FOREIGN LAW ILLEGALITY: *PATEL*'S NEW FRONTIER?

AS *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 continues to revolutionise the law on illegality, the question arises whether its range-of-factors test will project its influence over more decidedly "foreign" terrain: foreign law illegality, or illegality under a law other than the *lex contractus*. Foreign law illegality disputes have typically centred around the rules in *Foster v Driscoll* [1929] 1 K.B. 470, which renders contracts unenforceable if parties' "real object and intention" was to contravene a third state's law; and *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 K.B. 287, which renders contracts unenforceable if illegal under the *lex loci solutionis*. Although both *Foster* and *Ralli* are manifestations of English "public policy", they have never been associated directly with domestic illegality, instead having their "root" in the principle of "comity" (*Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole Et Financiere S.A.* [1979] 2 Lloyd's Rep. 98, 107). Today, *Foster* and *Ralli* continue to crop up in English courts (e.g. *Dana Gas PJSC v Dana Gas Sukuk Ltd.* [2017] EWHC 2928 (Comm)) and throughout the Commonwealth (e.g. *Ryder Industries Ltd. v Chan Shui Woo* [2015] HKCFA 85, [2016] 1 HKC 323; *Teng Wen-Chung v EFG Bank A.G.* [2018] SGCA 60, [2018] 2 S.L.R. 1145), seemingly insulated from the sea changes occurring in domestic illegality.

Magdeev v Tsvetkov [2020] EWHC 887 (Comm), however, suggests that *Patel*'s revolution may finally have reached the shores of foreign law illegality. Magdeev had loaned money to Equix Dubai, a company controlled by his friend Tsvetkov. The loan agreement, governed by English law, stated that no interest was payable on the loan. However, it also required Equix Dubai to employ Magdeev, for the sole purpose of enabling Magdeev to obtain a Dubai employment visa. When Magdeev sued Tsvetkov for repayment of the loan, Tsvetkov argued that the loan agreement was unenforceable because Magdeev's sham employment agreement breached United Arab Emirates (UAE) law. Cockerill J. found that the employment agreement constituted visa fraud under UAE law (*Magdeev*, at [285]–[296]). However, she also found that Equix Dubai's obligation to hire Magdeev was not "central to the adventure", but merely "incidental" (at [327], [329]). For this reason, neither *Foster* nor *Ralli* applied "squarely" on the facts: *Foster* was inapplicable since only one of parties' several "object[s] and intention[s] in reaching their agreement" was illegal under UAE law, while *Ralli* was inapplicable because only one term of the loan agreement was illegal under UAE law (at [322]–[323], [330]).

The test in such situations, Magdeev argued, should be "a unified approach whether the illegality is domestic or foreign", in line with

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"what Lord Collins said in *Ryder* and what Lord Toulson said in *Patel*" (at [327]). Cockerill J. first cautioned that domestic and foreign law illegality rested on "two different iterations of public policy": "consistency" and "comity" respectively (at [331]). However, she then agreed that "a perverse dichotomy with a flexible rule in one context and a rigid and inflexible rule in another" should be avoided; and so (at [332]):

> *Patel v Mirza* does provide a guide in this sense. Surely it is right in both cases that a balancing exercise has to be performed . . .. One does not specifically invoke proportionality, because that assumes an understanding of the questions of weight and gravity which may not be available in respect of a foreign court's or foreign judicature's priorities. But where the clear answer is not given by either of the main principles, one balances the relevant factors discernible from the case law in the light of the underpinning principle. It is thus that one gets to the factors which Lord Collins set out in *Ryder*.

Applying those "factors", Cockerill J. found that, "in the overall balance", "it would be contrary to justice to refuse enforcement". This was because (1) UAE law did not prohibit performance of the "dominant part" of the loan agreement according to its terms; and (2) visa fraud seemed to be of a "degree of seriousness", but UAE authorities also "might not take this kind of breach too seriously". On the other hand, (3) parties had intended to, or inferred that they would, contravene UAE law, but this alone could not justify non-enforcement (at [334]–[341]).

Cockerill J.'s reading of *Ryder*, as laying out a flexible multi-factorial test for foreign law illegality, was probably inaccurate; there, Lord Collins of Mapesbury applied only "well established rules of the conflict of laws", namely *Foster* and *Ralli* (*Ryder*, at [36]–[55]), and expressed "considerable reserve" in adopting a "discretionary approach" to foreign law illegality (at [57]). Nevertheless, two aspects of the decision in *Magdeev* demonstrate how it, unlike *Ryder*, essentially extends *Patel*'s test to foreign law illegality. They also simultaneously demonstrate why doing so raises concerns which should give courts pause before following suit in the future.

First, Cockerill J. undertook an assessment of the "seriousness" of parties' breach of foreign law from the perspective of the foreign legal system, focused on the "degree" and "scale" of such seriousness "so far as UAE law is concerned" (*Magdeev*, at [336], [338]). This "seriousness" enquiry was thus non-binary, resembling Lord Toulson's "seriousness" factor in *Patel*, which envisioned "that there may be degrees of illegality" within a legal system (*Patel*, at [107]–[108]; cf. [262]–[263] (Lord Sumption)). By contrast, *Foster* and *Ralli* have traditionally only asked whether parties' behaviour is objectionable in a binary or *categorical* sense. Under *Foster*, courts only take notice of a breach of foreign law if it is "sufficiently serious" from perspective of the domestic legal system's foreign policy (*Ryder*, at [57]), such that countenancing it might spark a diplomatic incident, like breaches of the US Constitution in *Foster* or breaches of Indian trade sanctions

against South Africa in *Regazzoni v KC Sethia (1944) Ltd.* [1958] A.C. 301. Likewise, under *Ralli*, courts simply ask whether performance would attract criminal or civil liability under the *lex loci solutionis*; all liability is objectionable, regardless of the extent of its gravity within the foreign legal system. Evidently, then, *Magdeev*'s seriousness enquiry departed from foreign law illegality orthodoxy, in favour of the approach employed in *Patel*.

But problems abound when courts attempt to apply *Patel*'s seriousness enquiry in foreign law illegality disputes. The breaches such disputes tend to involve – breaches of exchange control, banking or customs regulations – are not acts of clear moral turpitude, and so their seriousness within the foreign legal system will not be intuitive to the forum's courts. This difficulty is amplified by the foreign provenance of those regulations, since courts are outsiders to foreign legal systems, unfamiliar with the values that constitute ideas of moral turpitude therein. Indeed, Cockerill J. herself acknowledged that courts would face difficulties in ascertaining "a foreign court's or foreign judicature's priorities" when applying *Patel* to foreign law breaches (*Magdeev*, at [332]). Unsurprisingly, then, when she nevertheless attempted to assess the seriousness of visa fraud in Dubai, no clear conclusion was forthcoming: the offence seemed serious because of its potential "national security" implications, but UAE authorities might also take a "less serious view" towards such offences committed by "affluent investors" like Magdeev (at [336]–[340]). Once courts depart from *Foster* and *Ralli*'s categorical seriousness enquiries for breaches of foreign law, only uncertainty awaits.

The second similarity between *Magdeev* and *Patel* is Cockerill J.'s use of a "flexible" "balancing exercise" between competing "relevant factors" to resolve the dispute (at [332]). In particular, the three factors she balanced – the seriousness of parties' conduct, that conduct's centrality to their agreement, and parties' relative intentions and culpabilities – were the very same factors Lord Toulson identified as relevant to his "proportionality" balancing exercise (*Patel*, at [107]). The effect was a "sliding scale" for the enforceability of international contracts: a serious but non-central and unintentional breach of foreign law might render a contract unenforceable, as may a central and intentional but non-serious breach (*Magdeev*, at [352]–[353]). Thus, much would depend on the facts of the particular case. Clearly, this differed greatly from the approaches taken in *Foster* and *Ralli*, which focused only on a single factor each (parties' intentions and liability in performance, respectively).

But again, applying *Patel*'s balancing exercise in foreign law illegality disputes presents difficulties. This exercise essentially requires courts to compare the pros and cons of preferring the value underlying contractual enforcement (i.e. freedom of contract), and the value underlying the law breached, in the circumstances of the dispute. In domestic illegality disputes, courts rely on a "core of consensus" within the domestic legal

system, on the interplay between those competing values, as the basis for that comparison (Tan Z.X., "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (2020) 33 Can J.L. & Jur 215, 238). However, in foreign law illegality disputes it is unclear what courts should use as that basis, since the competing values come from two different legal systems: freedom of contract comes from the *forum* (being the contract choice-of-law rule's underlying value), but the value underlying the law breached comes from the *foreign* state. Courts cannot justifiably choose either the value consensus of one of those legal systems, to the exclusion of the other. Other alternatives are also unworkable: a detailed international value consensus does not exist, and a *via media* between the two legal system's values would be difficult to construct. Courts are then left with no option but to balance without a clear basis, which renders the competing values incommensurable and thereby threatens the logical coherence of the exercise: in *Magdeev*, Cockerill J. confusingly balanced in light of both conflicting perspectives on the seriousness of visa fraud mentioned above, leading to a result lacking the "robustness" of "common-sense" reasoning (at [341]).

Magdeev was a misguided attempt at extending *Patel* range-of-factors test to foreign law illegality: a test which weighs and balances the values underlying foreign laws raises concerns of uncertainty and incommensurability which undercut any ostensible benefits it might bring. We have been here before: similar concerns fuelled the UK's rejection of Rome I's initial third-country mandatory rules proposal (see A. Dickinson "Third-country Mandatory Rules in the Law Applicable to Contractual Obligations" (2007) 3 J.Priv.Int'l L. 53, 66–69). At their heart lies a fear that courts would get mired in the intractable value conflicts international legal pluralism necessarily produces, at the expense of private justice, party autonomy and security in commercial transactions. It would be unfortunate, and quite ironic, if these concerns, so ardently raised in the multilateral context, were now overridden by an extension of domestic doctrines like *Patel*'s. This does not mean that rules of foreign law illegality must remain entirely rigid: for instance, Cockerill J.'s alternative reasoning sensibly endorses a doctrine of severance, limiting *Ralli* only to a contract's objectionable terms (*Magdeev*, at [359]). However, courts must never attempt to weigh the relative importance of the values at stake in international disputes – and must therefore refrain from extending *Patel*'s test to foreign law illegality cases – given the problems of uncertainty and incommensurability that would create.

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