Foreign illegality and English courts: Do the Ralli brothers now have a sister?

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In the recent and interesting case of *LLC Eurochem v Société Generale S.A. et al* [2025] EWHC 1938 (Comm), the English High Court (Commercial Court) considered the extent to which economic sanctions enacted by a foreign jurisdiction (EU law in this instance) can impact the enforcement of contractual payment claims (governed by English law) in English courts. More broadly, the decision also highlights the somewhat diminishing role of the Rome I Regulation (and its interpretation by the European Court of Justice) in the English legal system, and probably that of conflict of laws rules in general.

The underlying facts

A Russian company, respectively its Swiss parent (the assignee of the claimed proceeds of the drawdown), both of which are ultimately controlled by a Russian oligarch, claimed €212 million from two banks (one French and one Dutch, the latter operating through its Italian branch) out of six on-demand bonds governed by English law, based on corresponding exclusive jurisdiction agreements in favour of English courts. The performance bonds had been issued by the defendant banks to secure the proper performance of a contract for the construction of a fertiliser plant in Russia, which was terminated as a consequence of Russia's illegal invasion of Ukraine. When the Russian company called on the bonds to recover advance payments made under the construction contract, the banks refused to pay, arguing that doing so would violate applicable EU sanctions.

The Commercial Court agreed with the banks that payment under the bonds would indeed breach both Art. 2 of Council Regulation (EU) No 269/2014 and Art.

11 of Regulation (EU) No 833/2014. However, even though the ultimate owner of the claimant was also subject to UK sanctions, UK sanctions did not apply in this case, as payment under the bonds would not have involved any acts in the UK or by UK companies or persons.

The key question

The key question was therefore this: Could the banks rely on the EU sanctions as a defence against the payment claim in an English court, given that their contractual performance would be illegal under foreign law? According to the Ralli Brothers principle (as established by the English Court of Appeal in *Ralli Brothers v Companie Naviera Sota y Aznar* [1920] 2 KB 287 and also serving as a blueprint for Art. 9(3) of the Rome I Regulation), the answer would be yes if the contractual performance required an act to be carried out in a place where it would be unlawful to do so. However, was the place of performance in the EU in this case, despite the fact that, under English common law, the place of payment is generally where the creditor (here, the claimant, as the beneficiary) is located, unless otherwise agreed by the parties?

The court's resolution

The resolution was straightforward in relation to the defendant Italian branch, as the corresponding bond incorporated the ICC Uniform Rules for Demand Guarantees (URDG) and Art. 20(c) of the URDG explicitly states that payment is to be made at the branch or office of the guarantor (para. 447). However, the Commercial Court also answered this question in the affirmative with regard to the payment claims against the French bank (the relevant five bonds had not incorporated the URDG). This was based on the general proposition that, in relation to on-demand instruments, the place of performance should generally be where the demand must be made — hence in this case in France rather than Russia or Switzerland (paras 449 ff.).

Public policy was the alternative reasoning offered by the Commercial Court

More interesting still is the alternative argument offered by the Commercial Court. The court explicitly agreed with the defendants that the bonds should not have been enforced, even if the place of performance were in Russia (in which case the Ralli Bros. principle could accordingly not apply). The court postulated

that, even outside the Ralli Bros. rule, *'a sufficiently serious breach of foreign law reflecting important policies of foreign states may be such that it would be contrary to public policy to enforce a contract'* (paras 466 et seq). According to the defendants (and as confirmed by the court), the principle of comity was engaged particularly strongly here, given that the defendants would have faced prosecution, significant fines and the risk of imprisonment for individuals acting on behalf of the banks in France and Italy if they had paid.

Comments

The alternative reasoning given by the Commercial Court for the unenforceability of the bonds based on public policy seems to have two flaws.

Firstly, the view that enforcing a contract may be contrary to public policy due to a sufficiently serious breach of foreign law even outside the Ralli Bros. rule cannot be based on a clear line of precedent. The Commercial Court only refers to two High Court decisions, the more recent of which is *Haddad v Rostamani* (2021) EWHC 1892, para. 88. These decisions are difficult to reconcile with the Court of Appeal's finding in *Celestial Aviation Services Limited v Unicredit Bank GmbH* [2024] EWCA Civ 628, paras. 105 et seq and prior High Court precedents relied on in this judgment, in particular *Banco San Juan Internacional Inc v Petróleos De Venezuela S.A.* [2020] EWHC 2937 (Comm), para. 79, which states that, '*the doctrine therefore offers a narrow gateway: the performance of the contract must necessarily involve the performance of an act illegal at the place of performance. Subject to the Foster v. Driscoll principle, […] it is no use if the illegal act has to be performed elsewhere*'. In Banco San Juan, the High Court referred to the *Foster v Driscoll* principle as the only legitimate expansion of the Ralli Bros. rule. But this principle is not applicable in the present case: It is limited to contracts entered into by the parties with the intention of committing a criminal offence in a foreign state (*Foster v Driscoll* [1929] 1 KB 470, 519).

Secondly, it is somewhat ironic that, in order to give effect to EU sanctions law, the Commercial Court relies on English common law precedents that hardly align with Art. 9(3) of the Rome I Regulation. This is because the ECJ has expressly taken the view that Art. 9 contains an exhaustive list of situations in which a court may apply foreign overriding mandatory provisions not merely as a matter of fact (see ECJ, 18 Oct 2016, Case C-135/15, *Nikiforidis*: *'Article 9 of the Rome I Regulation must therefore be interpreted as precluding the court of the forum*

*from applying, **as legal rules**, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed'*).

Although the Commercial Court does not mention the Rome I Regulation in this regard, it still forms part of English statutory law as 'assimilated law' (formerly 'retained EU law'). The justification for ignoring the Regulation is probably the prevailing, though (against the background of the general function of private international law and the fact that Art. 9 of the Rome I Regulation explicitly and exhaustively deals with this very problem) unconvincing, view in England that the Ralli Bros principle, and consequently its potential expansion in the present case, is not a conflict of laws rule in the first place: Instead, it is considered a principle of domestic English contract law, therefore unaffected by the exhaustive nature of Art. 9(3) of the Rome I Regulation (in favour of this view, for example, *Chitty on Contracts*, Vol. I General Principles, 35th edition (2023), para. 34-290, *Dicey, Morris & Collins*, The Conflict of Laws, Vol. 2, 16th edition (2022), para. 32-257 with further references. Contrary, *A. Briggs*, Private International Law in English Courts (2014) para. 7.251, who rightly notes that such a characterisation '*was only possible by being deaf to the language and tone in which the judgments were expressed, and it is a happy thing that the Rome I Regulation puts this seemly principle on a statutory footing*' and characterises the Ralli Bros principle accordingly as a '*rule of common law conflict of laws*' (*A. Briggs*, The Conflict of Laws, 4th edition, 2019, p. 239). For a full discussion of the history and characterisation of the Ralli Bros rule, see *W. Day* (2020) 79 CLJ 64 ff.)

The need to rely both on a questionable characterisation and expansion of the Ralli Bros principle in this case may be due to English contract law (at least in its substantive core) being ill-equipped to address factual impediments caused by foreign illegality for the parties. Unlike civil law jurisdictions, which can rely on the doctrine of (temporary) impossibility to address such cases — the recent decision of the Court of Arbitration in CAS 2023/A/9669, *West Ham United Football Club v PFC CSKA & FIFA* (applying Swiss law), is a case in point — the doctrine of frustration is apparently too limited in scope to recognise factual impediments triggered by foreign illegality. Furthermore, the doctrine of frustration does not offer the necessary flexibility as it results in the termination of the contract rather than merely suspending it temporarily.