International Corporate Rescue

Published by

Chase Cambria Company (Publishing) Ltd

ChaseCambria

www.chasecambria.com

SOUTH SQUARE

Centre for Commercial Law

UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2024 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 560.00
VAT will be charged on online subscriptions.
For ‘electronic and print’ prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

Redefining 'Debt' in the Face of Unrecognised Foreign Judgments: *Servis-Terminal LLC v Drelle* [2025] EWCA Civ 62

Harry Denlegh-Maxwell, Senior Associate, **Andrew West**, Associate, and **Louis Gregory**, Trainee Solicitor, McDermott Will & Emery UK LLP, London, UK

Synopsis

The enforceability of debts arising from unrecognised foreign judgments, by English bankruptcy proceedings, was recently reconsidered in *Servis-Terminal LLC v Valeriy Ernestovich Drelle* (the 'Judgment').[1]

The Court of Appeal ('CA') considered this issue in the context of the statutory demand, and the criteria that must be fulfilled to allow a creditor to present a bankruptcy petition. This, in turn, required the CA to determine whether non-payment of a sum ordered by a foreign court could amount to a 'debt' for the purpose of s. 267 Insolvency Act 1986 ('IA 1986').

In overturning the High Court decision at prior instance, the CA has reaffirmed the importance of obtaining recognition of a foreign debt when pursuing a creditor with assets situated in England & Wales. Effectively, the CA has confirmed that, in the absence of recognition, such sums will not be caught by the s. 267 meaning of 'debt', cannot give rise to a 'debt' capable of forming the basis of a bankruptcy petition, and will, in turn, be non-recoverable in the courts of England & Wales.

This decision should be of interest both to foreign creditors, who face additional procedural hurdles in enforcing debts ordered in their home country – and to debtors with a presence in England & Wales, who will benefit from the extra protections afforded by this Judgment.

Background

The Judgment concerned a claim brought by the trustee in bankruptcy of the Russian-incorporated Servis-Terminal LLC (the 'Company') against its ex-CEO, Valeriy Ernestovich Drelle, in relation to a RUB 2 billion loan (the 'Loan') made to another Russian company ('Fort Steiton') with the benefit of a personal guarantee from that company's owner, Anatoly Motylev. It was successfully argued that Mr Drelle had not acted in good faith or reasonably, in procuring that the Company make the Loan without first verifying the financial position of either Fort Steiton or Mr Motylev.

On the strength of successful proceedings in the Russian Arbitrazh Court on 25 May 2019 (the 'Russian Judgment'), and the dismissal of Mr Drelle's subsequent appeals, the trustee in bankruptcy served a s. 268(1)(a) IA 1986 statutory demand on Mr Drelle in England on 9 October 2020. The statutory demand sought repayment of the Loan which the Company claimed it was owed by virtue of the Russian Judgment. No English law recognition proceedings had been commenced.

With the statutory demand remaining unsatisfied at the expiry of the prescribed 3-week period, it became the subject of a bankruptcy petition. Subsequently, on 31 March 2023, ICC Judge Burton made a bankruptcy order against Mr Drelle (the 'Order').

However, it was not until Mr Drelle appealed the Order that the ground central to the CA appeal, amongst others, was raised – namely, that the unrecognised Russian Judgment could not constitute a 'debt' for the purpose of s. 267 IA 1986.

Prior instance

Mr Drelle argued before the High Court on appeal that, as the Russian Judgment had not been the subject of recognition proceedings in England & Wales, the Company could not rely on it for the purposes of presenting a bankruptcy petition.

Richards J rejected this 'lack of recognition' argument. In reaching this outcome, Richards J considered the primary question before him was what 'debt' means. Richard J reasoned that, through enacting s. 267 IA 1986, 'Parliament has legislated to determine which claims can found the presentation of a bankruptcy petition'.[2] Subsequently, in adopting a definition of 'debt' that did not exclude claims that could not be

Notes

1 [2025] EWCA Civ 62.
2 *Drelle v Servis-Terminal Llc* [2024] EWHC 521 (Ch), para. 35.

'enforced' as a matter of common law, it was stated that the Russian Judgment is 'to be taken as conclusive of any matter that it adjudicates',[3] in accordance with Rule 51 in *Dicey, Morris & Collins on the Conflict of Laws*.[4]

As a result, it was found to be open to the Company to bring a bankruptcy petition based on the Russian Judgment, despite its non-recognition within the E&W jurisdiction.

Issue

The issue that lay before the CA was whether the unrecognised Russian Judgment was in fact capable of providing the basis for a bankruptcy petition. Prior to the Judgment, the position on this issue was ambiguous.

Under common law, foreign judgments were not automatically enforceable in the absence of recognition proceedings held in England & Wales. To accept otherwise was largely considered by commentators to undermine the status of judgments as acts of state sovereignty,[5] and in turn, the jurisdiction of the national courts.

But at face value, the statutory provision in question appeared contradictory. As Richards J provided, s. 267 IA 1986 'requires that there be a "debt" without expressly considering how, or in which courts, any such debt could be enforced'.[6] On this interpretation, it was the intention of Parliament that debts recognised by any jurisdiction be capable of enforcement in the courts of England & Wales, in conflict with the common law stance.

The consequence was that it fell to be decided whether the High Court's interpretation of s. 267 IA 1986 was correct. If so, there could be no refuting the Order and the corresponding outcome that recognition at English law was not necessary to utilise foreign debts as a 'sword' in proceedings in England & Wales.

The central authorities relied upon by the appellant included Rule 45 and 51 of *Dicey, Morris & Collins on the Conflict of Laws* ('Rule 45' and 'Rule 51'), and Adrian Briggs' *Recognition of Foreign Judgments: a Matter of Obligation*. Otherwise, discussed in depth was the treatment of unregistered foreign debts under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the '1933 Act'), in *Re a Judgment Debtor*.[7]

Decision and reasoning of the CA

The CA overturned the decision of the High Court and allowed the appeal.

In determining that the Russian Judgment could not, in and of itself, amount to a 'debt' enforceable in England & Wales, the CA provided that 'where there is no statutory provision to contrary effect, a bankruptcy petition cannot be presented in respect of a foreign judgment which has not been the subject of recognition proceedings'.[8]

The reasoning which led to this outcome was ultimately twofold:

i. The use of an unrecognised foreign judgment in insolvency proceedings amounts to seeking enforcement, and therefore, use of the debt as a 'sword', in contrast to academic commentary; and
ii. Adopting an interpretation of 'debt' in line with the general law, was what Parliament had intended by s. 267 IA 1986 (e.g. the 'revenue rule', and the 1933 Act as applied in *Re a Judgment Debtor*).

Both points are considered in turn below.

i. Use as a 'sword'

In contrast to the decision of the High Court, the CA held that the definition of 'debt' under s. 267 IA 1986 necessarily required interpretation in line with Rule 45, which states:

> 'A judgment of a court of a foreign country … has *no direct operation* in England but may […] be enforceable by claim or counterclaim at common law or under statute …'

The reasoning underpinning the court's application of this principle, over the conflicting Rule 51 (which appears to confirm that where a foreign judgment is not impeachable it may in fact be considered determinative of a debt existing), was that the established position under common law relied on a distinction between the use of unrecognised foreign judgments as a 'sword', and as a defence. In applying this distinction to the Judgment, it was found that the use of the Russian Judgment to bring a bankruptcy petition amounted to use of it as a 'sword', despite the Company not technically seeking to enforce the foreign judgment by 'direct execution'.[9]

Notes

3 *Ibid.*, para. 43.
4 Lord Collins of Mapesbury and Jonathan Harris (eds.), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, London, 2022), 772 *et seq.*
5 Adrian Briggs, 'Recognition of Foreign Judgments: a Matter of Obligation' (2013) 129 LQR 87, 88.
6 See *supra* n. 2, para. 45.
7 [1939] Ch 601.
8 See *supra* n. 1, para. 55.
9 *Ibid.*, para. 39.

In support of this, the CA raised the fact that Rule 45 reflects the common law's aversion to enforce a foreign exercise of sovereign power.[10]

Whilst the bankruptcy petition in question was not considered to be a form of 'direct execution', the Company was nonetheless seeking enforcement – and was using the Russian Judgment not defensively, but as a 'sword'. From this indistinguishable effect, the court determined that bankruptcy petitions too must have no 'direct operation' in this jurisdiction without prior recognition, in line with Rule 45. In turn, Rule 51 was held to apply only in instances where a judgment was being used defensively, and the High Court's contrary finding in this regard was found to be inaccurate.

Therefore, the Russian Judgment did not amount to either a 'debt' ora debt which the debtor was 'unable to pay'. Under s. 286, this in turn required the Russian Judgment to have been 'payable' immediately after the 3-week statutory demand grace period expired. But without having direct operation in England & Wales, it was not considered 'payable' without first being recognised.

ii. Consistency with the general law

Supplemental to point (i), the CA considered the basis for rejecting the Order as an enforceable 'debt' by reference to comparable frameworks in the general law surrounding recognition.

For one, the CA was in no doubt that the presentation of bankruptcy petitions in respect of foreign tax liabilities was precluded under the 'revenue rule'.

Again, appreciating the relevance of judgments as acts of sovereignty – the CA held that the common thread between this exception of foreign tax liabilities under the revenue rule, and the exception of unrecognised foreign judgments for the purpose of insolvency and bankruptcy petitions, was that each would involve 'an assertion of sovereign authority by one state within the territory of another... contrary to all concepts of independent sovereignties'.[11]

In addition, the CA raised the inability to serve an unregistered bankruptcy notice under the 1933 Act, shown in *Re a Judgment Debtor*, as similarly supportive of their position.

The construction of the 1933 Act adopted in *Re a Judgment Debtor*, was that bankruptcy proceedings could not be brought in respect of a foreign judgment to which the 1933 Act applied unless and until the judgment was registered. It followed that it was the act of registration that was key to place the foreign creditor on footing equivalent to their debt being the final judgment of an English court.[12]

Applying this to the Judgment, the CA was persuaded that a holder of an unrecognised judgment would be in a better position than a holder of an unregistered judgment were it the case that a petition can be founded on the former.[13]

Amongst others, these reasons persuaded the court that the Russian Judgment did not amount to a 'debt', in respect of which a bankruptcy petition presented should be 'payable … either immediately or at some certain, future time'.[14] To find otherwise would be contradictory to both the most readily applicable piece of academic commentary on the matter, and to common law adjacent to the issue at hand – and so, the High Court's decision was overturned.

Comment

The CA decision in *Servis-Terminal LLC v Drelle* provides an important clarification that unrecognised foreign judgments are not capable of enforcement through bankruptcy proceedings without prior recognition under English law. This is the first time the CA has considered this issue. Moving forward, the decision will provide an added layer of protection to debtors situated in England & Wales, at the expense of their creditors. But with the reasoning in doing so rooted in principles of national sovereignty and legislative purpose – the decision should be appreciated as a just apportionment of responsibilities that caters to both the existing common law on the area, and the broader framework of recognition.

The additional procedural hurdles and expenses involved in obtaining recognition of a foreign judgment will doubtless cause some creditors to reconsider their course of action and may even deter some creditors from attempting to obtain a judgment in their home country altogether.

Other than where countries already have reciprocating enforcement legislation in place, it remains to be seen whether this decision will bring about an increase in such agreements, whether we will see an increase in 'final stands' being made in the English courts whereby debtors seek to prevent the recognition of foreign judgments, or conversely, whether creditors will be discouraged from pursuing cross-border debt recovery in England.

Notes

10 *Ibid.*, para. 41.
11 *Ibid.*, para. 42.
12 See *supra* n. 7, 609.
13 See *supra* n. 1, para. 50.
14 Section 267(2)(b) IA 1986.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com