Foreign law illegality and non-contractual claims

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Since *Foster v Driscoll* [1929] 1 KB 470, common law courts have recognised that contracts made with the intention to commit a criminal offence in a foreign state are unenforceable, even if the contract contemplated an alternative mode or place of performance. However, recent developments in domestic law illegality have sparked debate on whether foreign law illegality too should be reformed in a similar light (see *Ryder Industries Ltd v Chan Shui Woo* [2016] 1 HKC 323, [36], [52]-[55]; *cf Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), [331]-[332]). The debate, however, has thus far not considered whether foreign law illegality should expand to bar certain *non*-contractual claims – a question which the Singapore Court of Appeal's recent decision in *Jonathan Ang v Lyu Yan* [2021] SGCA 12 raises.

Lyu Yan wanted to transfer money from China to Singapore. Her bank in Singapore introduced her to Joseph Lim for assistance. Joseph proposed that Lyu transfer Renminbi from Lyu's Chinese bank account to the Chinese bank accounts of two other individuals, Jonathan Ang and Derek Lim. Jonathan and Derek would then transfer an equivalent sum in Singapore Dollars from their Singapore bank accounts to Lyu's Singapore bank account. Lyu performed the transfer in China, but received no money in Singapore. She then sued Joseph for breach of contract; and sued Joseph, Jonathan and Derek in tort and unjust enrichment. At first instance, the Singapore High Court ruled against all three defendants. Joseph did not appeal, but Jonathan and Derek did, arguing, *inter alia*, that *Foster* barred Lyu's non-contractual claims against them because Chinese law prohibited their transaction.

Andrew Phang JCA, who delivered the Court's judgment, dismissed Jonathan and Derek's appeal. It was undisputed that the transaction, if performed, would have violated Chinese law (See *Lyu Yan v Lim Tien Chiang* [2020] SGHC 145, [15]-[16]). However, Lyu did not intend to break Chinese law – the facts at their "highest" showed that she thought the transaction contravened *Singapore* law

rather than Chinese law (*Jonathan Ang*, [18], [20]). Thus, since *Foster* does not apply if the claimant does not intend to contravene a specific foreign law, it was inapplicable.

Of interest, though, were Phang JCA's *obiter* comments: if Lyu had known the transaction contravened Chinese law, would her *non-contractual* claims be barred? *Foster*, he noted, was "not applicable in relation to non-contractual claims" ([26]). This was contrasted with the position in domestic law illegality, where an illegality affecting a contract could sometimes also bar other non-contractual claims arising from the contractual relationship ([27]-[28]). Here, Phang JCA referenced *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363, where the Court of Appeal had held that claims in unjust enrichment (and, potentially, tort) arising from a contractual relationship would be barred if it stultified the policy underlying the law which rendered the contract unenforceable (*Ochroid Trading* [145]-[159], [168])

Phang JCA then considered whether *Foster* and *Ochroid Trading* could be "read together" (*Jonathan Ang*, [30]) – *i.e.*, whether foreign and domestic law illegality, as *separate* doctrines, could apply on the same facts. This could only happen when Singapore law was the *lex contractus*, because, while *Foster* barred contract claims "regardless of their governing laws", *Ochroid Trading* barred only claims governed by Singapore law. If indeed *Foster* and *Ochroid Trading* were "read together", however, "possible difficulties" arose, because it would put a plaintiff with a Singapore law contract in a worse position than a plaintiff with a foreign law contract: the former would potentially have *both* his contractual and non-contractual claims barred, while the latter would have *only* his contractual claim barred ([33]). To Phang JCA, this was undesirable, because there was "no principled reason" for this distinction ([34]). While Phang JCA did not attempt to resolve these "difficulties", he concluded by noting that for both foreign law and domestic law illegality "the concept of *policy* serves as a limiting factor to ensure that the illegality involved does not inflexibly defeat recovery where such recovery is justified" ([34]) – presumably, then, Phang JCA was noting tentatively that recourse to public policy arguments might help ameliorate the differences between the two classes of plaintiffs he identified.

Phang JCA's comments in *Jonathan Ang* raise more questions than answers; this was of course by design, given their tentative and exploratory nature. However, with respect, the correctness of some of the assumptions Phang JCA relied on may

be doubted. First, one may only conclude that there is no "principled reason" for treating plaintiffs with Singapore law contracts differently from plaintiffs with foreign law contracts if one accepts that domestic and foreign law illegality share the same "principled" basis. However, *Foster*'s principled basis remains shrouded in uncertainty: courts and commentators have variously called it a doctrine of public policy, comity and international jurisdiction, but only the first conception of *Foster* aligns it with domestic law illegality. Second, while it is true that the public policies of the forum limit both domestic and foreign law illegality, those public policies perform that function in different ways in those two contexts. In domestic law illegality, courts ask whether *barring* the plaintiff's claim would give effect to the forum's public policies; but in foreign law illegality, courts ask whether denying recognition of the relevant foreign law, and thus *allowing* the plaintiff's claim, would give effect to the forum's public policies. It follows that public policy arguments may not consistently resolve differences between the two classes of plaintiffs identified by Phang JCA.

At base, the questions posed in *Jonathan Ang* (and the assumptions they relied on) were only relevant because of Phang JCA's continued acceptance of one central proposition: that foreign law illegality bars *only* contractual claims. Yet, this proposition is doubtful; in *Brooks Exim Pte Ltd v Bhagwandas Naraindas* [1995] 1 SLR(R) 543, Singapore's Court of Appeal considered *Foster* in relation to a claim for "money had and received", and found it inapplicable only because parties there did not intend to breach foreign law (*Brooks Exim*, [1], [14]). Moreover, the justification for limiting *Foster*'s rule to contractual claims remains unclear: in *Jonathan Ang* Phang JCA cited the English High Court's decision in *Lilly Icos LLC v 8PM Chemists Ltd* [2010] FSR 4 for it, but there that proposition was simply accepted without argument (*Lilly Icos*, [266]). A possible justification might be that only in contract claims may parties, by virtue of their ability to choose the governing law, avoid the applicability of the (criminal) law of a foreign state objectively connected to their relationship. This, however, would be a poor justification, since parties have the autonomy to choose the governing law for various non-contractual claims as well. An expressly chosen law, for example, may govern not just parties' contract, but also claims in unjust enrichment arising from that contractual relationship by virtue of a characterization sub-rule, and potentially also tort claims under an exception to the *lex loci delicti* rule (or, in Singapore's context, the double actionability rule). If foreign law illegality exists to prevent parties from avoiding the law of a state objectively connected to their

contractual relationship, it should bar all claims arising from that contractual relationship governed by parties' chosen law, regardless of whether those claims are "contractual" or "non-contractual".