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CONTRACTS, ILLEGALITY AND COMITY: *RALLI BROS* REVISITED

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ABSTRACT. *There has always been considerable uncertainty about the nature and scope of the rule by which contractual performance is excused if illegal in the place of performance, even though performance would not be illegal by the contract's governing law. This article revisits the so-called "Ralli Bros rule" and looks at how the scope of the rule has been developed and its nature misunderstood. It argues that the rule is neither a choice of law rule nor part of the rules discharging a contract for frustration but is instead a public policy rule favouring judicial abstention for reasons of comity. This has implications for how the rule interacts with the choice of law rules for contracts under the Rome Convention and the Rome I Regulation.*

KEYWORDS: *choice of law, conflict of laws, contracts, frustration, illegality, public policy.*

I. INTRODUCTION

An English court will not enforce performance of a contract if its performance is, or has become, illegal in the place of performance (the *lex loci solutionis*), even if there is no illegality under the law governing the contract (the *lex causae*). This is the rule in *Ralli Bros*.[1] It has to be described by reference to the case which is associated with the rule because a neutral title is impossible. There is no consensus about its nature and scope: indeed, as will be seen, even the summary offered in the first sentence of this article is open to considerable debate. In the immediate aftermath of the case, *Ralli Bros* was taken as articulating a choice of law rule. However, for most of its life, the prevailing (but by no means universal) view has been that *Ralli Bros* is a part of the rules of frustration that apply to contracts governed by English law. The absence of common ground as to the nature of the

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[1] *Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 1 K.B. 614 (KBD) and [1920] 2 K.B. 287 (CA). For ease of reference, the abbreviations *Ralli Bros (KBD)* and *Ralli Bros (CA)* are hereafter used.

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rule has led to considerable uncertainty about its scope, and even its continuing existence. Does the same rule apply in cases of foreign illegality subsisting at the time of contracting, as opposed to supervening foreign illegality? Could the rule be applied to contracts not governed by English law? Has the rule been repealed and replaced by the legislative reforms on choice of law for contracts, particularly the Rome I Regulation?[2]

This article offers a new perspective on *Ralli Bros*. It argues that the rule should be understood neither as a choice of law rule nor as part of the rules discharging a contract for frustration but rather as a public policy rule favouring judicial abstention for reasons of comity. It is a decision by the English courts not to enforce performance of a contract otherwise enforceable by its governing law where performance is stipulated to be in a place where it is prohibited. That abstention reflects the common law's deep-seated respect for the territorial sovereignty of other states. This new perspective assists in resolving controversies on the scope of the rule. In particular, once the rule is seen in this light, it becomes easier to understand how it interacts the Rome I Regulation which now occupies the field on choice of law in contracts.

II. Ralli Bros v Compañia Naviera Sota y Aznar

A. The Litigation

In July 1918, Ralli Bros sold a large cargo of jute to a Spanish company called Godo & Co. Jute was a particularly valuable commodity during the First World War because it was used for sandbags for the trenches on the Western Front. The firm chartered a steamship called the *Eretza Medni* from another Spanish company called Compañia Naviera Sota y Aznar in order to deliver the jute to Godo & Co. The freight, at £50 per tonne, was said to be largest to have been earned during the First World War.[3] The *Eretza Medni* set sail from Calcutta to Barcelona. However, mid voyage, in September 1918, a Spanish Royal Decree fixed the freight for the transport of jute from India to Spain to no more than 875 pesetas per tonne. On arrival in Barcelona in early January 1919, Godo & Co. informed the captain that the freight payable was limited to that amount under Spanish law. They refused to pay any greater sum. Compañia Naviera sought the balance under the terms of charterparty from Ralli Bros.

In the High Court, Bailhache J. held that Ralli Bros was not liable for freight above the level of 875 pesetas per tonne. The judge's starting point was that charterparty was governed by English law, that choice being implied from the English arbitration clause under the supervision

[2] Regulation (EC) No. 593/2008. Hereafter the Rome I Regulation.
[3] *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 K.B. 172 (CA), 208, per Atkin L.J.

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of the High Court in London. Bailhache J. went on to consider the conflicting case law on the effect of foreign illegality. In earlier cases the court had refused to give any effect to foreign illegality,[4] whereas in later cases the court allowed foreign illegality to excuse performance.[5] Bailhache J. reconciled those cases by holding that foreign illegality by the law of the place of performance could excuse performance only where "it affects both parties alike" and not where the inability to perform was "of one of the contracting parties only".[6] On the facts, Bailhache J. held that *Ralli Bros* fell into the former category because the terms of the contract demanded that the freight both be paid and be received in Spain and therefore would involve illegal performance by both Ralli Bros and Compañia Naviera.[7]

Compañia Naviera appealed, but this was dismissed by the Court of Appeal. While three separate judgments were delivered, each of Lord Sterndale M.R., Warrington and Scrutton L.JJ. adopted a consistent tripartite approach to the issue. First, all of the judges agreed with Bailhache J. that the charterparty was governed by English law and that by its terms the freight was to be paid in Spain.[8] Second, they held that Ralli Bros was to be excused from paying the excess freight, each Lord Justice of Appeal citing with approval from Dicey's second edition of the *Conflicts of Law* the following rule: "A contract (whether lawful by its proper law or not) is, in general, invalid in so far as … the performance of it is unlawful by the law of the country where the contract is to be performed".[9] Scrutton L.J. added that this rule was concerned with "the obligations of international comity as now understood".[10]

Third, and differing from the judgment of Bailhache J., the Court of Appeal did not limit the rule to illegality affecting the performance of both parties. The judges overruled the cases which Bailhache J. thought required that limitation, on the basis that they were decided before the development of the rules by which a contract could be discharged for frustration. Lord Sterndale M.R. referred to this development elliptically as the "qualification" of "the doctrine that a person who has contracted absolutely to perform a contract must do so whatever the difficulties".[11] Warrington and Scrutton L.JJ. considered that Ralli Bros was to be excused on "an implied condition … that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country".[12]

[4] *Sjoerds v Luscombe* (1812) 104 E.R. 1065; *Barker v Hodgson* (1814) 105 E.R. 612.
[5] *Ford v Cotesworth* (1869–70) L.R. 5 Q.B. 544; *Cunningham v Ford* (1878) 3 C.P.D. 443.
[6] *Ralli Bros (KBD)*, 635.
[7] Ibid., at p. 635.
[8] *Ralli Bros (CA)*, 290–91, per Lord Sterndale M.R.; 293–94, per Warrington L.J.; 299, per Scrutton L.J.
[9] Ibid., at pp. 291, per Lord Sterndale M.R.; 295, per Warrington L.J.; 300, per Scrutton L.J.
[10] Ibid., at p. 300.
[11] Ibid., at p. 291.
[12] Ibid., at p. 296, per Warrington L.J.; see also pp. 300–01, 304, per Scrutton L.J.

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This should also be understood to be a reference to law of frustration, which was at that time explained by reference to the existence of an implied term.[13] The earlier cases which conflicted with the recognition of this rule were again distinguished as predating the doctrine of frustration.[14]

There is an obvious ambiguity in the reasoning adopted by the Court of Appeal. On the one hand, by citing *Dicey* and raising issues of international comity, the judges appeared to be adopting a conflict of laws analysis of the issue. On the other, their reliance on the development of the doctrine of frustration suggested an English law contractual approach to the problem. That ambiguity has given rise to conflicting perspectives of the *Ralli Bros* rule over time.

B. Conflicting Perspectives of Ralli Bros

The prevailing academic and judicial view now is that *Ralli Bros* is a contract rather than a conflicts rule.[15] However, *Ralli Bros* was originally taken to be articulating a rule of private international law. That perspective was confirmed in a trilogy of decisions given by Lord Wright, who had acted as leading counsel for Compañia Naviera in *Ralli Bros*. Once on the bench, he insisted that the rule was "based on the principle that it is contrary to the comity of nations that the Court of one country should seek to enforce the performance of something in another country which is forbidden by the law of that country",[16] and that this was "part of the English law which is commonly called the conflict of laws".[17] Lord Wright went even further and reasoned that the rule recognised by *Ralli Bros* applied a law other than the proper law or *lex causae* (i.e. the law chosen by the parties) to a contract: "It is established that prima facie, whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract".[18]

This use of *Ralli Bros* to create an exception to the general rule that a contract should be governed by the law by which the parties intended to contract led to the reinterpretation of *Ralli Bros* as part of the rules of frustration for contracts governed by English law. That revisionism began with F.A. Mann. Writing in the 1937 *British Yearbook of International Law*, his starting point was that: "It is the function of private international law to

[13] See further *Chitty on Contracts*, 33rd ed. (London 2018), [23.010]–[23.011].
[14] *Ralli Bros (CA)*, 297, per Warrington L.J.; 300, 303, per Scrutton L.J.
[15] *Chitty on Contracts*, 33rd ed., [23.027], [30.284]. *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed. (London 2012), [32.100].
[16] *R. v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500 (CA), 519.
[17] *Vita Food Products Inc. v Unus Shipping Co. Ltd.* [1939] A.C. 277 (PC), 291.
[18] *Adelaide Electric Supply Co. Ltd. v Prudential Assurance Co. Ltd.* [1934] A.C. 122 (HL), 151.

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answer the question which of two or more conflicting legal systems shall prevail … If any individual law has been found to be applicable, no further question of private international law is involved and the case is governed by the duly ascertained municipal law".[19]

On Mann's argument, once the Court of Appeal in *Ralli Bros* had determined the charterparty was governed by English law, the choice of law analysis was complete. The question of supervening foreign illegality was thus for English contract law not private international law. In particular, Mann seized upon the references to the development law of frustration in the judgments in *Ralli Bros* itself to argue that "it thus seems clear that *Ralli's* case turned on the doctrine of impossibility of performance in English law which was the proper law".[20] Accordingly, the case on its own terms was "not relating to the conflict of laws" but was "a simple rule of English law of contracts".[21]

Mann's textual reading of *Ralli Bros* is not convincing. As Briggs has noted, it "was only possible by being deaf to the language and tone in which the judgments were expressed".[22] Nonetheless, where Mann went, others soon followed. Cheshire's second edition of *Private International Law* discussed *Ralli Bros* without hint of controversy,[23] but his third edition (citing Mann) contended that *Ralli Bros* "bristles with difficulties" and the rule should instead be "restricted to the case where the proper law is English".[24] When Kahn-Freund became an associate editor of *Dicey's Conflict of Laws* in 1949, he substantially rewrote its text on *Ralli Bros*,[25] stating that it was "doubtful and highly controversial" whether the rule was "a principle of the conflict of laws at all" rather than "merely an application of the English domestic rules with regard to the frustration of contracts".[26] The criticisms of Mann and his contemporaries "deserve the closest of attention, but it has been felt not to be convenient to alter the wording of a Rule which has been judicially approved on so many occasions".[27] Morris also found Mann's argument on *Ralli Bros* "undoubtedly attractive",[28] and dismissed Lord Wright's wider approach on choice of law for contracts as a "heretical doctrine that [by 1953] … has at last been eliminated from the English conflict of laws".[29]

[19] F.A. Mann, "Proper Law and Illegality in Private International Law" (1937) 18 B.Y.I.L. 97, at 100.
[20] Ibid., at p. 111.
[21] Ibid., at pp. 110, 112.
[22] A. Briggs, *Private International Law in English Courts* (Oxford 2014), [7.251].
[23] G.C. Cheshire, *Private International Law*, 2nd ed. (Oxford 1938), 277–79.
[24] G.C. Cheshire, *Private International Law*, 3rd ed. (Oxford 1947), 348–49. See also C.G. Cheshire, *International Contracts* (Glasgow 1948), 70–74.
[25] Much of which survives to the equivalent chapter in the present edition of *Dicey, Morris & Collins*, 15th ed.
[26] *Dicey's Conflict of Laws*, 6th ed. (London 1949), 638–39.
[27] Ibid., at p. 639, note 83. See also J.D. Falconbridge, *Essays on the Conflict of Laws*, 2nd ed. (Toronto 1954), 389–94; E. Rabel, *The Conflict of Laws: A Comparative Study*, vol. II (Chicago 1947), 535–39.
[28] J.H.C. Morris, "The Eclipse of the *Lex Loci Solutionis*: A Fallacy Exploded" (1953) 6 V. and L.Rev. 505, at 509.
[29] Ibid, at pp. 531–32.

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In 1957, the "conflicts versus contract" debate was canvassed before the House of Lords in *Regazzoni v KC Sethia (1944) Ltd*.[30] The House of Lords was circumspect on the nature of the rule. Viscount Simonds did not address the underlying characterisation of the rule beyond citing "international comity",[31] which might be taken to be an indication of support for the conflict of laws perspective. In contrast, Lord Somerville said that *Ralli Bros* was a principle "of our municipal law", which probably was a reference to the contractual analysis.[32] Lord Reid was slightly more forthcoming: "the question … is not, properly speaking, a question of international law. The real question is one of public policy in English law; but in considering this question we must have in mind the background of international law and international relationships often referred to as the comity of nations".[33]

But even this is ambiguous. The rejection of the application of "international law" might be taken to be rejecting a conflict of laws analysis. On the other hand, Lord Reid's invocation of a public policy rule based on the comity of nations is not obviously a reference to the rules of frustration, then understood as arising from an implied term.

If the *Ralli Bros* rule is about choice of law, it has now been superseded by the Rome Convention and the Rome I Regulation. The Rome Convention applies to contracts made after 1 April 1991 but before 18 December 2009. Under the Rome Convention, only Article 7(1) envisaged the application of rules of law to a contract other than the law of the forum and the governing law of the contract. The UK entered a reservation in respect of Article 7(1) and it did not become a part of English law.[34] However, after the Rome Convention came into force, the point was rarely taken that *Ralli Bros* had been superseded by legislation. And where the point was taken, the court preferred not to resolve it.[35] The Rome I Regulation applies to contracts concluded after 17 December 2009.[36] When negotiating the text of the Rome I Regulation, the European Commission and the British Government took the position that an outlet needed to be provided in it for the *Ralli Bros* rule,[37] which led to the adoption of Article 9. Yet, after the introduction of the Rome I Regulation,

[30] *Regazzoni v KC Sethia (1944) Ltd*. [1958] A.C. 301 (HL).
[31] Ibid., at p. 319.
[32] Ibid., at p. 330.
[33] Ibid., at p. 323.
[34] Contracts (Applicable Law) Act 1990, s. 2(2)(a).
[35] *Isaphani v Bank Melli Iran* [1998] Lloyd's Rep. Banking 113 (CA), 137, per Robert Walker L.J.; *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd.* [2007] EWHC 1713 (Comm), at [46], per Cooke J.
[36] Rome I Regulation, Art. 28.
[37] European Commission, "Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernization" (14 January 2003) COM(2002) 654, at [3.2.11]. UK Ministry of Justice, "Rome I – Should the UK Opt In?' Consultation Paper" (2 April 2008) CP05/08, at [79]–[81].

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English courts have variously asserted, without analysis, that *Ralli Bros* is good law and belongs to "domestic English law"[38] and also that it is "so well-known a principle of the English conflict of laws that it is unlikely to require prolonged legal argument".[39]

The current confused and unsatisfactory state of the law is encapsulated by the decision in *Eurobank Ergasias SA v Kalliroi Navigation Company Ltd*. The claimant sought to recover sums due under a loan agreement governed by English law. The defendant relied on *Ralli Bros* to resist summary judgment on the basis that a sum due under the loan agreement was an illegal commission under Greek law. The claimant argued that *Ralli Bros* had been subsumed by the Rome I Regulation. The court noted the controversy but rightly felt unable to decide the point on an interim basis. On a summary judgment application, it was enough that the debate of whether *Ralli Bros* remained good law was a "triable" one.[40] The nature and scope of the *Ralli Bros* is thus ripe for revisiting.

III. The Scope of the *Ralli Bros* Rule

A. Place

For the rule to apply, the terms of the contract must require performance to be in a place where it is illegal. It is only when performance necessitates an illegal act in a foreign country that the question of impossibility of performance is engaged or some countervailing public policy reason might arise for not enforcing the contract. Otherwise parties should be held to their bargains.[41] Thus, when applying the rule, the first step is to construe the terms of the contract itself. That was clear enough from the reasoning in *Ralli Bros* itself, but it has been the defining feature of the trilogy of leading cases that followed *Ralli Bros*.

In *Kleinwort, Sons & Co. v Ungarische Baumwolle Industrie A.G.*, the claimant held bills of exchange in London, payment of which was to be made in London.[42] The defendants, who were Hungarian and whose account was at a Hungarian bank, claimed that any payment they made would be illegal by Hungarian exchange regulations because they had not obtained the consent of the Hungarian central bank to make payment in London. This defence was rejected by the Court of Appeal, on the

[38] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549, at [99]; *Dana Gas PJSC v Dana Gas Sukuk Ltd.* [2017] EWHC 2928 (Comm), at [79], per Leggatt J. but cf. [2018] EWHC 278 (Comm), at [32], per Leggatt J.

[39] *Deutsche Bank AG v Unitech Global Ltd.* [2013] EWHC 2793 (Comm), [2014] 2 All E.R. (Comm) 268, at [99], per Teare J.

[40] *Eurobank Ergasias S.A. v Kalliroi Navigation Company Ltd*. [2015] EWHC 2377 (Comm), at [36]–[37], per H.H.J. Waksman Q.C. sitting as a Judge of the High Court.

[41] *Kleinwort, Sons & Co. v Ungarische Baumwolle Industrie AG* [1939] 2 K.B. 678 (CA), 696, per Du Parcq L.J.

[42] The bills of exchange stated "we hereby undertake to provide you with cover in pounds sterling in London": ibid., at p. 680.

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basis that: "This is no contract to do anything in Budapest or elsewhere in Hungary, but a contract to do something in London".[43]

That analysis was confirmed in *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière S.A.*[44] This concerned a contract for the sale of wheat governed by English law. The seller was to be paid by a letter of credit. The buyer was a branch of the Turkish state but, after entering the contract, failed to obtain approval of the Turkish Ministry of Finance to open a letter of credit to pay for the wheat. The buyer argued that it would have been illegal to open a letter of credit in these circumstances and sought to rely on the *Ralli Bros* rule to excuse its performance. Goff J. held that the rule did not apply. The parties had never contemplated that the letter of credit would be opened in Turkey. Indeed, the buyer had never made any communication to the sellers suggesting that the credit could only be opened in Turkey and the seller's sole concern was that the credit be confirmed by a "first class" American or Western European bank.[45] Moreover, it would not have been enough even if the parties contemplated that the letter of credit be opened in Turkey. The rule only excused performance by reference to illegality in the country where the contract "requires performance".[46]

In some cases, the contract will contain no express or implied stipulation as to a place but the obligation is nonetheless one that from the outset "involves of necessity" performance in a particular place.[47] This requires careful analysis of what is involved in performance. In *Libyan Arab Foreign Bank v Bankers Trust Co.*,[48] the dispute arose from US sanctions against Libya. No similar UK sanctions existed. The claimant sought to withdraw $131 million from its dollar account with the defendant bank in London. The defendant refused, citing the US sanctions. However, the claimant had only made a demand for performance in London, and the contract governing the London account was governed by English law.[49] Payment to the claimant in cash or some forms of bank transfer in London did not necessarily involve any performance in New York, since those means of withdrawal could be effected without any part of the transaction taking place in the US.[50] Staughton J. held that the defendant was not excused by the US sanctions from making payment. The exception was the bank's obligation to effect a withdrawal by bankers' draft. That

[43] Ibid., at pp. 693–94, per Mackinnon L.J.; see also pp. 699, per du Parcq L.J.; 700, per Atkinson J.
[44] *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière S.A.* [1979] 2 Lloyd's Rep. 98 (Comm Ct and CA).
[45] Ibid., at p. 105.
[46] Ibid., at p. 106, per Goff J; also p. 114, per Lord Denning M.R.
[47] Ibid., at p. 106, per Goff J.
[48] *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] Q.B. 728 (QBD).
[49] Ibid., at p. 746.
[50] Ibid., at pp. 750, 755, 761–62, 764.

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was suspended by sanctions because that would necessarily have required clearing in New York.[51]

B. Performance

For the purposes of the *Ralli Bros* rule, performance "does not mean any activity required or contemplated by the contract; it has a relatively narrow and technical meaning".[52] So, for example, in *Kleinwort Sons*, the bills of exchange stipulated that the claimant would receive payment in London. But the Hungarian defendant's only bank account was in Hungary, and Hungarian exchange controls forbade payment. The Court of Appeal held that the rule could not be extended to "steps which the debtors may have to take to put themselves in a position to pay. It is only concerned with the payment itself, which is to be made in this country".[53] In *Libyan Arab Foreign Bank*, Staughton J. put the position well when stating that, in identifying what constituted contractual performance, it would be "immaterial whether one party has to equip himself for performance by an illegal act in another country".[54]

This narrow approach to what constitutes performance has striking parallels with frustration. In *Blackburn Bobbin Co. v Allen & Sons*, a contract to sell Finnish birch timber at Hull was not frustrated by the outbreak of the First World War, making it impossible for the seller to obtain timber from Finland. As Pickford L.J. observed, "it was no concern of the buyers as to how the sellers intended to get the timber there".[55] Even if *Ralli Bros* is different from frustration, the rationale in both instances may be the same. Both frustration and the *Ralli Bros* rule are cited to avoid contractual liabilities. The focus naturally falls on what has been contractually promised by obligor to obligee and not what the obligor has privately calculated it must first do in order to render what was promised. Moreover, both doctrines are exceptions to general rule that parties should be held to their contracts. Their scope must be narrow in order to avoid overly disrupting the general rule itself. In particular, in the case of *Ralli Bros*, the driving concern behind this narrow approach to performance is to avoid extending the rule to excuse performance not because of illegality in the place where performance has been promised but because of illegality in an obligor's place of primary residence or domicile or incorporation.[56]

[51] Ibid., at p. 762.
[52] *Isaphani v Bank Melli Iran* [1998] Lloyd's Rep. Banking 113 (CA), 137, per Robert Walker L.J.
[53] *Kleinwort, Sons & Co. v Ungarische Baumwolle Industrie AG* [1939] 2 K.B. 678 (CA), 700, per Atkinson J.; see also pp. 694–95, per Mackinnon L.J.; see also *Toprak Mahsulleri Ofisi v Finagrain Compagnie Agricole et Financiere S.A.* [1979] 2 Lloyd's Rep. 98 (Comm Ct and CA), 105, 107–08, per Goff J.; 114, per Lord Denning M.R.
[54] *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] Q.B. 728 (QBD) 745.
[55] *Blackburn Bobbin Co. v Allen & Sons* [1918] 2 K.B. 467 (CA), 469.

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This approach to performance may be said to be unfair on an obligor since it could expose it to liability – possibly criminal liability – in its own country where they necessarily have to take some preliminary steps in order to render contractual performance in another country. Yet the obligor can always bargain for protection by insisting that the governing law of the contract be its own law or that a force majeure clause be inserted into the contract which suspends or excuses performance due to illegality in the obligor's home country.[57] By entering into a contract that does not contain either protection, the obligor takes the risk that it could face contractual liability by refusing to do what it promised on the basis of illegality in its place of origin.

C. Prohibition

The illegality must prohibit performance. It cannot merely disrupt or inconvenience performance. Nor is mere excusal of performance under the *lex loci solutionis* sufficient.[58] So, for example, where a charterparty provided for discharge of cargo at a rate of 1,500 tons per 24 hours but the port of discharge prohibited the discharge of cargo at night, that was not sufficient to engage the *Ralli Bros* rule because that rate could be achieved (albeit with difficulty) in daylight hours.[59] Similarly, where a charterparty provided for the loading of 155,000 tons of crude oil in Saudi Arabia but only 144,000 was in fact loaded due to rationing by the Saudi government, the *Ralli Bros* rule also could not be invoked by the charterer for dead freight because the shortage arose not from a prohibition but from how the Saudi oil companies had implemented the Government's rationing directive.

There are three decisions which gloss this aspect of the *Ralli Bros* rule. First, in *Emeraldian Limited Partnership v Wellmix Shipping Ltd.*,[60] a guarantee was executed in breach of Chinese foreign exchange laws. This constituted a criminal offence in China. The guarantee would be null and void but the guarantor, if at fault, could still be civilly liable in respect the sum guaranteed. Teare J. reasoned that: "If Chinese law does not regard the civil liability otherwise arising from the guarantee to be unenforceable there is no reason why English law should so regard it. It would not, it seems to me, be contrary to the principles of comity to enforce it".[61] While Teare

[56] For a recent unsuccessful attempt to expand the rule along these lines, see *Deutsche Bank AG v. Unitech Global Ltd.* [2013] EWHC 2793 (Comm), at [99]–[117], per Teare J.; [2016] EWCA Civ 119, [2016] 1 W.L.R. 3598, at [33]–[38].

[57] *Kahler v Midland Bank Ltd* [1950] A.C. 24 (HL), 48.

[58] *Jacobs v Crédit Lyonnais* (1884) 12 Q.B.D. 589 (CA) as explained in *Ralli Bros (CA)*, pp. 292, per Lord Sterndale M.R.; 297, per Warrington L.J.; 301, per Scrutton L.J.

[59] *Steamship "Induna" Co. Ltd. v British Phosphate Commissioners* [1949] 2 K.B. 430 (KBD), 438, per Sellers J.

[60] *Emeraldian Limited Partnership v Wellmix Shipping Ltd.* [2010] EWHC 1411 (Comm), [2010] 1 C.L.C. 993.

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J. described the case before him as "somewhat special", his argument has force whenever *Ralli Bros* is invoked and it can be shown that the prohibition under *lex loci solutionis* would not render the contract unenforceable in the place of performance.

Second, in *Lemenda Trading Co. Ltd. v African Middle East Petroleum Co. Ltd.*,[62] Phillips J. held that, in addition to legislation prohibitions, an English court would not enforce a contract which was contrary to English public policy founded on universal principles of morality and the same public policy applied in the place of performance. However, this has nothing to do with *Ralli Bros*. If the *lex fori* would not enforce a contract on such grounds of public policy, the contract will not be enforced; it does not matter what the position is in the *lex loci solutionis*.[63]

Third, it may be that acts by the executive branch of government in the place of performance, as opposed to those of the legislature, do not engage the *Ralli Bros* rule. In *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency*,[64] demurrage under a charterparty of an Italian ship had been triggered by the Soviet government who had refused to allow the vessel to load in the port of Batoum due to a wider diplomatic fall out between Italy and Russia. The charterers cited *Ralli Bros* in an effort to avoid paying the demurrage. The Court of Appeal rejected the argument, and in the course of their judgments two of the judges distinguished *Ralli Bros* on this basis.[65] However, with one exception,[66] this distinction between executive and legislative acts has not been discussed in later authorities, even where a defendant has relied upon the acts of the executive branch or an executive agency in the place of performance to excuse its liability.[67] It should be jettisoned. There is no good reason why executive and legislative acts should be treated differently in circumstances where either one can create an illegality in the place of performance. In both cases, the illegality provides an impossibility or a countervailing public policy reason against enforcement of the contract. Further, the caveat is based on the false assumption that a clean division can be made between the executive and legislative branches of a foreign state. For example, the executive of the foreign state may be exercising a power conferred on it under legislation.

[61] Ibid., at [179].
[62] *Lemenda Trading Co. Ltd. v African Middle East Petroleum Co. Ltd.* [1988] Q.B. 448 (QB).
[63] The Rome I Regulation, Art. 9(2).
[64] *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 K.B. 172 (CA).
[65] Ibid., at pp. 209–10, per Atkin L.J.; 213, per Sargant L.J.
[66] *Compania Crystal de Vapores of Panama v Herman & Mohatta (India) Ltd.* [1958] 2 Q.B. 196 (QBD).
[67] See e.g. *Zivnostenska Banka National Corporation v Frankman* [1950] A.C. 57 (HL); *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] Q.B. 728 (QBD).

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D. Self-Induced Illegality

The concept of self-inducement in the *Ralli Bros* rule owes much to its elision with frustration, where there is a principle that "self-induced frustration" cannot discharge a contract.[68] It was recently pointed out that the language of self-inducement was something of a "misnomer":[69] the principle simply looks at "post-contractual events and actions which indicate that certain options – that might have ameliorated the frustrating event – have been closed off by the acts or omissions of the party claiming frustration".

In the cases where *Ralli Bros* is invoked, it is important to distinguish between three scenarios when considering the issue of whether the supervening illegality has been self-induced. The first is where the party seeking to escape performance had, after entering into the contract, a choice about where to perform the obligation. Illegality in one of the places of performance will not excuse performance elsewhere. This might be viewed as a form of self-induced illegality, but that is an unnecessary complication in the analysis: the straightforward answer is that the requirement of a contractual stipulation as to the place of performance has not been met.

Second, there may be a pre-existing law that performance is illegal unless a waiver is obtained. Typical examples are export and import licences required for overseas sales contracts. The obligor assumes an absolute obligation, or an obligation to make reasonable or best endeavours, to obtain the licence. If it fails to do so in breach of such an obligation, the *Ralli Bros* rule will not be engaged because the obligation in question is not to do something unlawful but a failure to make that something lawful and the obligor will be liable in damages. Layering the discussion with a concept of self-induced illegality is again an unnecessary complication.[70]

The third scenario is where the party seeking to invoke the *Ralli Bros* rule is the state or an emanation of the state in the place of performance. In *The Playa Larga and Marble Islands*,[71] the *Ralli Bros* rule was engaged when, after a revolution in Chile, the new Chilean government passed a law which would make performance of the contract for the sale of sugar illegal. The seller was a wholly owned state enterprise. Ackner L.J. acknowledged that the point that the supervening illegality was self-induced could be taken when one contracting party is the state, on the basis of normal frustration principles.[72] But this point did not apply in *The Playa Larga* itself. The seller was not an emanation of the state; the state enterprise had its own legal personality.[73]

[68] *The Super Servant Two* [1990] 1 Lloyd's Rep. 1 (CA), 8, 10, per Bingham L.J.
[69] *Canary Wharf (BP4) T1 Ltd. v European Medicines Agency* [2019] EWHC 335 (Ch), at [206], per Marcus Smith J.
[70] See further *Benjamin's Sale of Goods*, 10th ed. (London 2017), [18.371]–[18.382].
[71] *The Playa Larga and Marble Islands* [1983] 2 Lloyd's Rep. 171 (CA).
[72] Ibid., at p. 192.
[73] Ibid., at p. 192.

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In contrast, the point was held to be engaged in *Canary Wharf (BP4) T1 Ltd. v European Medicines Agency*.[74] The European Medicines Agency sought to escape a 25-year lease on a London skyscraper for its headquarters by arguing that the lease would be frustrated when UK ceased to be a Member State of the EU. The Court held that the reason for the move of the Agency's headquarters from London to Amsterdam was not Brexit itself but a legislation passed by the EU in the wake of Brexit.[75] The supervening legislation was to be treated as a self-induced frustration and therefore did not discharge the contract.[76] However, this involves a conflation of the EU and the Agency, which is questionable given each has separate legal personality is the EU legal order.[77]

E. Subsisting and Supervening Illegality

Ralli Bros involved supervening illegality. The Spanish Royal Decree limiting the freight payable on jute was promulgated after the conclusion of the contract. However, there was no suggestion in any of the judgments in *Ralli Bros* that the rule was limited to cases of supervening illegality. Indeed, the Court of Appeal approved and applied Dicey's rule, which was expressed in terms that did not distinguish between whether the illegality arose before or after the conclusion of the contract. The better view is that the rule extends to cases in which illegality was subsisting at the time that the parties entered into the contract.[78]

The leading case is *Foster v Driscoll*.[79] This involved a scheme to import whisky into the US during the era of prohibition. The scheme foundered, and three claims were issued by various of the schemers against their former partners. The Court of Appeal treated the various contracts between the parties as amounting to a single partnership agreement and divided 2:1 on the facts as to whether claims under that agreement were unenforceable for illegality.[80] Lawrence L.J.'s starting point was the finding of fact by the trial judge, Wright J., that the object of the scheme was to profit from the lucrative black market for liquor in the US. The fact that this object was not included in the written documentation "ought not to blind the Court … or induce it to treat such documents as if they related to a legitimate

[74] *Canary Wharf (BP4) T1 Ltd. v European Medicines Agency* [2019] EWHC 335 (Ch), albeit not a *Ralli Bros* case since there was no illegality in the place of performance.
[75] Regulation No. (EU) 2018/1718. See further W. Day, "Isn't Brexit Frustrating?" (2019) 78 C.L.J. 270.
[76] *Canary Wharf (BP4) T1 Ltd. v European Medicines Agency* [2019] EWHC 335 (Ch), at [201]–[207].
[77] Treaty on the European Union, Art. 64 and Regulation (EC) 726/2004, Art. 71.
[78] In many cases, it is impossible to categorise cleanly the case as being one of subsisting or supervening illegality: a typical scenario is where there is a pre-existing law that performance is illegal unless a waiver is obtained and the obligor then fails to obtain the waiver: see further *Benjamin's Sale of Goods*, 10th ed., [18.388].
[79] *Foster v Driscoll* [1929] 1 K.B. 470 (CA).
[80] The dissenting judge was Scrutton L.J., who had also been on the bench for *Ralli Bros* itself. However, his dissent was based on the application of the law to the facts, not on the law itself: ibid., at pp. 497–98.

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commercial transaction".[81] As a result, the rights and obligations of such an illegal partnership should not be enforced because this "would furnish a just cause of complaint by the United States of Government against our Government … and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality".[82]

Lawrence L.J. noted the relevant cases, including *Ralli Bros*,[83] but added that "I have not found them of much assistance in arriving at a conclusion whether a partnership constituted under the circumstances of the present case is illegal or not".[84] The judge's point here was simply that the appeal had turned into a dispute upon the terms of the partnership agreement between the litigants rather than any wider point of law; he was not suggesting that *Ralli Bros* did not apply in the circumstances. Moreover, Sankey L.J., who concurred with Lawrence L.J. in the result, considered *Ralli Bros* and the relevant passage in Dicey's *Conflict of Laws* to be applicable;[85] as did Scrutton L.J., who agreed with his brethren on the applicable principles but disagreed on the facts.[86]

The question on the facts was whether the terms of the partnership agreement envisaged (legally) importing whisky into Canada as an alternative to (illegally) importing it into the US. If it did, then it would not necessarily be illegal to perform the contract and the claims made in the English courts would be enforceable. However, Lawrence L.J. concluded:

> in view of the main object of the contract of partnership between the parties in the present case, it is not saved from illegality merely because the partners may have contemplated the event of not being able themselves to import the whisky into the United States, and may have considered the possibility of having to deliver the whisky to the illicit buyers on the high seas or at such other convenient place as might be arranged between themselves and their buyer consistently with their being able to obtain the high price ruling on the illicit market in which they intended to sell the whisky.[87]

Similarly, Sankey L.J. rejected this possibility because, on the facts, the "real object and intention of the parties" necessitated them selling the whisky illegally into the US.[88] This reasoning is consistent with an exercise in contractual interpretation. Lawrence and Sankey L.JJ. clearly considered that it was a condition of the partnership that the profits be derived from selling the whisky in the US black market. It followed that the mere contemplation by the parties (without variation to the terms of the partnership

[81] *Foster v Driscoll* [1929] 1 K.B. 470 (CA), 501–02.
[82] Ibid, at p. 510.
[83] Ibid, at p. 513.
[84] Ibid, at p. 512; see also p. 514.
[85] Ibid, at pp. 518, 520.
[86] Ibid, at p. 496.
[87] Ibid, at p. 514.
[88] Ibid, at p. 521.

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agreement) that delivery to buyers elsewhere might be necessary did not save the partnership from falling foul of the rule in *Ralli Bros*.

Foster v Driscoll thus follows in the line of authority started by *Ralli Bros*. It confirms that the rule extends beyond supervening illegality to cases of illegality subsisting at the time that the parties contracted. This was confirmed by the House of Lords in *Regazzoni v KC Sethia (1944) Ltd*.[89] The parties contracted for the sale of jute bags, to be shipped from India to Italy for resale in South Africa. The contract was governed by English law. However, the export of jute from India to South Africa was prohibited under Indian law. The seller repudiated the contract. The buyer sued for damages. A live issue was whether *Foster v Driscoll* was correctly decided and, if so, whether it formed part of the *Ralli Bros* rule.[90] The House of Lords held that the contract was unenforceable. It could not be performed without a breach of Indian law.[91] In other words, it was a term of the contract that the jute be resold in South Africa in breach of that country's prohibition. Viscount Simonds viewed the case as being "precisely covered by the decision in *Ralli Brothers*" and "clearly covered by *Foster v Driscoll* . . . [where] principle of the decision in *Ralli Brothers* was emphatically reasserted".[92] The other Law Lords should be taken to have agreed implicitly with Viscount Simonds on this point. In particular, Lord Reid approved various passages from *Foster v Driscoll*, including Scrutton L.J.'s citation of *Ralli Bros* and his emphasis that the agreement must necessarily involve a breach of law in the place of performance before it could become unenforceable; Lord Reid added that he understood Scrutton L.J. dissented in *Foster v Driscoll* only "because he took a different view of the facts".[93] As for the other Law Lords, Lord Keith and Lord Somervell did not disagree with the point in their speeches, which focused on *Foster v Driscoll* without much wider citation of authority,[94] and Lord Cohen simply concurred with all of his brethren.[95]

Present orthodoxy, however, is that *Foster v Driscoll* embodies a different principle to *Ralli Bros*.[96] The turning point was *Toprak*. The issue arose because it was argued in that case by counsel that *Foster v Driscoll* and *Regazzoni* watered down the first requirement to the *Ralli Bros* rule, namely that the contract must require performance in a place where it is illegal, to a requirement of mere contemplation. As we have seen, *Foster v Driscoll* and

[89] *Regazzoni v KC Sethia (1944) Ltd.* [1958] A.C. 301 (HL).
[90] Ibid., at pp. 305–06, 307, 308, 314, 315, records the relevant parts of the argument.
[91] Ibid., at pp. 324, per Lord Reid; 330, per Lord Somervell. This appears to have been an implied term: see p. 322, per Viscount Simonds.
[92] Ibid., at pp. 322–23.
[93] Ibid., at pp. 324–25.
[94] Ibid., at pp. 326–31.
[95] Ibid., at p. 326.
[96] See e.g. *Chitty on Contracts*, 33rd ed., [16.059]–[16.060], [23.027], but cf. [30.289]; *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed., [32.094]–[32.102], [32.191]–[32.193].

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Regazzoni did nothing of the sort. But Goff J. instead dealt with the matter by distinguishing the latter cases as recognising a related but distinct rule in which contemplation would suffice. The stricter *Ralli Bros* rule, by contrast, was limited in its scope to supervening illegality. Viscount Simonds' dicta to the contrary in *Regazzoni* was dismissed by Goff J. as a minority view.[97]

Goff J.'s analysis has since been adopted as orthodoxy in a number of judgments, including in *Lemenda Trading Co. Ltd. v African Middle East Petroleum Co. Ltd.*,[98] *Libyan Arab Foreign Bank v Bankers Trust Co.*[99] and *Isaphani v Bank Melli Iran*.[100] Yet in the latter case, Robert Walker L.J. overruled Goff J on the substantive issue and held that mere contemplation did not suffice even for the *Foster v Driscoll* principle. Since it came from the same "rootstock" as *Ralli Bros*: "the intended commission of prohibited acts within the territory of a friendly foreign country (whose laws prohibit those acts) is an essential and necessary ingredient of the principle in *Foster v Driscoll*".[101]

The very reason why Goff J. distinguished *Foster v Driscoll* from *Ralli Bros* has therefore fallen away. The case law has come full circle and recognises that the contractual terms must evince an intention by the parties to perform acts in a territory in breach of a prohibition.

F. Governing Law of the Contract

Despite a line of appellate obiter dicta confirming that the rule extends to contracts not governed by English law,[102] including *Ralli Bros* itself, this final point did not in fact arise until the 1999 decision of *Royal Boskalis Westminster NV v Mountain*.[103] The Dutch claimants owned a dredging fleet that was contracted to dredge Iraq's second most important port, Umm Qasr. After Iraq invaded Kuwait in 1990, the UN imposed sanctions and the Netherlands implemented those sanctions. In retaliation, the Iraqi government held the Dutch companies to ransom, by seizing the dredging fleet and those employed aboard the fleet. In breach of the UN-Dutch sanctions, the claimants paid around 24.25 million Dutch guilders demanded by the Iraqi government, and, under a contract governed by Iraqi law, waived their claims against the Iraqi government estimated to be worth 84 million guilders. The claimants then sought an indemnity under their war insurance

[97] *Toprak Mahsulleri Ofisi v Finagrain Compagnie Agricole et Financiere S.A.* [1979] 2 Lloyd's Rep. 98 (Comm Ct and CA), 106–07.
[98] *Lemenda Trading Co. Ltd. v African Middle East Petroleum Co. Ltd.* [1988] Q.B. 448 (QBD), 454, per Phillips J.
[99] *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] Q.B. 728 (QBD), 745, per Staughton J.
[100] *Isaphani v Bank Melli Iran* [1998] Lloyd's Rep. Banking 113 (CA).
[101] Ibid., at pp. 139–40.
[102] *Adelaide Electric Supply Co. Ltd. v Prudential Assurance Co. Ltd.* [1937] A.C. 500 (HL), 519, per Lord Wright; *Zivnostenska Banka National Corporation v Frankman* [1950] A.C. 57 (HL), 79, per Lord Reid; *Mackender v Feldia AG* [1967] 2 Q.B. 590 (CA), 601, per Diplock L.J.
[103] *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674 (CA).

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in respect of the claims they had been forced to waive. The insurers argued that the *Ralli Bros* principle would apply to render the Iraqi law governed waivers unenforceable, so there was no loss to indemnify. A majority in the Court of Appeal agreed.[104] Stuart-Smith L.J. held that: "In the application of this principle it is immaterial whether the contract is governed by English or foreign law."[105] Similarly Pill L.J. held: "While English law was the proper law of the contract in *Regazzoni*'s case, the principle stated by Lord Reid does not appear to me to be confined to such contracts and would apply also to contracts where the proper law is foreign".[106] Since the waivers would not be enforceable, the claimants could sue Iraq in respect of their losses. That meant there was no loss for the purposes of the insurance claim.

Despite this decision, commentaries repeatedly claim that there is a dearth of authority on whether the *Ralli Bros* rule applies to disputes litigated in England over contracts not governed by English law.[107] *Royal Boskalis* appears to be overlooked because it is a case on subsisting illegality rather than supervening illegality.[108] But if Goff J.'s approach in *Toprak* is rejected in favour of that of Viscount Simonds in *Regazzoni*, it follows that *Royal Boskalis* must apply to supervening illegality cases as well.

IV. The Nature of the *Ralli Bros* Rule

A. Comity

The prevailing frustration interpretation of the *Ralli Bros* rule does not withstand scrutiny. It fails to provide a convincing justification for the rule. It also does not fit with the requirements of the rule. The *Ralli Bros* rule cannot be reduced to the terms of the contract. The contract itself does not evince an intention to apply the law of the place of performance; indeed, the *Ralli Bros* rule can only be engaged where the chosen law of the contract is different to the law of the place of performance. The rule must therefore be explained by reference to some external public policy. But it is difficult to derive from the case law on frustration an external public policy consideration that convincingly applies to the *Ralli Bros* scenario. Indeed, construction theory of frustration eschews an external explanation for the doctrine: according to it, frustration is determined by assessing the express and implied terms of the contract to see whether performance was conditional on the non-occurrence of a future event.[109]

[104] See Phillips L.J.'s dissent: ibid., at p. 735.
[105] Ibid., at p. 692.
[106] Ibid., at p. 703.
[107] See e.g. *Chitty on Contracts*, 33rd ed., [16.060], [30.284]; *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed., [32.099]–[32.102]; F. Reynolds, "Illegality by the *lex loci solutionis*" (1992) 108 L.Q.R. 553, at 555.
[108] *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674 (CA), 734, per Phillips L.J.
[109] *Chitty on Contracts*, 33rd ed., [23.010], [23.017]; see also Day, "Isn't Brexit Frustrating?", pp. 271–72.

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The main external theory for frustration is one that invokes the demands of justice: "to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances".[110] Chong has argued that justice is the "simplest and strongest reason" for the application of *Ralli Bros* and equivalent rules.[111] But if the underlying driver of the *Ralli Bros* rule was justice and fairness between the parties, the scope of the rule would be very different. It would be a flexible discretionary rule that weighed up the injustice of requiring performance (or any necessary preliminary step to performance) on the obligor against the injustice of the obligee not receiving what had been promised to it.[112] As presently constituted, the rule does not engage with issues of fairness or justice.

Of course, supervening illegality raises public policy issues not raised by other forms of supervening events.[113] These have been best explored in the difficult context of the illegality defence. However, the primary policy justification in entirely domestic cases also does not translate to justify excusing performance due to foreign illegality. The policy there is preserving the consistency and integrity of the legal system, so as to avoid "the law's giving with one hand what it takes away with the other".[114] That cannot explain the *Ralli Bros* rule. There is no inherent legal inconsistency in enforcing a contract when performance is not illegal by its governing law. The other principal policy justifications for the illegality defence in English law follow from this first policy. They cannot by themselves explain why, under the *Ralli Bros* rule, an English court will look to the law of the place of performance. So, for example, the illegality defence's function to further the purpose of the rule that performance would infringe simply begs the question of why an English court would want to further a rule which is part of neither the applicable law nor the law of the forum.[115] The deterrence justification for the illegality defence raises a similar question.[116] Why should English law seek to deter a party from breaching a law that does not apply to the contract?

Rather than frustration or illegality, *Ralli Bros* and most cases which follow it repeatedly invoke comity as the underlying public policy for the rule.[117] It is suggested that comity is the most credible explanation for

[110] *The Super Servant Two* [1990] 1 Lloyd's Rep. 1 (CA), 8, per Bingham L.J.
[111] A. Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2 J.P.I.L. 27, at 40.
[112] Cf. A. Dickinson, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 J.P.I.L. 53, at 82.
[113] G. Treitel, *Frustration and Force Majeure*, 3rd ed. (London 2014), [8.002].
[114] *Hall v Hebert* [1993] 2 SCR 159, 170–80, per McLachlin J. Integrity of the legal system was the policy upon which significant weight was put by all of the Supreme Court Justices in what is now the leading case, *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467.
[115] Law Commission, *The Illegality Defence: A Consultative Report* (CP No. 189, 2009), [2.6]–[2.12].
[116] Ibid., at [2.19]–[2.23].

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the rule so long as it is carefully defined, so as to sidestep the criticisms of leading commentators who variously describe the concept as "meaningless and misused",[118] and "a singular specimen of confusion of thought produced by a laxity of language".[119] Comity is deeply interconnected with territorial theories of sovereignty.[120] It is not to be confused with reciprocity or deference. And its importance should not be overstated: it cannot justify all of private international law, and it may be overridden by other considerations such as the ensuring justice between the parties.[121] It is best defined in relatively narrow terms. It justifies why a court may, or must, refrain from taking a step which it would otherwise be entitled to take in its own territory out of respect for the territorial sovereignty of another state.[122] Comity is thus a public policy of the *lex fori* which acts as a "self denying ordinance".[123] It underpins a number of discrete rules in the English conflict of laws. So, for example, an English court has a discretion not to exercise jurisdiction where it is otherwise entitled to adjudicate a dispute because some other forum is more appropriate for its resolution.[124] A court also must not adjudicate the merits when some foreign court has already heard the dispute when the parties were present its territory: recognition must be given to that judgment.[125] And a court should be cautious about issuing an anti-suit or other extra-territorial injunctive relief because of its interference in the territory of another sovereign.[126]

In choice of law rules, comity is most famously expressed through the rule that an English court does not question state confiscation of property

[117] See e.g. *Ralli Bros (CA)*, 300, per Scrutton L.J.; *Foster v Driscoll* [1929] 1 K.B. 470 (CA), 510, per Lawrence L.J.; 519, per Sankey L.J.; 496, per Scrutton L.J.; *R. v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500 (CA), 519, per Lord Wright M.R.; *Regazzoni v KC Sethia (1944) Ltd.* [1958] A.C. 301 (HL), 319, per Viscount Simonds; 323, per Lord Reid; 327, per Lord Keith; 330, per Lord Somervell; *Toprak Mahsulleri Ofisi v Finagrain Compagnie Agricole et Financiere S.A.* [1979] 2 Lloyd's Rep. 98 (Comm Ct and CA), 107, per Goff J.; *Royal Boskalis Westminster NV v Mountain* [1997] C.L.C. 816 (CA), 866, per Phillips L.J.; *Society of Lloyd's v Fraser* [1998] C.L.C. 1630 (CA), 1653, per Hobhouse L.J.; *Isaphani v Bank Melli Iran* [1998] Lloyd's Rep. Banking 113 (CA), 140, per Robert Walker L.J.

[118] See e.g. P. Torremans et al., *Cheshire, North & Fawcett: Private International Law*, 15th ed. (Oxford 2017), 4.

[119] A.V. Dicey, *A Digest of the Law of England with reference to The Conflict of Laws*, 1st ed. (London 1896), 10; cf. L. Collins, "Comity in Modern Private International Law" in J. Fawcett (ed.), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford 2002); R. Fentiman, *International Commercial Litigation*, 2nd ed. (Oxford 2015), [1.52]–[1.61].

[120] U. Huber, "De Conflictu Legum Diversrum in Diversis Imperiis", trans. E.G. Lorenzen, "Huber's De Conflictu Legum" (1919) 13 Illinois L.Rev. 199, at 227.

[121] *Hilton v Guyot* (1895) 159 US 113, 163–64, per Gray A.J.

[122] Cf. A. Briggs, "The Principle of Comity in Private International Law" (2012) 354 Recueil des Cours 87–93.

[123] *Airbus Industrie GIE v Patel* [1999] 1 A.C. 119 (HL), 132–33, per Lord Goff.

[124] *The Abidin Daver* [1984] AC 398 (HL), 411–12, per Lord Diplock. The position is different under the Brussels Recast Regulation (EU) 1215/2012.

[125] Briggs, "The Principle of Comity", pp. 149–50; A. Briggs, "Recognition of Foreign Judgment: A Matter of Obligation" (2013) 129 L.Q.R. 87, at 91–92.

[126] See e.g. *Airbus Industrie GIE* [1999] 1 A.C. 119 (HL), 138–40, per Lord Goff; *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [2010] 1 W.L.R. 1023, at [50], per Toulson L.J.; *Star Reefers Pool Inc. v JFC Group Co. Ltd.* [2012] EWCA Civ 14, [2012] 1 C.L.C. 294, at [2], [40], per Rix L.J.

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where the property was within the territorial jurisdiction of the confiscating state. The classic case is *Luther v Sagor*:[127] a Court of Appeal judgment handed down less than two months after *Ralli Bros* by a bench that included two of the judges who had decided *Ralli Bros* itself, Warrington and Scrutton L.JJ. The issue was whether the English court should respect the confiscation of manufactured wood stock by the nascent Soviet Union. The stock had been in Soviet territory when confiscated, but it had since been exported to England. The victim of the confiscation brought a claim for damages for conversion in England.[128] However, the court recognised the validity of the confiscation and dismissed the claim. Warrington L.J. gave this clear definition of comity: "It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country".[129] Scrutton L.J. added that, to go behind forced transfer of title in Russia, would "not be consistent with the comity of nations as between independent sovereign states".[130]

It is suggested that emphasis on respecting the territorial sovereignty of another state is what also underpins *Ralli Bros*. The only difference is that, in the case of contracts rather than property, that respect is expressed by the court not enforcing performance, whether specifically or requiring the payment of damages as a substitute for performance,[131] when such performance would be illegal in the place where it is contractually stipulated. Conceptualising the *Ralli Bros* rule in this way sidesteps the primary objection of the mid twentieth century writers like Mann, Morris and Cheshire. Their criticisms were based on the principle that a contract should only be governed by the proper law, namely that by which the parties intended to contract,[132] or which has the closest connection to the contract.[133] The suggestion by Lord Wright in his judgments which immediately followed *Ralli Bros* that the rule operated to apply the *lex loci solutionis* to a contract was what prompted their revisionism of *Ralli Bros*,[134] since on Lord Wright's view of the case it was "incompatible with the doctrine of the proper law".[135] In fact, as we have seen, the effect of the *Ralli Bros* rule is much more limited. It does not involve any choice of law exception to the proper law doctrine. It can do no more than render a contract, that

[127] *Luther v Sagor* [1920] 3 K.B. 532 (CA); see also *Paley Olga v Weisz* [1929] 1 K.B. 718 (CA); *Iran v Barakat Galleries Ltd.* [2007] EWCA Civ 1374, [2009] Q.B. 22.
[128] In addition to a claim for a declaration as to title and an injunctive relief.
[129] *Luther v Sagor* [1920] 3 K.B. 532 (CA), 548.
[130] Ibid., at p. 555; see also p. 556.
[131] As with damages as a substitute for title in a claim for conversion in a case such as *Luther v Sagor* [1920] 3 K.B. 532 (CA).
[132] Mann, "Proper Law and Illegality", p. 97; Falconbridge, *Essays on the Conflict of Laws*, p. 392.
[133] Cheshire, *International Contracts*, pp. 7–44.
[134] Morris, "The Eclipse of the *Lex Loci Solutionis*", pp. 511–31; see also Mann, "Proper Law and Illegality", p. 107.
[135] Cheshire, *International Contracts*, p. 73.

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would otherwise be enforceable, unenforceable. It was not an exception to the proper law doctrine at common law.

B. Fit

A striking omission in the literature is to explain how *Ralli Bros* could be part of the rules of frustration when it does not fit with many of its usual features. First, the effect of the rule is that the relevant part of the contract becomes unenforceable,[136] whereas the effect of frustration is to discharge the contract as a whole.[137] In *Ralli Bros* itself, for example, the Royal Decree did not discharge the charterparty: there is no suggestion that Compañia Naviera was relieved of its obligations to deliver the jute to Barcelona once the Royal Decree was promulgated mid voyage. Rather, it rendered the contractual obligation to pay the additional freight unenforceable. This point, surprisingly, appears to have been overlooked by Cheshire,[138] Kahn-Freund[139] and Mann:[140] all of whom wrongly asserted that the *Ralli Bros* rule discharges the contract. This distinction matters because it means that there cannot be a claim under the Law Reform (Frustrated Contracts) Act 1943 in respect of benefits conferred under a contract caught by supervening foreign illegality. The 1943 Act only applies where a contract "has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract".[141] It was for this reason that, in *Libyan Arab Foreign Bank v Bankers Trust Co.*, Staughton J. rejected a monetary claim under the 1943 Act for supervening foreign illegality: "the obligation of Bankers Trust was suspended but not discharged".[142]

Second, frustration is usually only engaged where there is a "gap" in the contractual terms. Where the contractual terms cater for, or allocate the risk of, the supervening event (for example by way of a force majeure clause) a contract cannot be frustrated.[143] However, when the *Ralli Bros* rule is engaged, there is no gap in the contract. Indeed, the contractual terms must have stipulated that performance has to take place in a place where it is prohibited. The obligor who agrees to that term, without a force majeure or some other clause reallocating the risk, should be understood

[136] *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency* [1925] 2 K.B. 172 (CA), 208, per Atkin L.J.
[137] *Hirji Mulji v Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497 (PC); cf. *Chitty on Contracts*, 33rd ed., [23.066]–[23.069].
[138] Cheshire, *International Contracts*, p. 72.
[139] *Dicey's Conflict of Laws*, 6th ed., pp. 638–39.
[140] Mann, "Proper Law and Illegality", 112.
[141] Law Reform (Frustrated Contracts) Act 1943, s. 1(1).
[142] *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] Q.B. 728 (QBD), 772.
[143] *Davis Contractors v Fareham Urban DC* [1956] AC 696 (HL), 720–21, per Lord Reid; 729, per Lord Radcliffe.

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as accepting the risk that performance might be prohibited in the place where it must be rendered. Yet, even though the risk has been assumed, the *Ralli Bros* rule will nonetheless excuse performance for reasons of comity. It is not possible to contract out of the *Ralli Bros* rule. A contract that provides that performance should be rendered in Utopia even if performance becomes unlawful in Utopia would not be frustrated on the introduction of a prohibition on performance in Utopia because there would be no radical difference in the performance that had been promised.[144] But it is inconceivable that the contract would still be enforced by the English courts for reasons of comity.

Third, the frustration analysis does not explain why the only foreign law that can count for these purposes is the law of the place of performance. If the test is truly whether performance has become radically different from that which was undertaken by the contract, it is not clear why there is a rigid rule against ever looking at illegality in the obligor's place of primary residence or domicile or incorporation. The most recent attempt to expand the *Ralli Bros* rule in this way was in the *European Medicines Agency* case. The question was the effect of the UK leaving the EU on a lease in London held by an EU agency, the EMA, for its headquarters. On Brexit, the UK would be treated as a third country for the purposes of EU law. Although the lease was governed by English law, and all performance was to be rendered in England, it was contended by the EMA that EU law *qua* foreign illegality could be applied as the law of the place of incorporation (*lex incorporationis*). Marcus Smith J. rejected this, but by reference to a choice of law analysis rather than principles of frustration: "the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law … are normally disregarded".[145] But that choice of law rule suggests that the law of the place of performance should have no part to play in a claim that an English law contract has been frustrated. The only supervening illegalities to which English domestic law should have regard are supervening illegalities arising under English domestic law.

Fourth, the frustration analysis leads to an artificial split between supervening and subsisting illegality cases. This split is artificial for a number of reasons. In the first place, it ignores the reasoning in the leading subsisting illegality cases – *Foster v Driscoll* and *Regazzioni* – which took as their starting point *Ralli Bros*. It also ignores the approval of Dicey's rule in *Ralli Bros* itself, which is not expressed so as to be limited to supervening illegality. Moreover, the only difference between the two scenarios is a

[144] Ibid., at p. 729, per Lord Radcliffe.

[145] *Canary Wharf (BP4) T1 Ltd. v European Medicines Agency* [2019] EWHC 335 (Ch), at [189], quoting *Goldman Sachs International v Novo Banco S.A.* [2018] UKSC 34, [2018] 1 W.L.R. 3683, at [12], per Lord Sumption.

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temporal one. The legal requirements for excusal of performance in both instances is the same. In particular, contrary to Goff J.'s reasoning in *Toprak*, cases both before and since that decision have confirmed that in subsisting illegality cases (as in supervening illegality cases) there must be an objective agreement that performance must be rendered in a place where it would be illegal. Furthermore, it is not possible to re-explain cases like *Foster v Driscoll* as common mistake cases (the equivalent of frustration for pre-contractual events) because there was never any mistake. The parties in *Foster v Driscoll*, for example, knew that importing whisky into the US was prohibited. Indeed, they contracted on that basis, intending to profit greatly from selling the whisky in the black market.[146]

Finally, the *Ralli Bros* rule, properly understood, applies to all contractual disputes in the English courts regardless of whether the contract's governing law is English law or some other law. As such, it cannot be regarded as a doctrine that is simply part of English contract law. Advocates of the contract view insist that there is a dearth of authority on this point. But we have seen that that misrepresents the case law. The Court of Appeal confirmed in *Boskalis* that subsisting foreign illegality in the place of performance will render a contract unenforceable, even when not governed by English law;[147] and there is no good reason why the position should be any different for supervening illegality. Indeed, there is the line of obiter dicta expressing the same rule in supervening illegality cases.

In contrast, underlying considerations of territoriality and comity explain why the effect of the *Ralli Bros* rule is that contractual performance becomes unenforceable rather than discharged altogether. This is a forum rule rather than a contractual one. This justification also fits with its scope. For example, the insistence that the contract must require performance in a place where it would be illegal arises because, if the contract does not require performance in that place, seeking to enforce or otherwise remedy the breach of contract does not engage issues of comity. In both subsisting and supervening illegality cases, the same combination (or clash) of the promise to perform in a particular place and the prohibition in that place gives rise to the comity concern. That is why the difference between the two types of illegality is a factual one relating only to timing; the legal requirements in both instances are the same. Similarly, the requirement that the illegality must be a prohibition rendering performance reflects the fact that an issue of comity only arises if there is no possibility of legal performance in the place in which it is stipulated to be rendered, however disruptive or inconvenient. Moreover, if the law of the place of performance would still enforce the obligation, there could be no disrespect to territorial

[146] *Foster v Driscoll* [1929] 1 K.B. 470 (CA), 500, per Lawrence L.J.
[147] *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674 (CA).

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sovereignty by the English courts enforcing the contract in accordance with the *lex causae*.

Only two possible aspects of the *Ralli Bros* rule cannot be explained by the comity justification. The first is the arguable distinction between legislative and executive acts. But we have seen that that distinction is unsound and has been ignored in subsequent cases. It should be jettisoned because comity is engaged by the prohibition of performance in the territory where performance is stipulated to take place; it is irrelevant which the branch of the state is responsible for the prohibition. Second is the possible rule against self-induced illegality. This is only really in issue when the party relying on the illegality is the state or an emanation of the state in the place of performance. However, that rule has been suggested in obiter dicta based entirely on the elision of the *Ralli Bros* rule with frustration. Once that domestic law categorisation is stripped away, there is no reason for that limitation to be maintained and developed. Comity demands respect for the act of a sovereign within its own territory, even if the act is considered to be self-serving, just as in the confiscation cases like *Luther v Sagor*.

V. The Future of the *Ralli Bros* Rule

A. Rule of the Forum

Because of the reservation made by the UK against Article 7(1) of the Rome Convention, it was commonly thought the *Ralli Bros* rule had no outlet under the Rome Convention unless it was an aspect of the rules of frustration that applied to English law contracts. However, that was based on the false assumption that, if the *Ralli Bros* rule was not an aspect of frustration, it must instead be a choice of law rule. It is actually neither. Instead, as a public policy of the *lex fori*, it would apply by way of Article 7(2), which provides that: "Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

The jurisprudence of the European Court of Justice has limited the scope of Article 7(2) to "essential" national provisions, namely those "deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith".[148] That position was cemented under the Rome I Regulation. The equivalent provision, Article 9(2), limits the scope of the *lex fori* to "overriding mandatory provisions", which Article 9(1) defines as: "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the

[148] Judgment of 17 October 2013, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, C-184/12, EU:C:2013:663, at [47].

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law otherwise applicable to the contract under this Regulation." Recital 37 confirms that this definition should be interpreted "restrictively" and does not extend to non-derogable provisions of national law.

For the *Ralli Bros* rule to be available under these provisions, a value judgment must be made about the importance of the rule within the English legal order. While the test is expressed in stringent terms as a matter of principle, the indications are that the hurdle to be cleared is much lower in practice. The Giuliano and Lagarde report on the Rome Convention stated that Article 7 was designed to safeguard forum rules like those on "cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage".[149] Prominent examples in English law of overriding mandatory provisions are rules on exclusion and similar clauses in consumer and commercial contracts,[150] employment rights,[151] regulation of financial services[152] and the carriage of goods.[153] Further, the ECJ itself has upheld agency rights as constituting overriding mandatory provisions.[154] While all statutory rules, it is doubtful that the concept of overriding mandatory provisions was designed to exclude common law principles.[155] There is a good argument that the *Ralli Bros* rule, based on comitous respect for territorial sovereignty, should also amount to an overriding mandatory provision. The rule itself establishes that there is a public interest in comity that overrides the usual rule of freedom of contract and the private interests of contracting parties. Without the rule, English courts would be in the unacceptable position of being asked to enforce performance directly or by an award of damages in a place where performance was prohibited. The rule is therefore essential to safeguarding the public interest in comity.

The other way in which *Ralli Bros* might survive as a rule of the *lex fori* under the Europeanised choice of law rules is by Article 16 of the Rome Convention and Article 21 of the Rome I Regulation: "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum".[156]

The effect of this provision is the same as the *Ralli Bros* rule: rendering what would otherwise be an enforceable obligation unenforceable. Further, while the focus is on the consequences of the application of the *lex*

[149] M. Giuliano and P. Lagarde, "Report on the Convention on the Law Applicable to Contractual Obligations" [1980] OJC 281/1.
[150] Unfair Contract Terms Act 1977, s. 27; Consumer Rights Act 2015, ss. 32, 74.
[151] Employment Rights Act 1996, s. 204(1).
[152] Financial Services and Markets Act 2000, s. 30.
[153] Carriage by Air Act 1961, s. 1(1); Carriage of Goods by Road Act 1965, s. 1; Carriage of Goods by Sea Act 1971, s. 1(2); Merchant Shipping Act 1995, s. 183(1).
[154] C-184/12, *United Antwerp Maritime Agencies (Unamar) NV*.
[155] *Dicey, Morris & Collins*, 15th ed., [32.086].
[156] Art. 16 of the Rome Convention has insubstantial differences in the wording.

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causae,[157] the *Ralli Bros* rule itself is inherently a consequential rule. It is only engaged where the consequences of applying the governing law would be the enforcement of performance in a place where it was prohibited. In those circumstances, application of the *lex causae* would be manifestly incompatible with the principle of comity in English law and as a result the forum can under Article 21 decline to apply that rule.

B. Overriding Mandatory Provision

When negotiating the text of the Rome I Regulation, the European Commission and the British Government took the position that an outlet needed to be provided in it for the *Ralli Bros* rule, which led to the adoption of Article 9(3). This provides: "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful."

However, there are significant differences between Article 9(3) and the *Ralli Bros* rule. First, rather than simply rendering a contract unenforceable, it purports to give effect to the *lex loci solutionis*. Thus, if treated as an implementation of the *Ralli Bros* rule, it breathes new life into Lord Wright's "fallacious" understanding of *Ralli Bros* as a choice of law rule. Second, it requires the law in the *lex loci solutionis* to be an overriding mandatory provision.[158] Precisely what is meant by the definition is open to debate, and the case law that develops is likely to be fact sensitive.[159] But it is more stringent than *Ralli Bros*, which is triggered by any prohibition. Third, Article 9(3) applies to contractual obligations that "have to be or have been performed". "Have to be" is consistent with the limitation on the *Ralli Bros* rule that the contract must insist on performance in the place of illegality by express or implied stipulation or by necessity. However, "have been" may be understood to widen the provision to cover places where performance has historically been rendered even if that was a matter of party choice rather than contractual dictate.[160] The point is unlikely to arise often, since disputes in this corner of the law tend to arise from the fact that there has been no performance rather than after performance has occurred. Finally, a fundamental difference between Article 9

[157] *Dicey, Morris & Collins*, 15th ed., [32.185].
[158] Defined in Art. 9(1).
[159] Opinion of 20 April 2016, *Greece v Nikiforidis*, C-135/15, EU:C:2016:281, [2016] ILPr 39, [AG72]–[AG73].
[160] M. McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford 2015), [15.95]; M. Hellner, "Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles" (2009) 5(3) J.P.I.L. 447. In Judgment of 18 October 2016, *Greece v Nikiforidis,* C-135/15, EU:C:2016:774, [2016] ILPr 39, at [43]–[46], the European Court of Justice said that Art. 9(3) "must be interpreted strictly", but the context in which this was said suggests that this should be understood to mean "restrictively".

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(3) and *Ralli Bros* is that, even if a case falls within the scope of the provision, it is applied only at the discretion of the court. This provides some form of safety value to Article 9(3), and was central to the European negotiations of the text.[161] In contrast, *Ralli Bros* must be applied if its requirements are met; the court does not have a discretion about the matter.

VI. Conclusion

This article has proposed a new way of understanding the *Ralli Bros* rule. It is neither a choice of law rule nor part of the law of frustration; rather, it is a public policy rule of abstention grounded in comity. The comity justification is only engaged where the contract is enforceable by reference to its governing law, but illegal and unenforceable by reference to the law in the place of performance. This approach to the *Ralli Bros* rule is historically sound, fits with its doctrinal requirement, and is consistent with wider concerns in the common law about the territorial sovereignty of other states.

[161] McParland, *The Rome I Regulation*, [15.115].

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