PUBLIC POLICY IN THE CONFLICT OF LAWS: A CHINESE WALL AROUND LITTLE ENGLAND?

NELSON ENONCHONG*

THE English courts have often incurred the reproach of undue insularity in their attitude to foreign law.[1] A common gripe is that they have failed to recognise that there is a world elsewhere, and that England is not "a legal island".[2] Savigny, we are told,[3] was moved to lament over the fact that although in other branches of knowledge there was an internationalist outlook in England, in the field of jurisprudence alone it "remained divided from the rest of the world, as if by a Chinese wall". Recently it has been suggested that "The foundation of this Chinese wall ... lay ... in an unquestioning belief in the superiority of the common law and its institutions, at least in England."[4] It would be unsafe to affirm that the charge of insularity has always been without foundation. The "Little England"[5] attitude of mind, Roskill LJ reminds us,[6] was "once proclaimed in the phrase 'Athanasius contra mundum' ". And it should occasion no surprise that the examples commonly advanced to substantiate the charge are usually drawn from private international law.[7]

But there is one department of private international law where the practice of the English courts accords ill with their "Chinese wall" reputation. This article seeks to argue that in their approach to the doctrine of public policy the English courts have shown far more internationalism than they have been given credit for. In order to bring this unsung English

* Lecturer in Law, University of Leicester.

1. Scots lawyers are usually excluded from the charge since they are generally regarded as being "more internationally-minded": Markesinis, *The Gradual Convergence* (1994), p.2.

2. E.g. T. H. Bingham, " 'There is a World Elsewhere': The Changing Perspectives of English Law" (1992) 41 I.C.L.Q. 513, 514. It is said (Markesinis, *idem*, p.1) that "This insular mentality will survive for some time after the Channel Tunnel technically puts an end to our status as islands off the continent of Europe."

3. Quoted by Bingham, *ibid.*

4. *Ibid.*

5. *Idem*, p.515.

6. *James Buchanan* v. *Babco* [1977] 1 All E.R. 518, 529.

7. Notable among these is Lord Denning's dictum in *The Atlantic Star* [1973] Q.B. 364, 382: "No one who comes to this court asking for justice should come in vain ... The right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he decides to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of the service."

internationalism into sharper focus, it is proposed to compare the practice in England with that in a civil law country like France.

I. THE DOCTRINE OF PUBLIC POLICY

AMONG the postulates common to most systems of private international law there is one of "overall importance",[8] that a forum may exclude the foreign law designated by its own choice of law rules[9] or refuse to enforce a foreign judgment otherwise entitled to enforcement if the application of the foreign law or the enforcement of the foreign judgment would be contrary to the forum's public policy.[10] In other words, public policy gives the court the means by which to raise a "Chinese wall" and thereby keep out foreign law otherwise eligible for invitation by the court's own choice of law rules.[11] The more insular the court is in its attitude towards foreign law, the more frequent and widespread would be its use of public policy; and vice versa. The attitude of the courts of one country towards foreign law may therefore be gauged by the extent to which they resort to public policy in order to exclude foreign law. And, although there may be other tests by which to measure internationalism,[12] this article will focus on the use of public policy.

It may be well to point out from the outset that in France public policy—which there goes by the name of *ordre public*[13] or, to distinguish it from domestic public policy, *ordre public international*[14]—is sometimes con-

8. P. St. J. Smart (1983) 99 L.Q.R. 24, 26.

9. Hereinafter referred to as "the normally applicable foreign law".

10. Dicey and Morris, *Conflict of Laws* (12th edn, 1993), Vol.I, pp.88 *et seq.*; Batiffol and Lagarde, *Droit International Privé* (8th edn, 1993), Vol.I, pp.567 *et seq.*

11. Although this use of public policy may be criticised as contradicting the international spirit of private international law, it is justified on the ground that it provides a necessary escape route from the unpredictable results of applying choice of law rules. In this sense public policy "serves a corrective function": Castel, *Canadian Conflict of Laws* (1994), p.163. See also Holleaux, Foyer and de la Pradelle, *Droit International Privé*, para.602: "Public policy, far from irremediably blocking the conflicts system, permits it to surmount some of its weaknesses."

12. E.g. the willingness to learn from others (Bingham, *op. cit. supra* n.2) or the extent to which the conflict of laws rules of the forum are designed to make decisions workable in an international context (Kahn-Freund, *The Growth of Internationalism in English Private International Law* (1960)).

13. Lagarde, *Recherches sur l'ordre public en droit international privé* (1959).

14. E.g. *Chemins de fer portugais* v. *Ash*, S. 1945. I. 77, note Niboyet; *Rohman* v. *Kellerhals*, Clunet 1936. 399, note Perroud; *Sommer* v. *Mayer*, Rev. Crit. 1955. 133, note Motulsky; *Klopp* v. *Holder*, Rev. Crit. 1985. 131, note Mezgar; *Communauté urbaine de Casablanca* v. *Société Degremont*, Rev. Crit. 1994. 680, note Cohen. And in the doctrine, e.g. Lagarde, "L'ordre public international face à la polygamie et à la répudiation", *Mél. F. Rigaux* (1993), p.263.

fused with what is called *loi de police*[15] or a variant of it variously described as *loi d'application impérative*,[16] *loi d'application immédiate*,[17] *loi d'application nécessaire*[18] or *loi d'application directe*.[19] Yet the *loi de police*[20] differs from public policy. Whereas the *loi de police* intervenes directly, in that it is applied at the early stage of the choice of law process, even before choice of law rules are used to identify what would otherwise have been the applicable law,[21] public policy intervenes only at the ultimate stage of the choice of law process, after the normally applicable foreign law has been identified. The *lois de police* are, in effect, what are known as "mandatory rules"[22] or "overriding statutes"[23] in that they are rules of the forum which must be applied irrespective of the otherwise applicable foreign law.[24] Public policy, on the other hand, intervenes only where the application of the normally applicable foreign law will be incompatible with some fundamental policy of the forum.

The notion of *loi de police* is therefore more closely allied to Mancini's conception of public policy as a positive and autonomous connecting factor which requires the application of forum law to every situation if the law in question is one concerning public policy.[25] This contrasts with Savigny's approach to public policy as an exception to the application of the law designated by the forum's choice of law rules. It is, of course, Savigny's approach to public policy[26] which is now generally accepted.[27] Indeed

15. E.g. *Teretschenko* v. *Teretschenko*, Rev. dr. int. pr. 1924. 401, 402.

16. *Cts Houston* v. *Sté Turner Entertainment Co.*, Rev. Crit. 1991. 752, note Gautier, J.C.P. 1991. II. 21731, obs. Françon.

17. Audit, *Droit International Privé* (1991), pp.91 *et seq.*

18. Mayer, *Droit International Privé* (1987), p.355 *in fine.*

19. I do not here enter into the question whether there is any difference between these laws and the "*loi de police*". The ideas attendant on both categories are in essence the same, and the term "*loi de police*" may be used to cover them all.

20. Art.3, French Civil Code.

21. See e.g. Ph. Francescakis, Rev. Crit. 1966. 1.

22. North and Fawcett, *Cheshire and North's Private International Law* (12th edn, 1992), p.137.

23. Dicey and Morris, *op. cit. supra* n.10, at pp.21–25.

24. E.g. s.27(2) of the Unfair Contract Terms Act 1977; Art.7(2) of the Rome Convention of 1980.

25. See Art.12 of the Preliminary Provisions to the Italian Civil Code of 1865, drafted by Mancini: "In spite of the previous sections, in no way may Statutes, Acts and decisions of a foreign state and private commitments and conventions, derogate from the Kingdom's statutory prohibitions concerning people, goods and acts, nor to Statutes and Acts concerning public policy and good morals."

26. The Italian Civil Code was amended in 1942 and the new version of Art.12, now Art.31, is more akin to Savigny's view of public policy: "Notwithstanding the preceding provisions, in no circumstances may Statutes and Acts of a foreign State, regulations and Acts of any body or entity, and in general unilateral commitments and contracts, be effective in the territory of the State, if they are in conflict with public policy or good morals."

27. See e.g. Art.16 of the Rome Convention of 1980; s.9(2) of the Administration of Justice Act 1920; s.4(1)(a)(v) of the Foreign Judgments (Reciprocal Enforcement) Act 1933;

some regard this concept of public policy as a general principle of law accepted by civilised nations.[28]

Which rules of foreign law ought to be excluded on grounds of public policy is of course a matter best left for the judge[29] to decide at the time of trial and in the light of the then prevalent values of the community. For ever since Bartolus made his famous distinction between rules which are "odious" and those which are "favourable"[30] it has become self-evident that the line that separates the two is never constant but ever shifting. It is with the extent to which the courts in France and England resort to public policy that we are here concerned. For the conventional image of the parochial English judge with an insular mentality has been nurtured into notoriety partly by suggestions of unwarranted resort to public policy.[31]

Some commentators have remarked[32] that in English private international law, at least in cases involving a foreign status, public policy "has gradually blossomed into expansion to such an extent that apparently the judges now feel free to exclude the law of the domicile whenever they feel it proper to do so in the circumstances". Another writer[33] has expressed concern about some "ominous indications of a judicial willingness to see public policy in private international law" as having a "wide-ranging operation". But could it be said that the English courts are guilty of using public policy to erect a Chinese wall around Little England? Before that question is answered, it might be instructive to consider the practice in at least one other comparable jurisdiction, say France.

One of the propositions which seem likely to be received with ready concurrence in comparative private international law is the assertion that the domain of public policy in England is remarkably small compared to that of its counterpart in France. This phenomenon has been observed by many writers on both sides of the English Channel. In their leading work on private international law, Batiffol and Lagarde[34] have gone so far as to describe as "abusive" the frequent and widespread recourse to public policy by the courts in France. And in *Dicey and Morris on the Conflict of Laws*[35] we find this passage: "The doctrine of public policy has assumed far

Art.27(1) of the Brussels Convention of 1968; s.5(3) of the Arbitration Act 1975, implementing Art.5(2)(b) of the New York Convention of June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

28. E.g. *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (*Netherlands* v. *Sweden* I.C.J. Rep. 1958, 55, 92.)

29. Cf. Lenoan, D. 1958. 265, 266.

30. Cited in Batiffol and Lagarde, *op. cit. supra* n.10, at p.568.

31. E.g. Nygh, *Conflict of Laws in Australia* (1976) p.203, suggesting that the courts have been guilty of applying public policy "in an unthinking manner".

32. North and Fawcett, *op. cit. supra* n.22, at p.133.

33. Carter (1984) 55 B.Y.I.L. 111, 126.

34. Batiffol and Lagarde, *Traité de droit international privé* (7th edn), Vol.I., para.360. (This para. does not appear in the 8th edn of 1993.)

35. Dicey and Morris, *op. cit. supra* n.10, at p.88.

less prominence in the English conflict of laws than have corresponding doctrines in the laws of foreign countries, e.g. France and Germany."

The same conclusion has been arrived at by other commentators.[36] It is not disputed therefore that the scope of public policy in English private international law is not nearly as wide as that of its French counterpart.[37] But once the disparity in scope is recognised, a question of some interest immediately suggests itself: to what may this difference be assigned? Could it be an indication that the English courts are more internationalist in their attitude to foreign law?

II. FORUM-ORIENTATED BIAS OF ENGLISH CHOICE OF LAW RULES?

THE conventional view, consistent with the popular image of the English court, insular and inward-looking, is that the comparative smallness of the scope of public policy in English private international law is not "a symptom of any overall 'internationalist' attitude on the part of English courts".[38] Rather, it is "a consequence of the contrary"[39] attitude. But how is this so? The reasoning runs thus. English choice of law rules have an inbuilt *forum*-orientated bias which leads to the application of English law in many areas where in other countries like France foreign law will be applicable. Put simply, English law allows little scope for the application of foreign law. Since English law is applied in many areas, so runs the argument,[40] there is no need to resort to public policy or other such doctrine in order to exclude the normally applicable foreign law.

This reasoning is sound in theory, for the smaller the room allowed for the application of foreign law, the narrower the field within which public policy can be invoked. But, as an explanation for the comparative dearth of public policy in English private international law, it is questionable on at least two counts. First, it is not entirely clear that the domain reserved for foreign law is substantially larger in France than in England. In several areas, French law is applied mandatorily under the name of *loi de police*. For example, Articles 375—375-8 of the French Civil Code apply to all minors who are in France, whatever their nationality and whatever the nationality of their parents.[41] The same is true of Articles 212 *et seq*. of the

36. "In general the domain of public policy is narrower in the legal systems of the United Kingdom than is the domain of ordre public in continental systems": A. E. Anton and P. R. Beaumont, *Private International Law* (2nd edn, 1990), p.102. See also Carter, "The Rôle of Public Policy in English Private International Law" (1993) 42 I.C.L.Q. 1, 3; Husserl, "Public Policy and Ordre Public" (1938–39) Va.L.R. 37, 47 *et seq*.

37. In countries where the common law and civil law systems operate side by side a similar discrepancy in scope is noticeable. Thus "In the common law provinces of Canada very seldom has public policy been invoked in the courts with success as this exception has been construed narrowly": Castel, *op. cit. supra* n.11, at p.164.

38. Carter, *loc. cit. supra* n.36.

39. *Ibid*.

40. Dicey and Morris, *op. cit. supra* n.10, at p.89.

41. *Dame Th.* v. *Epoux T.*, Clunet 1981, 66, note Foyer.

Civil Code concerning the rights and duties of spouses.[42] So too on copyright, French law[43] also applies directly.[44] And the same has been decided in several other areas.[45] Indeed the trend is towards an ever augmenting number of the *lois de police* in France, as well as in other Continental countries.[46] This only serves to widen the domain of application of forum law and correspondingly to reduce that of foreign law. Therefore, if it be said that because English law is applied in certain circumstances this renders unnecessary any resort to public policy, then the same is true where, in the name of *loi de police*, forum law is applied in France.

Nor is the suggestion[47] that the use of the doctrine of *renvoi* reduces the domain of foreign law in England more than it does in France one which is entirely convincing. It is true that the doctrine of *renvoi* sometimes results in the application of English domestic law instead of foreign law. But the same is true in France where as far back as 1878, in the famous *Forgo* case,[48] the Cour de cassation applied the doctrine of *renvoi* and accepted a reference back to the forum. Indeed we have it on the high authority of the Cour de cassation in the well-known case of *Soulié*[49] that the avowed reason the French courts accept a *renvoi* made to the forum is because it leads to the application of French law, and there can only be an *advantage* "for French law to govern, according to its own views, interests arising within its territory". It is to be remembered that it is in this case that the Conseiller Denis openly made the well-known confession, "J'aime mieux la loi française que la loi étrangère." What is suggested here is that French courts are no more innocent than their English counterparts of a certain judicial inclination in *favor legis fori*.[50] The reality is that application of the theory of *renvoi* does not, of itself, extend the scope of the application of forum law in England any more than it does in France. Application of the doctrine of *renvoi* by the English courts is therefore not a very convincing explanation for why the scope of public policy is narrower in England.

But there is another reason why the explanation based on the idea that forum law occupies a larger field in England than in France is open to doubt. Even if we accept that the domain of forum law is wider in England

42. *Cressot* v. *Mme Cozma*, Rev. Crit. 1988. 540, note Lequette.

43. Art.1 of Law 64–689 of 8 July 1964 and Art.6 of the Law of 11 Mar. 1957.

44. *Cts Huston* v. *Sté Turner Entertainment Co.*, J.C.P. 1991. II. 21731, obs. Françon.

45. See e.g. *Teretschenko* v. *Teretschenko*, Rev. dr. int. pr. 1924. 401; *Hage* v. *Hage*, D. 1959. 47, note Malaurie; *Kaci* v. *Hammache*, Rev. Crit. 1984. 451, note Labrusse-Riou; *Société Thoresen Car Ferries Ltd* v. *Fasquel*, Rev. Crit. 1989. 63, note Lyon-Caen; *Cie Air Afrique* v. *Coulon*, D. 1992 I.R. 214.

46. Such as Belgium. Cf. G. van Hecke, "Notes Critiques sur la Théorie de la Non-justiciabilité", in *Mél. F. Rigaux* (1993), p.517, at p.521.

47. Dicey and Morris, *op. cit. supra* n.10, at p.89.

48. S. 1878. I. 429.

49. D.P. 1912. I. 262, rapp. Denis, S. 1913. I. 105.

50. Cf. *Camera* v. *Camera*, Rev. Crit. 1993. 41; *X.* v. *Y.*, D. 1993. Jurisp. 85 (accepting *renvoi* which leads to the application of French law).

than in France, we are still left with this difficulty, that, as will be shown, even in those areas where foreign law is applicable in England as well as in France, reliance on public policy in England is exceedingly rare compared to the practice in France. How, then, do we account for this phenomenon? The conventional idea that English choice of law rules lead to the application of forum law so that there is no need to invoke public policy is unequal to the task. Indeed the great point of enquiry which suggests itself here has never been satisfactorily elucidated.

III. FUNCTIONAL ANALOGUES?

IT could be argued that the reason why the scope of public policy in English law is smaller than that of its counterpart in French law is because some of the functions performed by public policy in France are discharged in England by means of other doctrines. At first sight there would appear to be some colour in this suggestion. Take the recognition of foreign judgments under the traditional rules.[51] Suppose the defendant was not given sufficient notice of the foreign proceedings or was not given a reasonable opportunity to present his case. There is no doubt that the resulting judgment will be refused recognition and enforcement both in England and in France. Yet the grounds for refusing enforcement will not be the same in each jurisdiction. Whereas in France the courts will resort to public policy,[52] in England it is the concept of natural justice[53] which will be invoked.

But the use by the English courts of functional analogues (like natural justice) to discharge the office of public policy does not provide us with a satisfactory explanation for why the scope of public policy is narrower in England than in France. For the French courts also use other doctrines to perform a function which in England is discharged by public policy. Consider the problem of evasion of law. Whereas French law has developed a separate doctrine of *fraude à la loi*[54] to deal with it, the approach of English law is not based on any underlying theory.[55] Here the English courts resort to the doctrine of public policy. Consider the problem of evasive talak divorces. In France as well as in England a talak cannot be pronounced in the forum. In both jurisdictions a marriage can be dissolved only by means of judicial proceedings. In order to evade this procedure a practice developed whereby Muslim men resident in these jurisdictions would rush to

51. National rules do not apply to foreign judgments entitled to recognition and enforcement under the Brussels Convention of 1968 (as amended) on Civil Jurisdiction and Judgments.

52. E.g. *Bairouk* v. *Essoudy*, Rev. Crit. 1984. 327, note Fadlallah; *Akla* v. *Akla*, Rev. Crit. 1991. 594, note Courbe.

53. *Middleton* v. *Middleton* [1967] P. 62, 69; *Adams* v. *Cape Industries* [1991] 1 All E.R. 981.

54. See generally Audit, *La Fraude à la loi* (1974).

55. Fawcett, "Evasion of Law and Mandatory Rules in Private International Law" (1990) C.L.J. 44.

their country of origin and there pronounce talak which they will then bring for recognition.[56] Whereas English courts deal with the problem by invoking public policy,[57] their French counterparts achieved the same result by using the concept of *fraude à la loi*.[58]

The truth then is that the use of functional analogues to public policy is not unique to the English courts, and cannot account for the comparative smallness in the scope of public policy in English private international law. This article seeks to argue that, contrary to the popular opinion, it is the internationalist attitude of the English courts, nurtured by the doctrine of international comity, which accounts for the comparative dearth of public policy in this branch of English jurisprudence.

IV. INTERNATIONAL COMITY

ONE of the most remarkable effects of the doctrine of international comity[59] in English jurisprudence, it is suggested, is the large extent to which it has induced in the courts a palpable reluctance to invoke public policy against the normally applicable foreign law. To sustain this suggestion it is not necessary to go so far as to hold that comity is the basis of the conflict of laws and that it is as a result of *comitas gentium* that rights created abroad are recognised, and foreign law applied, in England. Joseph Story regarded "comity of nations" as "the true foundation and extent of the obligations of the laws of one nation within the territories of another".[60] But comity has been so vigorously disparaged that today[61] it is generally agreed by most academic writers that it is not the true basis of the conflict of laws.[62] Yet, whatever may be said of the idea of comity,[63] the English courts continue to refer to it.[64] For, although comity cannot explain why in a particular case the forum will choose and apply the law of one foreign country rather than another, it does not mean that comity has nothing to do with the decision to apply foreign law rather than the forum's own

56. See e.g. *Fatma Kaci* v. *Hamache*, J.C.P. 1956. II. 9318, note Guiho (where the talak was pronounced by proxy in the foreign country); *Rohbi* v. *Kharkouch*, Rev. Crit. 1984. 325; *Bairouk*, *supra* n.52. See also *Quazi* v. *Quazi* [1980] A.C. 744. Of course Muslim men are not the only ones guilty of evasion of law: see e.g. *Russel* v. *Weiller*, S. 1951.187.

57. *Chaudhary* v. *Chaudhary* [1985] Fam. 19: talak divorce obtained in Pakistan though husband and wife were domiciled in England.

58. *Senoussi* v. *Senoussi*, Rev. Crit. 989. 721, note Sinay-Cystermann. See also *Akla*, *supra* n.52.

59. See generally Yntema, "The Comity Doctrine" (1966) 65 Mich.L.R. 9.

60. Story, *Conflict of Laws* (8th edn, 1883), s.38.

61. See however Meijers (1934) III Hag. Rec. 653 *et seq.*

62. Dicey and Morris, *op. cit. supra* n.10, at p.6; North and Fawcett, *op. cit. supra* n.22, at p.4; McClean, *Morris: The Conflict of Laws* (4th edn, 1993), p.4; Mann, *Foreign Affairs in English Courts* (1986), p.135.

63. E.g. Weinberg, "Against Comity" (1991) 80:53 Georgetown L.J. 53; Sprague, "Choice of Law: A Fond Farewell to Comity and Public Policy" (1986) 74 Cal.L.Rev. 1447.

64. More recently, *Hewitson* v. *Hewitson* [1995] 2 W.L.R. 287, 292.

law.[65] And although comity is not the basis on which the English courts recognise and give effect to foreign judgments,[66] it does not follow that considerations of international comity can have no effect on a court's decision whether or not to invoke public policy in order to deny recognition to a foreign judgment.

In order fully to appreciate the effect of comity on English public policy, it may be helpful first to look at the wider influence of comity on the English courts. A few singularities would, I think, illustrate the fortunes of comity in the modern English jurisprudence. If we take the interpretation of statutes, we can see that there is a well-established presumption limiting the scope which should be given to general words in a UK statute in their application to persons, property, rights and liabilities of the subjects of other sovereign States who do not come within the jurisdiction of the UK Parliament.[67] This presumption is founded on a desire to avoid any "conflict with public international law or with comity".[68] Comity plays an even greater role in the interpretation of statutes giving effect to international conventions.[69] For, in such a case, "international comity must surely require the United Kingdom courts to construe the convention in the same way as the courts of other high contracting parties".[70]

The right of a foreign sovereign to bring an action in England is also justified on the grounds of comity. Indeed Lord Redesdale once said[71] that refusal by the English court to entertain a suit by a foreign sovereign "might be a just cause of war". The idea is that to deny him that privilege, as an American court later said, "would manifest a want of comity and friendly feeling".[72]

The English courts also see the law of extradition as founded upon "the comity of nations".[73] That being so, no allegation of dishonesty on the part of a friendly foreign State can be admissible. *In re Arton*[74] was a case concerned with the Extradition Act 1870. When, in the course of argument, it

65. Cf. Smith, *Conflict of Laws* (1993), pp.295–296; Batiffol and Lagarde, *op. cit. supra* n.10, at para.226.

66. *Schibsby* v. *Westenholz* (1870) L.R. 6 Q.B. 155, 159 (*per* Blackburn J).

67. *Holmes* v. *Bangladesh Binam Corp.* [1989] A.C. 1112, 1126 *et seq.*

68. *Garthwaite* v. *Garthwaite* [1964] P. 356, 389.

69. "English courts are normally confined to examining the statutes giving effect to a treaty or international convention, and precluded from scrutinising the treaty itself. But where public policy and international comity are invoked ... it is permissible (indeed, incumbent) to examine our formal international obligations": *The Atlantic Star* [1974] A.C. 436, 471–472 (*per* Lord Simon).

70. *James Buchanan* v. *Babco* [1977] 1 All E.R. 518, 529.

71. *Hullet* v. *The King of Spain* (1828) 2 Bligh N.S. 31, 60. See also *United States of America* v. *Wagner* (1867) L.R. Ch.App. 582.

72. *The Sapphire* (1871) 78 U.S. (11 Wall) 164.

73. *In re Arton* [1895] 1 Q.B. 108, 111.

74. *Ibid.*

was suggested that the French government made the extradition application in bad faith and not in the interests of justice, Lord Russell CJ interposed to remind counsel: "The Court cannot permit you to argue the point that a friendly state is not acting in good faith ... that is not a question which the judicial authorities of this country have power to entertain."[75] In the same fashion, it will be seen, the idea of international comity militates against the exclusion of foreign law as being contrary to English public policy.

The rule that one State does not purport to exercise jurisdiction over the internal affairs of any other independent State is seen in England[76] as one of "the rules of comity". The House of Lords has said: "The comity of nations normally requires our courts to recognise the jurisdiction of a foreign state over all its own nationals and all assets situated within its own territories."[77] Therefore it has long been recognised that "the ordinary principles of international comity are invaded by permitting" service of process outside the jurisdiction of the court.[78] Consequently, as Lord Diplock said, "Comity thus dictates that the judicial discretion to grant leave [for such service] should be exercised with circumspection in cases where there exists an alternative forum."[79]

The idea of comity, far from being forgotten, as some would suggest, has gained ground and is actually changing attitudes in the English courts. Thus, although in the past when dealing with a plea of *forum non conveniens* the English courts adopted a rather chauvinistic approach,[80] the House of Lords has long recognised that such "judicial chauvinism has been replaced by judicial comity".[81] This dictum, itself confirming a movement from chauvinism to comity, should be a sufficient safeguard against the mistake of supposing that the English courts have at all times and in every regard had a special respect for foreign law. To be sure there were days when English courts paid scant regard to foreign law.[82] And it may be that some of the older decisions "tended to invoke the domestic doctrine of public policy in all its ramifications with remorseless determination".[83]

75. *Idem*, pp.110–111. Where the friendly sovereign power is a member of the British Commonwealth the reasoning applies *a fortiori*: *Zacharia* v. *Government of Cyprus* [1963] A.C. 634, 639. See also *Royal Government of Greece* v. *Governor of Brixton Prison, ex p. Kotronis* [1971] A.C. 250.

76. *Buck* v. *Attorney General* [1965] 1 Ch. 745. Cf. *British Nylon Spinners Ltd* v. *I.C.I.* [1953] Ch. 19, 24.

77. *Oppenheimer* v. *Cattermole* [1976] A.C. 249, 282.

78. *Vitkovice Horni* v. *Korner* [1951] A.C. 869, 882.

79. *Amin Rasheed Corporation* v. *Kuwait Insurance* [1984] A.C. 50, 59. See also *The Elli* [1985] 1 Lloyd's Rep. 107, 119.

80. See e.g. *The Atlantic Star* [1973] Q.B. 364, 381–382 (*per* Lord Denning MR); [1974] A.C. 436, 453 (*per* Lord Reid).

81. *The Abidin Daver* [1984] A.C. 398, 411, 412 (*per* Lord Diplock).

82. Cf. *Interdisco* v. *Nullifire* [1992] Lloyd's Rep. 180, 186.

83. North and Fawcett, *op. cit. supra* n.22, at p.130.

But that era had long come to a close. As the influence of comity increased, deference to foreign law progressed with it. The result, it is part of my contention, has been a corresponding decline in reliance on public policy as a Chinese wall.

This progress towards comity also exhibits itself in the evolution of the so-called rule against enforcing the revenue laws of a foreign country. As far back as 1775 Lord Mansfield stated the rule in very broad terms. "No country", he said,[84] "ever takes notice of the revenue laws of another." So, when years later in *Pellecat* v. *Angell*[85] it was suggested that an agreement to sell goods to be smuggled into a foreign country would not give rise to an action in England to recover the price of the goods, Lord Abinger brusquely responded that it would be "most unfortunate if it were so in this country, where, for many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other States".[86] But that situation has since changed. It has long been recognised that although the courts will not enforce a foreign revenue law at the suit of a foreign State, nevertheless, "in view of the obligations of international comity as now understood",[87] they will give effect to that law and refuse to enforce a contract which involves its violation.[88]

The same progress towards comity is seen in the wider area of illegality under foreign law. It used to be the view that "illegality according to the law of a foreign country does not affect the merchant".[89] So that the English courts would enforce a contract even if it was to be performed in breach of a foreign law.[90] But that attitude of mind has since lost its ascendancy. It has long been the position that the courts will refuse to enforce a contract which involves doing something in a foreign country which is illegal by the law of that country.[91] They will do so in "deference to international comity".[92] As deference to international comity increased so

84. *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343.

85. (1835) 2 Cr.M. & R. 311.

86. *Idem*, p.313. See also *Sharp* v. *Taylor* (1848) 2 Ph. 801, 816 (*per* Lord Cottenham LC).

87. *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* [1920] 2 K.B. 287, 300; *Foster* v. *Driscoll* [1929] 1 K.B. 470, 518.

88. *Regazzoni* v. *K.C. Sethia (1944) Ltd* [1958] A.C. 301, 322; *Euro-Diam* v. *Barthurst* [1988] 2 All E.R. 20, 33.

89. *British & Foreign Marine Insurance* v. *Samuel Sanday* [1916] 1 A.C. 650, 672 (*per* Lord Wrenbury).

90. In *Boucher* v. *Lawson* (1734) Cas. T. Hard. 85, Lord Hardwicke LCJ upheld a contract which involved the violation of the law of Portugal, saying (at p.89) that "if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom, which will be of very bad consequence to the principal and most beneficial branches of our trade; nor does it ever seem to have been admitted".

91. *Ralli Brothers* and *Foster* v. *Driscoll*, both *supra* n.87; *De Beéche* v. *South American Stores (Gath & Chaves) Ltd* [1935] A.C. 148, 156.

92. *Regazzoni* v. *Sethia* [1958] A.C. 301, 319. Even in criminal prosecutions, it has recently been decided (*R.* v. *Horseferry Road Magistrates' Court, ex p. Bennett* [1994] A.C. 42) that

resort to public policy decreased. The rise of comity entailed the decline of public policy.

By contrast, the idea of international comity seems never to have taken root in French jurisprudence on private international law. Whether in the territorial law approach of Charles Dumoulin and Bertrand d'Argentré or in the personal law approach of Pillett, *courtoisie internationale* does not occupy a prominent place, if it occupies any place at all.[93] The idea of international comity has not influenced French judges[94] to nearly the same extent as it has their English compeers. Untrammelled then by the restraining effects of international comity, public policy flourished in France whilst its growth in England was checked by the rise of comity.

V. CHINESE WALL OR INTERNATIONALISM?

A common criticism of comity is that it suggests that the application of foreign law depends not on rules of law but on an arbitrary desire of the forum to show courtesy to the foreign country whose law is applied.[95] As Justice Cardozo once said, the word "comity" "has been fertile in suggesting a discretion unregulated by general principles".[96] This idea has led some commentators[97] to the conclusion that recourse to the public policy exception "is facilitated by the doctrine of 'comity' ". But, as I will presently seek to show, even though the idea of comity may suggest a discretion, in England that discretion has been exercised more often than not in favour of the recognition or application of foreign law. Put differently, the effect of comity in English jurisprudence has been to inhibit rather than encourage recourse to public policy. Comity has destroyed not strengthened the English Chinese wall. A few illustrations will demonstrate the point.

A. Affiliation

The field of affiliation, perhaps more than any other, presents us with the most remarkable example of the large scope of public policy in France

where the defendant in a criminal matter has been brought back to the UK in breach of international law and the laws of the State where he had been found, the English court will, partly in the interests of "the comity of nations" (at p.76), take cognisance of these circumstances and refuse to try the defendant.

93. However, Jean Jacques Foelix is said to have adopted Joseph Story's comity approach in his *Traité de Droit International Privé* published in 1843: Nadelmann, "The Comity Doctrine" (1966) 65 Mich.L.R. 1, 5.

94. In one case (*Clegert* v. *République Démocratique de Viet-Nam*, Lexis 2 Nov. 1971) the Cour de cassation was of the view that the principle of sovereign immunity is based on "*la courtoisie internationale*".

95. E.g. Dicey and Morris, at p.6, and Batiffol and Lagarde, at p.384 (both *op. cit. supra* n.10).

96. *Loucks* v. *Standard Oil Co.* (N.Y. 1918) 120 N.E. 198, 201–202.

97. E.g. Cavers, "A Critique of the Choice of Law Problem" (1933) 47 Harv.L.R. 173, 183, n.20.

contrasting with its trifling dimensions in England on a matter where foreign law is the normally applicable law in both jurisdictions. In *K.* v. *M.*,[98] for example, Austrian law was excluded as being contrary to French public policy because it maintained the presumption of paternity in favour of the husband even in respect of a child born more than 300 days after the dissolution of the marriage.[99] So too foreign law which allowed for the voluntary acknowledgement of the paternity of an adulterine child was held to be contrary to French public policy and so inapplicable in France.[100] Similarly, when dealing with judicial declaration of paternity, foreign laws which declare such paternity on grounds outside those recognised by French law have been excluded repeatedly as being contrary to French public policy.[101] In particular, foreign laws which do not provide for certain substantive defences such as the *exceptio plurium concubentium*[102] have on several occasions been excluded by French courts on grounds of public policy.[103] With regard to the legitimation of adulterine children, the Cour de cassation once declared, in *Rewelioty*'s case,[104] that foreign law which allowed for the legitimation of an adulterine child on grounds outside those provided for by French law was contrary to French public policy.

Those cases were decided before the liberal reforms of 1972.[105] After these reforms French law allowed legitimation of adulterine children by the subsequent intermarriage of their parents.[106] At once there was a change in French public policy which became decisively in favour of legitimation of adulterine children and stoutly against foreign laws which restrict such legitimation. So, in *X* v. *Z*[107] the same Cour de cassation

98. Rev. Crit. 1978. 110, note Lequette.

99. In French law a child is presumed to have been conceived at least 180 days and at most 300 days before its birth: Art.311, Civil Code.

100. *Demoiselle Domino* v. *Vve Ginesty*, Clunet 1967. 614, note Malaurie; *Quang Vinh* v. *Delle Ngo Mai Kahnh*, *idem*, p.619. Though the requirements of French public policy on this matter might have been modified since the reforms of 1972 which repealed the old Art.335 of the Civil Code which contained the prohibition against the voluntary acknowledgement of paternity of adulterine children.

101. *Rohmann* v. *Kellerhals*, Clunet 1936. 399, Rev. Crit. 1935. 768; *Sommer* v. *Mayer*, Rev. Crit. 1955. 133, note Motulsky; *Cruel* v. *Melichova*, Clunet 1959. 120, note Bredin; *M.* v. *S.*, J.C.P. 1974. II. 17894, note Foyer.

102. The *plurium concubentium* defence is raised by the alleged father when he shows that during the legal period of conception the mother had or was having sexual relations with a person or persons other than him.

103. See e.g. *Numez Fernandez* v. *Lopez Rodriguez*, Rev. Crit. 1974. 93, note Foyer et Simon-Depitre; *L.* v. *Office de la jeunesse de Vocklabruck*, Rev. Crit. 1979. 603, note Simon-Depitre.

104. D.P. 1930. 113, note Savatier; S. 1931. 1. 9, note Niboyet.

105. Law 72–3 of 3 Jan. 1972.

106. Art.331, Civil Code.

107. Gaz. Pal. 1988. 1. 321, note Massip.

excluded, as being contrary to French public policy, Belgian law which did not allow for the legitimation of adulterine children by the subsequent intermarriage of the parents. The court declared: "The principle of legitimation, by marriage, of illegitimate children, even those of adulterine origin, reflects a current fundamental conception of French law, which entails, through the effect of public policy, the exclusion of the Belgian law."

With regard to paternity suits, the liberal reforms of 1972 also brought about a change in French public policy. Foreign law is no longer contrary to French public policy by reason only that it is more permissive of a paternity suit than French law.[108] Instead, a foreign law which is more restrictive of a paternity suit would now be contrary to French public policy.[109] It is true that the Cour de cassation[110] has decided that French public policy on this matter is concerned only to secure for the child the maintenance which it needs, so that foreign laws which prohibit the establishment of natural affiliation are not contrary to French public policy. But more recently the same court[111] has been quick to invoke French public policy in order to exclude foreign law which prohibits the establishment of natural affiliation, simply because the child in question is of French nationality or habitually resident in France. What these cases show is that in almost every aspect of the law of affiliation, from the presumption of paternity to the legitimation of adulterine children, French courts do not hesitate to invoke public policy in order to exclude the normally applicable foreign law. How does this compare with the use of public policy in England?

It must first be made clear that in England the validity of a person's status (legitimate or illegitimate) is determined by reference to the law of the country whence it originated. "Having furnished this principle," Lord Stowell once said,[112] "the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the [foreign] law." The choice of law rule is therefore not forum-orientated. Foreign law is the normally applicable law.[113] Yet, unlike their French compeers, the English courts have shown a remarkable reluctance to invoke public policy. Indeed, in this field, the English courts seem to apply foreign law whatever it says: "if in fact the status [say] of legitimacy is conferred by the law of the domicile of origin," then, says the English court,[114] "the time of, as also the

108. *S.* v. *S.*, Gaz. Pal. 1981. II. 778, note Massip; *Hublin* v. *Demoiselle Martone*, Rev. Crit. 1985. 643, note Foyer; Clunet 1985. 906, note Simon-Depitre.

109. *K.* v. *M.*, Rev. Crit. 1978. 110; *B.* v. *L.*, Rev. Crit. 1980. 83, note Lagarde; *G.* v. *K.*, Rev. Crit. 1986. 313, note Lequette.

110. Civ. 1re, 3 Nov. 1988, J.C.P. 1989. IV. 3.

111. *M.L.* v. *Mme B.*, Rev. Crit. 1993. 620, note Foyer.

112. *Dalrymple* v. *Dalrymple* (1811) 2 Hag. Con. 54, 58.

113. Except, of course in cases of succession to real estate in England, in which case English law is applicable: *Doe* v. *Vardill* (1825) 5 B. & C. 439, (1835) 2 Cl. & F. 571, (1840) 7 Cl. & F. 895.

114. *In re Bischoffsheim* [1948] Ch. 79, 92.

reason for, its conferment are surely immaterial". Any suggestion that the courts should, like their French counterparts, raise a Chinese wall against foreign law on grounds of public policy has long been dismissed by the English courts as nothing but "an insular vanity inducing us into thinking that our law is so good and so right, and every other system of law is naught, that we should reject every application of it as an unclean thing".[115] Could it really be suggested that this is an expression of a Little England attitude? Is it not clear that this is the language of internationalism? But what is the result of this English internationalism in the field of affiliation? It is this, that, as one writer has observed,[116] "the relevance of public policy in this field [has been restricted] almost out of existence". Nor can it be denied that comity is a cause which has contributed towards that result. For, as Sachs LJ once explained,[117] "Comity between nations in jurisprudential matters ... has some relevant application and tends to discourage refusals to recognise another country's internal laws on status."

B. Foreign Divorce and Nullity Decrees

The same internationalist attitude of the English courts is seen when we look at the cases on the recognition of foreign divorce and nullity decrees. In this field international comity is again in the fore of the English approach. The starting point is that, as Pearce J said in *Ingra* v. *Ingra*, the decisions of the competent foreign court:[118]

> should, as far as reasonably possible, be acknowledged by other countries *in the interests of comity*. Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticise the standards of another country or too reluctant to recognise decrees which are valid by the law of the domicile.[119]

Comity thus tends to encourage recognition and to discourage resort to public policy. This is so even where there is a statutory power to invoke public policy. Take section 8(2)(b) of the Recognition of Divorces and Legal Separations Act 1971 (now section 51(3)(c) of the Family Law Act 1986), which implements the Hague Convention on the Recognition of Divorces and Legal Separations 1970. It provides that recognition of a foreign decree of divorce or legal separation may be refused if it would be "manifestly contrary to public policy". To be sure, the courts have inter-

115. *In re Goodman's Trusts* (1881) 17 Ch.D. 266, 298.
116. Nygh (1964) 13 I.C.L.Q. 39, 50.
117. *R.* v. *Brentwood Superintendent Registrar of Marriages, ex p. Arias* [1968] 3 W.L.R. 531, 538.
118. [1951] P. 404, 412 (emphasis supplied).
119. "Mutatis Mutandis, ... that passage applies equally where questions of capacity to marry come under consideration": *Ex p. Arias*, *supra* n.117, at p.537.

preted the provision as giving them a discretion. No doubt some may question the idea that the courts should have what seems to be an unfettered discretion[120] in the use of public policy. Indeed others have complained that the discretion leads to an "enhanced scope for public policy".[121] But the reality is that the discretion has not resulted in a wider scope for public policy; quite the reverse. For in practice the discretion has been exercised more to restrict the scope of public policy than to expand it. And for this judicial restraint in the use of public policy we have chiefly the doctrine of international comity to thank. In *Newmarch* v. *Newmarch*,[122] for example, Rees J refused to invoke public policy to deny recognition to an Australian divorce decree because, he said, it had not been established that recognition would be "manifestly" contrary to public policy. But he went further to state that even if that had been established he "would nevertheless, in the exercise of my discretion, have upheld the decree". He was "glad" to have reached that decision because, *inter alia*, it "accords with the principle of comity".[123]

France did not sign the Hague Convention on the Recognition of Divorces and Legal Separations 1970 which is implemented by the English statutes discussed above. However, France has entered into bilateral conventions with several countries, especially the Maghreb countries, which deal with the same subject.[124] These conventions also contain a similar public policy exception. It is therefore possible to compare the extent to which the French courts use the public policy exception in these conventions with the way in which the English courts use the public policy exception in the provisions mentioned above. Take the attitude of the courts in both jurisdictions towards divorce by unilateral repudiations such as the Muslim talak. Whereas in France the Cour de cassation[125] continues to

120. Cf. Lewis (1963) 12 I.C.L.Q. 298.

121. Carter (1984) 55 B.Y.B.I.L. 111, 127 and again in (1993) 42 I.C.L.Q. 1, 5.

122. [1978] 1 All E.R. 1.

123. *Idem*, p.12. See also *Sabbagh* v. *Sabbagh* [1985] F.L.R. 29. Public policy will, of course, be invoked to refuse recognition in extreme cases especially where non-recognition will not be inconsistent with the principle of comity. Thus in *Kendall* v. *Kendall* [1977] Fam. 208, Hollings J refused to recognise a Bolivian divorce. But he did so because the divorce was obtained by deception. He said (at p.214) that in these circumstances the principles of comity did not require recognition because if the Bolivian courts were apprised of the facts of the deception they would set aside the decree.

124. E.g. Franco-Moroccan Convention on Personal and Family Status and Judicial Cooperation, of 10 Aug. 1981 (Rev. Crit. 1983. 531); Franco-Algerian Convention of 27 Aug. 1964 on the Recognition and Enforcement of Judgments (Rev. Crit. 1965. 784); Franco-Tunisian Convention of June 1972 (Rev. Crit. 1974, 392).

125. E.g. *Chaoui* v. *El Madani*, Rev. Crit. 1995. 103, note Déprez; *M.* v. *A.*, Rev. Crit. 1993. 684, note Courbe; *Akla* v. *Akla* and *Bairouk* v. *Essoudy*, both *supra* n.52; *Ferroudji* v. *Medjani*, Rev. Crit. 1981. 88. However, the talak has been recognised in some cases where recognition in France was being sought by the divorced wife: *Dahar* v. *Benmaghni*, Rev. Crit. 1981. 90; *Bonereau* v. *El Amrani*, *idem*, p.91; *Vanquethem* v. *Belarbi*, *idem*, p.92. Otherwise, the talak remains contrary to French public policy: *M.* v. *F.E.*, Rev. Crit. 1995. 569, note Déprez.

invoke public policy against the talak,[126] in England the courts have long recognised it.[127] Indeed it has been laid down that there is "nothing contrary to [English] public policy in the recognition of the khula or the talak".[128]

C. Commercial Contracts

Still more suggestive of the internationalist attitude of the English courts are the cases dealing with commercial contracts. It is curious that some commentators have seen in these cases evidence of the contrary attitude. Thus in support of his argument that the paucity of public policy in English private international law is due, not to the internationalism of the courts but to the forum-orientated bias of the English choice of law rules, Carter writes[129] that it is significant "that it is mainly in private international law relating to commercial contracts—an area in which English choice of law rules are more 'internationalist'—that public policy has been most frequently successfully invoked with regard to choice of law".

But, with respect, this is misleading, if not misconceived. It is true that English courts have frequently invoked public policy in these cases. But the public policy invoked here is not one which leads to a refusal to recognise or apply the normally applicable foreign law. Public policy is invoked here for precisely the opposite result, to recognise and give effect to foreign law even though it is not the normally applicable law. The public policy invoked here is, as the editors of *Cheshire and North* have noticed,[130] "a very different category of public policy". It is, as was pointed out in *Foster* v. *Driscoll*,[131] "public policy based on international comity". This public policy is invoked not in order to refuse to recognise foreign law but in order to refuse to enforce contractual agreements in breach of foreign law.[132] It does not exclude foreign law from the process, it includes it. Put differently, this category of public policy is not just in harmony with, but is actually commanded by, "conceptions of international comity".[133]

126. Austrian public policy is opposed to the recognition of unilateral repudiations: Verwaltungsgerichtshof—14 May, Oester-Juristenzeitung, 1985, p.248, No.28, cited in Clunet 1991. 429, somm. Cf. in Belgium, Rigaux and Fallon, *Droit International Privé* (1993), para.1062.

127. *Russ* v. *Russ* [1964] P. 312. See also *Qureshi* v. *Qureshi* [1972] Fam. 173, where it was said (at p.198) that the earlier case of *R.* v. *Hammersmith Registrar of Marriages* [1917] 1 K.B. 634 which refused to recognise a talak divorce was now bad law.

128. *Quazi* v. *Quazi* [1980] A.C. 744, 782. The ghet of Jewish Rabbinical law is also recognised in England: *Har-Shefi* v. *Har-Shefi (No.2)* [1953] P. 220.

129. Carter (1993) 42 I.C.L.Q. 1, 3.

130. North and Fawcett, *op. cit. supra* n.22, at p.504.

131. [1929] 1 K.B. 470, 496.

132. *De Wutz* v. *Hendricks* (1824) 2 Bing. 314; *Foster* v. *Driscoll* [1929] 1 K.B. 470; *De Beéche, supra* n.91, at p.156; *United City Merchants (Investments) Ltd* v. *Royal Bank of Canada* [1982] 1 Q.B. 208; *Lemenda Ltd* v. *African Middle East Co.* [1988] Q.B. 448.

133. *Regazzoni* v. *Sethia, supra* n.88, at p.327.

For it is "nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil".[134]

In private international law public policy divides itself therefore into two distinct categories: the one is used to exclude foreign law, but the other is used to "include" foreign law. Considerations of international comity encourage recourse to the latter but militate against resort to the former.[135] If we were to lose sight of this crucial distinction, and assume that all public policy is exclusionary, then we should find ourselves remarking that the frequent use of public policy in cases of commercial contracts is not a consequence of any overall internationalist attitude of the English courts but, rather, a consequence of the opposite. But when once we note that the category of public policy frequently invoked in these cases is "inclusionary", we are driven to protest that such use of public policy,[136] far from showing that the English courts are not internationalist in their attitude to foreign law, demonstrates precisely the opposite. For the principle of public policy in these cases is, as Kahn-Freund once observed,[137] "a principle of public policy in the service of international co-operation".

D. Confiscation

Another area of the law which very strikingly demonstrates the internationalist attitude of the English courts through their reluctance to use exclusionary public policy is that concerned with foreign expropriatory measures. It is recognised in both France and England that under the *lex situs* rule the law that determines title to property is the law of the place where the property was situated at the relevant time. There is, therefore, no inbuilt forum-orientated bias in the English choice of law rule here. Yet in this area public policy enjoys in France a prominence unknown to its counterpart in England. Why?

The doctrine of international comity again holds the clue. Consider the decision of the House of Lords in *Williams & Humbert Ltd.* v. *W. & H. Trade Marks Ltd.*[138] M and his family, nationals of Spain, owned all the

134. *Idem*, pp.318–319. Such is the desire of the English courts to preserve the comity with other friendly States that the rule of public policy by which they take notice of the laws of foreign countries is said *not* to be "dependent on proof of universality or [even] reciprocity" (*idem*, p.330).

135. E.g. *The Playa Larga* [1983] 2 Lloyd's Rep. 171.

136. For a similar use of public policy in France, see Seine, 2 July 1932, Rev. Crit. 1934. 770, note Niboyet (contract to supply money for a *coup d'état* in a foreign country); *Favier* v. *Soc. Anderson*, Rev. Crit. 1966. 264, note Louis-Lucas (arms trafficking).

137. Kahn-Freund, *op. cit. supra* n.12, at p.60.

138. [1986] 1 All E.R. 129. Criticised by F. A. Mann (1986) L.Q.R. 191.

shares of a Spanish company, Rumasa SA, which in turn held all the shares of Williams & Humbert, a company incorporated in England. By a law of 1983 the Spanish government compulsorily acquired the defendants' shares in Rumasa. The law provided for a fair price for the shares to be paid after a valuation agreement. But that had not happened at the time of the judgment. The Spanish government now in charge of the companies caused Williams & Humbert to bring actions in England against M and his family and W & H Ltd. for damages and to recover assets allegedly diverted from Williams & Humbert. The defendants sought to plead oppression on the part of the Spanish government and to argue that the compulsory acquisition was confiscatory and that therefore "it would be contrary to public policy to grant [the plaintiff] the relief sought or any relief". The plaintiffs successfully applied for that part of the defence to be struck out on the ground that it disclosed no reasonable defence.[139] The defendants' appeal to the House of Lords was dismissed. Lord Templeman, who delivered the decision of the House, said that such "allegations ... are inadmissible as a matter of law and comity".[140] Spain was a friendly State. "No English judge", it was stressed,[141] "could properly entertain such an attack launched on a friendly state which will shortly become a fellow member of the European Economic Community." The result of this show of courtesy is this, that:[142]

> an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title. The English courts will decline to consider the merits of compulsory acquisition.

There is little or no scope for public policy. Even if the foreign law is *confiscatory*, in that it provides no compensation, the English courts will not exclude it as being contrary to public policy.[143] *Luther* v. *Sagor*[144] is a Court of Appeal decision which was approved by the House of Lords in *Williams & Humbert*. The plaintiffs' timber was seized by the Soviet authorities under a nationalisation decree which did not provide for compensation. Part of the timber was later brought to England where it was sold to the defendants by a Soviet agent. The plaintiffs sued for damages in trover on the ground that the ownership of the timber was still vested in

139. R.S.C. Ord.18, r.19.
140. [1986] 1 All E.R. 129, 139.
141. *Idem*, p.136.
142. *Idem*, p.135. No distinction is made between nationals and non-nationals. However, it seems that it is unlawful in public international law for a State to seize the property of an alien without adequate, effective and prompt compensation: Brownlie, *Principles of Public International Law* (4th edn, 1990), p.532.
143. *Re Helbert Wagg & Co. Ltd* [1956] Ch. 323, 349.
144. [1921] 3 K.B. 532.

them since the English court would take no notice of the Russian decree because English public policy was opposed to the recognition of foreign confiscatory laws. The Court refused to invoke English public policy against the Russian confiscatory decree and so the plaintiffs' contention was rejected. To exclude the Soviet legislation on the ground that it is contrary to English public policy, Scrutton LJ said,[145] would be "a serious breach of international comity". He even went so far as to say that to invoke public policy in this way "might well with a susceptible government become a casus belli".[146] This statement may be somewhat hyperbolic, but it is a vivid illustration of how far in the field of confiscatory decrees considerations of international comity had smashed into smithereens any Chinese wall of public policy around Little England.[147]

By contrast, it is curious to observe how little the French courts have been troubled with these scruples and how easily and frequently they have invoked forum public policy in order to exclude foreign confiscatory decrees. *État russe* v. *Cie. russe Ropit*[148] concerned the same Russian confiscatory decrees with which the English courts were confronted. Ships belonging to a Russian company, Ropit, in order to avoid seizure by the Russian government under those confiscatory decrees, escaped to the French port of Marseille. The Russian government through its ambassador in France sought to take possession of the ships on the ground that the ownership of the same was vested in them by virtue of the decree. But it was held, dismissing the claim, that although Russian law was the normally applicable law, the Russian decree was contrary to French public policy because it was confiscatory. An appeal to the Aix Court of Appeal was dismissed on the same ground.[149] The Cour de cassation[150] likewise refused to recognise the decree because it did not provide for a just and antecedent compensation as required by Article 545 of the French Civil Code. Since then, it has several times been decided by the Cour de cassation that expropriation without adequate and prompt compensation is, *without more*, contrary to French public policy.[151] Other Continental

145. *Idem*, pp.558–559.

146. *Idem*, p.559.

147. See also *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718, Russian confiscatory decree recognised. Public policy will be used to refuse recognition to a foreign confiscatory decree only where, in addition to its confiscatory nature, it also violates human rights, as where a Nazi decree confiscated the property of Jews and, in addition, stripped them of their German nationality: *Oppenheimer* v. *Cattermole* [1976] A.C. 249, 282, 278, 265. The Nazi decree was unique in its barbarity and the UK was at war with Nazi Germany in 1941 when the decree was passed. These are exceptional circumstances which show that public policy will be invoked only in very rare cases.

148. Gaz. Pal. 1925. II. 167.

149. Gaz. Pal. 1926. I. 169.

150. Gaz. Pal. 1928. I. 497; Annual Digest (1927–29) 67.

151. *Sté Potassas Ibericas* v. *Natham Bloch*, Clunet 1939. 615; *Kassab v. Crédit Foncier d'Algérie et de Tunisie* and six other Cour de cassation decisions of the same day, 23 Apr. 1969, Bull. civ. 1969. I. 110–116; *Havas* v. *Société la Dépeche quotidienne d'Algérie*, *idem*,

courts are also of this view.[152] Indeed the French courts invoke their public policy to exclude the normally applicable law even though the property confiscated is land which was and has remained within the territory of the confiscating State.[153]

So, where international comity prevailed in England, forum public policy prospered in France. Whereas English courts see the invocation of forum public policy as a breach of international comity and a possible cause of war, their French counterparts see it as nothing but an exercise of national sovereignty. And whereas the English courts vehemently refused to criticise Russian confiscatory decrees, their French counterparts openly condemned them, not without a touch of scorn, as being "in reality an act of spoliation" which constituted "an act of usurpation and violence bringing together all the judicial elements of a fraudulent taking of another's property".[154]

Here lies a significant divergence in the approaches to public policy in the two jurisdictions. English courts regard the use of public policy as being discourteous to the foreign State whose law is excluded. It is like throwing stones at your neighbour's house. Public policy is seen in England as a catapult, which makes the courts (understandably) very reluctant to use it. For, as was said in one case,[155] "those who live in legal glass houses, however well constructed, should perhaps not be over-astute to throw stones at the laws of other countries".[156] But the French courts regard public policy in a different way; less as a catapult, more like a Chinese wall. It is designed not to throw stones at the laws of other countries but to protect the laws and values of the forum *in the forum*.[157] Thus, in the field of confiscation, whereas the English courts were preoccupied with the possible repercussions that non-recognition of foreign legislation could produce in the international relations between States, the French

p.225; *Alemany* v. *Banque Nationale pour le Commerce et l'Industrie Afrique*, *idem*, p.227; *Compagnie française de Crédit* v. *Société Établissements Atard*, J.C.P. 1969. I. 15897; *S.N.T.R.* v. *C.A.T.A.*, Rev. Crit. 1981. 524, note Lagarde; *Sté Sonatrach* v. *Lung*, Bull. civ. 1984. I. 81.

152. Cf. *Association des actionnaires de P. et consorts* v. *P. Bâle et P. S.A.* Rev. Crit. 1995. 507, Audit (Swiss public policy). For Belgian public policy see Rigaux and Fallon, *op. cit. supra* n.126, at para.1251.

153. *Humbert* v. *Banque Nationale pour le Commerce et l'Industrie Afrique*, Bull. civ. I. 1969. 112; *Crédit industriel et commercial* v. *Consorts Cora*, *idem*, p.113; *Sanchez* v. *Martinez*, Bull. civ. I. 1970. 208; *Société nationale Sonatrach* v. *Lung*, J.C.P. 1979. II. 19086, concl. Gulphe.

154. Gaz. Pal. 1925. II. 167, 171.

155. *Ex p. Arias*, *supra* n.117, at p.537 (Swiss law was recognised even though it differed from English law and was unattractive to the English court).

156. Therefore when dealing with the recognition of foreign marriages, the English courts are extremely reluctant to refuse recognition (*Nachimsom* v. *Nachimsom* [1930] P. 217, 233; *Cheni* v. *Cheni* [1965] P. 85; *Mohamet* v. *Knot* [1969] 1 Q.B. 1) on grounds of public policy because in their view that would be discourteous since it entails criticising the marriage laws of a foreign State (*Apt* v. *Apt* [1948] P. 83, 87).

157. Cf. Batiffol and Lagarde, *op. cit. supra* n.10, at pp.573–574.

courts were concerned primarily with the possible deleterious consequences of recognition *in France*. The Aix Court of Appeal, for example, considered that the Soviet confiscatory decree could not be recognised because its confiscatory nature "hurts the very bases of every French juridical edifice which rests on the respect of private property and the inviolability of rights arising therefrom".[158] Similarly, the Cour de cassation noted that the requirement of just and prompt compensation could not be waived in the face of foreign law "without a profound disturbance of the order established in France".[159] Here the Chinese wall attitude of the French courts stands in stark contrast to the international spirit of their English counterparts.

VI. THE ACT OF STATE DOCTRINE

THE same phenomenon meets us when we look at the act of State doctrine, a concept through which considerations of international comity sometimes find expression. The effect of the doctrine's presence in England has been to restrict further the use of public policy whereas its absence in France has allowed the courts more space to invoke public policy.

A. Presence in England

It was Warrington LJ who put the doctrine thus: "the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country".[160] Although it originated out of the law of sovereign immunity,[161] the act of State doctrine is said to be founded "upon the highest considerations of international comity and expediency".[162] In *Luther* v. *Sagor*[163] the refusal to invoke public policy was also explained on the grounds of the act of State doctrine. Scrutton LJ even suggested that the appropriate thing to

158. Gaz. Pal. 1926. I. 169, 170.

159. Gaz. Pal. 1928. I. 497.

160. *Luther* v. *Sagor* [1921] 3 K.B. 532, 548, citing with approval the US Supreme Court in *Oetjen* v. *Central Leather* (1918) 246 U.S. 297, where it was said (at p.303) that "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment of the acts of the government of another done within its own territory."

161. *Underhill* v. *Fernandez* (1871) 168 U.S. 250. In *Luther* v. *Sagor*, *ibid*, sovereign immunity was part of the reason the court refused to invoke English public policy against the impugned Soviet legislation. Scrutton LJ conceded (at p.555) that "The case may be different where the sovereign state submits to the jurisdiction". Cf. *The Playa Larga* [1983] 2 Lloyd's Rep. 171, 194.

162. *Oetjen* v. *Central Leather* (1918) 246 U.S. 297, 303–304, where it was also said (at p.304) that "To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."

163. [1921] 3 K.B. 532, 548.

do is not for the courts to resort to public policy but for the British government to refuse to recognise the foreign State which had carried out the confiscatory measure. Only then, in his view,[164] could the English courts "investigate the title without infringing the comity of nations".

The act of State doctrine has also been explained on the basis of the municipal constitutional law principle of separation of power.[165] In the United States, for example, the principle demands that US courts should not pronounce on political questions involving foreign States "in the absence of a treaty or other unambiguous agreement concerning controlling legal principles".[166] So, in the United States, the doctrine is now seen "more as a means of maintaining the proper balance between the judicial and political branches of government on matters bearing upon foreign affairs".[167]

It has been said that this is only an American theory "which has no counterpart in England".[168] But there is, with respect, something akin to it in England where a distinction is drawn between public policy and political policy.[169] The courts can pronounce on the former but the latter (which includes foreign affairs) is the province of other organs of the government. The English courts accept the American view that the extent to which a particular foreign decree serves the aims of the country and therefore should be enforced is "entirely a matter for political decision by the Government of the day".[170] What the English courts disapprove of is the American method by which that political decision is enforced by the courts. The American practice whereby the Attorney-General of the United States files a statement with the courts either approving or disapproving of the enforcement of the foreign law is what is considered in England to be "wrong", "because it would put it in the power of the Crown to legislate in a way which might affect the rights of British subjects ... without the authority of Parliament".[171] But the basic idea of separation of power remains controlling and English courts normally eschew the exclusion of foreign law as contrary to forum public policy because such use of public policy "may be embarrassing to the branch of the executive which is concerned to maintain friendly relations between this country and the foreign country in question".[172] Therefore, whether you base the

164. *Idem*, p.555.
165. In the US, *International Association of Machinists* v. *OPEC* (1981) 649 F.2d 1354, 1358; *Alfred Dunhill of London* v. *Republic of Cuba* (1976) 425 U.S. 682, 715.
166. *Banco National de Cuba* v. *Sabbatino* (1964) 376 U.S. 398, 428.
167. *Banco National de Cuba* v. *Chemical Bank New York Trust* (1984) 594 F.Supp. 1553, 1557.
168. Mann, *op. cit. supra* n.62, at p.176.
169. See e.g. *Bank voor Handel* v. *Slatford* [1953] 1 Q.B. 248, 265.
170. *Ibid.*
171. *Idem*, p.266.
172. *Oppenheimer* v. *Cattermole* [1976] A.C. 249, 277–278.

doctrine on international comity or municipal constitutional law, the effect on exclusionary public policy is the same, namely that it militates against its invocation and so restricts its scope.

And the act of State doctrine itself enjoys a fairly wide scope in England. It is true that, as Lord Denning MR pointed out in *Buttes* v. *Hammer*,[173] "the courts of the United States have carried the doctrine of 'act of state' further than the courts of this country". But Lord Denning's attempt to limit the scope of the doctrine in England to "a defence to an action in tort"[174] has proved unsuccessful.[175] For the House of Lords has insisted that the act of State doctrine extends to "the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation—often, but not invariably, arising in cases of confiscation of property".[176] The doctrine also applies to the delimitation of sea boundaries.[177] Lord Wilberforce has said that the non-examination of the foreign act of State in such a case is based not on the act of State doctrine but, rather, on "a principle of non-justiciability by the English courts of a certain class of sovereign acts".[178] The distinction, if any, between this principle and the act of State doctrine must be a very fine one. Yet Lord Wilberforce was prepared, though concerned to "avoid argument on terminology, ... to consider this principle ... not as a variety of 'act of state' but one for judicial restraint or abstention".[179] But whether you call it "act of State" or "judicial restraint" its effect is the same, it

173. [1975] Q.B. 557, 572.

174. *Idem*, p.573.

175. Similarly, in the US, a suggestion akin to that of Lord Denning that the doctrine does not apply affirmatively but only when invoked as a defence has been specifically and stoutly rejected: *Palicio* v. *Brush* (1966) 256 F.Supp. 481, 489.

176. [1981] 3 W.L.R. 787, 803. But the doctrine will not avail a government which induces breaches of contract. Cf. *The Playa Larga* [1983] 2 Lloyd's Rep. 171, 194. Contrast, in the US, *Liamco* v. *Libya* (1980) 482 F.Supp. 1175, where the doctrine was applied to acts causing breaches of contract. It has since been suggested, however, that the doctrine should not apply to *acta jure gestionis* (*Texas Trading and Milling Corp.* v. *Federal Republic of Nigeria* (1981) 647 F.2d 300, 316, note 38; *Allied Bank International* v. *Banco Credito Agricola de Cartago* (1983) F.Supp. 1440, 1443; *Chisolm & Co.* v. *Bank of Jamaica* (1986) F.Supp. 1393), particularly to acts causing breaches of contract (*Behring International Inc.* v. *Imperial Iranian Air Force* (1976) 475 F.Supp. 396; *Outboard Marine Corp.* v. *Pezetel* (1978) 461 F.Supp. 384; *National American Corp.* v. *Federal Bank of Nigeria* (1978) 448 F.Supp. 622, 641). But it has been said that compulsory acquisition will always be a governmental act and therefore not examinable (*Carey* v. *National Oil Corp.* (1975) 453 F.Supp. 1097, 1102; *Hunt* v. *Mobil Oil Corp.* (1977) 550 F.2d 68, 78).

177. *Buttes* v. *Hammer* [1981] 3 W.L.R. 787. See also in the US *Occidental Petroleum Co.* v. *Buttes Gas* (1972) 331 F.Supp. 92, 98–101; *Occidental of U.A.Q. Inc.* v. *Cities Services Co.* (1975) 396 F.Supp. 461, 468.

178. *Buttes* v. *Hammer*, *idem*, p.806.

179. *Idem*, p.804. In the US, by contrast, the act of State doctrine is expressly stated to be a judicial policy of restraint: Restatement (Revised), Foreign Relations Law of the United States, s.469 (Tent. Draft No.7, 1986), cited with approval in *Dayton* v. *Czechoslovak Socialist Republic* (D.C. Cir. 1987) 834 F.2d 203, 206.

precludes resort to forum public policy,[180] and therefore to that extent has curtailed the province of public policy in England.

B. Absence in France

By contrast, when we turn to French law we find that public policy has not suffered from a similar restriction because the act of State doctrine has never been allowed to take root there. That doctrine, it has been said, "is peculiar to Anglo-American law, there is no trace of it in any other country".[181] It has no place, for example, in Belgian law.[182] In France the Cour de cassation has expressly rejected any idea akin to the doctrine. In *Sté Potassas Ibericas* v. *Natham Bloch*[183] the Montpellier Court of Appeal recognised and enforced a Spanish confiscatory law on the ground that it was a sovereign act accomplished by the Spanish government the legality of which could not therefore be questioned by a French judge. But the Cour de cassation wasted no time in rejecting that notion and holding that French courts cannot recognise any deprivation of proprietary right "without a just and antecedent compensation".

The argument that, by invoking public policy in order to refuse to recognise the acts of a foreign government, the courts of the forum are sitting in judgment on the validity of the acts of that government is rightly rejected. For, as Batiffol and Lagarde[184] have said, by invoking the public policy of the forum, the courts are not questioning the validity of the act in question. They are simply refusing to give effect to it because to do so would be contrary to the public policy of the forum.

Even Niboyet's suggestion of a principle of non-justiciability, "based on the simple comity between nations",[185] by which the French courts should not examine foreign administrative acts, failed to seduce. In the absence then of the act of State doctrine in France public policy has flourished unencumbered into the prominence which it now assumes in the field of foreign expropriation.[186]

VII. CONVERGENCE?

WHETHER one applauds the English approach based on international comity or the French approach resting more on national interests, it seems that there is a danger in carrying either approach too far. The English

180. P. Herzog, "La théorie de l'Act of State dans le droit des États-Unis" Rev. Crit. 1982. 617, 639.
181. Mann, *op. cit. supra* n.62, at p.164.
182. G. van Hecke, *op. cit. supra* n.46, at p.526.
183. Clunet 1939. 615.
184. Batiffol and Lagarde, *op. cit. supra* n.10, at pp.573–574.
185. Niboyet, Rev. Crit. 1950. 139. 142.
186. *Narbonne Frères* v. *S.E.M.P.A.C.*, J.C.P. 1972. II. 17223.

approach is commendable for its internationalist spirit. Yet there is a danger that, beginning in an attempt not to despise foreign law but to respect it, not to vex the peace of nations but to maintain amicable relations between States, and not to infringe the sovereignty of other States but to respect their independence, the idea of international comity (and the derivative act of State doctrine) could be carried so far that it ends up neutralising the public policy of the forum. In the United States, for example, the courts have conceded that they are bound by the act of State doctrine to recognise the acts of foreign States even though in so doing they would avowedly be "implementing and enforcing [foreign] decrees which are abhorrent to our own policy and laws".[187] This is most markedly exemplified in the notorious case of *Bernstein* v. *Van Heyghen Frères SA*.[188] There barbaric acts of Nazi officials, recognised internationally as crimes, were accepted in the United States to be within the act of State doctrine and as such not to be refused recognition on the ground of forum public policy.[189]

In England the balance in favour of internationalism has not tilted so far.[190] But the risk of over-internationalism has always been present. Take *Vervaeke* v. *Smith*.[191] There the courts were confronted with a sharp conflict between the public policy of English law and the public policy of a foreign law (Belgian). Yet an English judge was able to say: "The fact that this conflict exists does not lead inevitably to the conclusion that to recognise the Belgian decree in the present case would offend against public policy."[192] And the Court of Appeal also supported this view that, although the Belgian law was contrary to English public policy, it does not follow that a "judgment based on it must be refused recognition as contrary to the public policy of this country".[193] But the House of Lords took the view that to allow recognition where there was such a marked conflict of public policies is to tip the scales too far in favour of internationalism at the expense of forum public policy. Lord Simon of Glaisdale explained

187. *Palicio* v. *Brush* (1966) 256 F.Supp. 481, 489.

188. (1947) 163 F.Supp. 246. The act of State doctrine also allowed laws institutionalising apartheid in South Africa to be given effect to in the US: *New York Times* v. *City of New York Commission on Human Rights* (1977) 362 N.Y.S. 2d. 321; 66 I.L.R. 301. Cf. *Board of Trustees* v. *City of Baltimore* (1989) 317 Md. 72, 562 A.2d. 720, cert. denied (1990) 110 S.Ct. 1167; (1990) 49 Maryland L.Rev. 1029.

189. The State Department ultimately intervened and made clear its policy that the validity of Nazi persecutions should be examined: *Bernstein* v. *Netherlandsche-Americaansche* (1953) 117 F.Supp. 898; (1954) 210 F.2d 375.

190. See, however, *Santo* v. *Illidge* (1860) 8 C.B. (N.S.), 861 (upholding a contract to deliver slaves (under the law of Brazil) even though the slave trade was contrary to the laws and public policy of England).

191. [1983] 1 A.C. 145.

192. [1981] Fam. 77, 117.

193. *Idem*, p.124.

that "there appears to be no inherent reason why, giving every weight to the international spirit of the conflict of laws, we should surrender our own policy to that of any foreign society".[194] Internationalism should not be allowed to dislodge forum public policy completely.

But the converse is also true. Public policy, which can be useful in the protection of human rights,[195] should not be turned into an impenetrable Chinese wall. So whereas nowadays the movement in England seems to be from internationalism towards a cautious reassertion of forum public policy, in France the movement is in the other direction, towards a more restrained use of public policy.[196] This changing attitude in France exhibits itself in the increasing emphasis on the distinction between domestic public policy (*ordre public interne*) and public policy in the international sense (*ordre public international*). Foreign law may be excluded only if it is contrary to the latter. In earlier times that distinction was not always adhered to. Statutory provisions were taken to be a reflection of the prevalent public opinion in France on which *ordre public international* is based.[197] And it was not uncommon for provisions of the Civil Code to be declared to be *d'ordre public international* therefore justifying the exclusion of any foreign law not in accordance with them.[198] But nowadays the Cour de cassation is insisting that for foreign law to be excluded on grounds of public policy it is not sufficient to show that it is contrary to a rule of public policy in the municipal sense; it must be shown to be contrary to public policy in the international sense.[199] That there has been in recent years a noticeable progress from judicial chauvinism towards judicial internationalism can be seen most vividly when we contrast the internationalist attitude of the Cour de cassation in the *Soulié* case[200] of the 1990s with the spirit which animated the same court in the *Soulié* case decided over 80 years ago.[201]

To this increasing internationalism of the French courts a valuable contribution has been made by the so-called theory of mitigated effect of pub-

194. [1983] 1 A.C. 145, 164.

195. *Osmar* v. *Procureur général près la cour d'appel de Paris*, Rev. Crit. 1995. 308, note Lequette.

196. E.g. *J.L.* v. *Office cantonal de la Jeunesse de Tübingen*, Rev. Crit. 1995. 68, note Ancel; *Bettan* v. *Simon*, Rev. Crit. 1995. 362, note Cohen.

197. E.g. *Riabouchinski* v. *Riabouchinski*, Rev. dr. int. 1924. 403; *Valentinis* v. *Valentinis*, Rev. Crit. 1959. 691, note Déprez, D. 1959. 51; *Chemins de fer portugais* v. *Ash*, S. 1945. I. 77, note J.-P. Niboyet.

198. E.g. the former Art.340 of the Civil Code: *Rohman* v. *Kellerhals*, Clunet 1936. 399, 400, note Perroud; *Sommer* v. *Mayer*, Rev. Crit. 1955. 133, 134, note Motulsky; Art.2252 of the Civil Code, *Antunes* v. *Bakhayoko*, Rev. Crit. 1981. 81, note Dayant.

199. E.g. *Compagnie L'Union et le Phenix* v. *Dlle Beau*, Gaz. Pal. 1990. panorama, p.184; *GAN Incendie-Accidents, Daniel Dubois* v. *Pascale Marchot*, Clunet 1991. 981, note Légier; *Piccinelli* v. *Maxeiner*, Clunet 1995. 122, note Légier.

200. D. 1993 Jurisp. 13, note Légier, Cour de Cassation refused to exclude foreign law on grounds of public policy because it was not shown that the foreign law was contrary to public policy in the international sense.

201. See text accompanying *supra* n.49.

lic policy (*effet attenué de l'ordre public*).[202] This theory, as enunciated by the Cour de cassation in the celebrated case of *Rivière* v. *Roumiantzeff*,[203] is that a distinction is to be made between the reaction of public policy to the *effects* in France of a right already acquired abroad, on the one hand, and the reaction of public policy to the acquisition of a right in France, on the other. In the first case the demands of public policy may be diminished or attenuated, but in the second they apply in their full vigour. In *Rivière*'s case itself the Cour de cassation was able to recognise a foreign divorce pronounced on the ground of mutual consent at a time when French public policy was opposed to the *application in France* of a foreign law which allowed divorce on that ground. The consequence of applying the theory of attenuated effect of public policy has been, whether designedly or by coincidence, a greater recognition of foreign law[204] and foreign judgments[205] and a corresponding reduction in the scope of public policy in France.

VIII. CONCLUSION

IT has been said[206] that "attitudes and phobias still constitute the greatest factor that separates this country [England] from the continent of Europe" and, one may add, the rest of the world. Some have expressed the hope or prognosis that the 1990s will see "a new dawn of internationalism in the English legal world".[207] What this article has sought to demonstrate and celebrate is the spirit of internationalism already manifested by the English courts in connection with the public policy exception in private international law. To that international spirit the concept of comity has given an impulse which few have cared to notice but which is far from having spent itself yet.

It is true that if the doctrine of public policy is not kept within proper limits "the whole basis of the [conflict of laws] system is liable to be frustrated".[208] But it is equally true that there are dangers in allowing internationalism totally to eclipse forum public policy. The divergent

202. Batiffol and Lagarde, *op. cit. supra* n.10, at pp.580–584.
203. Rev. Crit. 1953. 412, note Batiffol.
204. E.g. *Chemouni* v. *Chemouni*, Rev. Crit. 1958. 110, note Jambu-Merlin; D. 1958. 265, note Lenoan; Clunet 1958. 776, note Ponsard; *C.P.A.M. de Saint-Etienne* v. *Meguellati*, J.C.P. 1990. IV. 171, recognising polygamous marriages contracted abroad.
205. E.g. *Munzer* v. *Jacoby-Munzer*, Clunet 1964. 302, note Goldman; *R.* v. *R.*, Gaz. Pal. 1984. II. 20131; *Klopp* v. *Holder*, Rev. Crit. 1985. 131, note Mezgar; *Le Crédit Lyonnais Bank Nederland* v. *Perretti*, Rev. Crit. 1993. 664, note Gaudemet-Tallon.
206. Markesinis, *op. cit. supra* n.1, at p.1.
207. Bingham, *op. cit. supra* n.2, at p.515.
208. Dicey and Morris, *op. cit. supra* n.10, at p.88.

approaches of the courts in France and England resulted in the prominence of public policy in one jurisdiction and the dominance of internationalism in the other. What is required is a proper balance between the two. And although it is not easy to strike that balance or to invite everybody to agree on it, there are signs that the approaches and the attitudes in the two countries may now be converging towards that end.