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ANALYSIS OF THE HIGH COURT DECISION IN THE CASE OF HAM ENTERPRISES LTD & ANOR V. DIAMOND TRUST BANK (K) LTD & ANOR: CONFLICT OF LAWS AND THE RALLI PRINCIPLE OF FOREIGN ILLEGALITY

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ANALYSIS OF THE HIGH COURT DECISION IN THE CASE OF HAM ENTERPRISES LTD & ANOR V. DIAMOND TRUST BANK (K) LTD & ANOR: CONFLICT OF LAWS AND THE RALLI PRINCIPLE OF FOREIGN ILLEGALITY

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ABSTRACT

This comment explores the missed opportunity by the High Court decision in the case of Ham Enterprises & Anor V. Diamond Trust Bank (K) Ltd & Anor to raise the issue of conflict of laws. Particularly, focus is placed on the opportunity to determine the proper law governing the loan contract between a Ugandan company and a foreign bank, which contract had a 'foreign element.' The author also discusses the Ralli principle of foreign illegality, with a view of undoing the legacy of rigidly applying national (local) law to transactions with 'a foreign element.' This comment is a response to the High Court decision in Ham Enterprises case to start the discourse on Ugandan courts' application of private international law.

1.0 INTRODUCTION

The doctrine of the proper law is an application of the free will of the parties to the essence of the contractual relationship. It can be interpreted to mean:[1]

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[*] LLB (Mak) and author of: 'The Defence of Illegality and Unjust enrichment: A case for Flexibility in Breach of Contract Cases' (LLB thesis, Makerere University 2022). *See also*: Kabazzi Maurice Lwanga (2021) 'The Illegality Defense: A Case for Reform in Uganda's Judicial System.' Volume 20, Issue 1, Makerere Law Journal pp 154-177.
I would like to extend my gratitude to Jenipher Tuyiringire and Deborah Kimbowa for their invaluable assistance on this comment.

[1] R.H. Graveson, (1974) 'Conflict of Laws', Private International Law. Sweet & Maxwell. See also The Law Commission Working Paper No. 820 Private International Law Foreign Money Liabilities. London Her Majesty's Stationary office, p 19.

> *"The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as lex loci contractus or lex loci solutionis and has treated the matter as depending on the intention of parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts"*[2].

Foreign law illegalities are derived from the principles in *Foster v Driscoll*[3] and *Ralli Brothers v Compania Naviera Sota y Aznar ("Ralli Brothers").* The first rule of foreign illegality is that the forum ignores foreign law illegality as a general rule. This rule was considered in the case of *Vita Food Products Inc v Unus Shipping Co Ltd.* However, Tan Yock[4] concludes that that the forum court, as a general rule, is chiefly concerned with upholding an international contract where it is perfectly valid by the parties' chosen applicable law.

The second rule of foreign illegality is that court will not enforce contracts, where the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act, which is illegal by the law of such country. The third rule of ex turpi causa doctrine renders contracts unenforceable if illegal under the *lex loci solutionis* (the law of the place of performance).

TAN Yock Lin concedes that difficult questions have been asked about the role of the doctrine of *ex turpi causa non oritur actio* ("ex turpi causa") or the defense of illegality in the conflict of laws. It should be noted that the rule in *Foster v Discroll* is likely limited to contracts that obligate either party to commit a crime.[5]

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2 Per Lord Wright, Mount Albert Borough Council v. Australian Temperance, etc. Society [1938] AC 224 at pg. 240

3 (1929) 1 KB 470

4 Tan Yock Lin, 'Tainted Contracts in the Conflict of Laws' (2020) 32 SAcLJ 1003, [7]

5 As above

It deals with contracts where the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country.[6]

That notwithstanding, this comment is limited to conflict of laws and the impugned loan agreement, which had a foreign element in the dispute in the Ham Enterprise case.

2.0 THE CASE

The High Court of Uganda applied the local law[7] of Uganda to find the loan contract by DTB (K) Ltd tainted with illegality, and adhered to the "better law" approach to apply the law of the forum.[8] Briefly, the facts are that Diamond Trust Bank (K) Ltd, ("DTB(K)") was a Kenyan financial institution and parent company to its co-lender, Diamond Trust Bank (U) Ltd. ("DTB(U)"). In 2017, Ham Enterprises (the borrower) flew to Kenya and obtained new financing from DTB(K). The securities for this loan were perfected in Uganda, where they were situated. However, the borrower alleged it was illegal for the Kenyan bank to lend money to a Ugandan borrower without being licensed by the Bank of Uganda ("BoU") under the Financial Institutions Act, 2004 ("FIA").[9]

In this case, DTB(K) appointed DTB(U) as agent to debit the borrower's account with the fees and taxes and on each anniversary of the loan, to remit funds to

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6 With respect to Ham Enterprises case under consideration, the impugned loan transaction cannot be said to have been done with intention and knowledge of possible commission of illegality. Thus, the foreign illegality rule in Foster's case will not be analyzed in this comment with respect to Ham Enterprises case.

7 "The judge applying foreign law is a dilettante, a beginner; he is timid. The judge, applying the lex fori is a learned expert; he is a sovereign, superior judge." Zweigert, Some Reflections on the Sociological Dimensions of Private International Law or What Is Justice in Conflict of Laws? 44 U. COLO. L. Rv. 283, 293 (1973). See also Allstate Ins. Co. v. Hague, 101 S.Ct. 633, 647 & n.14 (1981) (Stevens, J., concurring).

8 The law of the forum lex fori is: If applicable, it provides that the law of the jurisdiction or venue in which a legal action is brought applies.

9 Phillip Karugaba, Rehema Nakirya Ssemyalo, Rachel Musoke and Anita Kenyangi, 'Does a foreign lender to a Ugandan business require a license?' available at <https://www.ensafrica.com> [Accessed October 19 2022]

DTB(K). This was the cause of disagreement.[10] The court ruled that the Financial Institutions Act of Uganda applies to foreign banks, and it was illegal for money held on deposit, whether in Uganda or outside, to be lent without the approval of the BoU. It also ruled that section 117 of the FIA required the local licensing of foreign banks doing business in Uganda. The court took the view that the syndication of the lending between DTB(K) and DTB(U) was aimed at dodging licensing from the relevant authority.

In consequence of its findings, the court declared the lending transactions illegal and void ab initio for violation of the law of the forum (Uganda). The borrower's debt was declared settled by law, and an immediate release of all the mortgaged property and a full refund of all monies allegedly debited from the borrower's account by DTB(U) was also declared. It was held that DTB(K) was in fact conducting financial institution business in Uganda and its failure to obtain a license to conduct such in Uganda rendered the credit transaction illegal, void *ab initio* and consequently unenforceable.[11]

This comment takes issue on the determination of this case from the conflict of laws perspective, arguing that the court ought to have first determined the proper law of the contract and applied foreign illegality principles if any was applicable, instead of domestic illegality.

3.0 APPLICATION OF PRIVATE INTERNATIONAL LAW IN UGANDA

Private International Law applies to the Ugandan courts. The author concurs that foreign law illegalities in conflict of laws are also applicable to Uganda. According to F.M Sekandi, conflicts of laws apply in Uganda, basically as part of

[10] ibid

[11] Anjarwalla & Khanna, 'Unlicensed Foreign Bank Loans Declared Illegal by Ugandan High Court' available at <https://www.lexology.com/library/detail> [Accessed October 19 2022]

the Common Law of England. We have no statute prescribing these rules.[12] F.M Sekandi conceived that courts can only rely on section 3(2) of the Judicature Act, 1967: Act 11/67 (replaced by the Judicature Act section 14). He concluded that

Private International Law is part of the English Municipal System Law and is essentially common law, part of Ugandan law in as far as its rules are consistent with the written law. Conflicts of laws in England are restricted to cases containing a foreign element. As Cheshire states:

> *"It functions only when this (foreign) element is present, and its objects three-fold:*
>
> *First to prescribe the conditions under which the court is competent to entertain such a suit. Secondary, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained. Thirdly, to specify the circumstance in which (a) a foreign judgment can be recognized as decisive of the question in dispute; and (b) the right vested in creditor by a foreign judgment can be enforced by action in England."*

3.1 The missed opportunity on Foreign Illegality in Conflict of Laws

The author criticizes the adherence to the domestic illegality rule in *Makula International* and its applicability to transactions with a foreign element. It is submitted that foreign illegality must be considered from the purview of the proper law of the contract in Private International law.

There are five propositions which establish foreign illegality in contracts from a conflict of laws perspective.

First, it is axiomatic that a contract that is illegal by its proper law cannot be enforced in Uganda. Second, no action lies in Uganda upon a contract which infringes the distinctive public policy of Ugandan Law. Thirdly, a contract falling within the ambit of a Ugandan statute by its creation is forbidden cannot be enforced in Uganda. Fourthly, a contract which is valid by its proper law is

[12] F.M. Ssekandi, 'Conflict of Laws. Uganda Law Focus' 1974 Law Development Center

enforceable in Uganda notwithstanding that is illegal according to the *lexi locis contractus*. Fifthly, that a contract illegal by the *lex loci solutionis* but not by proper law is unenforceable in Uganda.

The parties in this case should not have been faulted for having intended the doing of an act in a foreign country contrary to its laws.[13] It cannot be imputed that the real object, purpose, or intention of the contract was to break laws. In this commentary, we limited our analysis of the *Ham Enterprises* case in line with the Ralli principle of foreign illegality.

4.0 THE PROPER LAW OF CONTRACT UNDER HAM ENTERPRISES' CASE

To successfully apply foreign illegality in conflict of laws, there is need to determine the proper law of contract. The general principle is not in doubt. Parties are entitled to agree to what is to be the proper law of their contract, and if they do not make any such agreement then the law will determine what the proper law is.[14] The proper law is the system of law which the parties expressly or impliedly choose as the law governing their contract or, in the absence of such choice, the 'system of law with which the contract has its closest and most real connection."[15]

Cheshire submitted that with regard to valid creation of a contract, the proper law is the law of the country in which the contract is localized.[16] Its localization

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13 (Reggazoni v. KC Sethia (1944) Ltd (1958) AC 301, Royal Boskalis Westminster NV v. Mountain ()1999) QB 674

14 Whitworth Street Estates (Manchester) Ltd. James Miller & Partners Ltd. [1970] A.C. 5887 at p.603, per Lord Reid

15 Amin Rasheed Shipping Co v Kuwait Insurance Co [1984] AC 50, 69 ('Amin Rasheed'); Bonython v Commonwealth [1951] AC 201, 219 ('Bonython'). cited by Brooke Adele MARSHALL, 'Reconsidering the Proper Law of the Contract' 2012, 2 Melbourne Journal of International Law [Vol 13] Available at <https://law.unimelb.edu.au > [Accessed 22nd May 2022]

16 The proper law is the law in which the contract is localized. See pg. 203 of Cheshire, 'Private International law' 1948, Oxford Publishers

will be indicated by what may be called the grouping of elements as reflected in its formation and in its terms.[17] The country in which its elements are most densely grouped will represent its natural seat. First, the substantial connection test can be applied to determine the proper law of contract. In the decision by Denning L.J in *Boissevain v. Weil*, it was established that:

> *"The proper law do the contract depends not so much on the place where it is made, nor even on the intention of the parties or on the place where it is to be performed but on the place with which it has the most substantial connection."*[18]

According to the Ham Enterprises case, it is worth noting that the High Court decision was silent on the issue of choice of law. Thus, the author has found it unnecessary to comment on the applicability of choice of law to this matter. It is submitted that if the parties expressly provide their choice of law to govern their contract, the court should not attempt to determine the proper law for them.

5.0 PROPER LAW OF CONTRACT ANALYSIS OF THE CASE

According to Ham Enterprises' case, the loan agreement was connected to Kenya *lex loci contractus (place of contracting*). With regard to recovery of the loan and enforcement of the debt recoveries in Uganda, the appointment of the agent DTB(U) Ltd resident in Uganda, the perfection of securities in the company's assets was also completed in Uganda.

It is generally conceded that a contract is made where the last act necessary to constitute agreement is done.[19] However, since the last act involved in this foreign loan was perfection of securities by the borrower which puts Uganda as *lex locus solutionis*. Thus, the Court in *Ham Enterprises Ltd v DTB Bank (U) Ltd & Anor* could have applied the substantial connection test to decide the issue of the proper law. The author has doubt whether the proper law of contract would be Uganda according to the substantial connection test.

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17 The proper law depends on localization of contract.

18 Lord Denning repeated this view in The Fehmarn [1958] W.L.R. 159 p 162

19 Cheshire (n 16)

The proper law can be determined by the law of the country with which the contract has the most substantial connection, and no other, determines the question whether an obligation has been validly and effectively created. According to the applicants in Ham Enterprises, the financial institutions business alluded to in this case was commenced in Uganda, evidenced by factors such as the mortgage facility letter being drafted in Uganda by Ugandan lawyers and even witnessed in Uganda.

Furthermore, the applicants were Ugandan companies based in Kampala and issued securities for the loan facilities through mortgages, debentures and other securities registered in Uganda. It is seemingly tempting to say that the loan agreement was most substantially connected to Uganda's legal system. It should be noted that the law of the place of performance is the creditor's residence. In this case, since DTB(K) Ltd, the creditor, was resident in Kenya where the loan was disbursed, it can also be argued that the proper law of the contract was Kenyan law. This proposition finds support from the *Miliangos case*- a leading decision of the House of Lords enforcement of debts.

In the case of *Miliangos v. George Frank (Textiles) Ltd.*, the plaintiff, resident in Switzerland, had successfully claimed payment of a sum due from the English defendants. The case was remitted to the trial judge to determine that amount of interest due on the sum for which judgment was given in Swiss francs. Birstow J decided that the question of the right to interest by way of damages was to be referred to Swiss law as the proper law of the contract, and the parties had agreed that Swiss law gave such a right to the plaintiff in this case.

However, he also held that the rate at which interest should be awarded was a matter of procedure, to be governed by the proper law of the forum i.e. English law. He opined that, "while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the

lex fori to decide how much."[20] By analogy, the court ought to look to the proper law to decide whether the loan contract was legally valid.

5.1 Money's obligation as the proper law.

If the place of performance is not fixed or determinable from the contract, then the place of performance of a money obligation is the creditor's place of business. "The debtor must seek the creditor". This rule will leave the debtor with a free choice of how it will send or transfer the money to the creditor. When the debtor carries the risk of transmission, s/he will have no right to interfere with the mode of transportation or transfer used.[21]

Although the loan transaction was substantially connected to Kenya, the proper law of the contract shall be based on the money obligation. Against this background, the law of the place of performance in this case could be derived from the money obligation attached to the creditor's residence, which is Kenya.

5.2 Agency Contracts

Graveson argues that there is a presumption which exists in favour of the law of the principal's country, which is stronger than a presumption in favour of the law of the place of performance by the agent.[22] Based on this presumption, the author concedes that the agent debt-collecting bank being resident in Uganda did not in any way render the proper law to be Uganda since the principal DTB (K) Bank Ltd was resident in Kenya.

The author further concedes that the proper law, however, is not exclusively decisive on the question of the legality of a contract.[23] Cheshire argues that, in

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[20] [1977] Q.B. 489, 497. For better authority to the same effect, see The Funabashi [1972] 1 W.L.R. 666, 671; Wildhandel N.V. v. Tucker & Cross Ltd. [1976] 1 Lloyd's Re. 341, 342

[21] Principles of European Contract Law: Parts I and II at pg. 402 available at <https://www.law.kuleuven.be> [Accessed 23 March 2022]

[22] [1894] A.C. 202. *See* N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co. [1927] A.C. 604; Tzortzis v. Monark Line A/B [1968] 1 W.L.R 406

[23] Graveson (n 9) 435.

the particular matter of illegality,[24] though it certainly affects the creation of contact, it is no longer possible to refer exclusively to the proper law.

6.0 THE RALLI PRINCIPLE IN LINE WITH HAM ENTERPRISES CASE

Following the determination of the proper law of the contract, the Ralli principle of foreign illegality can be applied to the facts of the case. This applies to the legal system where the contract is/was/will be performed.

In *Ralli Bros. v. Compania Naviera Sota y Aznar*, an English firm chartered a Spanish ship to carry a cargo of jute from Calcutta to Barcelona, at the rate of £50 a ton, half of which was payable on discharge of the cargo in Spain. By Spanish law, payment of this freight was prohibited as exceeding the maximum legal rate of 875 pesetas a ton. The ship-owners sued in England for the unpaid balance of freight, relying on the absolute nature of the contractual obligation in English law.

In this case, the Court of Appeal made no attempt to classify Spanish prohibition as mandatory or directory; such classification was, indeed unnecessary, since the act was to be performed, if at all, in Spain. Scruton L.J rested his judgment on a term to be implied in the contract itself, saying:

> *"Where a contract requires an act to be done in a foreign country it is, in the absence of very special circumstances, an implied term of the continuing validity of such provision that the act to be done in the foreign country shall not be illegal by the law of that country."*[25]

In Private International law, there is illegality by the law of the place of contracting and illegality by the law of the place of performance. The Ralli principle falls under the latter. Dicey and Restatement both say that if the

[24] Cheshire (n 16) 222.
[25] Zivnostenska Banka National Corporation v. Frankman [1950] A.C. 57

performance of a contract is illegal by the law of the place of performance, there is no obligation to perform.[26]

The former principle with regard to legality of the loan contract in Ham Enterprises case is not considered, since the *locus contractus* was Kenya and the loan was valid and enforceable in that country. This brings us to the discussion of the second principle on illegality based on *locus solutionis*. It will necessitate a brief on the background of the *Ralli brothers* case.

In *Ham Enterprises*, the plaintiffs challenged the credit facility for illegality, as it was being entered into with DTB(K), a bank not licensed by Bank of Uganda. In this case, a loan agreement not illegal or prohibited at the time of its formation in Kenya became unenforceable upon its default in Uganda and the manner of enforcing the security involved a third party (agent), that is DTB (U) which was faulted for performing an illegal loan agreement on behalf of an unlicensed foreign lender.

The rule in *Ralli Brothers* renders contracts unenforceable or illegal under the *lex loci solutionis (law of the place of performance)*. However, there is a presumption that the creditor's residence determines the law of the place of performance prevails. Based on this presumption, the author is pressed to submit that foreign lending would not be illegal according to Kenya's legal system whereby the law proper law of contract is based on the creditor's residence)[27].

7.0 WAY FORWARD

The *Makula International*[28] domestic illegality principle is too narrow and must be limited to contracts governed by domestic law, not those with a foreign

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26 Restatement, Conflict of Laws (1934) and Dicey, 'Conflict of Laws' 637

27 There is a presumption that the creditor's residence determines the law of the place of performance prevails.

28 Makula International Ltd v His Eminence Cardinal Nsubuga & Anor (Civil Appeal 4 of 1981) [1982] UGSC 2

element. The treatment of the "public policy" defence[29] during this period is no more enlightening. In 1964, for example, in *Intercontinental Hotels Corp. v. Golden,* a government-licensed gambling casino in Puerto Rico advanced $12,000 in credit to a New York customer, with the result that it was promptly lost at the gambling tables.

When he failed to pay, the casino sought to recover the debt in New York, which not only forbids enforcement of gambling contracts, gambling being a criminal offense there, but also allows a loser to recover from the winner in a civil action. With two judges dissenting, the court held that enforcement of a gambling debt, valid where incurred, did not so offend justice or menace the public welfare of New York that its courts must withhold aid.[30]

In *Lemenda v African Middle East,*[31] Phillips J concluded that an English contract which falls to be performed abroad should not be enforced:

i. where it relates to an adventure which is contrary to a head of English public policy founded on general principles of morality and
ii. where the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.

Although Lemenda did not involve a breach of foreign law,[32] we submit that the same concerns apply to positive laws of universal application. We submit that the principles in Lemenda should be applied as the basis of any ex turpi causa

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29 See generally, Paulsen & Sovern, 'Public Policy' in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

30 David P. Earle III, Conflict of Laws and the Interest Analysis - An Example for Illinois, 4 J. Marshall J. of Prac. & Proc. 1 (1970) available at <https://repository.law> [Accessed 10 November 2022]

31 [1988] QB 448,

32 Ryder Industries Ltd (Formerly Saitek Ltd) v Timely Electronics Co Ltd MISCELLANEOUS PROCEEDINGS NO 13 OF 2015 Hongkong

doctrine tailor-made for foreign illegality.[33] The approach prevents the harsh result of depriving a claimant of a remedy where he is required to found a claim on past contraventions of foreign law based on a policy that is not shared by the *lex fori.* It also has the advantage of certainty in its application in each case.

Can it be concluded that the foreign loan contract was governed by Uganda's domestic law? It has been established that the doctrine of the proper law does not decide the matter involving foreign illegality.[34] There are two doctrines of illegality, namely the rule in *Foster v Discroll* and the rule in *Ralli Brothers v. Compamia Naviera Scotia y Aznar* ("Ralli Brothers"). The rule in the former does not apply because DTB (K) Ltd had no intention of violating Uganda's financial laws and neither did the plaintiffs know that the transaction was possibly illegal in Uganda.

The Trial judge squandered the opportunity to address himself to the Ralli principle. First, that a Ugandan court will not enforce a contract or award damages for its breach, if its object would involve doing an act in a foreign and friendly state, which would violate the law of that state – if applicable.[35]

The DTB (K) knew it was illegal to operate banking business without a license, which is why appointing a debt collecting agent (sister bank in Uganda) was justified. It was done, not in contravention of any law, but to enforce the performance of the contract from the borrower, which is legitimate. Second, that the English courts will not assist the breach of laws of other independent states concerned in a contract.[36] In this case under consideration, the Ugandan court would not have been assisting the breach of any laws of Kenya if it had been considered from the conflict of laws perspective.

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33 See Mitchell & Bond (2010) Butterworths Journal of International Banking and Financial Law 531, 533, where the Lemenda approach (adopted in Marlwood v Kozeny [2006] EWHC 872 (Comm), §§131-134) was preferred (cf Barros Mattos v MacDaniels [2005] 1 WLR 247, which is distinguishable).

34 Cheshire (n 16)

35 Graveson (n 9) 436

36 This principle was affirmed in Vita Food Products v. Unus Shipping Co *supra*

8.0 CONCLUSION

Although the High Court is *functus officio* on the issues, the matter of conflict of laws never featured in the litigation at lower court. The Court of Appeal decision cannot *suo motu*[37] raise new issues which may not necessarily constitute grounds of appeal or which never constituted issues for determination in the lower courts. In *Fangmin v. Belex Tours & Travel*[38], Odoki at page 30 quoting Katureebe JSC in *Julius Rwabinumi vs Hope Bahimbisibwe*[39] stated:

> *"It is a cardinal principle of our judicial process that in adjudicating a suit, the trial court must base its decision and orders on the pleadings and the issues contested before it. Founding a court decision or relief on unpleaded matter or issue not properly placed before it for determination is an error of law."*

Aware that this comment is limited in its effect on the case, the author is of the view that foreign illegality and proper law of contract should be applied by litigants and courts of law in resolution of matters in private international law.

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37 Belex Tours & Travel Ltd v Crane Bank Ltd & Anor (CIVIL APPEAL NO. 071 OF 2009) [2013] UGCA 13 (24 October 2013)

38 SC Civil Appeals No. 06 of 2013 and 01 of 2014

39 SCCA No. 10 of 2009

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