*[48] ("*Jones*"), which involved a contract governed by English law providing for the sale of a villa in Spain from McCarthy to Jones. The parties left this contract unnotarised so as to deliberately evade the obligation to pay taxes to the Spanish authorities. Although the court did not cite *Foster v Driscoll*, it seems that the principle would have been relevant given the court's finding that both parties intended to evade Spanish taxes.[49] According to the expert witness's report on the content of Spanish law, the avoidance of taxes would have been a criminal offence, but it would not have led to the unenforceability of the agreement between the parties. Rather, the Spanish tax authorities could bring action to recover the taxes due, and surcharges, penalties and interest could have been imposed on the parties.[50] The court found that the expert witness's report on Spanish law did not provide a "clear understanding of questions of weight and gravity of Spanish priorities in this regard", and that to allow the defence of illegality to defeat the claim

45 *El Haddad v Al Rostamani* [2021] EWHC 1892 (Ch).
46 *El Haddad v Al Rostamani* [2021] EWHC 1892 (Ch) at [86].
47 *El Haddad v Al Rostamani* [2021] EWHC 1892 (Ch) at [90].
48 *Jones v McCarthy* [2022] EWHC 2186 (Ch).
49 *Jones v McCarthy* [2022] EWHC 2186 (Ch) at [124].
50 *Jones v McCarthy* [2022] EWHC 2186 (Ch) at [123].

for damages would provide a windfall for McCarthy. The court also stated that both McCarthy and Jones may yet have to pay surcharges, penalties and interest to the Spanish Government.[51] This mirrors the approach followed in *Magdeev* and *El Haddad*, in that the court placed weight on the fact that the foreign law did not impose severe consequences for the breach and found that the foreign government was thus unlikely to be offended by enforcement of the contract.

17 The outcome of these decisions is reasonable. If the Legislature that enacted the law in question would give legal effect to the contract, there is no reason for forum fundamental policy to render the contract unenforceable. In these kinds of situations, the foreign law itself does not impose any civil law consequences for the parties involved. To deny enforcement of the contract in such cases would not further comity and would instead be contrary to commercial sense. This is also consistent with the status of *Foster v Driscoll* as a rule of fundamental public policy. Generally, a contract that is valid by its proper law should be enforced.[52] The rule in *Foster v Driscoll* allows public policy to step in in exceptional situations where the parties' conduct and the foreign law breached is so serious that enforcement of the contract would offend comity.

18 The cases cited above were influenced by the judgment of Lord Collins in the Hong Kong Court of Final Appeal case of *Ryder Industries v Timely Electronics*[53] ("*Ryder*"), where the court emphasised that it is only sufficiently serious breaches of foreign law which reflect important policies of the foreign state that will render it contrary to public policy to enforce a contract.[54] *Ryder* is different from the cases outlined above, in the sense that the parties in *Ryder* clearly did not intend to breach the laws of the People's Republic of China ("PRC").[55] However, Lord Collins emphasised the importance of determining the seriousness of the foreign law breached in addition to considering whether the parties intended to breach the foreign law. Notably, the learned judge emphasised that the principle in *Foster v Driscoll* does not apply to every breach of foreign law.[56] On this basis, the court found that the PRC laws that were breached were "mere administrative conventions" which did not result in criminal proceedings in the PRC. Therefore, even if Saitek (*ie*, the plaintiff) had intended to commit the illegality, enforcement of the contract would not be contrary to forum public policy.[57] The reasoning in

51 *Jones v McCarthy* [2022] EWHC 2186 (Ch) at [125].
52 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.
53 *Ryder Industries Ltd v Timely Electronics Co Ltd* [2016] 1 HKC 323.
54 *Ryder Industries Ltd v Timely Electronics Co Ltd* [2016] 1 HKC 323 at [57].
55 *Ryder Industries Ltd v Timely Electronics Co Ltd* [2016] 1 HKC 323 at [59].
56 *Ryder Industries Ltd v Timely Electronics Co Ltd* [2016] 1 HKC 323 at [57].
57 *Ryder Industries Ltd v Timely Electronics Co Ltd* [2016] 1 HKC 323 at [59].

these cases can be understood as a continuation of the approach adopted in *Les Laboratoires Servier v Apotex Inc*,[58] where the UK Supreme Court applied domestic principles on illegality to a dispute involving the breach of a Canadian patent, appearing to assume that "violations of foreign laws were to be treated in the same ways as violations of local laws".[59]

C. Implications for Singapore-law principles of foreign illegality

19 Although these cases are not binding as a matter of Singapore law, they do have some persuasive value as the domestic rules on foreign illegality continue to develop. Indeed, early signs of convergence between principles on foreign law and domestic law illegality can be observed in recent Singapore case law. In *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd*,[60] counsel for the defendant argued for the applicability of *Ting Siew May* even though the dispute involved questions of foreign law illegality. While this approach was not endorsed, it was not rejected outright by Vincent Hoong JC who went on to apply *Ting Siew May* for the sake of argument.[61] In *Baker, Michael A v BCS Business Consulting Services Pte Ltd*[62] ("*Michael Baker*"), the *Ochroid Trading* or *Ting Siew May* illegality framework was applied to a dispute involving a trust that contravened US bankruptcy provisions.[63] The broader significance of this decision is up for debate since no explanation was provided as to why the rules on foreign illegality were not applied instead. Since the trust in that case was governed by Singapore law,[64] that could be a reason why the domestic illegality framework was applied notwithstanding the illegality by foreign law. Nevertheless, the Singapore High Court has, in a subsequent case, cited *Michael Baker* as authority for the broad proposition that "the proportionality approach in *Ting Siew May* should apply to foreign illegality as it does to domestic illegality".[65] Although this was a dispute involving tainting rather than the rule in *Foster v Driscoll*,[66] there is no indication that Vinodh Coomaraswamy J intended to restrict this broadly worded statement to application in tainting disputes. Furthermore, although tainting by foreign illegality has traditionally been regarded as a different principle from the rule in *Foster v Driscoll*, academics have noted that the high degree of similarity

58 [2014] 3 WLR 1257.
59 Rennie Whang, "The Tainting Doctrine in Singapore Conflict of Laws" [2020] Sing JLS 726 at 739.
60 *Anuva Technologies Pte Ltd v Advanced Sierra* [2020] 4 SLR 569.
61 *Anuva Technologies Pte Ltd v Advanced Sierra* [2020] 4 SLR 569 at [56].
62 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 at [252].
63 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 at [258].
64 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 at [214].
65 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2022] 5 SLR 915 at [282].
66 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2022] 5 SLR 915 at [266].

between the two principles is such that the tainting rule can plausibly be seen as an application of *Foster v Driscoll*.[67] If this is accepted, that provides a further reason why proportionality should be applied for cases falling within the rule in *Foster v Driscoll* as well.

20 This does not mean that the *Magdeev* approach to foreign illegality can be replicated wholesale as part of Singapore law. The *Magdeev* approach was inspired by the range of factors test for domestic illegality adopted by the UK Supreme Court in *Patel v Mirza*.[68] For the purposes of Singapore law, these developments must be viewed in the context of the different framework for illegality adopted by the Singapore Court of Appeal in *Ochroid Trading*. The court in *Ochroid Trading* was careful to distinguish its approach to illegality from the broader range of factors analysis applied in *Patel v Mirza*, which it saw as introducing "even more discretion in an area of contract law that is already excessively fluid".[69] One key difference is that the proportionality analysis in *Ochroid Trading* or *Ting Siew May* applies only to the category of contracts that are not prohibited *per se* but were entered into with the object of committing an illegal act.[70] Contrastingly, the court in *Patel v Mirza* intended the range of factors test to apply across the board to all types of common illegality (but not for statutory illegality).[71] The court in *Ochroid Trading* emphasised that where the contract concerned is prohibited under an established head of common law public policy, the contract must necessarily be void and unenforceable. The rationale for this is that courts should not have a discretion to enforce contracts which are contrary to public policy.[72]

21 This must be read in the context of recent comments by the Court of Appeal in *Esben Finance Ltd v Wong Hou-Lianq Neil*[73] ("*Esben Finance*") regarding foreign illegality. In *Esben Finance*, the court noted that the rules in *Ralli Brothers* and *Foster v Driscoll* are both based on the principle of comity, which is one of the heads of common law illegality.[74] Under the *Ochroid Trading* framework, the proportionality

67 Yeo Tiong Min SC (*honoris causa*), *Commercial Conflict of Laws* (Academy Publishing, 2023) ch 12, at para 12.084; Tan Yock Lin, "Tainted Contracts in the Conflict of Laws" (2020) 32 SAcLJ 1003 at para 73.

68 *Patel v Mirza* [2016] 3 WLR 399 at [93].

69 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [20].

70 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [40].

71 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363. *Cf*, Lord Burrows, "The Illegality Defence after *Patel v Mirza*", speech at The Professor Jill Poole Memorial Lecture 2022 (24 October 2022) at p 6, stating that the range of factors test in *Patel v Mirza* can still apply to cases of statutory illegality where the effects of the illegality are not dealt with by the statute.

72 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [116].

73 [2022] 1 SLR 136 at [163].

74 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172].

inquiry only arises for the category of contracts that are not illegal *per se* but are entered into with the object of committing an illegal act.[75] The effect of the comments in *Esben Finance* is that once comity as a head of public policy is engaged, the contract is illegal under common law and is rendered unenforceable.[76]

22 Nevertheless, it is argued that the Court of Appeal's comments in *Esben Finance* do not preclude a court from applying the proportionality test to determine whether international comity as a head of public policy is engaged in the first place.[77] The legitimacy of this approach depends on whether the *Ting Siew May* or *Ochroid Trading* framework constitutes a forum mandatory rule.[78] It is submitted that the principles outlined in *Ting Siew May* should form part of forum overriding mandatory rules or forum fundamental public policy.[79] This approach has the practical advantage of promoting simplicity and doctrinal consistency between the forum's treatment of foreign and domestic illegality. It would also make sense as a matter of principle, given the clarification that international comity is a head of common law public policy under the *Ting Siew May* or *Ochroid Trading* illegality framework.[80] If the *Ting Siew May* or *Ochroid Trading* illegality framework now encompasses heads of fundamental public policy like international comity, that takes the framework outside the realm of purely domestic public policy and into the sphere of a forum mandatory rule.

23 Furthermore, applying the *Ting Siew May* factors to determine whether the rule in *Foster v Driscoll* is engaged would not represent a dramatic change in the law. This is because the factors in *Ting Siew May* are analogous to the considerations that influenced the courts in cases where the *Foster v Driscoll* rule was applied. First, the nature and gravity of the illegality and the question of whether allowing the claim would undermine the purpose of the prohibiting rule (factors (a) and (b) in *Ting Siew May*) are analogous to the question of whether the breach of foreign illegality reflects sufficiently important policies of the foreign state. Second, factor (c) in *Ting Siew May*, which relates to the remoteness or

75 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [35]; *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [66].

76 Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, "Conflict of Laws" (2022) 23 SAL Ann Rev 267 at para 12.97.

77 *Cf*, Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, "Conflict of Laws" (2022) 23 SAL Ann Rev 267 at para 12.98.

78 Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.136; *cf*, Tan Yock Lin, "Tainted Contracts in the Conflict of Laws" (2020) 32 SAcLJ 1003 at para 36.

79 *Cf*, *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [30].

80 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172].

centrality of the illegality to the contract,[81] is arguably already present in the *Foster v Driscoll* rule in the requirement that the unlawful conduct be "central to the adventure".[82] The concept of remoteness in *Ting Siew May* relates to the question of how closely the illegal conduct is connected with the claim.[83] If the unlawful conduct is not closely related to the claim, it is likely that the illegality will not be considered "central to the adventure" and the contract will be enforced. Third, the *Ting Siew May* proportionality test also allows courts to consider the object, intent and conduct of the parties (*ie*, factor (b)).[84] This factor is the main feature of the rule in *Foster v Driscoll*, which applies where there is a wicked intention to breach the laws of the foreign country.[85]

24 One question that remains is if the factors *Ting Siew May* are to be directly applied, or whether some form of indirect application is preferable. In *Magdeev*, Cockerill J stressed that that the factors in *Patel v Mirza* are not to be directly applied, although they do "provide a guide". The reluctance to directly apply *Patel v Mirza* stems from the difference in public policies underlying foreign illegality and domestic illegality principles.[86] While the former is based on the principle of *ex turpi causa*, the latter is based on international comity.[87] Despite this, Cockerill J went on to consider factors such as the seriousness of the breach, the purpose of the underlying prohibition, the centrality of the illegality and the intention of the parties.[88] These are essentially the same factors identified in the *Patel v Mirza* balancing exercise.[89]

25 The distinction between the direct application of a set of factors and the use of those factors as a guide is neither clear nor helpful and should not be adopted as part of Singapore law. After all, the *Ting Siew May* proportionality framework was designed to be applied in a flexible manner. A judge applying the framework is not bound to consider all the factors in every case, or to apportion equal weight to them.[90] And while it is true that the *Ting Siew May* proportionality test was first applied in a dispute involving domestic illegality, it is worded broadly enough to

81 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].
82 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [329].
83 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [66].
84 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].
85 *Foster v Driscoll* [1929] 1 KB 470 at 497.
86 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [332].
87 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [331].
88 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [335]–[341]; Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier" (2021) 80(1) CLJ 32 at 34.
89 *Patel v Mirza* [2016] 3 WLR 399 at [93].
90 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [71].

apply in the different context of determining whether the fundamental public policy of comity is engaged.[91]

26 This author does not argue that the rule in *Foster v Driscoll* should be replaced with the *Ting Siew May* proportionality test entirely. It has been rightly observed that one of the flaws of direct replacement is that the *Ting Siew May* framework does not address the private international law question of which laws are sufficiently connected to the subject matter of the dispute such that they should be given effect. Conversely, the rule in *Foster v Driscoll* tests for this sufficient connection through the requirement that there be a breach of the law of the place where the contract is to be performed.[92] Therefore, the better approach is to directly apply the *Ting Siew May* proportionality factors as part of the court's discretion in considering whether the rule in *Foster v Driscoll* is engaged.

27 In addition to being better able to filter out the cases where comity is engaged from the cases where it is not, this approach has the advantage of promoting a greater level of consistency in the forum's treatment of both domestic and foreign illegality. Since both areas of law engage important questions of forum public policy, there is no reason to maintain a dichotomy with a flexible rule in one context and a rigid and inflexible rule in another.[93]

28 However, in a dispute involving foreign illegality, the *Ting Siew May* factors should not be applied in exactly the same way as they are applied in the context of domestic illegality, particularly when it comes to ascertaining the nature and gravity of the illegality.[94] There are valid concerns that the forum court should not stray into value judgments on foreign law that it is not best placed to make.[95] The proper response to this is not to shy away from making those judgments where it is necessary to do so. Instead, courts should be cognisant of the inherent limitations of such an attempt and recognise that for foreign illegality disputes, the inquiry does not go beyond applying the principles of comity.

29 There are also legitimate concerns that applying a proportionality test to foreign illegality may undermine the doctrine of separation of powers by allowing for broad judicial discretion in matters of foreign relations. It is well established that foreign relations are the proper

91 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2022] 5 SLR 915 at [291].
92 Joel Lee Tye Beng, Leow Wei Xiang Joel, Marcus Teo Wei Ren, "Conflict of Laws" (2021) 22 SAL Ann Rev 268 at para 12.160.
93 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [332].
94 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2022] 5 SLR 915 at [291].
95 Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier" (2021) 80(1) CLJ 32 at 35.

province of the Executive, not the Judiciary.[96] Thus, in *Buttes Gas Oil Co v Hammer*, the House of Lords laid down a general principle of non-justiciability, providing that courts must refrain from adjudicating upon the transactions of foreign sovereign states, due to the possibility of "embarrassment in our foreign relations".[97] However, from its inception, the rule in *Foster v Driscoll* has always been concerned with maintaining the forum's foreign relations with friendly states. The rule allows courts to deny enforcement of a contract where parties intend to break the laws of a friendly foreign state, on the grounds that to enforce such a contract would furnish the foreign state with a "just cause for complaint".[98]

30 Therefore, there cannot be a blanket prohibition on the courts considering matters of the forum's foreign policy in deciding disputes. Instead, the courts must remain sensitive to the need to speak with one voice with the Executive on such matters, and to avoid overstepping the judicial function by devising foreign policy.[99] In cases where the proportionality analysis is politically uncontroversial, this concern may not arise. For example, if the foreign Legislature itself would not regard the contract as void or unenforceable, it would not be in the interest of the forum or international comity to refuse to uphold the contract. Such a finding does not require the forum court to wade into issues of foreign policy, since the priorities of the foreign Legislature are clear.

31 In other cases, the forum's interests may be less obvious. In less clear-cut scenarios, courts may benefit from requesting the views of the Executive, if this is possible. This has occurred before on occasions where courts have been faced with issues that involve foreign policy. For example, in *Rio Tinto Zinc Corp v Westinghouse Electric Corp*, the House of Lords accepted, and applied the view of the government that the extra-territorial application of US anti-trust law infringed British sovereignty, stating that "courts should in such matters speak with the same voice as the executive".[100] More recently, in *Kuwait Airways*, the House of Lords relied on a letter written by an officer of the Foreign Office (produced upon request by the lower court), setting out the policy of the Executive

96 *Buttes Gas Oil Co v Hammer* [1982] AC 888 at 938; *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [63].

97 [1982] AC 888 at 938; *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [62]; *cf*, Lawrence Collins, "Foreign Relations and the Judiciary" (2002) 51(3) TICLQ 485 at 508.

98 *Foster v Driscoll* [1929] 1 KB 470 at 510.

99 Lawrence Collins, "Foreign Relations and the Judiciary" (2002) 51(3) TICLQ 485 at 487.

100 [1978] AC 547 at 616–617; Lawrence Collins, "Foreign Relations and the Judiciary" (2002) 51(3) TICLQ 485 at 488.

on the legality of Iraq's conduct.[101] Although these cases do not involve foreign illegality, they are relevant as instances where courts deferred to views of the executive in deciding disputes which involved the state's foreign policy.

32 This is not a perfect solution since the views of the Executive may not always be available in every case. There is also no clear-cut formula for the appropriate weighing of foreign policy interests. Nevertheless, the problem is not resolved by retaining the rule in *Foster v Driscoll* in its current form without proportionality. The categorical approach of the rule may produce unreasoned judgments by allowing courts to sidestep analysis in the guise of neutrality. For example, in *Regazzoni*, the House of Lords applied the rule in *Foster v Driscoll* to render unenforceable a contract for export of Indian jute to South Africa.[102] This was in contravention of an Indian ban on exports to South Africa, in protest of the latter's policies of racial apartheid. In the words of Lord Reid, the House of Lords would not "set itself up as a judge of the rights and wrongs of a controversy between two friendly countries", as the consequences of such an attempt "might seriously prejudice international relations".[103] However, as Mann points out, it is arguable that the House of Lords "extricated itself from a dilemma by purporting not to see it".[104] If India would have had just cause for complaint about the enforcement of the contract, South Africa would have had no less just cause for complaint about its non-enforcement. Nevertheless, the court rejected the argument that the Indian law should not be recognised because it was hostile to another friendly state.[105] The outcome of the decision is justifiable on the grounds that it was in the forum's interest to support India's protest against racial apartheid by recognising the Indian law, but this reasoning should have been made explicit.

33 The point is it is not always the case that the forum's interest will be furthered by refusing to enforce a contract entered into with the intention of violating the law of a friendly foreign state. Thus, the Singapore Court of Appeal in *obiter* stated that the rule in *Foster v Driscoll* will not apply to defeat a contract entered into with the intention of breaking the laws of a foreign state, if the foreign law being violated is in itself repugnant to Singapore public policy.[106] It is argued that in cases involving sensitive

101 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2001] 3 WLR 1117 at 1207; Lawrence Collins, "Foreign Relations and the Judiciary" (2002) 51(3) TICLQ 485 at 508.
102 *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301.
103 *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 at 326.
104 F A Mann, "Illegality and the Conflict of Laws" (1958) 21 TMLR 181 at 183.
105 *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 at 307.
106 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [34].

foreign policy issues, applying a proportionality analysis may encourage courts to come to a reasoned conclusion by seeking out the views of the Executive instead of ignoring the issues altogether.

D. Comparison with concept of overriding mandatory provisions under Rome I Regulation

34 Since the goal of the rule in *Foster v Driscoll* is to promote the forum's maintenance of friendly relations with foreign states, understanding how this issue is dealt with in other jurisdictions may be helpful. Under the Rome I Regulation,[107] the relevance of the law of a third country other than the proper law of the contract is addressed through the concept of overriding mandatory provisions.[108] The approach under the Rome I Regulation differs from the rule in *Foster v Driscoll* in two interesting ways.

35 First, while the rule in *Foster v Driscoll* is focused on the wicked intention of the parties,[109] the Rome I Regulation is concerned solely with the nature of the foreign provision that has been breached. This is evident from the wording of Art 9(1), which defines overriding mandatory rules as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization to such an extent that they are applicable to any situation falling within their scope".

36 Second, Art 9 of the Rome I Regulation is phrased in discretionary terms, providing that "effect may be given" to overriding mandatory provisions, and in deciding whether to give them effect, "regard shall be had to their nature and purpose and to the consequences of their application or non-application". In *Alnati*,[110] from which the Art 9 definition of overriding mandatory provisions was derived, the Hoge Raad rejected the applicability of mandatory provisions of Belgian law, holding that Belgium did not have a sufficiently strong interest in the application of that law outside its territory.[111] Despite these differences, the approach under the Rome I Regulation bears a commonality with

107 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

108 Michael Hellner, "Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?" (2009) 5(3) JPIL 446 at 451.

109 *Foster v Driscoll* [1929] 1 KB 470 at 496.

110 [1967] NJ 3; (1967) 56 *Revue Critique de Droit International Privé* 522.

111 Trevor C Hartley, "Mandatory Rules in International Contracts: The Common Law Approach" in *The Hague Academy Collected Courses Online* (Brill, 1997); Adeline Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2(1) JPIL 27 at 41.

the statement in *Ryder* that "it is only sufficiently serious breaches of foreign law which reflect important policies of the foreign state that will render it contrary to public policy to enforce a contract". In *Ryder*, the court's finding that the restrictions on duty free imports under PRC law were "mere administrative conventions" meant that they would likely not be regarded as overriding mandatory provisions that were crucial for safeguarding the public interests of the PRC. The result was that even if the parties had intended a breach of these provisions, it would not be contrary to forum public policy to enforce the contract.[112]

37 The focus on the wicked intention of the parties under the rule in *Foster v Driscoll* should not be abandoned. It reflects the forum's view that considerations of comity are more prevalent in contracts where the parties show a wicked intention to breach the laws of the foreign country. However, following the reasoning of the recent UK cases outlined above, the intention of the parties is not conclusive. If the breach of foreign law does not engage sufficiently serious policies of the foreign country, then a finding that the breach was intentional will not render the contract unenforceable.

38 It is therefore suggested that the concept of overriding mandatory rules under the Rome I Regulation may provide some guidance as to the kinds of foreign law which reflect important policies of the foreign state such as to fall within the ambit of *Foster v Driscoll*. For example, the US Prohibition rule in *Foster v Driscoll* was a constitutional provision which involved moral considerations by the US Government as to the health and moral behaviour of its citizens. Applying the definition in Art 9(1) of the Rome I Regulation, this was clearly a provision regarded by the US Government as essential for public interests. In contrast, in *Magdeev*, evidence of non-enforcement of the relevant provisions breached cast doubt as to whether they would be considered overriding mandatory provisions which were regarded as crucial for the public interests of the UAE.[113]

39 Of course, Singapore is not a signatory to the Rome I Regulation, and a Singapore judge is not bound to apply the rule in *Foster v Driscoll* just because a mandatory overriding provision of the place of performance is involved. However, the concept of overriding mandatory provisions does provide a useful starting point as it provides a yardstick for determining the importance of a foreign law within a foreign legal system that has

112 *Ryder Industries v Chan Shui Woo* [2015] 18 HKCFAR 544 at [59].
113 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [339].

been widely accepted within the international legal community.[114] Where there is a breach of an overriding mandatory provision, it is suggested that the rule in *Foster v Driscoll* will most likely be engaged. A finding that the breach was intentional would reinforce that conclusion. The usefulness of the concept may only increase with time, especially if there are new judgments interpreting Art 9 of the Rome I Regulation.

40 If the foreign state legislative or judicial branch has explicitly designated the mandatory nature of the relevant law, then the clear cut response should be to give effect to that law. This approach would not be a novel one. It is already accepted that the intended territorial scope of the foreign law in question is relevant in determining whether the rule in *Foster v Driscoll* is engaged. In *Sheager s/o T M Veloo v Belfield International (Hong Kong) Ltd*[115] ("*Sheagar v Belfield*"), the Court of Appeal held that the rule in *Foster v Driscoll* did not apply to bar a transaction governed by English law that was alleged to have contravened the Hong Kong Money Lenders Ordinance[116] ("HKMLO"). This was because of Hong Kong case law indicating that the HKMLO was "plainly directed primarily to domestic transactions". The inquiry in this case was clear cut, given the finding from the Hong Kong court that the HKMLO "positively *shouts* domesticity"[117] [emphasis in original].

41 Where the foreign law is not explicitly designated to be mandatory, the court will need to make a value judgment. While there is no universal consensus on what kinds of laws are of an overriding mandatory nature, there is enough international agreement to suggest that they would include rules on monopolies, antitrust, import and export prohibitions, price controls, exchange control legislation, currency restrictions and embargoes.[118] An intentional breach of rules of this kind should be sufficient to engage forum fundamental public policy. In cases of this category, the proportionality analysis should be simple. A breach of an overriding mandatory provision would likely jeopardise friendly foreign relations with the foreign state and the contract should not be enforced. In this respect, a finding of intention would reinforce that conclusion.

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114 Max Planck Institute for Foreign Private and Private International Law, "Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization" (2004) 68(1) *Journal of Comparative and International Private Law* 1 at 75.

115 [2014] 3 SLR 524.

116 Cap 163.

117 *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [128].

118 *Cheshire, North & Fawcett: Private International Law* (Paul Torremans *et al* eds) (Oxford University Press, 15th Ed, 2017) at p 743.

42 Admittedly, the concept of overriding mandatory provisions is not free from difficulty and uncertainty. There are grey areas where it will be unclear whether the foreign law is to be regarded as mandatory. While mandatory rules usually implicate the state's public interests, the line between public and private interests may be blurred in certain cases. For example, it is unclear whether protective private law rules designed to safeguard a vulnerable party's position in a contract would be considered overriding mandatory rules.[119] Furthermore, where there is clear evidence of a state's non-enforcement of a rule, such practice of non-enforcement should cast doubt on the overriding mandatory nature of such a rule. However, evidence of non-enforcement might not be conclusive. For example, in *Magdeev*, Cockerill J struggled to reconcile the fact that the provision related to visa fraud, a crime which can affect national security and the economy of a state, with the evidence of its non-enforcement against wealthy foreign investors.[120] It is in these grey areas where the court may need to examine the nature and purpose of the provision and make a value judgment.

III. No proportionality inquiry is required for rule in *Ralli Brothers*

43 The preceding Parts have argued that the *Ting Siew May* proportionality framework is appropriate for cases falling within the rule in *Foster v Driscoll*, but separate considerations arise for the rule in *Ralli Brothers*, which presents its own set of conceptual difficulties. The judicial view of *Ralli Brothers* has vacillated between interpreting the doctrine as a conflict of laws rule of the forum,[121] and a principle of domestic contract law relating to frustration by supervening illegality.[122] There has been a litany of references to both interpretations in the cases, without much elaboration as to the reasons for endorsing either position.

A. Doctrinal status of rule in Ralli Brothers

44 The case law provides support for the conflicts interpretation. The court in *Ralli Brothers* cited and applied the rule in Dicey, that a contract

119 Frank Vischer, "General Course on Private International Law" in *The Hague Academy Collected Courses Online* (Brill, 1992) at s 20(III)(2).

120 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [337].

121 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [297]; *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* [2007] EWHC 1713 (Comm) at [46].

122 *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549 at 579; *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728.

is unenforceable if it is illegal by the laws of the *lex loci solutionis*.[123] In *Royal Boskalis Westminster NV v Mountain*, the court noted that subsisting illegality in the place of performance would render a contract unenforceable, regardless of its governing law.[124] Since then, there have been subsequent references in the case law to comity as the rationale for the rule, which supports the conflicts interpretation. However, the issue is far from clear cut. Despite the reference to Dicey's rule, the court in *Ralli Brothers* also appeared to apply the implied term analysis (which was the prevailing interpretation of the frustration doctrine at the time) and referred to cases involving the domestic law of frustration.[125] Additionally, there have been references to the contractual interpretation in subsequent cases. [126]

45 The Singapore Court of Appeal's remarks in *Esben Finance* can be interpreted as providing support for the conflicts interpretation.[127] The court observed that the rule in *Ralli Brothers* and the rule in *Foster v Driscoll* both stem from the common root centering on considerations of international comity. In support of this, the court cited the paragraph from the judgment of Scrutton LJ which endorsed the conflicts rule on illegality by the laws of the place of performance from the second edition of *Dicey, Morris & Collins*.[128]

46 However, the court did not explicitly reject the alternative frustration explanation for the rule, even though it was this interpretation that the Singapore International Commercial Court had initially endorsed at first instance.[129] Furthermore, the Singapore Court of Appeal had, in an earlier case, commented on the likelihood that *Ralli Brothers* could be interpreted as an application of the doctrine of frustration based on English contract law, and considered the doctrine inapplicable because the illegality in that case was subsisting rather than supervening.[130]

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123 *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 at 432.

124 [1999] QB 674 at 692.

125 *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 at 433–434 and 436; Andrew Dickinson, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, *Auf Wiedersehen*, *Adieu*" (2007) 3(1) JPIL 53 at 78; William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 66.

126 *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549; *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728.

127 Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.103; *cf*, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2023) at para 75.460.

128 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [165].

129 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [235].

130 *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [44].

The Singapore Academy of Law Law Reform Committee has also expressed the view that conceptually, it is difficult to see why the rule in *Ralli Brothers* "should be required as an independent choice of law rule, since the proper law of the contract may, as in the case of the common law, already take into consideration illegality under the law of the contractual place of performance".[131]

B. Contractual interpretation of Ralli Brothers *should be adopted*

47 If the case law is interpreted as establishing the conflicts interpretation, then this position merits further consideration.[132] It is argued that there is no need for a conflict of laws rule that bypasses the proper law on the issue of illegality by the *lex loci solutionis*. It has been pointed out that *Ralli Brothers* antedated the notion of the proper law of the contract established in *R v International Trustee for the Protection of Bondholders Aktiengesellschaft*[133] and *Vita Food Products Inc v Unus Shipping Co Ltd*.[134] These cases established that the substantive obligations of the contract are for the proper law to determine. Any derogations from this principle must be exceptional in nature.

48 If the conflicts interpretation is accepted such that the rule in *Ralli Brothers* is based on comity, it may be questioned whether it is always contrary to comity to enforce a contract that is valid by its proper law, but which is illegal according to the laws of the *lex loci solutionis*. Unlike the rule in *Foster v Driscoll*, the rule in *Ralli Brothers* encompasses supervening illegality. The *Ralli Brothers* doctrine can operate to render a contract unenforceable even where the foreign law in question does not engage important policies of the foreign state,[135] and even where parties may have taken all possible measures to ensure the legality of their transaction at the time of contract formation. This suggests that, far from being a public policy rule of international comity, the rule in *Ralli*

131 Singapore Academy of Law, Law Reform Committee, *Report on Reform of the Law Concerning Choice of Law in Contract* (May 2004) at para 95; *cf*, Australian Government, Australian Law Reform Commission, *Choice of Law* (ALRC Report 58, 15 May 1992) at para 8.17.

132 Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.103.

133 [1937] AC 500; F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 391.

134 [1939] AC 277 at 290; F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 391.

135 This was not a consideration in any of the cases applying *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287.

Brothers simply concerns the contractual question of who bears the loss caused by a change in the law.[136]

49 Against this, it may be argued that comity is still a feature of the rule in *Ralli Brothers*, even though the focus of comity considerations is different from the rule in *Foster v Driscoll*. For the rule in *Ralli Brothers*, the focus is on the act of performance itself rather than the intention of the parties.[137] If the forum were to order the parties to commit an act which is illegal in the *lex loci solutionis*, this would be an affront to the legal system of the foreign state.[138]

50 However, if the comity aspect of the rule in *Ralli Brothers* is concerned solely with preventing the performance of an illegal act in the *lex loci solutionis*, then there is no need for an independent conflict of laws rule. The better way to achieve this objective is for the proper law of the contract to determine the consequences of illegality by the *lex loci solutionis*.[139] It is uncontroversial that the forum should not order a party to perform an act which is illegal in the *lex loci solutionis*.[140] If the proper law of the contract would require specific performance of the obligation notwithstanding illegality in the *lex loci solutionis*, then this solution of the proper law of the contract will be rejected for being contrary to the public policy of the forum.[141] But the proper law may have responses to the illegality that does not engage comity considerations. For example, if the remedy is an award of damages instead of specific performance, it is far from clear whether comity is still engaged since the forum will not be ordering any party to commit an illegal act in the *lex loci solutionis*.[142]

51 In other words, if the proper law merely places the risk of legal impossibility in the place of performance on the promisor in allowing a claim for damages, this solution of the proper law should not offend

136 F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 391.

137 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [307].

138 Adeline Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2(1) JPIL 27 at 65.

139 Yeo Tiong Min, *Private International Law: Law Reform in Miscellaneous Matters*, paper presented for the consideration of the Law Reform Division, Attorney-General's Chambers (March 2003) at para 218.

140 F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 392.

141 Yeo Tiong Min SC (*honoris causa*), *Commercial Conflict of Laws* (Academy Publishing, 2023) ch 12, at para 12.075; F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 393.

142 Yeo Tiong Min SC (*honoris causa*), *Commercial Conflict of Laws* (Academy Publishing, 2023) ch 12, at para 12.075; F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 393.

comity.[143] There are other situations where the proper law may have a solution to illegality in the place of performance that does not offend comity. Mann points out that if the proper law in *Ralli Brothers* was German law instead of English law, German law would have held that, in view of the supervening Spanish legislation, the place of payment would no longer be Barcelona, but London. If the rule in *Ralli Brothers* is a conflicts doctrine, this perfectly reasonable solution of the proper law would have to be disregarded.[144] The point is that to interpret *Ralli Brothers* as a conflict of laws rule involves prematurely bypassing the proper law of the contract, which may contain solutions to the illegality that are not offensive to comity.

52 Furthermore, the objective of the rule in *Ralli Brothers* is doctrinally consistent with the contractual principle of frustration. It has been argued that the strongest reason for the rule in *Ralli Brothers* is the need to do justice between the parties.[145] This is because it is unthinkable that a court would order the performance of a contract that has become illegal by the law of the place of performance, for that would expose the party who must carry out the illegal performance to sanctions in the place of performance. This would be contrary to the parties' expectations at the time of contract formation.[146] This rationale for the rule is consistent with the construction theory of frustration, whereby the central inquiry is whether the frustrating event renders performance outside the scope of what was agreed in the terms of the contract.[147] Furthermore, the frustration interpretation of *Ralli Brothers* has the added advantage of resolving the issue as to which law governs the consequences of the

143 Yeo Tiong Min SC (*honoris causa*), *Commercial Conflict of Laws* (Academy Publishing, 2023) ch 12, at para 12.075; F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 393; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2023) at para 75.460; *cf*, William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 83, who states that "[r]espect is expressed by the court not enforcing performance, whether specifically or requiring the payment of damages as a substitute for performance, when such performance would be illegal in the place where it is contractually stipulated".

144 F A Mann, "Proper Law and Illegality in Private International Law" (1937) 18 BYBIL 97 at 111.

145 Adeline Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2(1) JPIL 27 at 40; *cf*, Andrew Dickinson, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, *Auf Wiedersehen*, *Adieu*" (2007) 3(1) JPIL 53 at 82.

146 Adeline Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2(1) JPIL 27 at 40; *cf*, Andrew Dickinson, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, *Auf Wiedersehen*, *Adieu*" (2007) 3(1) JPIL 53 at 82.

147 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ch 19, at para 19.019; *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [25].

illegality in favour of the proper law of the contract over the law of the place of performance and the *lex fori*.[148]

53 Admittedly, the references to comity in cases applying *Ralli Brothers* complicate the matter.[149] These references appear to support the conflicts interpretation while undermining the contractual explanation.[150] Whatever the original intention of the court in *Ralli Brothers* was, modern case law has established that the desire to do justice between the parties is not the only reason for the rule. The rule in *Ralli Brothers* does appear to have a public policy dimension, in so far as the forum's refusal to order an illegal act in the *lex loci solutionis* can be viewed as an expression of respect for the territorial sovereignty of the place of performance. The problem is that if *Ralli Brothers* is concerned with comity, then at first glance this seems incongruent with the construction theory of frustration, which focuses on purely the terms of the contract.[151]

54 However, it is argued that conceding that the rule in *Ralli Brothers* has a public policy dimension rooted in comity is not inconsistent with its status as an application of the contract law principle of frustration by supervening foreign illegality.[152] To illustrate this, a comparison may be made with the doctrine of frustration by supervening domestic illegality. It is well established that frustration cases involving supervening domestic illegality entail considerations of public policy that are not present in ordinary frustration cases.[153] Where domestic illegality is involved, the court is concerned not only with allocating or distributing the loss caused by the supervening event and doing justice between the contracting parties. There is also an element of public policy involved, as the court is concerned with upholding the domestic public interest that

148 Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.103.

149 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [307]; *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [164]; *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98.

150 Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.103; *cf, Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2023) at para 75.460.

151 *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233; *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696; *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ch 19, at para 19.019.

152 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2023) at para 75.460.

153 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ch 19, at para 19.044; *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm) at [100].

the law is observed.[154] In such cases, there is the imperative to uphold the internal consistency of the domestic legal system. This is why unlike other grounds of frustration (such as frustration by impossibility of purpose), it is not open for the parties to contract out of the doctrine of frustration by supervening domestic illegality.[155]

55 In cases of supervening foreign illegality, just as with supervening domestic illegality, it is undeniable that there is an element of public policy involved. It is just that the public policy consideration for supervening foreign illegality is comity and the respect for the territorial sovereignty of another country.[156] This is different from the public policy considerations at play in cases of domestic illegality, where the primary concern is to safeguard the internal consistency of the forum's legal system. Thus, even on a contractual interpretation of *Ralli Brothers*, comity is not irrelevant. But importantly, comity would apply as part of the proper law's contractual doctrine of frustration (or its functional equivalent, if any, in non-common law jurisdictions).

56 This is different from comity as a head of forum international public policy (which applies irrespective of the proper law of the contract). As an application of the contract law principle of frustration by supervening illegality, the rule in *Ralli Brothers* is primarily concerned with doing justice between the parties. Thus, in a contract governed by Singapore law, the rule in *Ralli Brothers* should only be engaged if the illegality in the place of performance has rendered contractual performance radically and essentially different from what was envisaged at the time of contract formation. It is just that in addition to this, the proper law provides a further public policy reason rooted in comity supporting the non-enforcement of the contract. The practical implication is that in cases of foreign illegality, comity is the reason why parties are excluded from excluding the operation of the doctrine of frustration by *lex loci solutionis* illegality by way of an express contractual provision.[157]

57 In other words, the role of comity in the rule in *Ralli Brothers* is merely to place supervening illegality by the place of performance on

154 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ch 19, at para 19.044; *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm) at [100].

155 Edwin Peel, *Frustration and Force Majeure* (Sweet & Maxwell, 4th Ed, 2022) ch 8, at para 8-057.

156 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 82.

157 Edwin Peel, *Frustration and Force Majeure* (Sweet & Maxwell, 4th Ed, 2022) ch 8, at para 8-057; *Ertel Bieber Co v Rio Tinto Co Ltd* [1918] AC 260.

the same footing as domestic illegality for the purposes of the doctrine of frustration.[158] This principle is distinct from the rule that the forum court will not order the specific performance of an act that is illegal in the place of performance.[159] The latter principle belongs to the forum's fundamental public policy (as opposed to the public policy of the proper law) and applies where the proper law of the contract would mandate the performance of an act that contravenes the laws of the place of performance.[160]

C. Consequences of characterisation of rule in Ralli Brothers

58 It has been remarked that the precise legal characterisation of the rule in *Ralli Brothers* is only relevant where the court is faced with supervening foreign illegality in a contract where the place of performance is in one foreign country and the contract is governed by the law of another.[161] There has been no reported instance of such a factual scenario. This might give the misleading impression that the issue is a mere academic curiosity of limited practical relevance. But if the arguments above regarding the need for proportionality analysis in cases of foreign illegality are accepted, then the legal characterisation of the rule in *Ralli Brothers* is of crucial importance.

59 If the rule in *Ralli Brothers* is a conflict of laws doctrine which engages the public policy of the forum, then the court may refuse to enforce the contract on account of illegality by the *lex loci solutionis*, regardless of what the proper law may have to say about the matter. If this is the case, the arguments above in relation to the need for proportionality for the rule in *Foster v Driscoll* will apply equally to the rule in *Ralli Brothers*. On this view of the doctrine, there are gradations in the seriousness and importance of the foreign law breached, and the conduct of the parties. Consequently, the forum would need to refer to the *Ting Siew May* factors to determine whether denying enforcement of the contract is an appropriate response to the illegality. The author argues instead that *Ralli Brothers* is an application of the domestic contract law principle of frustration by

158 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2023) at para 75.460.

159 F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 392.

160 Yeo Tiong Min SC (*honoris causa*), *Commercial Conflict of Laws* (Academy Publishing, 2023) ch 12, at para 12.075; F A Mann, *Foreign Affairs in English Courts* (Oxford University Press, 1986) at p 155, stating that it is "probably … a principle of customary international law, that no one is required to do an act which at the material time and place is unlawful, illegal or criminal and for this reason in law impossible"; and David Chong "Contractual Illegality and Conflict of Laws" (1995) 7 SAcLJ 393 at 338.

161 *Ryder Industries v Chan Shui Woo* [2015] 18 HKCFAR 544 at [43].

supervening illegality. If this is accepted, illegality of performance in the *lex loci solutionis* is no more than a fact to be considered by the courts in determining whether performance has become impossible by the proper law of the contract.[162] The central objective is to do justice between the parties, and the key inquiry is whether the law of the *lex loci solutionis* truly renders performance radically different from what was envisaged during contract formation according to the proper law of the contract. To this end, the nature of the foreign law and consequences of the breach may be relevant. A severe breach which would expose the performing party to criminal sanctions in the place of performance is more likely to frustrate the contract than a minor breach of an administrative kind such as the breach that occurred in *Ryder Industries*. At first glance, this may seem similar to the balancing test invoked in *Magdeev* and *Ryder*. The crucial difference is that on the contractual approach, the focus is on the terms of the contract, and whether the purpose of the contract has been defeated by the illegality.[163] The seriousness of the foreign law breached (and its legal consequences) is only relevant in considering whether performance has become radically and essentially different from what the parties contracted for. This is primarily a matter of justice between the parties, rather than public policy. [164] That is different from the weighing of forum public policy values which occurs in the proportionality analysis.

D. Addressing difficulties with contractual interpretation of the rule in Ralli Brothers

60 The preceding section argued that the contractual interpretation of *Ralli Brothers* has the advantage of paying sufficient regard to the proper law of the contract. Nevertheless, the contractual interpretation does leave a number of questions to be answered. This section will seek to outline the strongest objections to the contractual interpretation before concluding that these objections are ultimately not fatal to the contractual interpretation.

61 It has been observed that *Ralli Brothers* does not fit in neatly with the usual features of frustration.[165] This argument assumes that the effect of the rule in *Ralli Brothers* is that the relevant illegal part of the contract becomes unenforceable, whereas the effect of frustration is to discharge

162 *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [44]; J H C Morris, *Dicey and Morris on the Conflict of Laws* (Stevenson & Sons, 9th Ed, 1973) at p 783.

163 *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association Ltd* [2010] EWHC 2661 (Comm).

164 That said, public policy is not irrelevant. See paras 49–52 above.

165 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 84.

the contract as a whole. It has been observed that in *Ralli Brothers*, there is no suggestion that the Compañia Naviera was relieved of its obligations to deliver the jute to Barcelona on account of the Royal Decree. Rather, the supervening illegality merely rendered the contractual obligation to pay the additional freight unenforceable.[166] Of all the objections to the contractual analysis of *Ralli Brothers*, this one appears the most persuasive at first glance. If the *Ralli Brothers* doctrine merely renders the contractual obligation that has become illegal by the laws of the place of performance unenforceable, instead of discharging the whole contract, this means that there cannot be a claim under the Frustrated Contracts Act 1943[167] (or its Singapore counterpart, the Frustrated Contracts Act 1959[168]) in respect of benefits conferred under a contract caught by supervening illegality.[169]

62 However, it is argued that the court's approach in *Ralli Brothers* must be seen in the context of the antiquity of the judgment, which predates the enactment of the Frustrated Contracts Act 1943 in England. Before that enactment, the position under the common law was to let the losses lie where they fell.[170] Crucially, at the time the Royal Decree was passed, the jute had already been delivered.[171] The issue of whether the Compañia Naviera should be relieved of all its contractual obligations therefore simply did not arise. Since the jute had already been delivered, the recipient was entitled to keep the jute without paying the contractually stipulated freight.

63 As seen from the contradictory references to both the conflicts rule in Dicey and the domestic law cases on frustration,[172] it was not at all clear what the court in *Ralli Brothers* had in mind in terms of whether it was laying down a contractual or conflicts principle. Given that the legal characterisation of the rule in *Ralli Brothers* is in a state of flux, there is nothing preventing a court from applying the doctrine in a different manner in future. The correct position, in modern times, is that supervening illegality by the place of performance discharges the entire contract. This can be illustrated from the facts of *Ralli Brothers* itself. In *Ralli Brothers* the effect of the Royal Decree was to render the contractual

166 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 84.
167 c 40 (UK).
168 2020 Rev Ed.
169 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 84.
170 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.
171 *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 at 287.
172 *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 at 296 and 300–301; Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.100.

rate of freight on jute illegal.[173] This was surely a term that went to the heart of the contractual bargain agreed between parties. The fact that the payment of the contractually agreed price was rendered unenforceable meant that contractual performance had become radically and essentially different from what was envisaged during the time of contract formation.

64 A second objection to the contractual explanation for *Ralli Brothers* is that the rule is singularly focused on the law of the place of performance.[174] This gives the appearance of a conflicts principle on illegality by the *lex loci solutionis*. If the test for applying *Ralli Brothers* is truly whether performance has become radically different from what was envisaged in the terms of the contract, then it is unclear why the only foreign law that can count for these purposes is the law of the place of performance. Illegality by other laws also be relevant, so long as the illegality constitutes a frustrating event.[175]

65 However, it is submitted that the focus on the law of the place of performance in *Ralli Brothers* could simply reflect the reality that it is difficult to imagine that illegality under another law (other than the proper law) could affect contractual performance so drastically as to result in discharge by frustration.[176] One might point to the obligor's place of primary residence or domicile or incorporation as potential sources of supervening illegality that may frustrate a contract.[177] But doctrinally, prohibitions under these laws are better characterised as issues of supervening incapacity rather than supervening illegality.[178]

66 This was the position adopted in the English case of *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*.[179] In that case, the European Medicines Agency ("EMA") argued that it was excused from its contractual obligations in a lease agreement because the UK's exit from

173 *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 at 290.
174 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 85.
175 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 85.
176 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 290–291; *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 at [12].
177 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 85.
178 Under the common law, it is unclear whether the capacity of natural persons is governed by the law of place of residence, the *lex domicilii*, the *lex contractus* or the proper law of the contract: Adeline Chong & Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) ch 7, at para 7.71.
179 [2019] EWHC 335 (Ch); William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 85.

the EU meant that the EMA would no longer enjoy certain privileges and immunities under the EU treaties which were necessary to its functioning and maintenance.[180] The court adopted the contractual interpretation of the rule in *Ralli Brothers* and held that the doctrine of frustration by supervening illegality is concerned only with changes in the laws of the place of performance, and not with changes in the law of incorporation of the obligor.[181] This is because changes in the law of incorporation subsequent to contract formation are to be characterised as questions of supervening incapacity.[182] This distinction has the advantage of legal accuracy. It better reflects the true nature of the issue, which relates to the power of the entity in question to carry out the contract rather than illegality. It also means that there is no logical inconsistency or unfairness in holding that the *Ralli Brothers* rule is solely focused on illegality by the *lex loci solutionis*.

67 A third objection is that the frustration analysis of *Ralli Brothers* precludes the doctrine from applying in situations of subsisting illegality. At first glance, this might appear to be an unfair result since the only difference between subsisting and supervening illegality is a temporal one.[183]

68 However, it is argued that there is no unfairness in restricting the *Ralli Brothers* rule to situations of supervening illegality. Since the true foundation of *Ralli Brothers* is the contractual doctrine of frustration, incidents of subsisting illegality are better dealt with through other doctrines. The cases that attempted to apply the *Ralli Brothers* rule to cases of subsisting illegality had in mind the conflicts interpretation of the rule rather than the contractual interpretation.[184] In cases of subsisting illegality, the transaction will be caught by the rule in *Foster v Driscoll* (assuming the foreign provision engages sufficiently important policies of the foreign state).

69 In cases falling outside the rule in *Foster v Driscoll*, it should not ordinarily be objectionable to enforce the contract even if there is

180 *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) at [5].

181 *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) at [188]–[189].

182 *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) at [108]–[109].

183 William Day, "Contracts, Illegality and Comity: *Ralli Bros* Revisited" (2020) 79 CLJ 64 at 135.

184 *Toprak v Finagrain* [1979] 2 Lloyd's Rep 98 at 107; *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 at 322; David Chong "Contractual Illegality and Conflict of Laws" (1995) 7 SAcLJ 393 at 338.

subsisting illegality by the laws of the *lex loci solutionis*. Admittedly, there may be rare situations involving subsisting illegality where enforcing the contract might arguably be contrary to comity even though the rule in *Foster v Driscoll* is not engaged. This may occur, *eg*, where the contract mandates an act of performance that contravenes the law of the place of performance, but parties were unaware of the illegality in the place of performance at the time of contracting and/or the relevant law does not engage sufficiently serious policies of the foreign state. Such a case should not be dealt with under the rule in *Ralli Brothers*. It should instead come under the separate principle that the forum will not order specific performance of a contract that is illegal in the place of performance. This principle belongs not to the proper law of the contract, but to forum fundamental public policy.[185]

IV. Conclusion

70 The rule in *Foster v Driscoll* has never been a categorical rule designed for inflexible application. The courts have always had the discretion to determine whether the conduct of the parties and the seriousness of the foreign provision breached is of sufficient gravity such it would be contrary to forum fundamental public policy to enforce the contract. Seen in this light, applying the *Ting Siew May* proportionality test to determine whether the *Foster v Driscoll* rule is engaged would represent little more than a modern elaboration of an old doctrine that has always involved judicial discretion.

71 For the rule in *Ralli Brothers*, no proportionality analysis is necessary. Properly understood, the *Ralli Brothers* doctrine is not concerned with forum fundamental public policy and is instead an application of the contractual doctrine of frustration. On this view, the illegality by the place of performance is merely a fact to be taken into account in deciding whether performance has become essentially and radically different from what was envisaged during contract formation. There is no need for a proportionality exercise to determine when this would occur.

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185 F M B Reynolds, "The Enforcement of Contracts Involving Illegality" [1997] Sing JLS 371 at 392.