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THE TAINTING DOCTRINE IN SINGAPORE CONFLICT OF LAWS

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In Singapore conflict of laws, the tainting doctrine applies where a contractual claim governed by Singapore law is not itself unenforceable for illegality or public policy, but is sufficiently connected to a transaction which is so unenforceable. However, the mechanism of this doctrine—as articulated in the English Court of Appeal decision of *Euro-Diam Ltd v Bathurst Ltd*—is today uncertain due to, *inter alia*, its use of domestic illegality principles which no longer apply. This paper suggests two areas of clarification. First, it explores whether the doctrine should be seen an application of the proper law of the contract or the law of the forum. Second, it introduces a possible approach as informed by the test in tainting by domestic illegality, which may be applied where the contract sought to be enforced is governed by Singapore law.

I. INTRODUCTION: THE DOCTRINE OF TAINTING

The law relating to illegality and public policy has been identified as having two broad policy considerations: wider public interest in deterring illegal conduct and upholding the integrity of the courts,[1] and the consideration of justice between parties.[2] In the conflict of laws context, a third may be added: deference to international comity.[3]

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1 *Ie*, the public interest overrides parties' individual contractual rights: *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at paras 23-24 (CA) [*Ting Siew May*]; Nelson Enonchong, *Illegal Transactions* (London: LLP Reference Publishing, 1998) at 15-17 [Enonchong, *Illegal Transactions*]. As noted in *Halsbury's Laws of Singapore Volume 7: Contract* (Singapore: LexisNexis Singapore, 2016) at para 80.283, the SGCA in *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at para 20 (CA) [*Ochroid*] preferred the traditional reasoning that the court's reluctance to come to the aid of parties engaged in illegal contracts was "premised on the broader principle of public policy in protecting the integrity of the courts".

2 *Per* Toohey J in *Nelson v Nelson* (1995) 132 ALR 133 at 180 (HC), a relevant consideration is "preventing injustice and the enrichment of one party at the expense of the other"; Enonchong, *Illegal Transactions*, *ibid* at 18.

3 *Per* Viscount Simmonds in *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 319 (HL) [*Regazzoni*], public policy avoids "at least some contracts which violate the laws of a foreign State. . . because public policy demands that deference to international comity". This is because recognition of the contract "would give a just cause for complaint (by the foreign government)" and should thus be regarded as contrary to English conceptions of international comity (*Regazzoni* at 327). These views were endorsed by the SGCA in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR (R) 842 at paras

Here, public policy may function negatively by excluding a rule of foreign law.[4] It may also function positively by giving effect to foreign law, as demanded by comity.[5]

It is against this backdrop that we may consider the doctrine of tainting. The doctrine is distinct from other established rules on foreign illegality, which may be briefly mentioned here. First, the Singapore courts will not enforce a contract which is unenforceable according to its proper law. This is because the proper law of the contract determines its legal effects, including any illegality thereunder.[6] Second, it will not enforce contracts to breach the laws in a friendly foreign state which is the place of performance.[7] Third, it will not enforce contracts where performance contravenes both the domestic public policy of the forum and the same public policy of the place of performance.[8] Fourth, it will not enforce contracts governed by the law of the forum, where performance has become illegal by the law of the place of performance.[9] Apart from these, forum public policy may also render unenforceable contracts which offend basic principles of justice and fairness held by the forum court,[10] such as in instances of fraud,[11] or contracts which fundamentally breach human rights or international law.[12]

45-47 (CA) [*Peh Teck Quee*] and, prior to that, Lai Siu Chiu JC (as he then was) in *Bhagwandas Naraindas v Brooks Exim Pte Ltd* [1994] 1 SLR (R) 932 at para 14 (HC) [*Bhagwandas*].

4 For example, Phillips LJ in *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 at 729 (CA) [*Royal Boskalis*] stated that there is "a class of duress so unconscionable" that an English court would, based on public policy, "override the proper law of the contract". There, the finalisation agreement in question was valid by its governing law (Iraqi) but induced by duress of goods and persons who were threatened with being used as human shields; thus, it would be unenforceable in an English court (*Royal Boskalis* at 688, 709, 732).

5 Comity may be broadly defined as concerned with the "application of foreign law and recognition of foreign acts" due to "considerations of justice and of the mutual convenience of states" (Adeline Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2:1 J Priv Intl Law 27 at 37 [Adeline Chong, "Public Policy of Third Countries"]). See for example the rules in *Foster v Driscoll* [1929] 1 KB 470 (CA) [*Foster*] and *Lemenda Trading Co. Ltd. v African Middle East Petroleum Co. Ltd.* [1988] 1 QB 448 [*Lemenda*], discussed at *infra* notes 7-8.

6 *Mackender v Feldia A.G.* [1967] 2 QB 590 at 601-602 (CA); *Halsbury's Laws of Singapore Volume 6(2): Conflict of Laws* (Singapore: LexisNexis Singapore, 2016) [*Halsbury's on Conflicts*] at paras 75.352, 75.360; David Chong, "Contractual Illegality and Conflict of Laws" (1995) 7:2 Sing Ac LJ 303 at 311-312 [David Chong, "Contractual Illegality"].

7 *Foster*, *supra* note 5 at 521-522. This has been explained as "a matter of public policy based on international comity" (*Foster* at 496).

8 *Lemenda*, *supra* note 5 at 461. In such cases, "international comity combines with English domestic public policy to militate against enforcement". The rule in *Lemenda* was applied in Singapore in *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1994] 2 SLR (R) 605 at para 93 (HC).

9 *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 (CA); *De Beéche v The South American Stores (Gath and Chaves) Limited and the Chilian Stores (Gath and Chaves) Limited* [1935] AC 148 at 156 (HL); *Kahler v Midland Bank Ld* [1950] AC 24 at 36 (HL). As discussed in Lord Collins of Mapesbury *et al.* eds, *Dicey, Morris & Collins on The Conflict of Laws*, 15th ed (London: Sweet & Maxwell, 2012) [*Dicey, Morris & Collins*] at paras 32.097-32.101; *Halsbury's on Conflicts*, *supra* note 6 at para 75.366.

10 *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at para 18 (HL) [*Kuwait Airways*].

11 *Mitsubishi Corporation v Aristidis I. Alafouzos* [1988] 1 Lloyd's Rep 191 at 194-195.

12 *Kuwait Airways*, *supra* note 10 at paras 26-29; *Royal Boskalis*, *supra* note 4 at 729, 731-732; as noted in Paul Torremans *et al.* eds, *Cheshire, North and Fawcett: Private International Law*, 15th ed (Oxford: Oxford University Press, 2017) [*Cheshire, North and Fawcett*] at 135-139.

In the conflict of laws context, tainting applies where the contractual agreement is *ex facie* not contrary to any rule of illegality or public policy, but is "contaminated" with some foreign illegality so as to render it objectionable.[13] As established in *Euro-Diam*,[14] a contractual claim may be tainted by an illegal transaction if the latter is unenforceable in Singapore on an application of the appropriate connecting factor,[15] and there is "sufficient connection" between the claim and the illegality amounting to taint within the principles in *Bowmakers, Limited v Barnet Instruments, Limited* or *Beresford v Royal Insurance Company, Limited*.[16] However, the Court of Appeal ("SGCA") has recognised that the decision in *Euro-Diam* will need to be revisited because, *inter alia*, the *Bowmakers* and *Beresford* principles are no longer part of Singapore law.[17] The operation of tainting by foreign illegality in Singapore is therefore the subject of this paper. Furthermore, this paper is concerned with where Singapore law is the proper law of the contract. As argued subsequently, tainting should be conceived as part of the operation of the proper law.[18]

As a preliminary point, the concept of tainting has been applied in Singapore *domestic* illegality in a similar vein, insofar as the courts have recognised a category of common law illegality comprising contracts "not unlawful *per se* but entered into with the object of committing an illegal act".[19] But, in contrast to tainting in foreign illegality, the Singapore courts have identified the taint in domestic illegality as stemming from "the intention of one or both of the contracting parties to break the law".[20] The Singapore courts have further articulated a proportionality test which

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13 In the words of Staughton J in *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 15 [*Euro-Diam*], "'tainted'... means that while the contract is not itself illegal, it has a connection with some other illegal transaction which renders it obnoxious"; *Halsbury's on Conflicts*, *supra* note 6 at para 75.367. It is noted that the concept of tainting in *Euro-Diam* was previously applied in cases of domestic contractual illegality in England as well, until the law on domestic illegality was clarified in a series of cases from *Tinsley v Milligan* [1994] 1 AC 340 (HL) [*Tinsley*] to *Patel v Mirza* [2017] AC 467 (SC) [*Patel*], which emphatically restated the law on (domestic) illegality. This paper therefore discusses tainting in the sense of two "juridically independent" transactions, where illegality in one transaction affects the enforceability of rights arising from another transaction (see Tan Yock Lin, "Tainted Contracts in the Conflict of Laws" (2020) 32:2 Sing Ac LJ 1003 at paras 44-45 [Tan, "Tainted Contracts in the Conflict of Laws"]). Such a view of the tainting doctrine was also taken by Vincent Hoong JC (as he then was) in *Anuva Technologies Pte Ltd v Advanced Sierra Electrotech Pte Ltd* [2019] SGHC 244 at para 52.

14 *Supra* note 13.

15 *Euro-Diam*, *ibid* at 23. As noted by Staughton J in *Euro-Diam*, there are three relevant connecting factors for the conflict rules on contractual illegality: the forum, the proper law, and the place of performance. There is also a limited class of exchange contracts affected by the Bretton Woods Agreement Order, where the (fourth) connecting factor is currency (*Euro-Diam* at 21-22).

16 *Ibid* at 20, 23-24, 35. That is, the *ex turpi causa* defence will prima facie succeed where the plaintiff "seeks, or is forced to" found his claim on the illegal contract or plead its illegality to support his claim (*Bowmakers, Limited v Barnet Instruments, Limited* [1945] KB 65 at 71 (CA) [*Bowmakers*]), or where granting the plaintiff's claim would enable him to benefit from his criminal conduct (*Beresford v Royal Insurance Company, Limited* [1938] AC 586 at 598-599 (HL) [*Beresford*]).

17 *Teng Wen-Chung v EFG Bank AG, Singapore Branch* [2018] 2 SLR 1145 at paras 22-23 (CA) [*Teng Wen-Chung*].

18 See *infra*, Section II(B)(1).

19 *Ochroid*, *supra* note 1 at para 35; *Ting Siew May*, *supra* note 1 at paras 43-45, 77, 112.

20 *Ochroid, ibid.*

limits recovery pursuant to such a contract tainted by domestic illegality.[21] This is on the basis that while the courts will not in principle permit a "guilty party" to benefit from his own legal wrong, there might be legal wrongs intended to be committed which are "relatively trivial", rendering it "disproportionate" for the court to decide that the contract in question is void and unenforceable.[22] In other words, proportionality—a "balancing exercise. . . weigh[ing] up the application of the various policies at stake"[23]—allows the court to steer a middle course between two unacceptable positions: aiding a party pursuing or enforcing an illegal object on the one hand; on the other, "refus[ing] all assistance" to a plaintiff on the "first indication of unlawfulness" in a transaction without regard to the seriousness of his loss, or the disproportion between his loss and his unlawful conduct.[24]

This paper argues that, where the contract sought to be enforced is governed by Singapore law, developments in tainting in domestic illegality may be used to clarify tainting in foreign illegality. In particular, I argue that certain factors which govern proportionality in domestic illegality normatively indicate sufficient connection to an illegal act. For example, two factors, namely the purpose of the prohibiting rule and the proximity of the illegality to the contract, substantiate a "substantive" form of the reliance principle, which the Singapore courts have endorsed.[25] Furthermore, other factors in the proportionality rubric address concerns against disproportionate results that have been seen in cases of foreign illegality.[26] Indeed, it is argued that these factors are already nascent in cases on tainting in foreign illegality, including *Euro-Diam*.

This paper therefore proposes a two-stage sequential framework drawing on the factors in the proportionality test in domestic illegality to govern tainting by foreign illegality. This assessment would be done subsequent to the initial question posed according to the *Euro-Diam* formulation, namely whether the alleged source of taint would be enforceable domestically. The framework comprises, at the first stage, factors indicating "sufficient connection" to the illegality, and at the second, factors indicating that although "sufficient connection" has been satisfied, it may be disproportionate for the court not to enforce the claim.

I will first elaborate on the juridical basis for the doctrine of tainting by foreign illegality, in particular addressing whether it should be seen as an operation of the *lex causae* or the *lex fori*, and its scope, namely whether it only applies in relation to certain types of illegality. Next, I will describe my proposed approach to the doctrine.

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21 *Ochroid*, *ibid* at paras 38-39, citing *Ting Siew May*, *supra* note 1 at paras 66-71.

22 *Ting Siew May*, *ibid* at para 46; as noted in *Ochroid*, *ibid* at para 36 [emphasis in original].

23 *Ting Siew May*, *ibid* at para 61, citing the UK Law Commission, *Consultation Paper No 189, The Illegality Defence: A Consultative Report* at para 3.142.

24 *Ting Siew May*, *ibid* at para 65.

25 *Infra* notes 135-136. Professor Tan Yock Lin has argued for a broader re-conceptualisation of the reliance principle to encompass standards of necessity, proportionality and non-discrimination, which he proposes ought to limit a claim pursuant to such tainted contracts. He therefore restates the normative reliance principle as one where a claimant "profits" from an illegality by knowingly assisting or procuring another to commit it, "in the expectation of gaining some benefit for himself from his own lawful contract or of evading some liability otherwise incumbent on him or otherwise imposing liability on another" (Tan, "Tainted Contracts in the Conflict of Laws", *supra* note 13 at paras 54-59).

26 *Infra* notes 153-168.

II. The Juridical Basis of the Doctrine

A. *The Decision in Euro-Diam Ltd v Bathurst*

The tainting doctrine is generally regarded as originating from the decision in *Euro-Diam*. In the case, the plaintiffs claimed to be indemnified under an insurance contract governed by English law,[27] against the loss of certain diamonds which had been consigned to West German parties.[28] However, the defendant argued that the plaintiffs' claims were tainted by illegal acts in West Germany. The illegality was said to include that the plaintiffs had issued an invoice for the consignment underrepresenting its price and value, with a view to deceiving the West German customs authorities into charging less import turnover tax, a criminal offence under West German law, and that the alleged consignment agent had been carrying on business without the required residence permit.[29] Staughton J considered that where an English claim is said to be tainted by foreign illegality, the inquiry is first into whether, applying the appropriate connecting factor, "the transaction from which the taint is said to arise would be enforceable here".[30] If not, the next question is whether there is "sufficient connection" between that transaction and the claim amounting to taint within the principles in *Bowmakers* or *Beresford*.[31] Staughton J found insufficient connection on the facts. Although an English court would not enforce a contract to deceive the German customs authorities in Germany (Germany being the place of performance),[32] the plaintiffs did not need to rely on the illegal acts for their claim such as assert the false invoice by way of pleading or evidence, and the claim did not in any way represent the proceeds of crime so as to affront the conscience of the court.[33]

As a side note, the "public conscience test" appears to have been an additional overarching principle beyond the *Bowmakers* and *Beresford* tests for tainting to be made out.[34] Kerr LJ in *Euro-Diam* had regarded the "public conscience test" as a general principle undergirding the *ex turpi causa* defence, residually covering cases where neither the *Bowmakers* nor *Beresford* principles apply.[35] Furthermore, Staughton J in *Howard v Shirlstar Container Transport Ltd.*[36] subsequently referred

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27 *Euro-Diam*, *supra* note 13 at 21.

28 *Ibid* at 5.

29 *Ibid*.

30 *Ibid* at 23, see n 15.

31 *Ibid* at 23-24.

32 *Ibid* at 24.

33 *Ibid* at 20. Staughton J's decision was affirmed on appeal (*ibid* at 40).

34 *Ie*, whether "in all the circumstances, it would be an affront to the public conscience" to grant the plaintiff the relief sought as the court would by doing so "appear to assist or encourage" the plaintiff or others in such illegal conduct (*ibid* at 29). The "public conscience test" emerged from the case in tort of *Thackwell v Barclays Bank plc* [1986] 1 All ER 676 [*Thackwell*] and was extended to apply to contracts in *Euro-Diam* (Enonchong, *Illegal Transactions, supra* note 1 at 130).

35 *Euro-Diam*, *ibid* at 35. In relation to the rule in *Beresford*, Staughton J in *Euro-Diam* had referred to Lord Atkin's "absolute rule" that the "courts will not recognise a benefit accruing to a criminal from his crime" and a matter of "offend(ing) the conscience of the court" (*Euro-Diam* at 19-20). That said, he referred to the "public conscience test" in *Thackwell* and thought "there (was) a need for something" like it (*Euro-Diam* at 18-19).

36 [1990] 1 WLR 1292 (CA) [*Howard*].

to Kerr LJ's propositions in finding that although the *Beresford* principle would *prima facie* prevent the plaintiff from benefitting from his criminal conduct, the public conscience would not be affronted by allowing him to recover.[37] Similarly, K S Rajah JC in *Overseas Union Bank Ltd v Chua Kok Kay* was of the view that the "public conscience test" was the second question in the tainting inquiry.[38] However, not all cases have invoked this aspect of the doctrine,[39] and the SGCA in *Teng Wen-Chung* appeared to view the rule in *Beresford* as an "embodiment" of the "public conscience test".[40] In any case, this is a matter of historical interest as the "public conscience test" has been rejected both here and in England.[41]

B. *Applicability of the Doctrine*

1. *Tainting as the proper law of the contract*

An area of uncertainty concerns whether tainting operates as part of the proper law of the contract or the law of the forum. This paper argues that the former should be the case. This would be in keeping with the primacy of the proper law in determining the rights and obligations arising from a contract.[42] While cases applying the doctrine have concerned contracts which were governed by the law of the forum,[43] coincidence between the proper law and law of the forum should not be required for tainting to apply. It is noted though that alternative views have considered the doctrine as an application of forum public policy, rendering a contract with "sufficient connection between a contract and illegal acts under a foreign law" unenforceable even though it may be valid by its proper law and the law of the place of performance.[44]

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37 In *Howard*, *ibid*, the plaintiff contracted with a British company to "successfully" remove two aircraft from Nigerian airspace. The contract was to fly the aircraft to England, with payment in English pounds. The plaintiff did so illegally under Nigerian law, after being warned that, *inter alia*, the lives of him and a wireless operator were in danger. Staughton J considered the contract one of "English domestic law" and found that the public conscience would not ultimately be affronted by allowing recovery as the plaintiff had committed the offence(s) to free himself and the wireless operator from "pressing danger" (*Howard* at 1295, 1298, 1301).

38 [1992] 2 SLR (R) 811 at para 79 (HC) [*Chua Kok Kay*].

39 See *eg*, *Sea Glory Maritime Co v Al Sagr National Insurance Co M/V "Nancy"* [2013] EWHC 2116 (Comm) at paras 298-299 [*The "Nancy"*]; *Station Hotel Co v Malayan Railway Administration* [1993] 2 SLR (R) 818 at para 57 (CA).

40 *Teng Wen-Chung*, *supra* note 17 at para 23. However, Kerr LJ in *Euro-Diam* at 35 appeared to view *both* the *Bowmakers* and *Beresford* principles as expressions of the 'public conscience test'. Staughton J in *Howard* at 1300-1301 similarly saw the *Beresford* principle as an "example" of the main principle of the 'public conscience test'; this suggests that the *Bowmakers* principle would have equally been an example for him.

41 Andrew Phang Boon Leong, "Illegality and Public Policy" in Andrew Phang Boon Leong & Goh Yihan eds, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) 903 at para 13.124; *Tinsley*, *supra* note 13, as noted in *Teng Wen-Chung*, *ibid* at para 23.

42 See n 6.

43 *Halsbury's on Conflicts*, *supra* note 6 at para 75.367. This was the case in *Euro-Diam* (the proper law of the insurance contract being English), *Howard*, *The "Nancy"* (claim under a marine insurance policy governed by the law of England and Wales), and *Chua Kok Kay* (the loan contract governed by Singapore law).

44 *Per* Lai Siu Chiu JC (as he then was) in *Bhagwandas*, *supra* note 3 at para 31; *Halsbury's on Conflicts*, *ibid* at para 75.367. Similarly, Professor T C Hartley appeared to view the decision in *Euro-Diam* as an

It has also been suggested that the doctrine may apply as part of forum procedural rules. This is on the basis that illegality is not just concerned with the political or allocative functions mentioned earlier—*ie*, coherence in the law and justice between parties[45]—but can also operate as a "rule of judicial abstention".[46] On this view, as the law "withhold[s] judicial remedies"[47] based on whether a claimant has been involved in illegality, tainting is a matter of enforceability as opposed to the existence of a right, in line with the distinction between substance and procedure which applies in Singapore.[48] But the preferable view, as argued by Professor C F Forsyth, is that if the proper law of the contract is not English, it is "not obvious" that English law rules such as the *Bowmakers* and *Beresford* principles apply.[49]

Indeed, it is submitted that the doctrine should *not* apply as part of forum rules. As I will elaborate on below, subordinating the proper law of the contract to forum tainting principles would go too far against the principle of party autonomy and engender legal uncertainty.[50] The illegality in cases of tainting are also not of such severity as to be properly considered applications of forum public policy. Furthermore, it does not appear that comity[51] would require that the forum extend existing conflict rules to embrace the concept of tainting, where it does not apply under the proper law of the contract. This is as courts are typically restrained in applying (their own) public policy so as to override the proper law of the contract, and *Euro-Diam* has rarely been applied elsewhere as a rule in the conflict of laws. As noted above, even when *Euro-Diam* was applied, it was not clearly on the basis of the law of the forum, as it had coincided with the proper law of the contract in the cases.[52] Tainting therefore does not seem to be a principle generally applied as part of the *lex fori*.

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application of English public policy: he opined that the judgment clearly indicated the result would have been the same if it had been the British tax authorities which were deceived, as "the court expressly rejected the argument that British public policy was not concerned with a violation of foreign law". At the same time, had there been a more direct relationship between the criminal offence and the insurance contract, "the latter would almost certainly not have been enforced" (T C Hartley, "General Course on Private International Law" (2006) 319 Hague Recueil 9 at 245). However, he was of the view that while the same test might sometimes apply as if English law had been infringed, the position might be different in other situations—as *Howard* would likely not have been decided the same way if it were British air traffic control regulations that had been breached.

45 See nn 1-2. Similarly in *Patel*, *supra* note 13 at para 99, Lord Toulson noted that the two broad policy reasons for the illegality doctrine is that "a person should not be allowed to profit from his own wrongdoing" and that the law should not contradict itself by seeming to "condone illegality… giving with the left hand what it takes with the right hand".

46 *Per* Lord Sumption in *Les Laboratoires Servier v Apotex Inc* [2015] AC 430 at para 23 (SC) [*Les Laboratoires*]; Frederick Wilmot-Smith, "Illegality as a Rationing Rule" in Sarah Green & Alan Bogg eds, *Illegality after Patel v Mirza* (Oxford: Hart Publishing, 2018) 107 at 112-113.

47 *Les Laboratoires*, *ibid*.

48 *Star City Pty Ltd v Tan Hong Woon* [2002] 1 SLR (R) 306 at para 12 (CA); *Halsbury's on Conflicts*, *supra* note 6 at para 75.367; *cf*. *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at para 21 (CA), in which the SGCA questioned the traditional distinction between remedy and right as "untenable in principle".

49 C F Forsyth, "When Can a Foreign Illegality Taint an English Contract" (1987) 46:3 Cambridge LJ 404 at 406, cited by the CA in *Teng Wen-Chung*, *supra* note 17 at para 24.

50 Assuming parties do not choose where they litigate. Andrew Dickinson, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 J Priv Intl Law 53 at 60.

51 As expressed in the law relating to foreign illegality and public policy, as discussed in nn 3-5.

52 See n 43.

First, it must be noted that the principle of party autonomy is a forceful one in Singapore.[53] As such, the subordination of the proper law of the contract, in many cases the express choice of parties,[54] must be "carefully and properly justified".[55] Furthermore, it has been said that restrictions on the principle of party autonomy should be "proportionate in its effect to the objectives which are said to justify it."[56] As noted by Professor Andrew Dickinson, public policy rules should not then be so "uncertain in their application, as to deter types of economic activity" the forum State wishes to foster, or drive contracting parties away from the forum in search of a more favourable forum, with possible plans to subsequently enforce that judgment in the (first) forum State.[57] Given Singapore's generally narrow approach to the public policy defence to the recognition and enforcement of foreign judgments,[58] the operation of forum public policy in instances of direct contractual enforcement should be similarly circumscribed.

Second, applying the tainting doctrine as forum public policy would create unnecessary legal uncertainty. As things stand, there is already a level of uncertainty with regards the application of forum public policy to international contracts, given the distinction drawn between forum "domestic" public policy—which renders an international contract unenforceable only if the same rule of "domestic" public policy

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53 As noted by Dr Yeo Tiong Min, the CA has in recent cases emphasised enforcement of the contractual promise and upholding party autonomy in the context of choice of court agreements: "The Choice of Court Agreement: Perils of the Midnight Clause" (12th Yong Pung How Professorship Lecture, School of Law, Singapore Management University, 22 May 2019), discussing *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (CA), *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 (CA), and *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 (CA). This consideration has also featured in the courts' contemplation of whether Singapore private international law rules might give effect to contractual choice of law clauses for tort, as noted by the same author (*Ong Ghee Soon Kevin v Ho Yong Chong* [2017] 3 SLR 711 at para 108 [HC]; Yeo Tiong Min, "The Rise of Party Autonomy" in Michael Douglas *et al.* eds, *Commercial Issues in Private International Law: A Common Law Perspective* (Oxford: Hart Publishing, 2019) 257 at 259).

54 *Vita Foods Products, Incorporated v Unus Shipping Company, Limited (in Liquidation)* [1939] AC 277 at 290 (PC), followed by the SGCA in *Peh Teck Quee*, *supra* note 3 at para 12. See also *Halsbury's on Conflicts*, *supra* note 6 at para 75.343: "The private international laws of Singapore, like that of most modern countries, gives significant weight to party autonomy in its choice of law rules for contract."

55 Dickinson, *supra* note 50 at 60.

56 *Ibid.*

57 *Ibid.*

58 In the context of the recognition and enforcement of foreign judgments, the focus of the public policy rules on objections to recognising the judgment, as opposed to the underlying contract, makes it a narrower defence compared with its rules for direct enforcement. As stated by the SGCA in *Liao Eng Kiat v Burwood Nominees Ltd* [2004] 4 SLR (R) 690 at para 32 (CA), a "higher standard of public policy" applies when a forum court is faced with a foreign judgment, as opposed to the enforcement of an underlying claim. (*Halsbury's on Conflicts*, *supra* note 6 at para 75.210; *Dicey, Morris & Collins*, *supra* note 9 at para 14.155; Adeline Chong, "Singapore" in Adeline Chong ed, *Recognition and Enforcement of Foreign Judgments in Asia* (Singapore: Asian Business Law Institute, 2017) at para 20) However, it has been accepted in England that there may be circumstances where an English court "might enquire into the underlying transactions which gave rise to the judgment", for example "corrupt practices which would give rise to obvious public policy considerations" (*Lenkor Energy Trading DMCC v Puri* [2020] EWHC 75 (QB) at para 28). Furthermore, the SGCA in *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at paras 120-121 (CA) suggested that a common law action on a foreign judgment resting on a gambling debt might be re-characterised as a "direct" action to recover a gambling debt and so would be barred by s 5(2) of the *Civil Law Act*, although it refrained from expressing a conclusive opinion on this issue.

applies in the country of performance[59]—and forum public policy that applies even in an international context,[60] or "international public policy"[61]—such as, in the English context, an extreme form of physical duress.[62] It is not clear why further uncertainty should be added in the form of the discretionary tainting doctrine.[63]

Third, on a related note, the illegality in cases involving tainting do not appear to rise to the severity of such "international public policy" objections. The latter may be said to include public policy that is "transnational" in the sense of referring to rules and principles that are accepted across borders.[64] However, the alleged deceiving of customs authorities in *Euro-Diam* for example, or the registration of securities in New York in the wrong name to avoid United States federal taxation in *In Re Emery's Investments Trusts*[65] as cited in *Euro-Diam* are far from the extreme duress in *Royal Boskalis*, or "gross violation(s) of established rules of international law of fundamental importance", as seen in Iraq's invasion of Kuwait and seizure of its assets in *Kuwait Airways*.[66] As such, tainting cases cannot be rationalised on the basis of applications of forum public policy, bearing in mind that the notion of public policy in the conflict of laws context is "narrower and more limited" than in domestic law.[67]

Fourth, it does not appear that comity would require an application of tainting as a matter of forum public policy. In this context, arguments based on comity may be in the form of a motivation to, *inter alia*, preserve relations with friendly foreign states, and foster international co-operation as well as encourage similar reciprocal action by foreign courts.[68] However, as foreign courts tend to *limit* the application of (their own) forum public policy so as to override the proper law, it would be odd for a forum such as Singapore to go in the opposite direction by imposing the tainting doctrine and thereby *extending* the application of forum public policy. Thus, for example, the *Rome I Regulation* limits the application of forum public policy to instances where applying the foreign law would be "manifestly incompatible" with the former.[69]

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59 *Lemenda*, *supra* note 5 at 461 and *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd.* [2000] QB 288 at 304 (CA) [*Westacre*], which suggest that this principle applies even where the proper law of the contract is not the *lex fori*. (*Halsbury's on Conflicts*, *ibid* at para 75.277).

60 Adeline Chong, "Public Policy of Third Countries", *supra* note 5 at 29.

61 Adeline Chong, "Transnational Public Policy in Civil and Commercial Matters" (2012) 128 Law Q Rev 88 at 89 [Adeline Chong, "Transnational Public Policy"].

62 *Royal Boskalis*, *supra* note 4 at 729.

63 As noted by Professor Dickinson, a discretionary rule is of course less predictable in its application than an absolute one, and "more likely to offend the principle of legal certainty" (Dickinson, *supra* note 50 at 63).

64 Adeline Chong, "Transnational Public Policy", *supra* note 61 at 92.

65 [1959] 2 WLR 461; *Euro-Diam*, *supra* note 13 at 22-24.

66 *Kuwait Airways*, *supra* note 10 at para 29; Adeline Chong, "Transnational Public Policy", *supra* note 61 at 94-95.

67 *Per* Lord Steyn in *Kuwait Airways*, *ibid* at para 114, citing P M North & J J Fawcett, eds, *Cheshire & North's Private International Law*, 13th ed (London: Butterworths, 1999) at 123. As noted by Dr Chong, Lord Steyn was "careful to stress" that not every breach of international law would fall under the public policy exception (Adeline Chong, "Transnational Public Policy", *ibid* at 99).

68 Adeline Chong, "Public Policy of Third Countries", *ibid* at 38; as noted by Dickinson, *supra* note 50 at 76.

69 Article 21. As noted by Professors Mario Giuliano & Paul Lagarde, the predecessor Art 16 of the *Rome Convention* is a "precise and restrictively worded reservation." ("Report on the Convention on the law applicable to contractual obligations" [1980] OJ C282/1 at 38).

While the Regulation also provides for the application of forum mandatory rules in less "restricted" language, the concepts may operate as "two sides of the same coin",[70] and the word "manifest" nevertheless conveys that the conditions under which the forum is allowed to exclude a rule of the applicable law on the basis of forum public policy is "intended to be very narrow in scope".[71] Furthermore, the concept of tainting by foreign illegality, as in *Euro-Diam*, also does not appear to have been applied among the reported cases in Canada, and was applied just once in Australia (*Re O'Connor's Bills of Costs*[72]) and Hong Kong (*Ryder Industries Ltd v Timely Electronics Co Ltd*[73]), discussed below.[74] Even where tainting had applied, it is not clear if it was on the basis of the *lex fori*, as the relevant *leges causae* were Queensland[75] and Hong Kong law[76] respectively. As such, given the approach by foreign courts to forum public policy in general and tainting in particular, there is no reason for Singapore to apply tainting as a matter of forum public policy, if the proper law of the contract does not have the doctrine. Conversely, if the proper law of the contract is foreign law and has the tainting doctrine, the Singapore courts should naturally give effect to the proper law and its corresponding mechanism of tainting.[77]

An implication of viewing tainting as part of the proper law is that an incidental question may arise.[78] For example, the proper law may find that there is a sufficient connection between the two transactions, but under its choice of law rules, the collateral transaction is not illegal, although it is illegal according to the choice of law rules of the forum. It is noted though that jurists are divided[79] as to whether the

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70 Article 9(2). As indicated in nn 4-5, forum public policy may operate positively in the sense of applying a mandatory rule, and negatively in the sense that it can exclude an otherwise applicable law (Professor T C Hartley, "Mandatory Rules in International Contracts: The Common Law Approach" (1997) 266 Hague Recueil 341 at 350; Adeline Chong, "Public Policy of Third Countries", *supra* note 5 at 32; Richard Plender & Michael Wilderspin, *The European Private International Law of Obligations*, 3d ed (London: Sweet & Maxwell, 2009) at para 12.055).

71 Jonathan Hill & Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, 4th ed (Oxford: Hart Publishing, 2010) at para 14.3.28. Indeed, it was held in the context of the UK *Family Law Act 1986*, concerning the recognition of an overseas divorce, annulment or legal separation, that such exclusion on the basis of forum public policy was for "truly exceptional" cases (*Golubovich v Golubovich* [2010] 3 WLR 1607 at para 78 (CA); as noted by C M V Clarkson & Jonathan Hill, *The Conflict of Laws*, 4th ed (Oxford: Oxford University Press, 2011) at 51). Section 51(3)(c) of the Act provides that recognition of the validity of an overseas divorce, annulment or legal separation may be refused if it would be "manifestly contrary to public policy".

72 [1991] 1 Qd R 423 [*Re O'Connor's*].

73 [2016] 1 HKC 323 [*Ryder*].

74 *Infra* notes 153-161. In New Zealand, *Euro-Diam* was cited by the Wellington Court of Appeal in *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 at 287 [*Controller*], but the principle ultimately applied was that in *Regazzoni*, namely that "it is contrary to comity and public policy to assist" breaches of foreign revenue or penal laws. The decision in *Controller*, which was not related to contractual enforcement, was later applied in *Equiticorp Industries Group Ltd (in Statutory Management) v The Crown* [1998] 2 NZLR 481 at 679-681, but again on the principle in *Regazzoni*.

75 *Re O'Connor's*, *supra* note 72 at 426.

76 *Ryder*, *supra* note 73 at paras 8, 12.

77 This is given an understanding of the doctrine as operating as part of the proper law of the contract, as discussed in this section.

78 Yeo Tiong Min, "Restitution, Foreign Illegality and Foreign Moneylenders" (1996) 8:1 Sing Ac LJ 228 at 241.

79 *Cheshire, North and Fawcett*, *supra* note 12 at 52.

incidental question should be resolved in favour of the choice of law rules of the forum or proper law, or whether a contextual approach should be taken, considering the practical consequences in each situation.[80] As a preliminary view, since tainting is to be viewed as an application of the proper law, it would be odd to then construe the legal concept used in the proper law according to the forum instead.[81]

2. *Scope of illegality in question*

Although cases applying the doctrine have generally considered tainting in conjunction with the rule in *Foster*—a contract may be tainted if it was "closely connected" to an act intentionally done in a foreign friendly state violating the law of that state[82]—it may be possible to view tainting as applicable in relation to the other established conflict rules on foreign illegality and public policy. For example, an insurance claim for losses pursuant to another contract, which contravenes both forum domestic public policy and the domestic public policy of the place of performance,[83] may well be closely connected with the latter contract so as to be tainted and unenforceable. After all, there is no such constraint to the statement of the tainting doctrine in *Euro-Diam*;[84] what is apparently objectionable is the "sufficient connection" to a transaction that has been rendered unenforceable for illegality or public policy generally. However, whether the courts will apply the mechanism of tainting in relation to other conflict rules on illegality remains to be seen.

III. Proposed Approach to the Doctrine

The SGCA has noted uncertainties over the mechanism of the tainting doctrine. In *Teng Wen-Chung*, which concerned claims under an indemnity agreement governed by Singapore law, the SGCA rejected the defendant's arguments of foreign illegality to the effect that, *inter alia*, the indemnity agreement was part of a fraudulent scheme.[85] Given the defendant's inability to demonstrate the existence of such a scheme or any alleged involvement by the plaintiff bank, the tainting doctrine did not apply.[86] However, as the doctrine had been applied in the court below, the

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80 *Dicey, Morris & Collins*, *supra* note 9 at para 2.051. For example, A E Gotlieb has suggested the consideration of a wide variety of factors, such as the policy of the forum and the need for consistency among its decisions, the policies and public order of the foreign State or States concerned, the need to promote international harmony, and fairness and equity ("The Incidental Question Revisited: Theory and Practice in the Conflict of Laws" (1977) 26:4 ICLQ 734 at 797; as noted in T S Schmidt, "The Incidental Question in Private International Law" (1992) 233 Hague Recueil 305 at 364).

81 Schmidt, *ibid* at 369-370. Schmidt at 383 argues as well that the contextual approach may lead to unnecessary legal uncertainty.

82 Yeo, *supra* note 78 at 240. Such an act can be at the outset (as in *Euro-Diam*) or in the course of the performance of the contract (as in *Howard*). Any act which otherwise contravenes a forum mandatory law could also taint a claim.

83 Therefore, it would be unenforceable in Singapore courts, reading *Lemenda* in light of the subsequent decision of *Westacre*.

84 See nn 15-16, 30-31.

85 *Teng Wen-Chung*, *supra* note 17 at paras 4, 13-14.

86 *Ibid* at para 17.

CA nevertheless observed that there were "potential difficulties" with the decision in *Euro-Diam*, which would need to be revisited in the future.[87] First, it noted its principles would have to be re-examined given recent developments in domestic illegality, including the Court's distinction between procedural and substantive reliance in *Ochroid*, which called into question the *Bowmakers* principle as applied in the tainting doctrine.[88] Second, it observed that the *Beresford* principle, also applied in the tainting doctrine, was not part of Singapore law.[89] Finally, it noted Professor Forsyth's argument, as mentioned above, that the *Beresford* and *Bowmakers* principles should only be relevant if English law is the *lex causae*.[90] It is however submitted that the Court seemed to accept in principle the continued relevance of the doctrine, and rather noted a need to re-examine the criteria in applying the doctrine.[91]

Where the contract sought to be enforced is governed by Singapore law, it may be possible to somewhat align tainting principles in domestic illegality with those in foreign illegality. This is as developments in domestic illegality have reflected concerns of Singapore law in, *inter alia*, ensuring a proportionate result,[92] and that the outcome does not depend on "adventitious procedural" matters as may be caused by applying the principle in *Bowmakers* and *Tinsley*,[93] but considers normative or substantive reliance.[94] It would thus be incongruous for Singapore law to continue applying the discarded tests of *Bowmakers* and *Beresford* as they no longer reflect the prevailing normative position: this much was hinted at by the SGCA in *Teng Wen-Chung*.[95] As such, I will briefly consider developments in the Singapore law on tainting in cases of domestic illegality, before considering how such alignment may be possible for tainting by foreign illegality.

A. *Developments in the Singapore Law on Domestic Illegality*

A two-stage inquiry applies to the analysis of domestic illegality in Singapore. According to the SGCA in *Ochroid*, the court first ascertains whether the contract was prohibited either pursuant to a statute (expressly or impliedly) and/or an established head of common law public policy.[96] If it was so prohibited, there can be no recovery

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87 *Ibid*.

88 *Ochroid*, *supra* note 1; *Teng Wen-Chung*, *supra* note 17 at paras 20-22.

89 *Teng Wen-Chung*, *ibid* at para 23; Phang, *supra* note 41 at para 13.124.

90 *Teng Wen-Chung*, *ibid* at para 24; Forsyth, *supra* note 49 at 406.

91 *Teng Wen-Chung*, *ibid* at paras 22-23.

92 See nn 103, 149-150.

93 *Tinsley*, *supra* note 13.

94 *Ochroid*, *supra* note 1 at paras 134, 137, endorsing Lord Sumption's analysis in *Patel*, *supra* note 13 at para 237. Similarly, writing extra-judicially, Andrew Phang has endorsed Lord Sumption's analysis of a conception of "reliance" as entailing "*a direct causal link* between the illegality and the claim" [emphasis in original] (Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract—A Comparative Perspective" in Robert Merkin & James Devenney eds, *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (New York: Informa Law from Routledge, 2019) 178 at 216-217).

95 *Teng Wen-Chung*, *supra* note 17 at paras 22-23, 25.

96 *Ochroid*, *supra* note 1 at paras 40, 64.

pursuant to the contract.[97] However, for the very limited sphere of the category of contracts not unlawful *per se*, but entered into with the purpose of committing an illegal act, the principle of proportionality in *Ting Siew May* applies.[98] Second, if the contract was prohibited, the court considers whether there can be restitutionary recovery of the benefits conferred under the contract.[99]

In relation to the proportionality test in *Ting Siew May*,[100] relevant considerations include "(a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent and conduct of the parties; and (e) the consequences of denying the claim".[101] The SGCA in *Ting Siew May* further emphasised that this was not a closed list of factors to be applied rigidly, but to be considered in the context of each case.[102]

The proportionality test is not focused on sufficient connection as such, but is rather aimed at recognising that the court should not automatically strike down contracts "regardless of the relative importance (or unimportance) of the legal wrong committed", which might not even be related to the contract sought to be enforced.[103] However, some of its factors indicate sufficient connection to the illegality or illegal transaction, so as to be deemed objectionable and hence unenforceable by the *lex causae*. Furthermore, although the test in *Ting Siew May* seems to apply to a category of cases resembling *Foster*—that is, tainting by the commission of an illegal act—the illustration of sufficient connection according to these factors would not change even if one accepts that the tainting doctrine can apply more generally to other rules on foreign illegality and public policy.[104] While this paper seeks to illustrate how these factors could be relevant in cases of tainting by foreign illegality, they may not be applicable in all cases and should be drawn upon as called for by the facts of each case, similar to their operation in domestic tainting cases.

What about the role of proportionality then? On the one hand, it might be argued that the concept is not appropriate to the conflict context as it involves an examination of the "relevant policy considerations underlying the illegality principle... so as to produce a proportionate response."[105] If illegality here is parasitic on *foreign* statutory or policy objections, then it might be argued that Singapore courts are

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97 *Ibid*.

98 *Ibid* at paras 42, 65. The SGCA in *Ting Siew May*, *supra* note 1 at para 65 preferred the principle of proportionality to that of remoteness for its "simplicity and adaptability", and noted it has been part of the judicial approach towards illegality and public policy for a long time (citing *Saunders v Edwards* [1987] 1 WLR 1116 at 1134 (CA)).

99 The SGCA in *Ochroid*, *ibid* at paras 43-60, 147-148, 168, 176 identified at least three possible legal avenues for such recovery: (i) where parties are not *in pari delicto*; (ii) where the doctrine of locus poenitentiae applies; (iii) where the plaintiff brings an independent cause of action in unjust enrichment, tort or trusts; with the principle of stultification applying to claims in unjust enrichment, and tentatively to claims on tort and trusts as well.

100 As opposed to the "range of factors" approach, in which proportionality is a factor to be considered (*Ibid* at para 41).

101 *Ting Siew May*, *supra* note 1 at para 70; reproduced in *ibid* at para 38.

102 *Ting Siew May*, *ibid* at para 71; reproduced in *Ochroid*, *supra* note 1 at para 38.

103 *Ting Siew May*, *ibid* at para 47.

104 As suggested in Section II.B(2) above.

105 *Ting Siew May*, *supra* note 1 at paras 62, 66.

not well-placed to consider the gravity of a breach of foreign statute (Factor (b)) and weigh it against the consequences of breach (Factor (e)).[106] Yet, it is submitted that proportionality is nevertheless evidently a concern in practice. For example, in *Les Laboratoires*,[107] the UK Supreme Court in holding that *ex turpi causa* was inapplicable considered that the patentee's interests were adequately vindicated by the availability of damages for patent infringement in Canada, which would be deducted from any damages recovered pursuant to the undertaking.[108] There was "no public policy which could justify in addition" the forfeiture of the defendants' rights.[109] There, the Court had considered the enforceability of a claim for loss of payments made under a cross-undertaking (given in England), which was allegedly barred by illegality as payments would have been received pursuant to contracts which, while not unlawful under English law, would have involved breaching a Canadian patent.[110] The Court appeared to assume that "violations of foreign laws were to be treated in the same ways as violations of local laws" for the purposes of applying English rules based on the principle,[111] and applied the principles in *Tinsley* as the prevailing law.[112]

It is therefore proposed that a two-stage sequential test can apply in cases of tainting by foreign illegality, as part of the second step in the *Euro-Diam* inquiry: the test of sufficient connection at the first stage, and the test of proportionality at the second stage to ascertain where, for example, even if sufficient connection to illegality has been made out, it should not render a claim unenforceable given the minor nature of the illegality. Although the forum is naturally not *best* placed to consider the gravity of a breach of foreign law, this should not in principle preclude it from doing so to ascertain whether the illegality defence is made out. This in fact has been done in practice, as elaborated below.[113] Furthermore, the test of proportionality addresses concerns voiced elsewhere regarding the uncertain scope of foreign illegality and the need for a flexible test: while there may be cases where a "sufficiently serious breach of foreign law" in the performance of a contract reflecting "important policies of the foreign state" would make it contrary to public policy to

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106 An objection here may be similar to the one seen in the context of the governmental interest analysis approach to choice of law. For example, even where rules of law are statutory, ascertaining their policy may not be easy and courts may well end up making assumptions (The Law Commission & the Scottish Law Commission: *The Law Commission Working Paper No. 87 and The Scottish Law Commission Consultative Memorandum No. 62, Private International Law: Choice of Law in Tort and Delict* at para 4.42 [*Working Paper No. 87*]). However, the courts will be assessing these matters with the help of parties (Adeline Chong, "Public Policy of Third Countries", *supra* note 5 at 36). Furthermore, the assessment of the gravity and effects of the breach under the tainting doctrine would not encounter the more fundamental problems with governmental interest analysis, such as that it may involve a weighing of different state interests (*Working Paper No. 87* at paras 4.36, 4.38).

107 *Les Laboratoires*, *supra* note 46.

108 *Ibid* at para 30.

109 *Per* Lord Sumption in *ibid* at para 30.

110 *Ibid* at paras 47, 54.

111 Lord Collins of Mapesbury *et al.* eds, *Dicey, Morris & Collins on The Conflict of Laws: Fifth Cumulative Supplement to the Fifteenth Edition* (London: Sweet & Maxwell, 2018) at para 32.102 [*Dicey, Morris & Collins (Supplement)*].

112 *Les Laboratoires*, *supra* note 46 at para 20.

113 *Infra* notes 153-161.

enforce a contract, "there is no basis in authority or principle" that all breaches of foreign law should be so considered.[114]

B. *Proposed Approach to Tainting by Foreign Illegality*

I next consider how individual factors have featured in the cases. As noted above, while the factors discussed here were endorsed by the SGCA in *Ting Siew May*, the Court had also emphasised that the list was not necessarily a conclusive one and that the factors should not be applied in a "rigid or mechanistic fashion", but weighed in accordance with the "fact-centric" nature of the illegality inquiry.[115] In a similar vein, it might be possible to take reference from factors proposed elsewhere, for example by the Law Reform Committee of the Singapore Academy of Law in its report in the subject.[116] It would appear that these other factors go towards proportionality, rather than sufficient connection.

1. *Stage 1: Sufficient connection*

(a) *Undermining the purpose of the prohibiting rule*: As tainting has typically been applied to *Foster*-type situations so far, the "prohibiting rule" in this context would for practical purposes be the relevant foreign law which was or will be contravened.[117] Even if a broader role is accepted for tainting such that it may apply to

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[114] *Per* Lord Collins in *Ryder*, *supra* note 73 at para 57; as noted in *Dicey, Morris & Collins (Supplement)*, *supra* note 111 to para 32.102 and Adam Johnson, "Foreign Law Illegality: Where are We Now?" (2018) 77:3 Cambridge LJ 475 at 476-477. Lord Collins' statement was in the context of rejecting the submission that the Hong Kong Court should treat a contract governed by Hong Kong law as unenforceable due to "incidental breaches" under PRC law in its performance (at para 58). It is not argued here that proportionality should be applied across the existing rules of foreign illegality, which are arguably *already* proportionate in their application. For example, the English Court of Appeal in *Ispahani v Bank Melli Iran* [1997] All ER (D) 124 found that an "essential and necessary element" of the rule in *Foster* was the carrying out of prohibited acts within the territory in question; as international comity is "naturally much readier to accept that a country's laws ought to be obeyed within its own territory". On such a view, the role of proportionality is then to guard against instances where, although sufficient connection to illegality is made out, it might nevertheless be disproportionate to enforce the related claim as, for example, remedies under the foreign law would sufficiently compensate for the breach, as in *Les Laboratoires*.

[115] *Ting Siew May*, *supra* note 1 at para 71, reproduced in *Ochroid*, *supra* note 1 at para 38 [emphasis in original].

[116] Law Reform Committee, "Relief from Unenforceability of Illegal Contracts and Trusts", online: Singapore Academy of Law <https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2002-07%20-%20Illegal%20Contracts%20and%20Trusts.pdf> [*Law Reform Committee Report*]. In the report, the Law Reform Committee suggested that the court in deciding whether to grant relief to any party to an illegal transaction (or claiming through such party) might have regard to circumstances including, apart from those mentioned by the SGCA in *Ting Siew May*, the extent to which the illegal transaction had been performed; the extent of compliance to the written law which had rendered the transaction illegal; and whether the written law provided for relief (Draft Bill, ss 5-6); these were referred to in *Ting Siew May*, *ibid* at para 69.

[117] There may be similarities here with the effect of a potentially illegal contract on the validity of its provision for arbitration, although there are distinct commercial considerations in favour of upholding arbitration agreements. The English courts have considered that while an arbitration agreement can be invalidated only on a ground relating to the arbitration agreement, "if the public policy ground on which

conflict rules on illegality generally, the factor would make sense in connection with the other rules. In *Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited,* concerning an alleged illegal purpose behind variations to a facility agreement governed by English law (where the operative facts were said to have occurred in the Republic of Tanzania),[118] Flaux J appeared to apply this factor without much difficulty, as he considered whether allowing the claim would undermine "the purpose for the rule against fraud, to prevent misappropriation of assets".[119] But it is likely that ascertaining the policy of the underlying rule would be far less straightforward in most cases of foreign illegality. Indeed, the difficulty of doing so has been acknowledged even for domestic illegality.[120] Yet, this factor has been highlighted as an "important" policy behind the (domestic) illegality defence by the UK Law Commission,[121] remains the first consideration in the framework

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the underlying contract is unenforceable also taints the arbitration agreement, the latter will similarly be unenforceable"ž (*Beijing Jianlong Heavy Industry Group v Golden Ocean Group* [2013] EWHC 1063 (Comm) [*Beijing Jianlong*] at paras 25-26, citing *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at para 19 and *Harbour Assurance Co. (U.K.) Ltd v Kansa General International Insurance Co. Ltd. and others* [1993] QB 701 at 724). For example, in *Beijing Jianlong*, the English High Court considered the effect of the unenforceability of English law guarantees—due to its alleged contravention of the rule in *Foster*—on its provisions for arbitration in London. The arbitration agreement was said to be part of a scheme to execute these guarantees, which were illegal under Chinese foreign exchange regulations. As the arbitration provisions required nothing to be done in China, Mackie QC found that they would not have been unenforceable under *Foster* for being contrary to international comity. Thus, he held that "the policy and purpose of the rule" invalidating the guarantees did not strike down the arbitration provisions (*Beijing Jianlong* at paras 1, 12-15, 21, 41). The illegality of the guarantees (and the arbitration agreements being part of that unlawful scheme) was assumed for the purpose of the case, which was an appeal against earlier tribunal findings that the arbitration agreements were not void or unenforceable.

118 *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] EWHC 2908 Comm (QB) [*Standard Chartered Bank*] and [2016] EWCA Civ 411 (CA), citing the decision of Marrero J in earlier proceedings in New York.

119 *Standard Chartered Bank* , *ibid* at para 147. The case concerned claims by two bank subsidiaries against a Tanzanian company for, *inter alia*, sums due under a facility agreement governed by English law. Both the first defendant, Independent Power Tanzania Limited, and the second defendant, a 30% shareholder of the first defendant, were based in Tanzania. The defence based on an alleged illegal purpose behind variations to the facility agreement, namely to defraud the first defendant, was rejected as "inherently fanciful". Further, Flaux J opined that even if the illegality case had any "proper factual basis", it would not constitute a defence. Here, he appeared to assume the applicability of the decision in *Patel* to cases of foreign illegality: applying its principles, he held that allowing the claims would not so undermine the purpose for the rule against fraud as the claim concerned repayment of sums pursuant to a loan, and thus would not give effect to a fraud or amount to the claimants profiting from wrongdoing. Additionally, the alleged illegality of the payments was "entirely collateral to and remote from the loan". Notably, the authors of *Dicey, Morris & Collins* have suggested that while *Patel* did not concern foreign illegality, there may be merit in extending its more flexible approach to cases involving the violation of foreign laws, such as in *Les Laboratoires* and *Ryder* (both of which pre-dated the decision in *Patel*). (*Dicey, Morris & Collins (Supplement*), *supra* note 111 to para 32.102).

120 The UK Law Commission in *Consultation Paper No 189*, *supra* note 23 accepted that this policy underlying illegality, of "furthering the purpose of the rule which the claimant's illegal behaviour has infringed" would not be easy to apply in all cases, given difficulties in determining the purpose behind any particular invaliding rule. Furthermore, the operation of this rationale could conflict with others, in which case the courts would have to decide which should be preferred. Yet it argued that this was an "important policy [underlying the illegality defence], justify[ing] its operation in many cases" (at para 2.12).

121 *Ibid* at paras 3.126-3.127. The factors proposed by the Commission were tied to the policies underlying the illegality doctrine (at para 3.125).

for common law illegality by the majority in *Patel*,[122] and is part of the *Ting Siew May* framework in Singapore.[123] Thus it ought to be a consideration in principle, where relevant. It is noted that the Singapore International Commercial Court had previously considered this factor in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*,[124] although this was on an application of Indonesian law as the proper law of the contract.[125]

(b) *Proximity of the illegality to the contract*: As elaborated on in *Ting Siew May*, this factor inquires into "how closely the unlawful conduct is connected to the particular claim."[126] It is similar to the principle of remoteness, namely that there must be some "real or central (and not merely remote) connection between the contract and the unlawful intention.[127]

Proximity was implicitly considered in *Euro-Diam,* where Staughton J stated that it was neither proven nor suggested that breaches of German law "caused or contributed to the loss of the diamonds in any way;" similarly, on appeal, Kerr LJ stated that the understated invoice "had no bearing on the loss of the diamonds".[128] That said, Staughton J's observation was made in the context of ascertaining whether the breaches of German law afforded the insurers a defence generally, and Kerr LJ's in considering whether it would be, *inter alia*, "an affront to public conscience" to grant the plaintiff the relief he sought, as the court might thereby appear to be assisting the plaintiff in his illegal conduct.[129]

Proximity was also a factor in *United City Merchants (Investments) Ltd. v Royal Bank of Canada*,[130] which was considered in *Euro-Diam*. In the former case, a credit contract (for payments in London, issued by Royal Bank of Canada as the confirming bank) was held to be tainted and unenforceable with regard half of its proceeds as it was "an essential part of a [transaction]" to exchange Peruvian currency, contrary to the exchange control regulations in Peru.[131] But payment under the documentary credit for the other half of the invoice price was enforceable, as it represented the genuine purchase price of the subject goods.[132] Proximity was therefore relevant in

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122 *Patel*, *supra* note 13.

123 It was also proposed in the *Law Reform Committee Report*, *supra* note 16, here at para 7.39. The Committee noted that Professor G.H. Treitel had suggested this question ought to be "the decisive issue in all cases."

124 [2016] 4 SLR 1 (HC(I)) [*BCBC Singapore*].

125 *Ibid* at paras 172, 180, 192, 213. In *BCBC Singapore*, the Court considered whether the supply of coal under a side letter (governed by Singapore law) and coal supply agreements (governed by Indonesian law) were or would have been illegal, or entered into for an illegal purpose under Indonesian law. It considered, *inter alia*, whether the "effect" of the letter and the agreements "frustrate[d] or undermine[d] the underlying objectives" of the relevant Indonesian law. This was as parties' experts on Indonesian law were on common ground that any agreement entered into for the purpose of circumventing an Indonesian Regulation would be regarded as an agreement with a "prohibited cause" under Indonesian Civil Code, and would therefore be invalid and unenforceable.

126 *Ting Siew May*, *supra* note 1 at para 67.

127 *Ibid*.

128 *Euro-Diam*, *supra* note 13 at 11, 37.

129 *Ibid* at 11-12, 37.

130 [1983] 1 AC 168 (HL) [*United City Merchants* (HL)].

131 *Ibid* at 190; *per* Staughton J in *Euro-Diam*, *supra* note 13 at 24, to enforce that portion "would achieve a criminal objective".

132 *United City Merchants* (HL), *ibid* at 190.

considering the extent to which enforcing the credit contract would have been tantamount to "giv[ing] effect" to the impugned act of currency exchange,[133] although it is noted that Staughton J in *Euro-Diam* considered unenforceability on that basis as an issue of tainting within the *Beresford* principle.[134]

It is argued that this factor of proximity, as well as the first factor of considering the purpose of the prohibiting rule, also substantiates the SGCA's acceptance in *Ochroid* of the concept of substantive (as opposed to procedural) reliance.[135] The SGCA in *Ochroid* had opined that the former sense of reliance—that is, where a "plaintiff seeks to enforce, and thereby profit from, the illegal contract" via his claim—was "legally impermissible", offending the fundamental principle that there could be no recovery pursuant to an illegal contract.[136] These two factors certainly indicate where there might be such reliance, in a normative sense, on an illegal contract.

(c) *Parties' object, intent, and conduct*: Just as the courts in dealing with tainting by domestic illegality consider the conduct of parties in deciding whether to enforce the plaintiffs' claim,[137] the knowledge, intent and conduct of the plaintiff has been considered by the courts in cases of tainting by foreign illegality.

In *Euro-Diam*, Staughton J found that the managing director of the plaintiffs "must have realised" the object of the false invoice, which was to deceive the German customs, and "must have appreciated that such conduct would be unlawful in Germany".[138] However, it was not proven that the managing director was aware of the alleged agent's offences.[139] In any case, it appeared that such knowledge (albeit constructive) would have been insufficient to bar the plaintiffs' claim, as Staughton J did not ultimately consider that there was sufficient connection between illegal activities by German law and the insurance contract to render the latter tainted and thus unenforceable.[140] Apart from the aforementioned lack of proximity, other factors which militated against the illegality defence in the case included a finding that there

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133 *Ibid*.

134 *Euro-Diam*, *supra* note 13 at 24.

135 As recognised by the SGCA in *Teng Wen-Chung*, *supra* note 17 at paras 21-22. Interestingly enough, the UK Law Commission in *Consultation Paper No 189*, *supra* note 23 at para 7.24 opined that the proximity-based test, which "looks at the closeness of the connection between the claimant's loss or injury and the illegal conduct"—and was increasingly applied by the courts during the time of the report—afforded a "certain amount of flexibility" that the *Tinsley* reliance test did not have.

136 *Ochroid*, *supra* note 1 at para 128 [emphasis in original].

137 *Ting Siew May*, *supra* note 1 at para 70. As noted by the UK Law Commission, this is "most obviously illustrated" in cases of illegal purpose and performance, where the courts will only deny a plaintiff relief if he has "participated" in the illegality" (*Consultation Paper No 189*, *supra* note 23 at para 3.134). The Law Reform Committee had previously also recommended that while the law on when a contract or trust is illegal should not change, courts and arbitrators should be empowered to afford relief in their discretion considering, *inter alia*, "the knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it" (*Law Reform Committee Report*, *supra* note 16 at para 8.3). The Committee opined however that this should not be a matter of weighing the plaintiff's "guilt" against that of the defendant; as the illegality defence acts to deprive the plaintiff of rights or remedies it would otherwise have been able to claim, it should only be the plaintiff's conduct that is relevant (*Law Reform Committee Report*, *ibid* at para 7.37).

138 *Euro-Diam*, *supra* note 13 at 8, 11.

139 *Ibid* at 11.

140 *Ibid* at 24.

was no agreement between the managing director and the third party that the invoice "would in fact be used to deceive the German customs", and the plaintiffs had not intended that it would be so used.[141] The understated invoice had also not involved any deception of the insurers, as the plaintiff's register had recorded its true value and paid the correct premium, as noted by Kerr LJ.[142]

Similarly, in *United City Merchants*, the House of Lords might have been inclined to enforce part of the credit contract as, although it was previously found that "the [second] plaintiffs were prepared to close their eyes to the implications" of what the third party sellers was asking them to do,[143] it did not appear that the ultimate parties to the letter of credit knew of any infringement of Peruvian law.[144] K S Rajah JC in *Chua Kok Kay* also cited *United City Merchants* for the proposition that knowledge by the plaintiffs could establish a legal connection sufficient to taint, although he did not ultimately find that the alleged illegality was relevant.[145] Overall, it is likely that sufficient connection might be found only where the claimants had actively participated in the illegality—not mere acquiescence,[146] but a knowing conspiracy.[147]

2. *Stage 2: Proportionality*

The principle of proportionality recognises that there are "degrees of illegality".[148] Where legal wrongs intended to be committed by parties are "relatively trivial", it might be disproportionate for courts to refuse enforcement.[149] However, a countervailing consideration is certainty. Thus in the domestic illegality context, the SGCA rejected the *Patel* majority approach of applying a balancing exercise across all cases of illegality at common law, but was prepared to accept "*some* uncertainty" for contracts not unlawful *per se*—in the sense of being expressly or impliedly prohibited

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141 *Ibid* at 32.

142 *Ibid* at 37. Kerr LJ emphasised that the misleading invoice was issued solely for the benefit of the importers; any benefit accruing to the claimants was merely "some intangible indirect benefit" in the form of goodwill (*Euro-Diam*, *supra* note 13 at 34; R A Buckley, *Illegality and Public Policy*, 3d ed (London: Sweet & Maxwell, 2013) at para 4.18).

143 Namely, the "extraordinary nature of the request to double the invoice price" and pay surplus money over to an account in Miami. (*United City Merchants (Investments) Ltd v Royal Bank of Canada (No 2)* [1979] 2 Lloyd's Rep 498 at 503 (QB) [*United City Merchants (QB)*]).

144 At least on the part of the second third party who had issued the letter of credit and the defendant. (*United City Merchants (QB)*, *ibid* at 503). The knowledge of the first plaintiff was not explicitly discussed, with Mocatta J simply discussing that of the second plaintiffs, as it was accepted that "their assignees [the first plaintiff] [were] in a no better position" (*United City Merchants (QB)* at 500).

145 *Chua Kok Kay*, *supra* note 38 at paras 65, 82-88, cited in *Bhagwandas*, *supra* note 3 at para 31.

146 *Consultation Paper No 189*, *supra* note 23 at para 7.39.

147 Thus, possibly similar to the courts' approach to the rule in *Foster*, which is engaged where a party to a contract "actively engage(s)" in the illegal adventure (*Patriot Pte Ltd v Lam Hong Commercial Co* [1979-1980] SLR (R) 218 at para 10 (CA)). Similarly, LP Thean J (as he then was) in *Dimpex Gems (Singapore) Pte Ltd v Yusoof Diamonds Pte Ltd* [1987] SLR (R) 349 at paras 6-7 (HC) held that while the plaintiffs who had sold and delivered to the defendants goods in Singapore might have been aware that the defendants would then smuggle the goods into Malaysia without paying customs duty, "mere knowledge" without "active participation" did not constitute a defence (see also David Chong, "Contractual Illegality" at 331).

148 *Ting Siew May*, *supra* note 1 at para 46.

149 *Ibid.*

by statute or an established head of common law public policy—but rather "tainted by illegality", "involv[ing] the commission of a legal wrong either in their formation, purpose or manner of performance".[150] This would suggest that proportionality should only apply in a limited sense: not to all instances of foreign illegality, but for the category of contracts tainted due to sufficient connection to illegality.[151] This would additionally have the virtue of aligning the approaches here to tainting by domestic and foreign illegality, insofar as the principle of proportionality ultimately limits the claim.[152]

(a) *Nature and gravity of the illegality*: The nature and gravity of the illegality sufficient to taint was considered in *Re O'Connor's*, where a solicitor who was qualified to practice in Queensland had sought payment under a contract, governed by Queensland law, for work he had illegally done in New South Wales, where he was not so qualified.[153] The contract did not require that he work in New South Wales, but he had chosen a mode of performance that was illegal.[154] Derrington J stated that while some conduct in the performance of a contract in a foreign state might be "so criminal or anti-social" as to justify refusing enforcement as a matter of public policy, "not every illegal act gives rise to the application of this principle."[155] Thus he considered that the solicitor's transgression of illegally doing work in New South Wales was not of such gravity as to give rise to the principle of *ex turpi causa*, and the solicitor was permitted to enforce the contract.[156] Such a view of considering the gravity of the illegality was affirmed by Lord Collins of Mapesbury in *Ryder*, as noted above.[157] Thus in *Ryder*, concerning claims pursuant to a joint venture to manufacture mobile phones in China, the Hong Kong Court of Final Appeal found that even if the claimant had intended in its manufacturing to commit the customs breach of using materials imported duty-free without first obtaining approval, these were "not a very serious contravention of the law. . . [but] mere administrative contraventions".[158] To refuse enforcement of the contract in the case would "be contrary to common-sense and justice".[159]

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[150] *Ibid* at para 47; *Ochroid*, *supra* note 1 at para 31 [emphasis in original]. The SGCA in *Ochroid* at para 123 opined that the scope of uncertainty contemplated by the approach in *Ting Siew May* was "much reduced" as it was confined to "only a residuary area of common law illegality", and "anchored" to the "overarching principle of proportionality", which the courts are accustomed to applying in the context of assessing damages in civil proceedings and the taxation of costs, among others).

[151] As noted at n 114, existing rules of foreign illegality arguably already operate in a proportionate manner.

[152] *Ochroid*, *supra* note 1 at para 36.

[153] *Re O'Connor's*, *supra* note 72 at 426 and 428.

[154] *Ibid* at 429.

[155] Derrington J noted that even in "purely domestic cases" where there was no express prohibition against recovery, cases where the court would refuse enforcement due to public policy were those where enforcement was against public interest and would "shock the public conscience" (*Re O'Connor's*, *ibid* at 430, citing *Gray v Barr* [1971] 2 QB 554 (CA), *Euro-Diam* and *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745 (CA)).

[156] *Re O'Connor's*, *ibid* at 430. Derrington J therefore considered the issue being, at its core, one of the seriousness of the illegality such that "the court will not, as a matter of public policy, uphold the claim"; as opposed to a "technical question" of whether an illegal contract should be enforced "simply because it would be wrong to enforce the doing of an illegal act".

[157] See n 114, citing *Euro-Diam* and *Re O'Connor's*.

[158] *Ryder*, *supra* note 73 at paras 22, 59.

[159] *Per* Lord Collins in *Ryder*, *ibid* at para 59.

On both the facts of *Re O'Connor's* and *Ryder*, sufficient connection between the illegality and the claim might have been made out—in *Re O'Connor's*, recovery on the bill of costs in Queensland, for the work illegally done in New South Wales, and in *Ryder*, the usage of materials for production pursuant to joint venture agreements. But it was more so on the basis of insufficient gravity of the illegality that the illegality defence would fail. In *Re O'Connor's*, the seriousness of the solicitor's conduct was insufficient to engage the *ex turpi causa* principle (in the view of domestic Queensland law).[160] In *Ryder*, apart from the fact that there was no finding that the claimant always intended to commit the illegality, the minor nature of such "administrative contraventions" was determinative.[161]

(b) *Consequences of denying the claim*: Both the nature and gravity of the illegality as well as the consequences of denying the claim were considered in *Les Laboratoires*.[162] In considering what constituted "turpitude" for the *ex turpi causa* defence, Lord Sumption was of the view that criminal and quasi-criminal acts were to be distinguished from others which were tortious or contractual in nature.[163] Only acts in the former category engaged the public interest, which he considered "the foundation of the illegality defence".[164] Acts in the latter category, including patent infringement in the premises, offended against interests which were "essentially private".[165] In such cases, he stated, there was no reason for the law to withhold its ordinary remedies, as the public interest would be sufficiently served with the presence of a system of corrective justice to regulate the consequences between parties.[166]

It therefore appears that where the illegality in question offends private interests, the courts may see less reason to refuse enforcement of a contract. In arriving at their decision, the courts will also consider the availability of redress for that breach (outside of the proceedings for enforcement). Here, Lord Toulson additionally noted that there was public interest in the enforceability of cross-undertakings, which he saw as a "standard and valuable feature of litigation".[167] There was also no "good public policy reason" why the claimant "should be in a better position than if the English injunction had not been granted", or why the defendant should be required to give greater credit for its breach of Canadian patent, than had already been assessed by the Canadian court as reflecting that breach.[168]

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160 *Re O'Connor's*, *supra* note 72 at 430. Derrington J and the authors of *Ngyh's Conflict of Laws in Australia* have observed that in such instances where a party seeks counter-performance (in a manner not illegal) for illegal acts already performed, the question is one of taint; as compared to where a party seeks to enforce contractual performance that would be illegal in the place of performance, in which case it would be more clear that comity might require the forum court not enforce performance of illegal acts. (*Re O'Connor's* at 429-430; M Davies, A S Bell & P L G Brereton, *Ngyh's Conflict of Laws in Australia*, 9th ed (London: LexisNexis, 2014) at para 19.80).

161 *Ryder*, *supra* note 73 at para 59.

162 *Les Laboratoires*, *supra* note 46 at para 30.

163 *Ibid* at para 28.

164 *Ibid.*

165 *Ibid*.

166 *Ibid* at para 22. In so holding, Lord Sumption was sensitive to the "draconian" consequences which could be caused by an overly wide scope for the *ex turpi causa* principle.

167 *Ibid* at para 63.

168 *Ibid*.

IV. Conclusion

This paper has argued that it is possible to see the considerations in assessing tainting by domestic illegality reflected in cases involving foreign illegality. In relation to the doctrine of tainting by foreign illegality, it is proposed that the Singapore courts may draw on certain factors in the *Ting Siew May* framework as elucidating the existence of "sufficient connection". Further, they may consider its other factors in possibly assessing the proportionality of denying the claim. This would be in line with the more flexible approach to foreign illegality seen in recent cases such as *Ryder*.It is argued that this is a possible way forward for the tainting doctrine, given that its mechanism is currently uncertain—its principles have since been departed from in cases of domestic illegality, in favour of a more nuanced approach considering the policies involved[169] and the need for proportionality. My proposed approach is premised on the view that the tainting doctrine operates as part of the proper law of the contract. This would be consonant with the imperatives of party autonomy and certainty,[170] while still giving effect to the policies underlying the law on illegality and public policy.[171] Where Singapore law governs the contract sought to be enforced, further congruence with the law on domestic illegality is possible and desirable.

[169] For example, the proportionality test has as one of its factors the undermining of the purpose of the prohibiting rule; and the courts apply the principle of stultification to restitutionary recovery pursuant to a prohibited contract.

[170] See nn 53-63.

[171] See nn 1-3.