Court of Appeals

STATE OF NEW YORK

MOTOROLA CREDIT CORPORATION,

Appellant-Respondent,

NOKIA CORPORATION,

Plaintiff-Counter-Defendant,

MOTOROLA, INC., ET AL.,

Counter-Defendants,

—against—

STANDARD CHARTERED BANK,

Respondent-Appellant,

MURAT HAKAN UZAN, ET AL.,

Defendants-Counter-Claimants,

KEMAL UZAN, ET AL.,

Defendants.

On Question Certified by the United States Court of Appeals for the Second Circuit
(USCOA Docket Nos. 13-2535-cv(L) and 13-2639-cv(con))

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF RESPONDENT-APPELLANT

Timothy G. Cameron
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Tel: (212) 474-1000
Fax: (212) 474-3700

Attorneys for Amicus Curiae the Government of the United Kingdom of Great Britain and Northern Ireland

August 29, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

By Order dated January 14, 2014, the United States Court of Appeals for the Second Circuit certified the following question to this Court: "[W]hether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank." The Court's resolution of that question – including its ruling with regard to the continued application of the separate entity rule under New York law – has the potential directly to affect the large number of banks headquartered or operating in the United Kingdom which also have branches in New York. As such, the Government of the United Kingdom of Great Britain and Northern Ireland (the "Government of the United Kingdom") respectfully submits that it has an interest in these proceedings, for the following reasons:

First, banking is a heavily regulated and economically significant industry that is important not only globally, but particularly in the United Kingdom, which is an international center of banking and finance. Banks headquartered in the United Kingdom are among some of the largest foreign banks that have operations in New York. Those banks include the Bank of Scotland,

Barclays Bank, Lloyds Bank, Standard Chartered Bank and the Royal Bank of Scotland.[1]

Second, the Government of the United Kingdom has a strong interest in ensuring that all banking activities that occur in the United Kingdom – including applications by judgment creditors seeking to restrain funds held in U.K. bank accounts – comply fully with U.K. banking laws and regulations. The United Kingdom has enacted a comprehensive system of laws and regulations to effectuate its policy preferences about the appropriate operation of banks, banking activities and the enforcement of judgments within its territorial boundaries, and it expects those laws and regulations to be observed and complied with fully. In the absence of the recognition by New York courts of the separate entity rule, the Government of the United Kingdom is concerned at the prospect that judgment creditors may be permitted to seek, and obtain, orders from a New York court restraining assets held in a U.K. bank account – instead of seeking such a remedy in the courts of the United Kingdom, in compliance with U.K. law. Permitting judgment creditors to proceed in that manner not only fails to respect the sovereign interest that foreign governments, such as the Government of the United Kingdom, have in enforcing their own laws, but may expose the banks who are the subject of

[1] *See* New York State Department of Financial Services, *Foreign Branches* (May 6, 2014), http://www.dfs.ny.gov/about/whowesupervise/sifbranc.htm (listing foreign banks with New York branches). The Government of the United Kingdom has an equity interest in the Royal Bank of Scotland and Lloyds Banking Group, which owns the Bank of Scotland.

such orders to conflicting obligations under local laws and the risk of double liability, simply because they operate branches in both jurisdictions.

Third, in the view of the Government of the United Kingdom, application of the separate entity rule is consistent with important principles of comity and mutual respect for the sovereignty of other nations. For those same reasons, courts in the United Kingdom have previously recognized and applied a common law rule equivalent to the separate entity rule recognized by New York courts.

Finally, in the view of the Government of the United Kingdom, application of the separate entity rule in this context avoids the undue (and unnecessary) extraterritorial application of U.S. law – here, with regard to the garnishment of assets in bank accounts located outside the United States. Given the United Kingdom's stake in its own laws and policies, the overly broad, extraterritorial application of U.S. law substantially implicates the United Kingdom's legitimate sovereign interests. For that reason, the Government of the United Kingdom has repeatedly filed amicus briefs in U.S. courts to express its concerns about extraterritorial applications of U.S. law.[2] It does so once again

[2] *See, e.g.*, Brief of the United Kingdom *et ano*. in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 405480; Brief of the United Kingdom in Support of Respondents, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723009; Brief of the United Kingdom *et ano*. in Support of Petitioners, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226597; Brief of the United Kingdom *et al*. in Support of Petitioner, *Sosa v.*

here, because the question certified to this Court again raises the prospect of the extraterritorial application of U.S. law to permit garnishment orders over countless assets located in the United Kingdom and elsewhere around the world, in violation of the sovereign interests of the United Kingdom and other nations.

PRELIMINARY STATEMENT

The Government of the United Kingdom respectfully submits that the question certified to this Court should be answered in the affirmative, namely, that the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank. Applying the separate entity rule – which treats each branch of a bank as a separate entity, *inter alia*, for purposes of enforcing judgments – in the Government of the United Kingdom's view promotes comity, respects the rights of sovereign nations worldwide to regulate the operation of banks and the enforcement of judgments against assets located within their borders, avoids the risk of double liability on the part of the banks involved, and appropriately constrains the extraterritorial application of U.S. law.

Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), 2004 U.S. S. Ct. Briefs LEXIS 910; Brief for the United Kingdom in Support of Defendants-Appellants, *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014) (No. 12-4355-cv), 2013 WL 2167229. In the *Morrison* and *City of Pontiac* cases, for example, the Government of the United Kingdom successfully urged the U.S. Supreme Court and the U.S. Court of Appeals for the Second Circuit to reject the extraterritorial application of Section 10(b) of the Securities Exchange Act of 1934 to foreign securities claims. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 181 (2d Cir. 2014).

ARGUMENT

I. THE SEPARATE ENTITY RULE RECOGNIZES AND PROTECTS THE IMPORTANT SOVEREIGN INTERESTS OF OTHER NATIONS, AVOIDS SUBJECTING BANKS TO INCONSISTENT LAWS AND IS CONSISTENT WITH COMITY.

A. The United Kingdom Has a Strong Sovereign Interest in Ensuring that Banking Activities in the United Kingdom – Including the Restraint of Assets Located in U.K. Bank Accounts – Comply Fully with U.K. Laws and Regulations.

The Government of the United Kingdom has a strong, sovereign interest in ensuring that banks headquartered or operating in the United Kingdom, as well as all banking activities conducted in the United Kingdom, comply fully with U.K. laws and regulations. That interest includes ensuring that all steps taken to enforce a judgment against, or to restrain in any way, funds held in a bank account in the United Kingdom similarly comply fully with U.K. laws and regulations.

To that end, the United Kingdom has adopted a comprehensive mechanism for restraining assets held in U.K. bank accounts, in order to enforce or satisfy court judgments. The Civil Procedure Rules of England and Wales, for example, provide an effective avenue for judgment creditors to obtain orders from courts in England and Wales for the payment of money from a third party, such as

a bank, holding the debtor's funds.[3] Civil Procedure Rules, 72.1-72.11 (Eng. & Wales), *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part72. Those procedures – which differ to those that apply in New York – reflect important public policy determinations made by or on behalf of the Government of the United Kingdom regarding how judgments should be enforced, and how assets held in bank accounts within its jurisdiction can be restrained.

Against that background, the Government of the United Kingdom is very concerned that – should the separate entity rule not be applied in New York in the post-judgment context for any reason – judgment creditors could be permitted to seek and obtain orders from a court in New York restraining assets held in a U.K. bank account, instead of seeking such a remedy in the courts of the United Kingdom, in accordance with U.K. law. Permitting judgment creditors to proceed in that manner – particularly on the basis of nothing more than the fact that the bank involved operates branches in the United Kingdom and New York – fails to respect the important sovereign interests that foreign governments, such as the Government of the United Kingdom, have in enforcing their own unique laws. The Government of the United Kingdom thus respectfully urges that the question certified to this Court be answered in the affirmative, so that – consistent with

[3] The Civil Procedure Rules of 1998 referred to here are applicable only in England and Wales. There are analogous procedures available for the enforcement of judgments in the other parts of the United Kingdom.

those sovereign interests – any judgment creditor seeking to restrain funds in a U.K. bank account must seek such a remedy before a U.K. court, in accordance with U.K. law.

B. The Separate Entity Rule Avoids Subjecting Banks to the Potentially Inconsistent Laws of Different Nations and to a Risk of Double Liability.

If the separate entity rule is not applied in the instant context, the Government of the United Kingdom is concerned that courts in New York would be permitted to order the garnishment of assets held in foreign accounts of banks with branches in New York without first considering – or ensuring compliance with – the applicable rules and banking regulations in the foreign country where the assets are actually located. That possibility creates a real risk that the bank in question could be confronted with inconsistent obligations, if there are differences between U.S. (or New York) law and local law in the foreign jurisdiction regarding the garnishment of assets. Those inconsistencies may also expose a bank to the risk of double liability, even after it has complied with the U.S. court's garnishment order.

In that regard, the Government of the United Kingdom is concerned that a bank that – in the absence of the separate entity rule – restrains funds held in an account in the U.K. in response to a garnishment order issued by a court in New York, without also complying with the requirements for that relief imposed in the

United Kingdom, could potentially remain liable to pay those same funds again to the judgment debtor under U.K. law. That issue has not been addressed by courts in the United Kingdom, and it is not clear how it would be resolved were it to arise. However, faced with the possibility of conflicting obligations, the Government of the United Kingdom is concerned about the potential for, as the U.S. Supreme Court described it, "unintended clashes between [U.S.] laws and those of other nations which could result in international discord". *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). Application of the separate entity rule in this context avoids such inconsistencies, as well as the risk of double liability for the banks involved.

C. Application of the Separate Entity Rule Respects the Public Policy Choices of Other Nations and Promotes Comity.

The separate entity rule is necessary to respect the policy choices made by foreign nations – such as the United Kingdom – and to promote comity. Comity, an international principle of fundamental importance, has been defined by the U.S. Supreme Court as:

> "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."

Hilton v. Guyot, 159 U.S. 113, 164 (1895).

It is well established that courts can and should respect the public policy decisions made by foreign nations and seek to preserve and promote comity by "avoid[ing] unreasonable interference with the sovereign authority of other nations". *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This Court has recognized that when considering issues that "touch[] the laws and interests of other sovereign states", it is important to consider potential comity implications. *Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi*, 10 N.Y.3d 243, 247 (2008).[4]

In the view of the Government of the United Kingdom, the application of the separate entity rule to preclude a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank not only accords with, but is required by, comity. That is because, as noted above, the separate entity rule respects, and protects, the sovereign interests, public policy choices and laws of foreign nations, including the United Kingdom.

The importance of comity in this context has been recognized in both the United States and the United Kingdom. In the United States, courts in New York have previously recognized comity as a reason to apply the separate entity

[4] The continued importance of comity was also recently reiterated by the U.S. Supreme Court in *Daimler AG v. Bauman*, where the Court rejected an expansive interpretation of personal jurisdiction over foreign corporations based on concerns about the "risks to international comity". 134 S. Ct. 746, 763 (2014).

rule in an action involving a different aspect of New York's law concerning the enforcement of money judgments. In *Ayyash v. Koleilat*, the New York State Supreme Court ruled, after applying the separate entity rule, that banks with New York branches were not required to provide judgment creditors with account information about accounts located outside the United States. 38 Misc. 3d 916, 925-26 (N.Y. Sup. Ct. 2012), *aff'd*, 115 A.D.3d 495 (1st Dep't 2014). In reaching that result, the court expressly recognized that "[t]he mere fact that nonparty banks conduct general business in the United States is insufficient to negate comity considerations". *Id.* at 927. The Government of the United Kingdom urges this Court to reach the same conclusion here.

Courts in the United Kingdom have similarly recognized and applied, based on comity concerns, a common law rule equivalent to New York's separate entity rule. In *Société Eram Shipping Co. v. Cie Internationale de Navigation*, the House of Lords ruled, as regards England and Wales, that a judgment creditor could not obtain a garnishment order against the U.K. branch of a Hong Kong bank to restrain assets held by the judgment debtor in an account in Hong Kong. [2003] UKHL 30, [2004] 1 A.C. 260, ¶ 27 (H.L.) (appeal taken from Eng.) (available on Westlaw). In reaching that result, Lord Hoffman described the important sovereign interests raised by judgment enforcement procedures commenced against banks operating in multiple jurisdictions:

> "The execution of a judgment is an exercise of sovereign authority. It is the seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries.
>
> "In the modern world, banking is perhaps the strongest illustration of the importance of mutual respect for national sovereignties. There are nearly 500 foreign banks in London, to say nothing of British banks with branches overseas. Banking is a highly regulated activity and each head office or branch has to comply with the laws of the jurisdiction in which it operates. If the courts of one country in which a bank operates exercise no restraint about using their sovereign powers of compulsion in relation to accounts maintained with that bank at branches in other countries, conflict and chaos is likely to follow."

Id. ¶¶ 54-55. Recognizing those same concerns, Lord Bingham concluded that "it is inconsistent with the comity owed to the Hong Kong court to purport to interfere with assets subject to its local jurisdiction".[5] *Id.* ¶ 26. Again, the Government of the United Kingdom urges that this Court reach the same result, and uphold the continued applicability of the separate entity rule under New York law on comity grounds.

[5] Their Lordships also found that it was inappropriate to permit the garnishment order because doing so might have subjected the bank to double liability. *Société Eram*, [2004] 1 A.C. 260, ¶¶ 10, 25, 28. Consistent with concerns discussed above (*see supra* Section I.B.), Lord Hoffmann observed that "[t]he bank produced uncontradicted evidence that by Hong Kong law the garnishee order would not discharge the debt owing by the bank to the judgment debtor in Hong Kong." *Id.* ¶ 60.

II. THE SEPARATE ENTITY RULE APPROPRIATELY CONSTRAINS THE EXTRATERRITORIAL APPLICATION OF U.S. LAWS.

The Government of the United Kingdom views the separate entity rule as a very important constraint on the extraterritorial application of U.S. law – in this case, N.Y. C.P.L.R. § 5222. Such constraints are necessary to prevent the improperly extraterritorial application of this statute in a manner that interferes with the ability of the United Kingdom and other nations to regulate banks, banking activities and the enforcement of judgments within their borders.

A. The United Kingdom Has a Longstanding and Legitimate Interest in Limiting the Extraterritorial Application of U.S. Laws.

Given the importance to the United Kingdom of applying its own laws and policies within its borders, the overly broad extraterritorial application of U.S. law substantially implicates the Government of the United Kingdom's legitimate sovereign interests. Consequently, and as noted above, the Government of the United Kingdom has repeatedly appeared as amicus curiae in United States courts to express its concerns about extraterritorial applications of United States laws, and has succeeded in convincing courts to limit the reach of those laws. *See supra* note 2.

The certified question before this Court raises extraterritoriality concerns on the part of the Government of the United Kingdom because declining to apply the separate entity rule would effectively permit the application of

New York law on the collection of judgments, set forth in N.Y. C.P.L.R. § 5222, all over the world, as long as the bank in question has a branch in New York. Such an extraterritorial application of New York law would impact enforcement of the U.K. laws that regulate banking activities within the United Kingdom and, as the Government of the United Kingdom understands it, would have similar effects in other nations around the world.

B. Courts in the United States Have Recognized a Presumption Against the Extraterritorial Application of Federal and State Laws.

As the U.S. Supreme Court has confirmed – in cases where the Government of the United Kingdom filed amicus curiae briefs urging such a result – "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 561 U.S. at 255 (citation and internal quotation marks omitted). "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*; *see F. Hoffmann-La Roche*, 542 U.S. at 165 (explaining concerns about the extraterritorial application of U.S. antitrust laws, which "when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs"). Indeed, as this Court has recognized, "[t]he established presumption is, of course, against the

extraterritorial operation of New York law". *Global Reinsurance Corp. v. Equitas Ltd.*, 18 N.Y.3d 722, 735 (2012).

In the view of the Government of the United Kingdom, those principles are directly relevant to this Court's consideration of the certified question. Consistent with those principles, the Government of the United Kingdom respectfully submits that N.Y. C.P.L.R. § 5222 should not be permitted to apply extraterritorially, particularly where, as here, extraterritorial application of that statute will interfere with the ability of foreign nations to regulate conduct within their borders and to ensure compliance with their own laws.

C. The Separate Entity Rule Appropriately Constrains the Extraterritorial Application of N.Y. C.P.L.R. § 5222.

In the view of the Government of the United Kingdom, the separate entity rule imposes sensible geographic limits on the reach of N.Y. C.P.L.R. § 5222, and avoids situations in which New York court orders could cause interference with the legitimate sovereign interests and policy choices that the United Kingdom and other nations have made in the areas of bank regulation and enforcement of judgments.

The extraterritorial application of this statute is of great concern to the Government of the United Kingdom. Such extraterritorial application could significantly impact banking activities and the enforcement of judgments within the U.K. and could have similar and far-reaching effects worldwide. In light of the

fact that banks headquartered in the United Kingdom, Europe, Asia and South America all have branches in New York, in the absence of the separate entity rule, New York courts would effectively be able to order the garnishment of assets being held not just in accounts at those banks' overseas headquarters, but also, potentially, at any other branch location, anywhere in the world. Such sprawling extraterritorial effects are inconsistent with the presumption that New York law does not apply extraterritorially. *See Global Reinsurance Corp.*, 18 N.Y.3d at 735. Consequently, it is the Government of the United Kingdom's view that this Court should continue to apply the separate entity rule to prevent the extraterritorial application of N.Y. C.P.L.R. § 5222 and to respect and protect the sovereign interests of the United Kingdom and other nations in regulating banks, banking activities and the procedure for enforcing judgments against assets within their borders.

CONCLUSION

The Government of the United Kingdom hopes that its views and perspectives on these issues will be of benefit to the Court. For the foregoing reasons, it is the Government of the United Kingdom's respectful opinion that the Court should answer the question certified by the Second Circuit in the affirmative, and hold that the separate entity rule precludes a judgment creditor from ordering a

garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank.

Dated: August 29, 2014

CRAVATH, SWAINE & MOORE LLP

by _____

Timothy G. Cameron
A member of the Firm

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Amicus Curiae the Government of the United Kingdom of Great Britain and Northern Ireland