The Reception of Hilton v Guyot and Comity in the Recognition and Enforcement of Foreign Judgments in Anglophone Africa

Introduction

Hilton v Guyot, is the most influential case in the United States—and perhaps globally—on the use of comity as a basis for recognising and enforcing foreign judgments. In that case, Justice Gray of the United States Supreme Court defined comity as follows:

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent of which the law of one nation… shall be allowed to operate within the dominion of another nation, depends upon… the "comity of nations"…"

Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and goodwill, on the other; it is the recognition which one allows within its territory to the legislative, executive or judicial act 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 protection of its laws…"

By contrast, under English common law, the dominant basis for recognising and enforcing foreign judgments is the theory of obligation. Blackburn, J in the English case of *Schibsy v Westenholz* stated that the true principle is that,

"…the judgment of a court of competent jurisdiction over the defendant, imposes a duty or obligation on him to pay the sum for which the judgment is given, which the courts in this country are bound to enforce…"

And further on in his judgment, Blackburn J. makes it plain that the doctrine of "comity" is incorrect. Thus, no question of reciprocity could arise in an action brought upon a foreign judgment."

The theory of obligation is applied in many Commonwealth and Anglophone African countries. Interestingly, an emerging but underexplored trend is the growing consideration—and in some instances, application—of the principle of comity by courts in these jurisdictions, with several African judges expressly citing *Hilton v Guyot*.

This blog highlights selected cases illustrating this development, focusing on Liberia, Kenya, Uganda, Tanzania, South Africa, and Nigeria. The discussion is limited to the common law framework and does not address statutory regimes or international conventions.

Liberia

Liberia is a country that has historical ties of dependence to the United States located in West Africa. In *Turner v Burnette*, the Liberian Supreme Court firmly established the principle of comity in the recognition and enforcement of foreign judgments, drawing particular support from *Hilton v Guyot*. The Court further explained—by reference to another U.S. authority—that:

"*The application of comity does not rise [sic] to the effect of establishing an imperative rule of law; it has the power to persuade but not command. Comity being voluntary, and not obligatory, rests in the discretion of the tribunal of the forum and is governed by certain more or widely recognized rules." Generally, greater force and dignity will be given to judgments of foreign courts when parties have had their day in a court of competent jurisdiction, after due service of process or after an entry of appearance, and have had a full and impartial hearing upon the merits of their case; unless it can be shown that the proceedings were tainted with fraud."*

Andrew Moran and Anthony Kennedy, conclude on the basis of the above Liberian Supreme Court decision that, "*It seems, therefore, that any foreign judgment may be enforceable in Liberia at common law as a matter of comity between nations. The procedure appears to be that a suit commenced on the foreign judgment, in the same way as an action is commenced at common law in other jurisdictions.*"

Kenya

Kenya is a former colony of the United Kingdom located in East Africa. Nevertheless, Kenyan courts apply both the theory of obligation and the principle of comity in recognising and enforcing foreign judgments at common law.

In *ABSA Bank Uganda Limited (Formerly Known as Barclays Bank of Uganda Limited) v Uchumi Supermarkets PLC,* the Kenyan High Court held at paragraph 5 that,

In the absence of a reciprocal enforcement arrangement, a foreign judgment was enforceable in Kenya as a claim in common law. Where a foreign court of competent jurisdiction had adjudicated a certain sum to be due to another, a legal obligation arose to pay that sum, on which an action of debt to enforce the judgment could be maintained. In deciding whether a foreign court was one of competent jurisdiction, the courts would apply not the law of the foreign court itself but English rules of private international law. The competence of the foreign court was the competence of the court in an international sense, that was, its territorial competence over the subject matter and the defendant. Its competence or jurisdiction in any other sense was not material."

However, in a more recent case, the Kenyan Supreme Court in *Ingang'a & 6 others v James Finlay (Kenya) Limited*, relying on *Hilton v Guyot*, applied the principle of comity in determining whether to recognise and enforce a locus inspection order from Scotland (see Anam Abdul Majid and Chukwuma Okoli). After quoting the key passage from *Hilton v Guyot* with approval, the Court stated at paragraph 60 that:

"This approach prioritizes citizen protection while taking into account the legitimate interests of foreign claimants. This approach is consistent with the adaptability of international comity as a principle of informed prioritizing national interests rather than absolute obligation, as well as the practical differences between the international and national contexts."

Uganda

Uganda is a former colony of the United Kingdom located in East Africa. Nevertheless, Ugandan judges apply both the theory of obligation and the principle of comity in recognising and enforcing foreign judgments at common law.

At common law, the principle of comity, with key reference to *Hilton v Guyot,* also formed the sole basis of recognising and enforcing a US judgment in the earlier Ugandan case of *Christopher Sales v Attorney General.*

More recently, Ugandan courts have justified the recognition and enforcement of foreign judgments by reference to the theories of obligation, comity, and reciprocity. In the very recent case of *Brianna v Mugisha*, Justice Nagawa, after a careful consideration of Ugandan case law authorities and *Hilton v Guyot*, stated that:

"5.4 However, I have observed that despite the absence of a statutory reciprocal arrangement, Ugandan courts have recognized and enforced foreign judgments under the common law principles of obligation, reciprocity, and comity.

5.5. These doctrines provide a legal foundation for cross-border judicial cooperation, particularly in the absence of a formal treaty or statutory framework, such as in the case of Uganda and the United States.

5.6. The doctrine of comity is based on mutual respect between sovereign states. It allows a court to recognize and enforce a foreign judgment not as a matter of strict legal obligation, but out of respect to the foreign court's authority and fairness in its proceedings. Courts apply comity where: the foreign court had competent jurisdiction over the matter and the parties, the proceedings were conducted fairly, with due process observed and enforcing the judgment would not be contrary to public policy in the recognizing jurisdiction.

5.7. The obligation theory treats a valid foreign judgment as creating a legal duty on the judgment debtor to comply, similar to a contractual obligation. This approach holds that once a court of competent jurisdiction has determined a party's liability, that decision should be

respected and enforced in other jurisdictions unless there is a compelling reason not to do so, such as: Fraud in obtaining the judgment, Violation of natural justice, or a fundamental defect in jurisdiction.

5.8. Under reciprocity, a foreign judgment will only be enforced if courts in the originating country would likewise enforce judgments from the enforcing country. This principle ensures mutual legal cooperation between jurisdictions."

It must be noted, however, that the recent acceptance of reciprocity in Uganda as a basis for recognising and enforcing foreign judgments at common law represents a significant departure from the position in other Anglophone and Commonwealth African countries, as well as Commonwealth jurisdictions more generally. It should also be emphasised that the court's remarks on the applicability of reciprocity at common law were, at best, obiter, as the court did not apply the doctrine to the facts of the case.

Tanzania

In Tanzania, a significant number of recent cases have used foreign judgments to preclude new actions on grounds of res judicata, obligation, and comity (*Exim Bank (COMORES) SA vs Costa Sari; Standard Chartered Bank (Hong Kong) Limited & Another vs Independent Power Tanzania Limited & Others*)

South Africa

South Africa, located in Southern Africa and formerly colonised by both Britain and the Netherlands, is a mixed legal system drawing from Roman Dutch law and the common law. The theory of obligation remains the dominant basis for the recognition and enforcement of foreign judgments. This position was affirmed by the Supreme Court of Appeal in *Jones v Krok*, where the Court endorsed the English authority of *Nouvion v Freeman* as support for applying the obligation theory in recognising and enforcing foreign judgments

However, in *Government of the Republic of Zimbabwe v Fick*,, the Constitutional Court referred to the principle of comity to justify the development of the common law framework for recognising and enforcing judgments from international courts, signalling a limited but notable openness to comity based reasoning.

Nigeria

Nigeria is a former colony of the United Kingdom and is located in West Africa. Under the common law regime, it applies the theory of obligation in the recognition and enforcement of foreign judgments (*Alfred C Toepfer Inc v Edokpolor).*

However, some Nigerian judges at the Supreme Court have proposed comity, jurisdictional reciprocity, and the facilitation of international trade and commerce as additional bases for enforcing foreign judgments (Grosvenor Casinos Ltd v Ghassan Halaoui (2009) 10 NWLR 309, 338–39 (Oguntade JSC)), but there has been no reported case where these proposals have been implemented in practice.

Conclusion

The purpose of this post is to highlight how selected Commonwealth and Anglophone African courts have received and applied the principle of comity in the recognition and enforcement of foreign judgments under the common law, particularly as articulated in *Hilton v Guyot*.

At present, Liberia is the only jurisdiction that fully applies the principle of comity as advanced in *Hilton v Guyot*, arguably influenced by its historical ties to the United States.

Kenya, Uganda and Tanzania apply the doctrine of obligation alongside the principle of comity.

South Africa primarily follows the doctrine of obligation, although a few cases have considered comity in the context of recognising and enforcing foreign judgments, albeit without concrete application.

In Nigeria, courts continue to rely principally on the doctrine of obligation at common law. Although some Supreme Court justices have proposed comity as a possible basis for enforcement, this has not been implemented in practice.

Overall, the doctrine of obligation remains the dominant common law basis for the recognition and enforcement of foreign judgments across Anglophone and Commonwealth Africa. Nonetheless, the principle of comity, as developed in

Hilton v Guyot, continues to play an important role in shaping the jurisprudence of a limited number of African jurisdictions.