

2 High Court Cases Highlight Comity Principles

By **Egishe Dzhazoyan and Kabir Bhalla** (October 14, 2020, 5:11 PM EDT)

A number of recent decisions grapple with the concept of comity in English law where there are concurrent English and foreign proceedings, including *National Bank of Kazakhstan v. Bank of New York Mellon SA/NV*[1] and *RiverRock Securities Ltd. v. International Bank of St. Petersburg*. [2]

The decisions are a powerful restatement of the flexibility of comity, and a useful reminder that comity might require the English court to exercise judicial restraint, even where its assistance has been sought by foreign courts.

Comity is a concept often relied on by litigants, but rarely analyzed in detail in submission or judgments, and so developments in the law of comity are difficult to identify.

As Justice Christopher Clarke put it in *Ecobank Transnational Inc. v. Tanoh*, "Comity has a warm ring. It is important to analyze what it means. We are not concerned here with judicial amour proper but with the operation of systems of law." [3] Comity arises in concurrent foreign proceedings in three broad and related contexts:

1. Comity can come into play where an English decision, or its effects, is or are sought to be deployed in a foreign jurisdiction. Whether comity requires an English court to make findings for that purpose, or prohibits it from doing so, depends on a range of factors, including what has been asked of the English court, by whom, and whether answering those questions would trample on territory properly reserved for the foreign court.
2. Comity can arise where the English court is asked to grant injunctive relief, including anti-suit relief. The court must carefully consider whether such relief is in accordance with, or contradicts, international comity.
3. Comity can arise where a foreign court judgment purports to take effect in this jurisdiction. To what extent should the English court recognize it, assist in its enforcement or otherwise give effect to it?

Regarding the first two scenarios, several recent cases illustrate how comity is a flexible doctrine that can cut both ways. The respect for the procedures and systems of law of another jurisdiction might



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justify judicial restraint to protect the integrity of English procedure and the English legal system, as much as it might justify the grant of relief in aid of the concurrent foreign proceeding.

The first set of cases, including *Riverrock Securities v. Bank of St. Petersburg*, decided in September, concern comity in the context of anti-suit injunctions, an area of law in which comity plays a central role. The second, *National Bank of Kazakhstan v. Bank of New York Mellon*, concerns an unprecedented, and perhaps unique, referral of certain questions of English law by a Belgian court to the English court, in the context of related garnishment proceedings in Belgium.

In the first case, *Riverrock Securities*, the Commercial Court Justice David Foxton issued an interim anti-suit injunction to restrain insolvency proceedings in St. Petersburg of an arbitration proceeding in the London Court of International Arbitration.

In so holding, Justice Foxton rejected a submission that the anti-suit injunction would illegitimately — and in a way that was both exceptional and contrary to comity — prevent the administrator, an officer of the Russian court, from fulfilling its duties to the Russian court and the creditors of the insolvent company.

The grant of an anti-suit injunction was consistent with comity, because it involved deference to a freely agreed jurisdiction and forum selection clause.

The conclusion that comity might positively require the English court to restrain foreign proceedings to enforce compliance with a jurisdiction clause is particularly important when it is the English court's own jurisdiction at stake, including over assets sited in the jurisdiction — described in some of the case law as the "golden thread" that justifies anti-suit relief.

In this sense, *Riverrock* builds on another significant judgment on the role of comity in anti-suit injunctions this year: the Court of Appeal decision this May in *SAS Institute Inc. v. World Programming Ltd.*^[4] There, Justice Stephen Males ordered anti-suit injunctions for U.S. enforcement measures that sought to affect assets in England and Wales but not those that sought to affect assets situated in the U.S.

Justice Males emphasized that "comity is a two-way street, requiring mutual respect between courts in different states," and "a recognition of the territorial limits of each court's enforcement jurisdiction, in accordance with generally accepted principles of customary international law."^[5]

The problem with the U.S. enforcement measures that sought to affect assets in England was that they were exorbitant and thus contrary to international comity. They were "contrary to the internationally accepted principle that enforcement of a judgment is a matter for the courts of the state where the asset against which it is sought to enforce the judgment is located."^[6]

Comity here involved respect for the territorial allocation of enforcement jurisdiction, as much as it also entailed "great respect for the work of foreign courts, particularly those in countries such as the U.S. with which we share common traditions and fundamental principles, and which have a high regard for the rule of law."

The dual nature of comity, and its flexibility, is also at the core of the Commercial Court decision in *National Bank of Kazakhstan* — the first ever fully virtual trial in English legal history, and the first ever publicly broadcast via YouTube.

This decision underscores the way in which comity can be deployed on both sides of English litigation, where that litigation is initiated to assist concurrent foreign proceedings. It relates to the long-running and well publicized award enforcement efforts of a group of Moldovan investors, the Stati parties, against the Republic of Kazakhstan.

In December 2013, the Stati parties won a \$507 million Energy Charter Treaty award. The ruling in question marks the final resolution of a claim brought before the English court by Kazakhstan and its central bank, the National Bank of Kazakhstan, against the Stati parties and the national bank's Belgium-incorporated banker and global custodian, the Bank of New York Mellon SA/NV, London branch.

The Stati parties obtained an attachment in Belgium in October 2017 of assets of Kazakhstan's National Fund held in BNY Mellon's London accounts pursuant to an English law-governed global custody agreement between the National Bank of Kazakhstan and BNY Mellon.

The attachment is presently valued at \$530 million but was initially levied for the value of the entire savings portfolio of the National Fund under BNY Mellon's then-custody worth \$22.6 billion, or 13% of the country's entire gross domestic product, believed to be the largest in legal history.

Within the Belgian garnishment proceedings, a Belgian judge had made a referral to the English court in May 2018 of the question whether the Belgian attachment had a subject matter — i.e., whether it caught any property capable of being attached. Whether the debt had a relevant subject matter for the purposes of Belgian attachment law in turn depended, at least in part, on whether there could be said to be a relevant debt owed by BNY Mellon to Kazakhstan.

By the referral, the Belgian judge had determined that the English court's assistance was required in assessing whether there was such a subject matter. The critical question in terms of comity was how far that role of the English court extended, and how conclusive an English judgment on this point would be.

By a judgment dated April 22, 2020, Justice Nigel Teare of the Commercial Court in London made a series of declarations including that: BNY Mellon did not owe obligations, or any relevant debt, to Kazakhstan under the global custody agreement, pursuant to which BNY Mellon held the funds — BNY Mellon only owed obligations to the the National Bank of Kazakhstan; nor did Kazakhstan have any claims against BNY Mellon in relation to those National Fund assets, all as a matter of English law.

However, Justice Teare refused to go further and conclusively resolve the question of subject matter as a matter of Belgian law, or any other foreign law, on the footing that this was irreconcilable with comity.

The parties' submissions on comity, ironically, appealed to the competing aspects of the doctrine. Kazakhstan, the National Bank of Kazakhstan and BNY Mellon's joint submission at trial was that the English court should fully resolve the question of the validity of the Belgian garnishment, without the need for any further enquiry, including under Belgian and Kazakh law, by the Belgian court.

This submission was put on the basis that the Belgian court had requested the English court's assistance to resolve the entirety of the subject matter question, and that the English court's role was to determine whether there could be claims under any system of law, including Belgian law.

It would therefore be consistent with comity for the English court to resolve as much of the dispute as it could to assist the Belgian court; thus in effect resolving the question of whether the garnishment would

be discharged in Belgium.

The Stati parties' submissions relied on the opposite notion: that comity required the English court to exercise restraint and that it was only appropriate for the English court to (1) address questions of foreign law insofar as English conflict of law rules permitted the court to do so; and (2) make declarations for the purposes of concurrent foreign proceedings as to the English law position, not any academic questions of foreign law.[7]

The Stati parties also argued that the scope of the Belgian referral was clear: It was for the English court to resolve questions of subject matter under "its own national substantive law," leaving the Belgian court to determine the implications of that English law decision.

Justice Teare accepted that submission and selected the more limited role of the English court as the appropriate path to take, as consistent with comity:

I have no doubt that this court cannot, as it were, purport to determine the outcome of the attachment or garnishment proceedings in Belgium. ... This court's role is to answer a question which the Belgian court has referred to this court. ... [The notion that the English court would] ... purport to determine the outcome of the attachment or garnishment proceedings in Belgium ... determine the outcome of the Belgian garnishee proceedings [or] ... assume responsibility for the determination of the garnishee proceedings in Belgium [is] ... unthinkable [and] ... contrary to comity, that is, the respect which this court has for the procedures of another jurisdiction.[8]

This was in circumstances where the English court's role was "to answer a question which the Belgian court has referred to this court" and bearing in mind the proper construction of the referral in the judge's earlier judgment on jurisdiction.

Moreover, Justice Teare accepted that foreign law issues could only be relevant "where the English court applies, as part of the law of conflicts, a foreign law to a particular issue." [9] As a result, Justice Teare J declined to give judgment for the National Bank of Kazakhstan in the debt claim of \$530 million.

The decision serves as a powerful restatement of the point — made in similar ways in the anti-suit injunction cases — that the comity is not a one-way street; nor is it an unproblematic concept that inevitably points to a definite course of action that the court should take.

While the English court will pay appropriate respect to foreign proceedings, and might even answer questions when expressly asked in those proceedings, that respect does not require the court to grant impermissibly broad and extraterritorial relief; still less to allow a foreign proceeding to usurp its proper enforcement role over assets within its jurisdiction.

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[1] National Bank of Kazakhstan and others v. Bank of New York Mellon SA/NV, London Branch and others [2020] EWHC 916 (Comm).

[2] RiverRock Securities v. International Bank of St. Petersburg [2020] EWHC 2483.

[3] Ecobank Transnational Inc. v. Tanoh [2016] 1 WLR 2231 at [132].

[4] SAS Institute Inc. v. World Programming Limited [2020] EWCA Civ 599.

[5] *Id.* at 111-112.

[6] *Id.* at 83.

[7] Relying on *Howden North America v. ACE European Group* [2013] Lloyd's Rep IR 512.

[8] See *National Bank of Kazakhstan*, *supra*.

[9] *Id.* at paragraph 39.