Charles Samek KC

Bláthnaid Breslin

IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC/2025/0094**
ON APPEAL FROM THE COURT OF APPEAL, CIVIL DIVISION
(LORD JUSTICE NEWEY, LORD JUSTICE POPPLEWELL, LORD JUSTICE SNOWDEN)
B E T W E E N:

SERVIS-TERMINAL LLC
(A COMPANY INCORPORATED UNDER THE LAWS OF THE RUSSIAN FEDERATION)

Appellant

-and-

MR VALERIY ERNESTOVICH DRELLE

Respondent

WRITTEN CASE OF THE APPELLANT (AMENDED)

A. INTRODUCTION AND SUMMARY

1. This is the written case of the Appellant, Servis-Terminal LLC (a company incorporated in Russia) (**"ST"**), which acts by its liquidator, Mr Sergey Lisin (**"Mr Lisin"**). The Respondent, Mr Valeriy Drelle (**"Mr Drelle"**), is the former Director General of ST. The largest creditor of ST is Gazprom Neft (**"GPN"**). GPN became a designated person on 10 January 2025.

2. On 14 October 2020, ST presented a bankruptcy petition to the High Court based on an unpaid judgment debt of RUB 2 billion pursuant to the order of the Arbitrazh Court of Yaroslavl dated 24 May 2019 (the **"Russian Judgment"**), in proceedings brought by ST against Mr Drelle (the **"Petition"**). The Russian Judgment was upheld by the Court of Appeal, Court of Cassation and the Supreme Court in Russia. (Pages 405-415) (Pages 241-243)

3. Following the trial of the Petition in June 2022, a bankruptcy order was made by ICC Judge Burton on 31 March 2023 (the "**Bankruptcy Order**"). (Page 190)

4. The core issue raised on this appeal is whether it is permissible for a creditor to present a bankruptcy petition founded on non-payment of a sum ordered by a foreign Court, which has not been the subject of recognition proceedings in this jurisdiction (the **"Core Issue"**).

5. There are two key constituent parts to the Core Issue: (1) whether an unrecognised foreign judgment is a "*debt*" within the meaning of section 267(2)(b) of the Insolvency Act 1986 (**"IA86"**); and (2) whether presenting a bankruptcy petition based on an unrecognised foreign judgment debt amounts to enforcement of that judgment and is contrary to the common law rule (expressed as Dicey Rule 45) that an unrecognised foreign judgment has no direct operation in England. (Page 445)

6. The Core Issue was not considered by ICC Judge Burton since it was not raised before her. On appeal, Richards J held that an unrecognised foreign judgment is a debt within the meaning of section 267(2)(b) of the IA86 and that it was therefore unnecessary to decide whether a bankruptcy petition constituted "enforcement" contrary to Rule 45. The Court of Appeal subsequently disagreed with the Judge and its reasons are set out in more detail below. (Page 445)

7. The Court of Appeal's Judgment is wrong in law and contrary to the common law principle that, as a matter of English law, a foreign money judgment creates an obligation on the debtor to pay. On the facts, this obligation is a debt, for a liquidated sum and payable immediately, and is therefore a debt upon which a bankruptcy order can be made. Instead of reaching this conclusion, the Court of Appeal erroneously extrapolated from the principle that a foreign judgment is the exercise of a foreign sovereign power; wrongly conflated concepts of 'enforcement' of debts and 'execution' of judgments; and wrongly construed the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933 in concluding that judgments subject to recognition at common law should be treated the same as 'registrable' judgments. The result is a confused and erroneous decision, which if left undisturbed, is likely to distort the development of private international law across common law jurisdictions as well as in the sphere of domestic insolvency law. (Pages 429-443)

8. The rest of this Written Case is structured as follows:

(B) Relevant Factual Background.

(C) The Court of Appeal's Decision.

(D) **Ground 1**: Unrecognised unimpeachable foreign money judgment creates a 'debt'.

(E) **Ground 3**: Foreign judgment as the exercise of foreign sovereign power.

(F) **Ground 4**: Direct enforcement of a foreign judgment.

(G) The Foreign Judgments (Reciprocal Enforcement) Act 1933 (the **"1933 Act"**) (Pages 429-443)

(H) **Ground 2**: Article 13 of the Cross-Border Insolvency Regulations 2006 (**"CBIRs"**), which is addressed after Grounds 3 and 4, which in substance more directly follow Ground 1. (Pages 463-464)

(I) The Disputed Debt Issue.

(J) Conclusions.

B. RELEVANT FACTUAL BACKGROUND

9. As set out in the Agreed Statement of Facts and Issues, this case concerns proceedings in Russia brought by Mr Lisin, as ST's liquidator, against Mr Drelle in respect of a loan of RUB 2 billion made by ST—then controlled (relevantly) by Mr Drelle as its Director-General—to a third party (Fort-Steiton LLC), which was never repaid (the **"Loan"**). The basis of the claim against Mr Drelle was that in causing ST to advance the Loan, he had acted unreasonably and in bad faith, and had caused loss to ST. Although Mr Drelle had left the jurisdiction by the time the proceedings were issued, he defended the claim through his lawyers. GPN is ST's largest creditor. As such, it was entitled under Russian law to participate in the Russian proceedings as a third party, and did so. (Pages 9-16)

10. The proceedings in the Arbitrazh Court of Yaroslavl Region were conducted over a 14-month period before Judge M.B. Frolovicheva. In total there were 10 hearings as well as written submissions. In a reasoned written judgment dated 24 May 2019, Judge Frolovicheva held that Mr Drelle breached his duties to ST. She noted Fort-Steiton's financial position—in particular, that it had limited net assets (i.e. approximately RUB 2.1 million), no fixed assets, as well as losses—and held that acting prudently, Mr Drelle should have verified Fort-Steiton's financial position and evaluated the risks of entering into the Loan, as well as its economic viability for ST. Judge Frolovicheva also found that Mr Drelle had not properly verified Mr Motylev's solvency. She also dismissed the argument that the Loan was granted in the ordinary course of business given the size of the loan relative to the book value of ST's assets. (Pages 405-415)

11. Mr Drelle was ordered to pay RUB 2 billion to ST. ST's claim for loss of profits was dismissed on the grounds that it was not a lending institution and its claim against the shareholders and the Chief Financial Officer was also dismissed.

12. Mr Drelle subsequently appealed to the Court of Appeal (Second Arbitrazh Appeal Court) before a panel of three judges. The appeal was conducted by way of full review and gave Mr Drelle a further opportunity to argue the merits. Following a hearing on 31 July 2019, in a judgment dated 6 August 2019, the Court of Appeal (Second Arbitrazh Appeal Court) dismissed the appeal and upheld the original order. (Pages 386-404)

13. Mr Drelle subsequently appealed to the Cassation Instance Arbitrazh Court (Arbitrazh Court of Volgo-Vyatsky District), with a panel of three judges. In a judgment dated 6 November 2019, the appeal was dismissed. (Pages 369-385)

14. Mr Drelle subsequently appealed to the Supreme Court of the Russian Federation. His application was considered by a single judge who held that there were no grounds for the appeal. By a ruling dated 17 February 2020, the appeal was dismissed. (Pages 364-368)

15. ST subsequently initiated bankruptcy proceedings in England against Mr Drelle based on the Russian Judgment. The Russian Judgment debt was disputed by Mr Drelle on the grounds that, on account of GPN's role in the proceedings and interest in the outcome, the Russian proceedings were infected by bias and/or were contrary to natural justice and English public policy, further or alternatively, they were obtained by fraud and/or collusion. (Pages 191-237)

16. Mr Drelle adduced witness evidence from Alyona Zheglova, ST's Chief Financial Officer, in relation to his contention that the outcome of the Russian proceedings was pre-determined against him, as well as expert evidence on Russian law from Maxim Kulkov, and on State interference in Russian legal proceedings from John Lough. Mr Drelle's cross-appeal (dealt with in Section I below) is a challenge to ICC Judge Burton's evaluation of this evidence. As set out above, the Core Issue was only raised by Mr Drelle on appeal to Richards J. Richards J dismissed the Core Issue and all other grounds raised by Mr Drelle.

C. THE COURT OF APPEAL'S DECISION

17. On 31 January 2025, judgment was handed down by the Court of Appeal: [2025] EWCA Civ 62; [2026] Ch 1; [2025] 3 WLR 35; [2026] 1 All ER 69; [2025] BPIR 564 (the **"CoA Judgment"**). The Court of Appeal held that a bankruptcy petition cannot be presented on the basis of an unrecognised foreign judgment (Ground 1). There were three aspects to the Court of Appeal's conclusion. (Pages 129-153)

18. First, it decided that an unrecognised foreign judgment has no direct effect or operation in England and Wales. A foreign judgment is understood as being an act of state sovereignty, and given the common law's aversion to enforcing a foreign exercise of sovereign power, the use of any unrecognised or unregistered judgment as a "*sword*", including presenting a bankruptcy petition founded on it, is objectionable (at [41], [55] and [62]). (Pages 143, 148, 149)

19. Secondly, it decided that an unrecognised or unregistered foreign money judgment is not a debt within the meaning of section 267(2)(b) of IA86. It reached this conclusion on the basis of its conclusions on the preceding points, as well as by reference to the **"Revenue Rule"**, which precludes the recovery in England of claims based on foreign tax law. The relevance of the Revenue Rule was that the imposition of tax involves an exercise of sovereign power, such that the foreign tax is not regarded as "*debt*" on which a bankruptcy petition can be presented, which tended to support the conclusion that an unrecognised judgment (which also arises from an exercise of sovereign power) is likewise not to be seen as giving rise to a "*debt*" capable of founding bankruptcy proceedings [43], [47], [55] and [69]). (Pages 144, 145, 148, 152)

20. Thirdly, as a result of the decision of Greene MR in *Re A Judgment Debtor* [1939] Ch 601 ("***Re A Judgment Debtor***"), a creditor is unable to bring bankruptcy proceedings in respect of an unregistered foreign judgment registrable under the 1933 Act and was binding on the Court. But even if that was not the ratio of *Re A Judgment Debtor*, it was persuasive. As such, if it were the case that a bankruptcy petition could be presented in respect of an unrecognised foreign judgment, this would place the holder of the unrecognised foreign judgment in a better position than the holder of an unregistered foreign judgment (at [48], [50] and [55]). (Pages 145-147, 148)

21. In view of the fact that Mr Drelle had succeeded under Ground 1 and because the Court of Appeal did not want to say anything which might prejudice the hearing of any recognition proceedings which ST might bring, the Court of Appeal did not decide Mr Drelle's remaining Grounds of Appeal (Grounds 2, 3 and 4) which went to the Disputed Debt Issue (at [57]). (Page 149)

E. GROUND 1: Unrecognised unimpeachable foreign money judgment creates a "debt"

22. Under Ground 1, ST contends that the Court of Appeal was wrong to hold that an unrecognised unimpeachable foreign money judgment does not create a debt within the meaning of sections 264, 267, and 268 of IA86.

23. Section 267(1) provides that:

> *"A creditor's petition* ***must be in respect of one or more debts*** *owed by the debtor, and the petitioning creditor or each of the petitioning creditors* ***must be a person to whom the deb****t or (as the case may be) at least one of the debts* ***is owed****"* (emphasis added). (Page 145)

24. Section 267(2)(b) confines the type of debt on which a petition may be presented to the following:

> *"…the debt, or each of the debts, is for a* ***liquidated sum payable to the petitioning creditor****, or one or more of the petitioning creditors,* ***either immediately or at some certain, future time, and is unsecured****"* (emphasis added). (Page 145)

25. As to how "*debt*" is defined more generally, there is no definition of "*debt*" as such under IA86. However, section 382 provides a definition of "***Bankruptcy debt***" which includes (as relevant for current purposes):

> *"(1)(a)* ***any debt or liability to which he is subject at the commencement of the bankruptcy****…* (Page 451)
>
> *(3)* ***For the purposes of references in this Group of Parts*** *to a* **debt** *or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in this Group of Parts to owing a debt are to be read accordingly"* (emphasis added).

26. Section 382 is in the same Group of Parts as IA86 section 267.

27. Section 382 also applies to "*provable*" debts. In respect of bankruptcy, **"*Proof of debts*"** is governed by section 322, which is also in the same Group of Parts as section 382. As is clear from section 382(3), a "*provable*" debt is very broadly defined. Sections 322 and 382 are supplemented by Rule 14.2 of the Insolvency (England and Wales) Rules 2016 ("**IR16**") which defines ***"Provable*** **debts**" as follows: (Page 449)

> *"(1) All claims by creditors except as provided in this rule, are provable as debts against the company or bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages. …"* (Page 489)

28. Rule 14.2(2) then lists debts which are <u>not</u> provable, which does not include unrecognised foreign judgments. Mr Drelle suggested before the Court of Appeal that a foreign

judgment debt is capable of being a provable debt (as recorded at [36] of the Judgment) although the point was not decided. It is nonetheless relevant to the question raised under Ground 1 in light of the Court of Appeal's conclusion that an unrecognised or unregistered foreign judgment is unenforceable and cannot be used as a "*sword*" since in submitting a claim or lodging a proof of debt in a bankruptcy, a creditor asserts its rights as a creditor of the bankrupt to participate in the bankruptcy and to be paid a rateable distribution of the bankrupt's assets.

29. For the purposes of IA86 sections 264, 267 and 268, the Court of Appeal has previously held that the debt must be for a liquidated sum and that a *"debt for a liquidated sum must be a **pre-ascertained liability**"* (emphasis added): *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286 at [21] and [36] (Patten LJ). (Pages 793, 797)

30. Further, a "*liability*" is defined for this purpose as an obligation which is legally enforceable in an English Court: *Government of India v Taylor* [1955] AC 491 (HL), 508-509 (Viscount Simonds, with whom Lords Morton and Reid agreed). It follows that an obligation enforceable in an English Court to pay a pre-ascertained sum is a "*debt*" for these purposes.

31. As to the meaning of *"creditor"* for the purposes of sections 264, 267, and 268, the position is explained by the Court of Appeal in *Levy v Legal Services Commission* [2000] BPIR 1065 (CA), 1073 (Jonathan Parker LJ) and 1077 (Peter Gibson LJ): (Page 712)

(1) "*Creditor*" is defined as *"(a) in relation to a bankrupt…a person to whom any of the bankruptcy debts is owed"* and *"(b) in relation to an individual to whom a bankruptcy petition relates…a person who would be a creditor in the bankruptcy if a bankruptcy order were made on that petition";* see section 383, IA86.

(2) A *"bankruptcy debt…in relation to a bankrupt"* is *"<u>any</u> debt or <u>liability</u> to which he is subject at the commencement of the bankruptcy…"*; section 382(1)(a), IA86.

(3) Therefore, a "*creditor*" is one to whom is owed an obligation in money or money's worth that is enforceable in an English court.

32. Accordingly, the Russian Judgment made ST a "*creditor*" of Mr Drelle if, as at the commencement of the bankruptcy, it placed Mr Drelle under an obligation to ST in money or money's worth that was enforceable in an English court. Further, if there was such an obligation, it constituted a "*debt*" since it was plainly an obligation to pay an ascertained sum.

33. This leads to the question whether an unrecognisable unimpeachable foreign money judgment creates an obligation enforceable in the English Court. The answer, established by a long and hitherto unbroken line of authority, confirmed by the House of Lords and the Supreme Court, is that <u>it does</u> (hereinafter, the **"Obligation Principle"**):

(1) Parke B stated in *Russell v Smyth* (1842) 152 ER 343, 347:

> *"Where the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country".* (Page 1134)

(2) In *Godard v Gray* (1870) LR 6 QB 139, 149-150, Blackburn J said:

> *"the [foreign] judgment was considered, not **as merely prima facie evidence of that cause of action for which the judgment was given, but as in itself giving rise**, at least prima facie* [that is, subject to considerations of impeachability], ***to a legal obligation to obey that judgment and pay the sum adjudged**"* (emphasis added). (Pages 594-595)

(3) In *Schibsby v Westenholz* (1870) LR 6 QB 155, 159, Blackburn J said:

> *"the judgment of a court of competent jurisdiction over the defendant to pay the sum for which judgment is given, **which the courts in this country are bound to enforce**"* (emphasis added). Pages 1135, 1139)

(4) A unanimous Court of Appeal cited these passages with approval in *Adams v Cape Industries Plc* [1990] 1 Ch 433 (CA), 513. (Page 503)

(5) In *Owens Bank v Bracco* [1992] 2 AC 443 (HL), 484, Lord Bridge (with whom the rest of their Lordships agreed) stated: (Page 900)

> *"A foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court."*

34. The Court of Appeal accepted that an unimpeachable final foreign judgment given by a court of competent jurisdiction is conclusive as to the matters of fact and law adjudicated therein (at [38]; see also [18] and [40]). The key such matter adjudicated in the Russian Judgment is that Mr Drelle is indebted to ST for the judgment sum. The Court also referred to the Obligation Principle (at [15]), by which that judgment debt is enforceable in the English court and is therefore a "*debt*" for the purposes of the IA86 provisions discussed above. Together, these principles were sufficient to dispose of the appeal. (Pages 134, 143) (Pages 132-133)

Misunderstanding of *Rubin*

35. The Court of Appeal cited (at [15]) part of Lord Collins' explanation in *Rubin v Eurofinance SA* [2013] 1 AC 236 at [9] of the Obligation Principle. The Court of Appeal emphasised the statement that the Obligation Principle was *"a purely theoretical and historical basis"* (at [15]). If and to the extent the Court of Appeal took those words to cut down or undermine the fundamental common law principle, it was wrong to do so. Far from undermining the Obligation Principle at common law, the dicta in *Rubin* support it. (Page 132)

36. At [5], Lord Collins started his analysis of the Obligation Principle by emphasising that, had it applied, it would have determined the case:

> "*...**if the judgment debtors had appeared and defended the proceedings in the foreign courts, the issues on these appeals would not have arisen**. The reason is that the judgments would have been enforceable on the basis of the defendants' submission to the jurisdiction of the foreign court. **<u>Enforcement would have been at common law</u>**...*" (emphasis added). (Page 1121)

37. At [9], Lord Collins identified *"[t]he theoretical basis for the enforcement of foreign judgments at common law"* as being *"that they are enforced on the basis of a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, **<u>a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained</u>**"* (emphasis added). In support of that principle, Lord Collins referred to *Williams v Jones*, *Goddard v Gray*, *Adams v Cape Industries* and *Owens v Bracco*. Lord Collins did not question the existence or content of the Obligation Principle. He went on to say *"[b]ut this is a purely theoretical and historical basis for the enforcement of judgments at common law"* and made three points: (a) the common law principle does not apply *"to enforcement under statute"*, (b) it made *"no difference to the analysis"* in *Rubin* and (c) it made no difference to the issues on the appeals in *Rubin*. (Page 1122)

38. At [10], he concluded by reiterating that the judgments in *Rubin* would have been enforced in England at common law if the judgment debtors were present in the foreign country when the proceedings were commenced, or if they submitted to its jurisdiction. (Page 1122)

39. At no point did Lord Collins question the continuing validity of the Obligation Principle.

Irrelevance of the Revenue Rule and the Penalty Rule

40. The Court of Appeal's overarching error was to conflate (at [42]-[43], [55], [65], and [69]) the position of a creditor pursuant to an unrecognised unimpeachable foreign money judgment (**"foreign judgment creditor"**) with the position of a claimant under a foreign revenue law or a foreign penal law (**"foreign revenue claimant"** and **"foreign penalty claimant"**). (Pages 143-144, 148, 151, 152

41. The Court quoted (at [13]) the following sentence from Dicey:

> *"English courts **have no jurisdiction to entertain an action**...for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State"* (emphasis added).

This alone should have put the Court on notice that there could be no relevant analogy between claims arising pursuant to such a law and the claim held by a foreign judgment creditor. This is because there can be no suggestion, not least in the light of the Obligation Principle, that English courts "***have no jurisdiction to entertain an action…for the enforcement***" of a foreign money judgment debt. The false analogy led the Court to the erroneous conclusion; see in particular at [55]: (Page 131-132)

> *"A foreign tax will not give rise to such a 'debt'. **No more will an unrecognised foreign judgment, which similarly involves an exercise of sovereign power**"* (emphasis added). (Page 148)

42. The correct position is that, at common law, while a foreign judgment creditor has a claim enforceable in an English court, neither a foreign revenue claimant nor a foreign penalty claimant has any such claim (pursuant to the Revenue Rule and the **"Penalty Rule"**, respectively). This is plain from *Government of India v Taylor, supra,* which together with *Skatteforvaltningen v Solo Capital Partners LLP* [2024] AC 539 (SC) (***"Solo Capital Partners"***) is the leading authority on the Revenue Rule:

(1) Viscount Simonds (with whom on this point all their Lordships agreed) at 503 quoted with emphatic approval Rowlatt J's statement in *King of the Hellenes v Brostron* (1923) 16 Lloyds LR 190, 193 that:

> *"It is perfectly elementary that a foreign government cannot come here – nor will the courts of other countries allow our Government to go there – and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs".* (Page 634)

Similarly, Lord Keith said at 510:

> *"in no circumstances will the courts directly or indirectly enforce the revenue laws of another country".*

(2) In *Government of India v Taylor, supra,* at 504, Viscount Simmonds traced the origins of the Revenue Rule to the *"formula"* used by Lord Mansfield in three judgments to the effect that *"no country ever takes notice of the revenue laws of another".* (This proposition must now be read as limited to the enforcement under the common law of claims arising under such laws. The common law now recognises such laws unless such recognition is contrary to public policy: *Solo Capital Partners*, [21] and [36] (Lord Lloyd-Jones, with whom the other Justices agreed). It is also possible to enforce such claims under statute (see Ground 2). (Page 635) Page 1166, 1172)

(3) At 506, Viscount Simmonds explained that the principle underlying this formula was derived from cases dealing with foreign penalty claims and that Lord Mansfield had extended that principle to foreign revenue laws. Having considered the criticism of this extension, Viscount Simmonds rejected it. He approvingly cited, at 507, a statement in an early edition of Dicey to the effect that the: (Page 637)

> *"**essential characteristic**, in short, **of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual**"* (emphasis added). (Page 638)
>
> This was, Viscount Simmonds concluded, *"**an apt description…of a suit to recover taxes**"* (emphasis added).

43. Plainly, these principles underlying the Revenue Rule and the Penalty Rule have no application to claims arising pursuant to an unrecognised unimpeachable foreign money judgment of the sort presently at issue, which is a judgment pursuant to laws addressing the liability of a director for breach of duty (i.e. *"an action for remedying a wrong done to an individual"*).

44. Further, and in any event:

(1) Exceptional categories such as penal and revenue laws apart, the English court routinely (and even when not so directed by statute) *"takes notice"* of foreign laws, adjudicates disputes pursuant to them, and gives remedies to claimants whose claims arise pursuant to such laws (see for example *De la Viga v Vianna* (1830) 109 ER 792, addressed below). (Pages 581-583)

(2) In *Government of India v Taylor* itself, several of the authorities on which Viscount Simonds relied in explaining the origins and nature of the Revenue and Penal Rules expressly distinguish claims pursuant to foreign revenue and penal laws from those

arising pursuant to other foreign laws. For example, in *Holman v Johnson* (1775) 98 ER 1120 (KB), Lord Mansfield stated (at 1121):

> "*There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that* ***in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern****.—****<u>There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise</u>****. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For* ***no country ever takes notice of the revenue laws of another***" (emphasis added). (Page 651)

(3) Laws of the sort presently at issue are intended to provide remedies for wrongs done to individuals.

(4) Claims arising under such laws, including in particular those arising pursuant to the judgment of a competent foreign court, <u>do</u> create rights enforceable in this country (hence, the Obligation Principle).

45. The Court's error in this case lay in overlooking the bases of the Revenue Rule and the Penalty Rule. The correct position is that since foreign revenue and penal laws do not create a liability enforceable in an English court outside the realm of insolvency law, there is no liability for the purposes of English insolvency either. As Viscount Simonds explained in *Government of India v Taylor, supra,* at 508:

> *"…the winding up of a company…is only the machinery by which an entity, which can no longer, or at least no longer usefully, carry on its business, is brought to its statutory end. It is difficult to see why such a process* ***<u>should create new rights in foreign powers hitherto unknown in this or any other country</u>"*** (emphasis added). (Page 639)

46. However, as the Obligation Principle shows, an unrecognised unimpeachable foreign money judgment <u>does</u> give rise to a claim enforceable in an English court outwith an insolvency proceeding. Therefore, the position of a foreign judgment creditor is relevantly disanalogous to that of a claimant caught by the Revenue Rule or the Penalty Rule.

47. The Court's error is particularly salient given that it cited, albeit out of context, Lord Lloyd-Jones' judgment in *Solo Capital Partners, supra,* (at [20] and [66]), yet erroneously overlooked Lord Lloyd-Jones' warning (at [36]) that:

> *"The revenue rule* ***<u>only</u>*** *applies to proceedings in which there is an unsatisfied demand for tax which foreign tax authorities seek directly or indirectly to recover…****<u>If there is no claim, directly or indirectly, to recover tax which is due, there is no attempt to assert the sovereign authority of the state which imposed the taxes within the</u>*** (Page 1172)

territory of another_...Furthermore,_ ***there can be no justification for extending this exclusionary rule beyond what is required by its rationale***_"_ (emphasis added).

48. The Court should not have drawn and proceeded on the erroneous analogy that it did between the claim of a foreign judgment creditor and claims caught by the revenue rule and the penal rule.

Confusion between Debt and Remedy

49. The Court was also wrong to have held (at [55]) that an unrecognised unimpeachable foreign money judgment does not create a debt that is *"payable.., either immediately or at some certain, future time"* for the purposes of IA86 section 267(2). The Court said this was because:

> *"A sum for the payment of which a foreign judgment provides is not…to be regarded as so 'payable'* ***if the judgment is unenforceable unless and until recognised by a Court in this jurisdiction***_"_ (emphasis added). (Page 148)

50. The dictum above conflates debt with remedy:

(1) The debt pursuant to an unrecognised unimpeachable foreign money judgment is payable immediately if that judgment so provides, since the judgment debtor's obligation arises once the foreign court has made its order (subject to any appeal).

(2) This is no different from, for example, a contract made in another country and subject to that country's law. What such a contract requires of the parties and whether a party is thereby obligated to make an immediate or a deferred payment is a matter of the proper construction of the contract.

(3) The **content** of the obligation – relevantly, whether the debt is payable immediately – does not change depending on the location of the debtor.

(4) It is not the case that, by virtue of the Russian Judgment, Mr Drelle was under an immediate obligation to pay while in Russia, but ceased being under an immediate obligation to pay the instant that the aeroplane carrying him crossed into British airspace. Since his debt was immediately payable in Russia, it remained immediately payable in England. (The position may be tested by considering a scenario in which Mr Drelle's payment obligation arose pursuant, not to a Russian judgment, but instead to a contract governed by Russian law.)

(5) What does change with the debtor's location is the process by which, and the nature of, the **remedy** that may be obtained to enforce the debt.

51. The distinction between debt and remedy is trite. Further, critically, and relevantly, it has been established in English law since no later than Lord Tenterden CJ's judgment in *De la Viga v Vianna, supra* that:

(1) the debt is governed by the *lex causae,* while,

(2) the remedy is governed by the *lex fori*.

52. In *De la Viga*, the Spanish plaintiff had caused the Portuguese defendant to be arrested in England for a debt alleged to have accrued in Portugal. The defendant adduced evidence from *"a Portuguese avogado or barrister…stating that by the law of Portugal the person of a debtor was not…liable to arrest at the suit of the creditor"* (at 792).

(1) Delivering the court's judgment, Lord Tenterden held (at 793, emphasis added) that while:

(i) *"**<u>in construing contracts the law of the country in which they are made must govern</u>"*** (the content of the obligation),

(ii) ***<u>the remedy upon them must be pursued by such means as the law points out where the parties reside</u>"*** (the remedy). (Page 582)

(2) The Chief Justice explained this distinction by reference to the principle of non-discrimination in relation to the foreign plaintiff:

> *"**<u>A person suing in this country must take the law as he finds it</u>**; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. **<u>He is to have the same rights which all the subjects of this kingdom are entitled to</u>"*** (emphasis added). (Page 582)

53. In the present case, the Court's confusion between debt and remedy is particularly salient since it was referred to the Court of Appeal's judgment in *In re McGreavy* [1950] 1 Ch 269, and quoted (at [51]) from Somervell LJ's judgment for the Court in that case warning against confusing debt with remedy. In *In re McGreavy* the issue was whether unpaid rates constituted a petitionable debt under section 4(1)(b) of the Bankruptcy Act 1914 (the **"1914 Act"**), which denied a creditor the entitlement to present a petition unless its *"debt is a liquidated sum, payable either immediately or at some certain future time…"*. The debtors argued that because unpaid rates could not be recovered by ordinary action (a point established by the Court of Appeal in *Liverpool Corporation v Hope* [1938] 1 KB 751), there could be no "*debt*" within the meaning of section 4(1)(b) of the 1914 Act. Under section 33(1)(a) of the 1914 Act, rates were regarded as becoming *"due and* (Page 147)

payable", giving the rating authority a remedy by proving for the sum due in the bankruptcy. Somervell LJ noted at p.275 that the wording of section 4(1)(b) tended to:

> *"negative the view that 'debt' is used in its pleading or procedural sense* [i.e. whether it is actionable]. *If it were, it would be unnecessary to provide that the debt must be a liquidated sum"*, (Page 1071)

and went on to find that:

> *"although in certain contexts the word 'debt' means a liquidated sum which can be sued for, to treat the word as prima facie so restricted is, we think, to confuse…the debt with the remedy".* (Page 1072)

54. Thus, *In re McGreavy* is also authority for the proposition that in order to be petitionable, the debt need not be actionable.

55. The Court of Appeal wrongly dismissed *In re McGreavy* as not being relevant since it was not concerned with an unrecognised foreign judgment, and considered that because the local authority had the remedy of distress:

> *"There was thus no question of the individual against whom the bankruptcy petition had been brought…not being liable for the rates in the eyes of English law, nor of the local authority not being entitled to enforce the liability"* (at [52]). (Page 147)

However, this reasoning is fallacious: in the eyes of English law, an unrecognised foreign judgment <u>does</u> give rise to an obligation enforceable in England, as the Obligation Principle establishes.

56. The Court should not have conflated debt with remedy in this way and should instead have acknowledged that since the Russian Judgment created an immediately payable debt in Russia, the debt remained immediately payable in England. That is not to deny that the Russian Judgment could not be enforced *as a judgment* in England, i.e. by *execution,* but that is a different point (and is dealt with under Ground 4).

<u>F.</u> <u>GROUND 3: Foreign exercise of sovereign power</u>

57. The Court held that since the common law is:

> *"**<u>avers[e] to enforcing a foreign exercise of sovereign power</u>**", **"<u>any use of an unrecognised and unregistered judgment as a 'sword', including presentation of a bankruptcy petition founded on it, is objectionable</u>"*** (at [41], emphasis added). (Page 143)

58. Referring to the judgment and order pursuant to which ST's claim arises, the Court said (at [62]):

> "*that judgment and order is the result of the exercise of sovereign power by the judicial organs of the Russian state, and … the fundamental principles of state sovereignty mean that **<u>a judgment or order resulting from such exercise of foreign</u>*** (Page 149)

***__sovereign power has no direct effect in England__* and *__cannot be enforced__* for the individual benefit of the successful litigant using any of the processes of the English court*" (emphasis added).

59. Further, whilst the Court acknowledged that an unrecognised judgment may be "*determinative for some purposes*" (at [40] and [55]), it assumed a stark dichotomy between the use of a judgment as a "*sword*", which it considered "*objectionable*" (at [41]), and other "*merely defensive[]*" uses that are not objectionable (at [39]-[41], and [55]). (Page 143, 148)

60. The posited dichotomy between use of a foreign judgment as "*sword*" and "*merely defensively*" is misleadingly stark, as shown by the examples below.

61. Further, the premise underlying the statements quoted and referred to above, that the common law is averse to "*enforcing*" a foreign exercise of sovereign power is ambiguous and, unless significantly qualified, wrong in law.

62. The premise is ambiguous because it confuses the **__enforcement of a debt__** with the **__execution of a judgment__**. The Obligation Principle shows that there is no objection to **__enforcement__ of the __debt__** arising pursuant to a foreign money judgment through the English court. What may not be done is **__execution__ of a foreign __judgment__** as if it were an English judgment. This point is explained under Ground 4. However, execution of the Russian Judgment simply is not at issue in this case.

63. Therefore, when the Court speaks of the common law's supposed "*aversion to enforcing a foreign exercise of sovereign power*", it appears to have a broader notion of "*enforcement*" in mind. Understood in this broader way, "*enforcement*" occurs whenever the English court gives the consequences of a foreign exercise of sovereign power due effect in England. On this understanding of "*enforcement*", the proposition asserted by the Court is wrong in law unless significantly qualified. The following examples make the point.

64. First, the making of law is a paradigmatic exercise of sovereign power; see e.g. *Solo Capital Partners*, supra (at [58]), referring to "*prior exercises of sovereign power by Denmark in creating its laws*". Yet the English courts routinely recognise and give effect to exercises of such power. For example, they routinely adjudicate disputes concerning rights, powers, liberties, duties, liabilities, immunities, and prohibitions arising under foreign law, and routinely grant remedies in relation to such rights, etc. This is clear from (Page 1179)

Lord Mansfield's judgment in *Holman v Johnson* (1775) 98 ER 1120 (KB), 1121, quoted above, and from *De la Viga v Vianna* (1830) 109 ER 792, also considered above.

65. It is not a "*merely defensive*" reliance on the exercise of foreign sovereign power to assert, in England, legal rights or exercise legal powers arising under foreign law, such as those arising pursuant to a contract.

66. Second and relatedly, ST's legal personhood is a product of the exercise of Russia's sovereign power to enable creation of legal persons. The English courts have long recognised the personhood of foreign corporations and have given due and 'direct' effect in England to the consequences of such recognition. This has been the case since at least 1734, when, *in Henriques v The General Privileged Dutch Company Trading to the West Indies* 92 ER 494, at 496, Lord Chief Justice King recognised the legal personhood of the Dutch West India Company after having sought and received in evidence "*the proper instruments whereby by the law of Holland they [the Company] were effectually created a corporation there*". There was no statute directing the English court to recognise the legal personhood of foreign corporations. (Page 649)

67. The example of corporate personhood again shows that there is no neat distinction between reliance in England on foreign law as either a "*sword*" or "*merely defensively*". English courts recognise a foreign corporation's standing, in England, to own property, enter into contracts, bring legal proceedings in its own name, and etc. In *Henriques*, for example, the English court recognised not merely the legal personhood of the Dutch West India Company but also (for example) its capacity to own and loan money and its standing to bring an action in the English court for money lent. And having decided in its favour, the English awarded it substantial damages.

68. Third and similarly, the English court recognises and gives appropriate effect in England to foreign court orders. For example:

    (1) Continuing with corporate personhood, the House of Lords explained in *Lazard Brothers v Midland Bank* [1932] AC 289 that the foreign sovereign's extinguishment — which would often be by court order — of a corporation created by that sovereign's act would be recognised by the English court and given due effect. For example, at 297, Lord Wright said:

"*as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law.* ***The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact"*** (emphasis added). (Page 691)

Again, there was no statute instructing the English court so to do.

(2) In bankruptcy law, *Solomon v Ross*, decided in 1764 ((Wallis & Lyne, Irish Chancery Reports, 1839), footnote at pp. 59 et seq) shows the Court of King's Bench recognising and giving due effect to the judicial acts of a foreign court, namely, Amsterdam's Chamber of Desolate Estates. The English Court duly recognised the standing of the curators (trustees in bankruptcy) of a bankrupt Dutch partnership appointed by the Chamber. In other words, the English Court recognised that the curators represented and acted for the partnership, and on that basis, allowed them access to the English court and its remedies. Upon having received evidence that Dutch bankruptcy law did not discriminate against foreign creditors, the English Court cooperated with the curators by undoing the attachment that the defendant Ross, an English creditor of the partnership, had obtained against one of the partnership's English debtors, and required the moneys (equivalent to about £3.5m today) to be handed over to the curators for the benefit of the partnership's creditors as a whole. The order made by the English court expressly acknowledged that Ross could prove in the Dutch bankruptcy. There was no statute directing the English court to do any of these things, and the English court's treatment of the curators defies any neat categorisation between sword and shield. (Page 1229)

69. The Court fell into error by ignoring countless such instances in which the English courts recognise and give due effect in England to the foreign exercise of sovereign power. Instead, the Court erroneously extrapolated from the Revenue Rule (as shown above). It thereby wrongly extrapolated a proposition derived from exceptional scenarios involving a state or its agent acting in a sovereign capacity and treated it as a general rule.

70. The Court should not have held that the use of a foreign judgment claim pursuant to an unrecognised unimpeachable money judgment for the purposes of serving a statutory demand and of bringing a bankruptcy petition is an exorbitant exercise of sovereign power analogous to that to which the Revenue Rule is directed.

H. GROUND 4: No "*Direct*" Operation, Effect, Execution, or Enforcement

71. Under Ground 4, ST contends that the Court erred in law in holding that for an unimpeachable foreign money judgment debt to constitute the basis of a statutory demand or a bankruptcy petition (or both) amounts to that foreign judgment being given "*direct operation*" (at [39], [41], [43], [55]), or *"direct enforcement*" (at [39]), or "*direct effect*" (at [62]) in England. In this context, the distinction between *execution of a judgment* and *enforcement of a claim* is critical, yet the Court of Appeal conflated or obscured these concepts. The Court's error may be analysed in four steps. (Page 143, 144, 148

72. First and as already noted, the Court erroneously extrapolated from the Revenue Rule. For the purposes of this Rule, however:

> "***Direct enforcement*** *occurs where* ***a foreign state or its nominee*** *seeks to obtain money or property, or other relief,* **in reliance on the foreign rule in question**", while "***Indirect enforcement*** *occurs where* **the foreign state (or its nominee)** *in form seeks a remedy, not based on the foreign rule in question, but which* **in substance** *is* ***designed to give it extra-territorial effect****; or where a private party raises a defence* ***based on the foreign law in order to vindicate or assert the right of the foreign state***": *Solo Capital Partners*, supra, at [21] (emphasis added), quoting Dicey, Morris & Collins. (Page 1166)

73. Plainly, the exorbitant exercise of foreign sovereign power at which exclusionary rules such the Revenue and Penalty Rules are directed lies in:

    (1) the particular nature of the claim and of the law pursuant to which it arises, and

    (2) the fact that it is brought by or on behalf of a foreign state authority.

74. This has no relevance to the position of a foreign judgment creditor who is not a state authority or the nominee or assignee of such an authority and who seeks to serve a statutory demand and to bring a bankruptcy petition in right of a claim that is not of the sort excluded by rules such as the Revenue and Penalty Rules.

75. Second, a foreign judgment creditor who is successful in obtaining a bankruptcy order does not thereby obtain execution or direct enforcement of the foreign judgment, nor does such judgment obtain direct operation or effect. As Millett J explained in *Re International Tin Council* [1987] Ch 419 at 455H-456A:

> "*in my judgment* ***the winding up process is plainly not a method of enforcing a judgment*** *or arbitration award…* ***Far from enabling any judgment or award to be enforced, the making of a winding up order prevents it****.* ***The great object of insolvency law****, whether* ***individual*** *or corporate,* ***is to protect the debtor from harassment by the creditors****, and the assets from piecemeal realisation and unequal* (Pages 1013-1014)

> *distribution as the creditors scramble for them.* ***Whether the petition is presented by a creditor or by the debtor, <u>its purpose is to obtain an order which will preclude the creditors from enforcing any judgments</u>*** *or awards which they may have obtained, and substitute the right to participate in a pari passu distribution out of an insufficient fund in full satisfaction of their claims.* ***<u>That is not the enforcement of their judgments</u>*** *or awards,* ***<u>but the opposite</u>****"* (emphasis added).

76. The correct position when the English court makes a bankruptcy order is as follows. The order brings into play a proceeding governed by English law and overseen by an English statutory officeholder who is a regulated professional in England and who acts as the English court's officer pursuant to English statutory obligations and the English court's direction. The proceeding is run pursuant to the English statute in the collective interests of the insolvency estate's creditors. The foreign judgment creditor's claim falls to be classified by reference to English law, particularly the statutory law governing the classification and priorities of different types of claim. Any payment to the foreign judgment creditor occurs if and as directed by English law and as part of the collective English insolvency process.

77. In this light, it is erroneous to characterise the service of a statutory demand, the bringing of a petition, and/or the opening of the bankruptcy proceeding as constituting execution or direct enforcement, etc., of the foreign judgment creditor's (and indeed any other creditor's) claim. To the contrary and far from being an exorbitant exercise of foreign sovereign power, enforcement of the debt pursuant to the foreign judgment is mediated entirely through and governed entirely by English law processes.

78. Third, the Court failed to consider how a money judgment of an <u>English</u> court would be directly enforced in England. The methods for such enforcement are set out in Civil Procedure Rules ('**CPR**') 70 *et seq*. CPR 70.2 states that Practice Direction 70A ('**PD70A**') "*sets out methods of enforcing judgments or orders for the payment of money.*" PD70A identifies the following methods: "*(1) a writ…or warrant of control…(2) a third party debt order…(3) a charging order, stop order or stop notice…(4) in the County Court, an attachment of earnings order…(5) the appointment of a receiver*". That the bringing of a bankruptcy (or other insolvency) petition is not listed amongst such methods is consistent with the previous points, viz, that such enforcement as is provided by the making of a bankruptcy order is entirely indirect and does not amount to direct execution. (Pages 491-492)

79. These methods all amount to *execution* of an English judgment, which is to be distinguished from *enforcement*. An unbroken line of authority from at least 1705 confirms that it is only English judgments that can be executed, although money obligations arising pursuant to foreign judgments can be enforced. In *Dupleix v De Roven* (1705) 2 Vern. 540, the plaintiff recovered a judgment in France, and brought proceedings in England. The Lord Keeper held that the judgment *"must be considered as a debt by simple contract"* but that the plaintiff could *"maintain no action here, but an indebitatus assumpsit, or an insimul computaset"*. Thus, the plaintiff could not enforce by execution but could enforce the debt.

80. The distinction between execution and enforcement in the broader sense is further supported by the following authorities:

(1) In *Re Lines Bros (in liq.) (No.1)* [1983] Ch. 1 at p.20 per Brightman LJ:

> *"The liquidation of an insolvent company* ***is a process of collective enforcement of debts for the benefit of the general body of creditors****."".* (Page 1057)

(2) In *Re Bayoil S.A.* [1999] 1 WLR 147 at 156G-H per Ward LJ: *"Winding up is not a form of execution"*.

(3) In *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] BCC 496 at [29] per Mummery LJ:

> *"A winding up petition is neither (a) […], or (b) a process of execution of the judgment on which the petition is based. It is sui generis, being in the nature of a wider legal proceeding available for the collective enforcement of the admitted or proved debts of the company for the benefit of the general body of creditors on a pari passu basis: see, for example, Re Lines Bros (in liq.) (No.1) [1983] Ch. 1 at p.20".*

81. Although these principles were cited by the Court of Appeal, it wrongly concluded that <u>enforcement of the debt</u> arising pursuant to an unrecognised foreign judgment, and not merely <u>execution of the foreign judgment</u>, is prohibited at common law. The correct position is that when a creditor brings bankruptcy proceedings based on an unrecognised foreign judgment, it seeks not execution of the foreign judgment but instead enforcement of the obligation, long recognised in English law, to pay the judgment debt (see Ground 1) by way of an English law-governed collective enforcement process.

82. Fourth, the purpose of *recognition* proceedings (usually by way of Part 7) is for the English court to take notice of the foreign judgment is some relevant way, including whether the foreign proceedings have been conducted in accordance with the rule of law:

(1) The English courts will conduct a review of foreign judicial acts (an exception to the Act of State doctrine) on the basis of a shared understanding of how courts should behave under the rule of law: *Belhaj v Straw* [2017] AC 964, [73(ii)] (Lord Mance). (Page 516)

(2) The English Court is more willing to investigate whether a foreign court is acting in accordance with those shared standards, and foreign judgments are assessed under different rules from those applicable to legislative and executive acts: *Central Bank of Venezuela v Governor and Company of the Bank of England* [2021] UKSC 57, [159] (Lord Lloyd-Jones). (Page 724)

(3) The reason for the distinction was explained in *Yukos Capital (No 2)* [2014] QB 458 at [87] per Rix LJ:

> *"… the judicial acts of a foreign state are judged by judicial standards, including international standards regarding jurisdiction, in accordance with doctrines separate from the act of state doctrine, even if the dictates of comity still have an important role to play. As Lindley MR said in Pemberton v Hughes [1899] 1 CH 781, 790: '*If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a manner with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, **unless they offend against English views of substantial justice'".** (emphasis added). (Page 1301)

83. Accordingly, if it is not disputed by the debtor that the foreign proceedings were conducted in accordance with the rule of law as understood by the English Court ("*English views of substantial justice*"), there is no reason for the English Court to go behind the foreign judgment.

84. In the case of a bankruptcy petition based on a foreign money judgment, it falls to the English bankruptcy court to consider, if and as appropriate, whether the foreign proceedings resulting in that judgment were conducted in accordance with English views of substantial justice. Relevantly, this occurs when the debtor disputes that the foreign proceedings were conducted in accordance with the rule of law.

85. This is exactly what the English bankruptcy court did in this case. Mr Drelle disputed the Russian Judgment on rule of law grounds, ICC Judge Burton received evidence and submissions, and concluded that Mr Drelle's liability was not disputed in good faith on substantial grounds. This is all that was required to satisfy the English court that the Russian Judgment had been given in compliance with the rule of law.

86. This would not contravene the well-established principle of procedure that the insolvency court is not the forum to resolve disputes. If the debt is bona fide disputed on the grounds that the foreign judgment was not obtained in accordance with the rule of law, that issue will need to be determined in an ordinary action. This reflects general bankruptcy practice: if the debtor establishes that the debt is disputed, the petition will be dismissed and the dispute resolved in an ordinary action.

87. Moreover, it is no objection to contend that the English Court <u>must</u> go through the process of <u>actually</u> reviewing for itself whether the foreign proceedings were conducted in accordance with the rule of law. This is clear from the fact that if a judgment creditor issues Part 7 proceedings but the debtor does not file a defence, the creditor is entitled to a judgment in default, which it may then use to petition for bankruptcy. In that scenario, recognition is an entirely formal process. The purpose of recognition is equally well served by the bankruptcy court when deciding whether to make a bankruptcy order.

<u>I. THE POSITION UNDER THE 1933 ACT</u>

88. An important part of the Court of Appeal's reasoning was its conclusion as to the effect of *Re A Judgment Debtor,* namely, that a bankruptcy petition cannot be presented in respect of a foreign judgment in advance of registration. *Re A Judgment Debtor* concerned the intersection between the provisions of the 1933 Act and the 1914 Act. Of particular importance was the Court of Appeal's conclusion as to the effect of section 6 of the 1933 Act (*"Foreign judgments which can be registered not to be enforced otherwise"*), which provides:

> *"No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom".* (Page 435)

89. *Re A Judgment Debtor* concerned a bankruptcy notice under section 1(1)(g) of 1914 Act, which was based on a debt pursuant to a registered French judgment. In order to present a bankruptcy notice under section 1(1)(g), a creditor was required to have an English judgment (see at p. 609). That meant that a *foreign* judgment that had been made the subject of an *English* judgment, could be the basis of a bankruptcy notice under section 1(1)(g) of the 1914 Act. However, if the creditor fell within the 1933 Act, he would be unable to get an English judgment because he was unable to sue on the foreign judgment. As explained by Greene MR, whereas earlier legislation left it open to the judgment

creditor to sue on the foreign judgment, the 1933 Act *"prohibits any such method of dealing with a foreign judgment if it is a judgment registrable under the Act"* (see at p. 608). The inability to obtain an English judgment was the issue in *Re A Judgment Debtor*.

90. The ratio of the decision in *Re Judgment Debtor* was that a creditor holding a registered foreign judgment can serve a bankruptcy notice under section 1(1)(g) of the 1914 Act because a registered foreign judgment is treated as if it was a final judgment of the English Court. As Greene MR explained (at p. 609):

> *"…the effect of the Act of 1933 as I have construed it is to place the foreign judgment, when registered for the purposes of the bankruptcy notice, in the same position* ***as if it was a final judgment of an English Court****"* (emphasis added). (Page 1037)

91. Further, as explained by Greene MR, a contrary construction would have meant that the holder of a foreign judgment registrable under the 1933 Act would never be able to pursue bankruptcy proceedings. This is because section 6 prevents the holder of a foreign judgment from suing on it in ordinary proceedings to obtain an English judgment (at p. 608):

> "*But, if the argument for the respondent were correct, it would produce this startling result, that it would not be open for the holder of a foreign judgment registrable under the Act ever to enforce that judgment in bankruptcy, and for this reason, that he cannot sue on it - s. 6 prevents him doing so* ***- and the only thing he could do would be to register it****…"* (emphasis added). (Page 1036)

92. It is clear that Greene MR was construing the effect of section 6 of 1933 Act against the requirements for serving a bankruptcy notice under the 1914 Act. The latter required a judgment on which execution had not been stayed (see section 1(g) of the 1914 Act); that is, it required an executable judgment. At common law, only an English judgment is executable. The result of the 1914 Act was that a registrable foreign judgment was, upon registration, treated as if it were an English judgment (see at p. 609). (Page 1037)

93. It was an aspect of the peculiarities of the "*acts of bankruptcy*" doctrine under section 1 of the 1914 Act that it required an executable judgment. This doctrine has long since been abolished and is of no relevance. In *In re a Debtor (No. 1 of 1987)* [1989] 1 WLR 271, Nicholls LJ explained at p.276G-H that the IA86 had to be construed *"unfettered by previous authorities"* contrasting the differences between bankruptcy notices under the 1914 Act with statutory demands under IA86. This was approved by Lord Jauncey in *Re Smith* [1990] 2 AC 215 at p.237H-238C.

94. The Court of Appeal in this case held (at [50]) that Greene MR plainly considered section 6's bar on *"proceedings for the recovery of a sum payable under a foreign judgment…other than proceedings by way of registration"* encompassed bankruptcy proceedings and that accordingly, its significance extended beyond section 1(1)(g) of the 1914 Act. For reasons explained above, this is not the ratio of *Re A Judgment Debtor*. As such, the Court of Appeal's conclusion that the decision *"provides authority for the proposition that a bankruptcy petition simply cannot be presented in respect of a foreign judgment in advance of registration"* is also in error. (Pages 146-147)

95. *<u>If</u>* contrary to the above, the ratio of *Re A Judgment Debtor* was that the effect of section 6 of the 1933 Act prevents the holder of an unregistered foreign judgment from presenting a bankruptcy petition, it was wrongly decided. This is because bankruptcy proceedings are not *"proceedings for the recovery of a sum payable"* but are for the initiation of a collective process under which the debtor's estate is collected in and distributed rateably to his creditors. This was explained clearly by Buckley J in *In Re Crigglestone Coal Co Ltd* [1906] 2 Ch. 327 at 331-332:

> *"…the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiæ is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon s. 91 of the Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class."* (Pages 1020-1021)

96. There have been numerous statements to similar effect:

(1) In *Re Lines Bros (in liq.) (No.1)* [1983] Ch. 1 at p.20 per Brightman LJ, *ibid*. (Page 1057)

(2) *Re International Tin Council* [1987] Ch 419 at 455F-G in which Millett J stated: (Page 1013)

> *"<u>**I am not satisfied that…the presentation and hearing of a winding up petition…are properly to be classified as falling within the enforcement jurisdiction at all**</u>. It is fallacious to suppose that, because the petitioner is not seeking to establish his debt, the court is exercising its enforcement jurisdiction. Even if the petitioner has previously resorted to litigation to establish his debt, the presentation of a petition marks the commencement of an entirely new lis. The issue at the hearing is not whether the petitioning and other creditors, some of whom will not yet have established their claims, should be paid, but whether the company is insolvent and, if so, whether it should be wound up or allowed to try and trade out of its difficulties. There is much to be said for the view that, in deciding whether or not the company should be wound up, the court is engaged in a new process of adjudication, separate and different from any that*

may previously have been involved in establishing the petitioning creditor's debt (emphasis added).

(3) In *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 at [26]-[27] per Lord Hoffmann:

> *"It is first necessary to remember that a winding up order is not the equivalent of a judgment against the company which converts the creditor's claim into something juridically different, like a judgment debt. Winding up is, as Brightman LJ said in In re Lines Bros Ltd [1983] Ch 1, 20, "a process of collective enforcement of debts".* (Pages 1296-1297)

97. Moreover and crucially, the Privy Council in *Sian Participation Corp (in liquidation) v Halimeda International Ltd* [2025] AC 1321, speaking through Lord Briggs and Lord Hamblen, recently confirmed that (at [32] and [54]):

> *"**<u>the process of seeking and obtaining an order for the appointment of a liquidator (or a winding up order in the UK) does not require or involve any pursuit or adjudication of the applicant's claim to be a creditor</u>**, either as to liability or quantum. Thus for example **the court's order creates no res judicata as between the applicant and the company**...**<u>The successful outcome of a winding up petition is not a judgment which can be executed</u>**...The liquidator is free to reject the applicant's proof of debt, in part or in whole...If the debt is disputed by the liquidator that dispute may be referred to court or to arbitration...* (Pages 1201, 1206)
>
> *...**a creditor relies on non-payment of a specific debt in a winding-up petition 'as evidence' that the company 'is unable to pay its debts as they fall due'**; **<u>the petition "is not a claim for payment of the debt"</u>**"* (emphasis added).

98. The Court of Appeal in this case also placed weight on Mr Drelle's submission that the holder of an unrecognised foreign judgment would be in a better position than the holder of an unregistered foreign judgment, the latter only being able to present a bankruptcy petition following registration of the judgment (at 50]). However, even if there was different treatment between registrable and non-registrable foreign judgments in the context of s267(2)(b), this would not be surprising. The 1933 Act was enacted at a time when it was only possible to petition for bankruptcy on the basis of a final judgment or order of the English court, as a result of section 1(g) of the 1914 Act. This changed in 1986.

99. Moreover, the holders of registrable and non-registrable judgments are in different positions and fall into distinct systems. If Parliament had intended that they would have been treated the same way for all purposes it could have made all foreign judgments registrable.

100. For these reasons, the Court was wrong in its conclusion as to the effect of *Re A Judgment Debtor* and of the scope of section 6 of the 1933 Act.

J. GROUND 2: ARTICLE 13 OF THE MODEL LAW

101. Ground 2 raises a point of pure law based on Article 13 of the United Nations Commission on International Trade Law on 30th May 1997 (**"Model Law"**) that was not made in the courts below. In summary, Article 13 provides ST, a "*foreign creditor*", with the same rights regarding the commencement of an English bankruptcy proceeding as a creditor with "*an equivalent local claim*". ST's claim arises pursuant to a foreign judgment and ST is located in Russia. ST is, on any view a *"foreign creditor"*. Under Article 13 ST has the same rights as a creditor with an equivalent claim under English law. (Page 1595-1596)

102. Ground 2 is an alternative to Grounds 1, 3 and 4, and would be sufficient to dispose of the appeal.

<u>The Model Law</u>

103. By virtue of the CBIRs, the Model Law has "*force of law in Great Britain in the form set out in Schedule 1…with certain modifications to adapt it for application in Great Britain*"; Regulation 2(1). The CBIRs were made on 3 April 2006 in exercise of the powers conferred by section 14 of the Insolvency Act 2000. Unless otherwise specified, references below to Articles are to the Articles of the Model Law in the form incorporated in the "*law in Great Britain*" (and in particular in English law). (Page 454)

104. The Model Law is not a treaty and does not impose any public international law obligation on any state. Accordingly, the principle of construction that requires the court to seek to interpret domestic legislation in compliance with such obligations (see e.g. *Rex (N3) v Secretary of State for the Home Department* [2025] AC 1473 (SC), [68] (Lords Sales and Stephens)) has no application. The Model Law is, nevertheless, an international instrument, which fact has critical implications for the interpretation of that Law's text as implemented in this jurisdiction. The following matters are relevant. (Pages 1107-1108)

105. First, Article 8 provides:

> "*In the interpretation of this Law, regard is to be had to its* ***international origin*** *and to* ***the need to promote uniformity in its application*** *and* ***the observance of good faith***" (emphasis added). (Page 1594)

106. Relatedly, the Explanatory Memorandum prepared by the Department of Trade and Industry and laid before Parliament explains "***Our approach to enactment***" as follows:[1]

> "*The Model Law is a legislative text that is recommended to countries for incorporation into their national law. In Great Britain,* ***we have tried follow*** [sic] ***UNCITRAL's exhortation to stay as close as possible to the original drafting in order to ensure consistency, certainty and harmonisation with other countries enacting the Model Law****.* (Page 1452)
>
> ***The language of the Model Law is similar to that used in international treaties and conventions and will almost certainly be approached by the courts in that way****, i.e.* ***it will be interpreted purposively****. Accordingly the UNCITRAL Guide to Enactment will be a useful tool in interpreting the text*" (emphasis added).

107. Second and given the Model Law's "*international origin*", "*the need to promote uniformity*", and "*the observance of good faith*", the following principles are relevant:

(1) In *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 (HL), in relation to the interpretation of a provision in the Warsaw Convention of 1929, Lord Hobhouse explained (at [77] and [147], emphasis added): (Pages 814, 816)

> "*As the language was not chosen by English draftsmen and was not designed to be construed exclusively by English judges, it should not be interpreted according to the idiom of English law.* ***What one is looking for is a meaning which can be taken to be consistent with the common intention of the states which were represented at the international conference. <u>The exercise is not to be controlled by technical rules of English law or domestic precedent</u>. It would not be right to search for the legal meaning of the words used****, as the Convention was not based on the legal system of any of the contracting states. It was intended to be applicable in a uniform way across legal boundaries. …*
>
> ***The purpose of uniformity means that it is the duty of the national court to put to one side its views about its own law and other countries' laws****…* ***the relevant point for decision always remains: what do the actual words used mean?***" (emphasis added).

(2) In *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2021] 1 WLR 1436 (SC), Lord Briggs and Lord Hamblen stated (at [38]-[39] and [42], emphasis added): (Pages 821-822)

> "*As an international Convention the Collision Regulations should be interpreted by reference to* ***broad and general principles of construction rather than any narrower domestic law principles****…*
>
> *Such general principles include the general rule of interpretation set out in article 31.1 of the Vienna Convention on the Law of Treaties 1969, which provides that: '*A treaty shall be interpreted in good faith in accordance with **the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose**.*'…*

[1] HMG Department of Trade and Industry, *Explanatory Memorandum to The Cross-Border Insolvency Regulations 2006* (2006 No. 1010), paras 7.18-7.19.

They should also be interpreted in a uniform manner *and* ***<u>regard should therefore be had to how they have been interpreted by the courts of different countries</u>****…*"

(3) As to "*the observance of good faith*", Lord Kerr's approach, interpreting the reference to good faith in Article 31 of the Vienna Convention on the Law of Treaties (**"VCLT"**), in *Moohan v Lord Advocate* [2015] AC 901 (SC), [64], was approvingly quoted by Lord Hamblen in *JTI Polska Sp z oo v Jakubowski* [2024] AC 621 (SC), [27]: (Page 810)

"***<u>It would be wrong to read article 31 as reflecting something like the so-called 'golden rule' of statutory interpretation where one starts with the ordinary meaning of the words and then moves to other considerations only if the ordinary meaning would give rise to absurdity</u>. That is not international law***. *The International Law Commission made clear in its commentary to the draft treaty, at p 219, that, in accordance with the established international law which these provisions of VCLT codified, such a sequential mode of interpretation was not contemplated:* 'The commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connection between paras 1 and 2 and again between para 3 and the two previous paragraphs, intended to indicate that **the application of the means of interpretation in the article would be a single combined operation**'" (emphasis added).

108. Third, by Regulation 2(2) of the CBIRs, and "***[w]ithout prejudice to any practice of the courts as to the matters which may be considered apart from this paragraph***", the court may in ascertaining the meaning of the Model Law as implemented in Great Britain consider the Model Law's original text, preparatory documents, and the *Guide to Enactment* prepared by UNCITRAL. (Page 454)

109. Fourth and following from the previous points, the Model Law must accordingly be given an autonomous international interpretation, not one that varies with domestic law categories that differ from State to State and would defeat the uniformity that Article 8 mandates. The Court should look, as part of a <u>unitary</u> (and <u>not sequential</u>) exercise and unconstrained by technical rules of English law, at the ordinary meaning of the relevant terms in their context and in light of the Model Law's object and purpose.

110. Fifth, the Model Law is intended to modify and (in case of conflict) prevail over domestic English insolvency law. Regulation 3 provides:

"***3.— Modification of British insolvency law***

*(1) British insolvency law…****<u>shall apply with such modifications</u> as the context requires for the purpose of giving effect to the provisions of these Regulations***. (Page 454)

> *(2) In the case of any conflict between any provision of British insolvency law or of Part 3 of the Insolvency Act 1986 and the provisions of these Regulations, the latter shall prevail.*"

111. Sixth, in relation to the Revenue and Penal Rules, the following principles are relevant:

(1) First, when giving effect in domestic law to the Model Law, the legislator is presumed (insofar as relevant) to know of the Rules; see e.g. *Unger v Ul-Hasan* [2024] AC 497 (SC), [37], [39] (Lord Stephens). (Page 1287)

(2) Second, legislation may show that the legislator intended to depart from one or both Rules; see e.g. *R (on the application of Forge Care Homes Ltd) v Cardiff and Vale University Health Board* [2018] 1 All ER 449 (SC), [35] (Lady Hale).

112. Seventh and finally as to the interpretive approach, the general presumption is that where the same term is used in multiple places in a piece of legislation, it bears the same meaning in each such place. However, this is a presumption, not a rule, and the ultimate question is what the legislator intended; *R (Secretary of State for the Home Department) v Immigration Appeal Tribunal* [2001] QB 1224 (Admin), [35] (Scott Baker J). The presumption may be rebutted if it would result in a meaning that, in context, makes no sense or does not reflect any rational policy. For example, in *R v Lynsey* [1995] 3 All ER 654 (CA), the Court of Appeal agreed with the judge at first instance that the term "*common assault*" had different meanings in sections 39 and 40, respectively, of the Criminal Justice Act 1988. (Page 955)

"*Creditor*" includes creditor pursuant to unimpeached foreign money judgment

113. The Model Law does not define the term "*creditor*". It must therefore be given its ordinary meaning, unconstrained by technical rules of English law, in the context in which the term appears in the Model Law and in light of that Law's object and purpose.

114. Construed thus, it is plain that references to "*creditor*" in the Model Law include a creditor holding a claim pursuant to foreign law. This includes a creditor whose claim arises pursuant to a foreign money judgment. The following points should be noted.

115. First, the Preamble to the Model Law, not reproduced in the CBIRs but relevant to their interpretation under Regulation 2(2)(a), provides:

> "*The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:…* (Page 1592)

(c) *Fair and efficient administration of cross-border insolvencies that* ***protects the interests of all creditors*** *and other interested persons, including the debtor*" (emphasis added).

(1) The ordinary meaning of "*creditors*" covers creditors irrespective of the proper law of their debt. It also covers money judgment creditors irrespective of the State whose court has given the judgment. This conclusion is reinforced by the modifier "*all*".

(2) To limit the reference to "*creditors*" in the Preamble to those whose claims arise pursuant to the law of the very State in whose domestic law the Model Law is given effect (relevantly, England and Wales) would defeat or significantly undermine even the most basic purpose of the Model Law. For the Law as implemented in English law to be concerned only with creditors holding English law-governed claims would significantly rob it of efficacy as a framework governing <u>cross-border</u> insolvency; nor would such an outcome be fair, especially to creditors holding claims not governed by English law.

(3) Further and critically, there is no basis for conditioning the inclusion of foreign money judgment creditors in the Preamble's reference to "*creditors*" to their meeting peculiar technical requirements for recognition in the enacting State.

(4) In ordinary usage, an <u>English</u> money judgment creditor is a creditor. It is no less a creditor even if it has not met the technical requirements for recognition in one or other foreign State. For example, if ST had a creditor holding an <u>English</u> judgment, such a creditor would be a "*creditor*" for the purposes of the Model Law as implemented in England irrespective of whether it had complied with any technical <u>Russian</u> law recognition requirements. This conclusion generalises irrespective of the State whose court has given the judgment under which the claim arises.

(5) The conclusion is strengthened by considering the purpose of the Model Law, which is to facilitate the fair and efficient administration of cross-border insolvencies in the interests of all creditors.

(6) At first instance in *Rubin v Eurofinance SA* [2010] 1 All ER (Comm) 81 (Ch), it was argued that a business trust could not be a "*debtor*" for the purposes of the Model Law since such a trust, while a separate legal entity under its governing law, is not a separate legal entity in English law (see at [36]). The court rejected this contention as requiring a "*parochial*" interpretation of "*debtor*" that was

inconsistent with Article 8 (see at [[40]-[42]). The position in relation to a creditor pursuant to an unimpeachable unrecognised foreign money judgment is *mutatis mutandis* and *a fortiori*.

116. Second, Article 14 ("*Notification to foreign creditors of a proceeding under British insolvency law*") provides at (1):

> "*Whenever under British insolvency law notification is to be given to creditors in Great Britain, such notification shall also be given to the known creditors that do not have addresses in Great Britain. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. ...*" (Pages 463-464)

(1) It would undermine the purpose of the Model Law to read this provision as requiring notice only to creditors holding English law-governed claims.

(2) Further and even if the Court of Appeal were right, it would be absurd to require a foreign money judgment creditor to register its judgment <u>as a precondition to</u> being entitled to be given notice in relation to proceedings that may fundamentally affect its legal rights and interests.

117. Third, several provisions of the Model Law require the court to take account of the interests of creditors. Each such provision refers to "*creditor*" in such a way as to require the inclusion of those whose claims arise pursuant to a law other than that of the enacting State, including those holding claims pursuant to a foreign judgment unrecognised in England:

(1) Article 19 ("*Relief that may be granted upon application for recognition of a foreign proceeding*") empowers the court to make certain interim orders "*where relief is urgently needed to protect the assets of the debtor or* ***the interests of the creditors***".

(2) Article 21 ("*Relief that may be granted upon recognition of a foreign proceeding*") makes similar provision.

(3) Article 22 ("*Protection of creditors and other interested persons*") provides that in granting or denying relief, "*the court must be satisfied that* ***the interests of the creditors (including any secured creditors****...)...are adequately protected*" (emphasis added). (Pages 466-470)

(4) Article 23 ("*Actions to avoid acts detrimental to creditors*") gives the "*foreign representative*" (a person representing an insolvency proceeding pursuant to

foreign law, as further discussed below) standing to apply to the court pursuant to certain provisions in IA86, such as those aimed at undoing the effects of certain voidable preferences and undervalue transactions. Subsection 7 provides:

> "*On making an order on an article 23 application, the court may give such directions regarding the distribution of any proceedings of the claim by the foreign representative, as it thinks fit to ensure that* ***the interests of creditors in Great Britain are adequately protected***" (emphasis added). (Page 470)

118. In relation to each of these provisions:

(1) The creditors whose interests count must include creditors whose claims arise pursuant to foreign law, including foreign money judgment creditors irrespective of whether they have obtained recognition in this jurisdiction.

(2) To hold otherwise would be contrary both to the ordinary meaning of "*creditor*" in each of these contexts and to the purpose of the Model Law, which is to provide a fair and efficient framework for cross-border insolvency. This purpose is undermined rather than advanced if the English court may only attend to the interests of English law-governed creditors, and only to those foreign money judgment creditors who have obtained Part 7 orders in England.

(3) By way of illustration, assume that it was ST itself (and not Mr Drelle) that was sought to be made subject to English insolvency proceedings, and that Mr Lisin were to apply pursuant to the CBIRs for recognition of ST's Russian insolvency proceedings. In that hypothetical, it would be neither fair nor efficient—indeed, it would be perverse—for the English court, in seeking to apply any of the Model Law provisions above, only to take account of such (if any) of ST's creditors whose claims arose under English law.

(4) Continuing the same hypothetical in which ST itself was sought to be made subject to English insolvency proceedings, assume that ST had one or more Russian money judgment creditors, the same conclusion applies *mutatis mutandis* to the suggestion that, in order to be considered for the purposes of any of the provisions above, such creditors must have obtained Part 7 orders from the English court.

119. For these reasons, a creditor holding a claim not governed by English law—including an unrecognised foreign money judgment creditor such as ST—is a "*creditor*" for the purposes of the Model Law.

The meaning of "*Foreign*" includes "pursuant to foreign law"

120. In the Model Law, the modifier "*foreign*" qualifies not just "*creditor*" but also "*State*", "*law*", "*court*", "*representative*", "*proceeding*", and "*tax or social security authority*". Bracketing "*creditor*" for the moment, "*foreign*" denotes a connexion to a legal system other than (relevantly) English law:

(1) In relation to "*foreign law*" (Article 5), the position is self-evident. (Page 462)

(2) A "*foreign State*" (Articles 1(b) and (d), 5, 17(2)(b), 32) is foreign precisely because it comprises territory that is subject to a different legal system. That is what makes Calais foreign to England and Dover foreign to France. (Pages 456, 462, 465, 472)

(3) A "*foreign court*" (defined in Article 2(f)) is a court constituted under the law of a foreign State. This could refer to the legal system under which the court is constituted, or its geographical location. Importantly, however, a court constituted under the law of State X would remain an X court even when sitting in State Y, for example, in order to take evidence from a witness in Y. (Page 459)

(4) A "*foreign proceeding*" (Article 2(i)) is one conducted under the law of a foreign State or in a foreign court. (Page 460)

(5) A "*foreign representative*" is defined in Article 2(j) to include "*a person or body…authorised…to act as a representative of the foreign proceeding*". Such person or body need have no physical or personal connexion with the relevant foreign State at all. What makes one a foreign representative is the connexion with the foreign proceeding (which, as noted above, is "*foreign*" because a creature of a foreign law). (Page 460)

(6) A "*foreign tax or social security authority*" (Article 13(3)) is constituted such an authority pursuant to the relevant foreign law. The tax authority constituted by the law of State X remains X's tax authority even when it maintains offices abroad. (Page 464)

Location as proxy for applicable law

121. The Model Law sometimes implies the requisite connexion to foreign law by referring to foreign location.

122. For example, it defines "*foreign proceeding*" as "*a collective judicial or administrative proceeding* ***in a foreign State****…pursuant to a law relating to insolvency…*" (Article 2(j), emphasis added). The fact that the proceeding is conducted in a foreign State is used as (Page 456)

a proxy for the fact that it is conducted pursuant to that State's law. "*Foreign court*" is then defined as "*a judicial or other authority competent to control or supervise a foreign proceeding*" (Article 2(f)). As noted above, "*foreign representative*" is also defined by reference to "*foreign proceeding*". (Page 456)

123. Further, Article 1 provides:

> "*This Law applies where—…*
>
> *(b)* ***assistance is sought <u>in a foreign State</u>*** *in connection with a proceeding under British insolvency law, or…*
>
> *(d)* ***creditors*** *or* ***other interested persons <u>in a foreign State</u>*** *have an interest in requesting the commencement of, or participation in, a proceeding under British insolvency law*" (emphasis added). (Page 456)

124. Article 1(b) prefigures Article 5, which provides:

> "*A British insolvency officeholder is authorised to act* ***<u>in a foreign State</u>*** *on behalf of a proceeding under British insolvency law, <u>as permitted by the applicable foreign law</u>*" (emphasis added). (Page 462)

125. The references to "*in a foreign State*" in Articles 1(b) and 5 should not be read as restricted to location alone. Properly read, these Articles confirm that the British officeholder has authority to operate extraterritorially, including and in particular by invoking and acting through the foreign State's laws. This reading is supported by the final seven words of Article 5, which confirm that British law does not purport to authorise acts in a foreign State which would be unlawful by that State's law.

126. Article 1(d) prefigures Article 13, considered next. The reference to creditors or other interested persons "*in a foreign State*" equally includes creditors and other persons whose interest in commencing and/or participating in the British insolvency proceeding arises pursuant to that State's law.

<u>Article 13 – Original Text</u>

127. The original text of the Model Law provides as follows:

> "Article 13. Access of foreign creditors to a proceeding under
>
> [*identify laws of the enacting State relating to insolvency]*
>
> *1. Subject to paragraph 2 of this article,* ***<u>foreign creditors</u>*** *have* ***the same rights*** *regarding the commencement of, and participation in, a proceeding under* [identify laws of the enacting State relating to insolvency] *as* ***<u>creditors in this State</u>***. (Page 1595)
>
> *2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under* [identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than* [identify the class of general

non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if **<u>an equivalent local claim</u>** (e.g. **claim for a penalty or deferred-payment claim**) has a rank lower than the general non-preference claims].[2]

> [2] *The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13(2):*
>
> *2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under* [identify laws of the enacting State relating to insolvency] *or **the <u>exclusion</u> of foreign tax and social security claims from such a proceeding**. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than* [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if **<u>an equivalent local claim</u>** (**e.g. claim for a penalty or deferred-payment claim**) has a rank lower than the general non-preference claims]" (emphasis added).

128. A "*foreign creditor*" under this Article is one whose claim arises pursuant to a foreign law. The following points should be noted.

129. First the "*rights*" with which Article 13(1) is concerned are the rights constituting standing to commence and participate in insolvency proceedings. Article 13(1) provides what the *Guide* refers to as "*the principle of non-discrimination*" between "*foreign creditors*" and "*creditors in this State*" (para 119). In particular:

> "*article 13 embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated worse than local creditors*" (para 118). (Page 1648-1649)

130. Second and for the reasons given above, the term "*creditor*", simpliciter, when used in the Model Law, covers creditors irrespective of the governing law of their claim. For that reason, where the Model Law seeks to distinguish claims arising under the law of the forum from those arising under a foreign law, it needs a qualifier for the term "*creditor*". In Article 13, that qualifier, consistently with the presumption identified above, is "*foreign*".

131. Third, Article 13(1) is focussed on the *"rights*" of *"foreign creditors"*. The physical location or nationality of a creditor does not generally affect its "*rights*" to commence or participate in legal proceedings. By contrast, the governing law of its claim may, as the Court of Appeal's decision in the present case illustrates.

132. Fourth, the reference to "*creditors <u>in this State</u>*" in Article 13(1) does not detract from this reading. The text of the Model Law uses the modifier "*in this State*" equivocally to refer to both governing law and physical location. For example:

(1) Article 23 refers to "***the types of actions** to avoid or otherwise render ineffective acts detrimental to creditors that are **available** **<u>in this State</u>** to a person or body administering a reorganization or liquidation*". This is plainly a reference to mechanisms under local insolvency law to undo the effects of certain types of transaction such as voidable preferences and undervalue transactions. The same holds true of references to assistance being "*sought <u>in this State</u> by a foreign court*" (Article 1(1)(a), "*a special insolvency regime <u>in this State</u>*" (Article 1(2)), "*a court <u>in this State</u>*" (Article 9), "*Intervention by a foreign representative in proceedings <u>in this State</u>*" (Article 24), etc. In each case, the reference to location also covers governing law. (Page 1680) (Page 1592, 1593, 1595, 1601)

(2) By contrast, the several references to assets "located *in this State*" (e.g. Articles 19(1)(b), 21(1)(e) and (2), and 28) are naturally read as referring to physical location, though even here, the location of certain intangibles might be determined by governing law rather than physical location. (Page 1599, 1600)

133. Fifth, Article 13(2) underlines the point that references to "*foreign*" and "*in this State*" are references, in that article, to governing law rather than physical location. In qualifying paragraph 1 (which "*does not affect the ranking of claims in a proceeding*"), paragraph 2 focuses on "*the **<u>claims</u>** of foreign creditors*", which it compares with "*an **equivalent** **<u>local claim</u>***". Equivalence is indexed to the legal nature of claims so as to pick out governing law as the relevant difference. Taking the two alternative optional texts in turn:

(1) The primary text sets as the general baseline for the treatment of "*foreign*" claims "*the class of general non-preference claims*", which in English law is the class of unsecured claims not given a statutory preference. The paragraph requires that "*foreign*" claims be classified no lower than such claims, except that where a "*local*" claim would be given a lower ranking, an "*equivalent*" "*foreign*" claim may be given the same ranking as well. The examples are a penalty and a "*deferred-payment claim*", i.e. one that is subordinated to general unsecured claims (as is the case in English insolvency law in relation to, e.g., certain of a corporate debtor's debts to its shareholders). There is in this context no plausible physical location-based reading of these references to "*claims of foreign creditors*" and "*equivalent local claim*". (Page 1596)

(2) The alternative text provided in the footnote permits exclusion of "*foreign tax and security claims*". The text requires other "*claims of foreign creditors*" not "*to be ranked lower than…the class of general non-preference claims*" unless "*an equivalent local claim*" has a lower rank. Penalties and "*deferred-payment*" claims are again offered as examples. Again, there is no plausible physical location-based reading of these references. A claim is "*local*" or "*foreign*" by virtue of its proper law.

134. Sixth, it should be noted that those drafting the Model Law consciously set out to reverse the Revenue Rule (see e.g. A/CN.9/378/Add.4 (23 June 1993), A/CN.9/419 (1 December 1995), A/CN.9/WB.V/WP.44 (8 March 1996)), and that the intended difference between the primary and alternative texts of paragraph 2 is that the former but not the latter brings about such reversal. As the *Guide* explains (at para 120): (Pages 1709-1720, 1743-1785, 1786-1815)

> "*The alternative provision in the footnote differs from the provision in the text only in that it provides wording for States that refuse to recognize foreign tax and social security claims to continue to discriminate against such claims.*"

135. Seventh, the fact that Article 13 distinguishes between "*creditor*" and "*claim*" is significant to any attempt to read the Article as focusing on nationality. In using the concept of "*foreign creditor*" to (relevantly) overrule the Revenue Rule, Article 13 plainly intends to define the requisite "*foreign*" character of the "*creditor*" by reference to the nature of the "*claim*". This is plain from the fact that what causes a claim to fall subject to the Revenue Rule is the 'nationality' not of the creditor but of the claim, or in other words, the claim's nature pursuant to its proper law. The Revenue Rule would continue to apply to such claim even if the foreign tax authority were to assign its claim to a citizen of the enacting State. The claim and therefore the "*creditor*" holding it would nevertheless remain "*foreign*" and therefore remain in need of Article 13(1)'s protection.

136. Eighth, those drafting the Model Law also consciously set out to avoid the type of outcome resulting from the Court of Appeal's decision in this case. This is clear from the discussion in the preparatory documents of exequatur (see e.g. A/CN.9/413 (12 April 1995), A/CN.9/WG.V/WP.42 (26 September 1995), A/CN.9/436 (16 April 1997)). The *Guide* refers to "***enabling orders** (exequatur)*"[2] (para 7) and explains what the position upon which the Model Law was intended to improve (at para 8): (Pages 1704-1708, 1721-1742, 1816-1846)

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[2] See also *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 (SC), [101], where, in the context of the improvements in the cross-border

"***Approaches based purely*** *on the doctrine of comity or* ***on exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as contained in the Model Law****, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example,* ***in a given legal system general legislation on reciprocal recognition of judgements, including exequatur, might be confined to enforcement of specific money judgements*** *or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings...*" (emphasis added). (Page 1610)

137. Ninth, a money judgment creditor is one whose claim arises by virtue of a judgment. Accordingly, the "*equivalent local claim*" to a claim arising under a foreign money judgment is one arising under an English money judgment.

138. Taken together, these considerations show that the original text of Article 13(1), read in context and in light of the Model Law's object and purpose, applies to creditors whose claims arise under a foreign money judgment, that requirements similar to exequatur are dispensed with, and that the standing of such creditor to (relevantly) commence English insolvency proceedings is no worse than that of an English money judgment creditor.

139. Importantly, the converse also follows. All the bases on which the claim of an English money judgment creditor may be challenged, such as that the debt is disputed bona fide on substantial grounds, are equally available in relation to a foreign money judgment creditor. Further, Article 6 preserves the enacting state's public policy, and is discussed in the next subsection.

<u>Article 13 – Domestic Law</u>

140. As incorporated in (relevantly) English law, Article 13 provides:

"Article 13. Access of foreign creditors to a proceeding under British insolvency law

1. Subject to paragraph 2 of this article, ***<u>foreign creditors</u>*** *have* ***the same rights*** *regarding the commencement of, and participation in, a proceeding under British insolvency law as* ***<u>creditors in Great Britain</u>****.*

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under British insolvency law, except that ***the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims*** *solely because the holder of such a claim is a foreign creditor.* (Page 463)

enforceability of arbitration awards brought about by the New York Convention, Lord Collins refers to an exequatur as an example of "*an order for leave to enforce*", and to "*double exequatur*" as the requirement that such an order be obtained both in the country in which the arbitration was seated and in the country in which it was sought to be enforced. See also the entry on "exequatur" in *Jowitt's Dictionary of English Law* (6th ed, revision as of 15 December 2023), and Marta Isidro, "Exequatur", in *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, updated May 2019).

3. A claim may not be challenged solely on the grounds that it is ***a claim by a foreign tax or social security authority*** *but such a claim may be challenged—*

(a) on the ground that it is in whole or in part a penalty, or

(b) on ***any other ground*** *that a claim might be* ***<u>rejected</u>*** *in a proceeding under British insolvency law*" (emphasis added).

141. The analysis of this version of Article 13 is materially identical to that of the original save as to the terms of paragraph 3. Article 13(1) confirms and gives to effect to the principle of equal treatment as regards "*foreign creditors*" (i.e. creditors with claims subject to foreign law) and *"creditors in Great Britain*", i.e. "*local*" creditors. Further, Article 13(2) makes clear that this general principle does not affect the ranking of claims under British insolvency law, except that the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such a claim is a foreign creditor. As to Article 13(3), the following points should be noted.

142. First, paragraph 3 reverses the Revenue Rule but, by subparagraph a, retains the Penalty Rule.

143. Second, paragraph 3(b) preserves other English law bases on which a claim may be "***<u>rejected</u>*** *in a proceeding*" under English insolvency law. The context including the words "*any other ground*" — which suggests that such ground belongs to the same genus as the fact that a claim is based on a revenue law or on a penalty — shows that the intended reference is to the confiscatory, expropriatory, or other public law claims brought by or on behalf of a state authority (of the sort referred to in *Skatteforvaltningen v Solo Capital Partners, ibid,* [25], [27], [29], [53], and [55] (Lord Lloyd-Jones)). Such claims are on par with claims addressed in Article 13(3)(a) in being claims that would be "*rejected in*" English insolvency proceedings. (Pages 1168-1170, 1177-1178)

144. Third and for the avoidance of doubt, claims arising under an unimpeachable foreign money judgment are <u>not</u> "*rejected in*" English insolvency proceedings. Gloster J's decision in *Re Shruth Limited (In Liquidation)* [2005] EWHC 1293 (Ch) provides an example. This concerned an appeal against a rejection of proof of debt by a liquidator, the debt being an unrecognised foreign judgment, on the grounds that there had been a miscarriage of justice in the foreign proceedings. The court allowed the appeal and directed the liquidator to accept the proof. (There was no argument in that case that the debt could not be submitted to proof because it had not been recognised in English proceedings.)

145. Fourth, the English court remains able to satisfy itself that the foreign judgment pursuant to which the relevant debt arises satisfies the requirements of the rule of law as conceptualised in English law. In particular (and without limitation), Article 6 provides:

> "*Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it.*" (Page 462)

146. Accordingly, the English court may refuse to recognise the standing of a foreign money judgment creditor if satisfied the judgment is impeachable on (relevantly) public policy grounds.

<u>Article 14</u>

147. Unlike Article 13, Article 14 applies to *"foreign creditors"* as *"creditors that do not have an address in Great Britain."* Article 14, is a notice provision that distinguishes between creditors who would be likely to receive notice and those creditors who would not be likely to be thus notified and for whom different forms of notice is therefore called for.

148. Accordingly, Article 14 identifies "*creditors in Great Britain*" and contrasts them with "*creditors that do not have addresses in Great Britain*". It is location focussed.

149. The Article provides (insofar as relevant):

> "*1. Whenever under British insolvency law notification is to be given to **<u>creditors in Great Britain</u>**, such notification shall also be given to the known **<u>creditors that do not have addresses in Great Britain</u>**. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.*
>
> *2. **Such** notification shall be made **to the foreign creditors** individually, unless—*
>
> > *(a) the court considers that under the circumstances some other form of notification would be more appropriate; or*
> >
> > *(b) the notification to creditors in Great Britain is to be by advertisement only, in which case the notification to **the known foreign creditors** may be by advertisement in such **foreign newspapers** as the British insolvency officeholder considers most appropriate for ensuring that the content of the notification comes to the notice of the known foreign creditors. ...*" (emphasis added). (Pages 463-464)

150. The provision of notification addressed by this Article makes physical location relevant in the way that it is not in Article 13.

151. It would not be right to read "*foreign creditors*" in Article 14 across to Article 13 for all purposes. Whether or not a person has an address in England or Wales for the purpose

of getting notice has no relevance to that person's standing to commence or participate as a creditor in English insolvency proceedings.

152. That Article 13 was not intended to be read as based on address is also plain from the preparatory documents, which show that (what are now) Articles 13 and 14 were originally conceived of as a single provision, Draft Article 17, which, insofar as relevant, read as follows ((see A/CN.9/WG.V/WP.44 (8 March 1996)):

> "*(1)* *Any creditor,* ***whether or not [habitually] resident, domiciled or with a registered office in the enacting State[, including foreign tax authorities and social security authorities,]*** *has the right to commence and file claims in insolvency proceedings in the enacting State, [to the same extent and in the same manner as* ***other creditors of the same priority****,] in accordance with the laws of the enacting State.*
>
> *(2)* *As soon as insolvency proceedings are opened in the enacting State, the [court][administrator] shall immediately* ***cause notification of the opening of the proceedings to be made to known creditor not [habitually] resident, domiciled or with a registered office in the enacting State****. ...*" (emphasis added). (Page 1810)

153. Paragraph 1, the precursor to Article 13 (as enacted), expressly (a) provided that residence, domicile, and registered office were irrelevant; (b) focused on the governing law and nature of the claim, as shown by the reference to foreign tax authorities; and (c) required non-discrimination within proceedings, by protecting participation and priority, as well as in accessing proceedings. Paragraph 2, the precursor to Article 14, then expressly focused on creditors lacking habitual residence, domicile, or registered office in the enacting State.

154. The two provisions, dealing respectively with the rights of commencement, participation, and priority on the one hand, and to be notified on the other, were subsequently separated.

155. This fact, together with the text of Articles 13 and 14 as enacted, underlines that Article 13 is concerned with the foreignness of the "*rights*" or "*claims*" of the creditor.

Conclusion on Ground 2

156. Pursuant to Article 1, "*This Law applies where…(d) creditors…in a foreign State…have an interest in requesting the commencement of…a proceeding under British insolvency law*". ST is just such a creditor: it is a Russian entity without an address in Great Britain which seeks to commence English bankruptcy proceedings on the basis of a claim arising from an unimpeachable foreign money judgment. It is a foreign creditor for the purposes of Article 13(1).

157. Accordingly and if ST is wrong on Grounds 1, 3, and 4, then pursuant to Regulation 3, the Court should read references to "*creditor*" in IA86, including (without limitation) sections 264, 267, and 268 with such modifications as are necessary and appropriate to respect ST's standing pursuant to Article 13(1) to petition for Mr Drelle's bankruptcy on the same basis as if ST had an equivalent claim under English law. In the present case that means a claim under an English judgment.

K. THE DISPUTED DEBT ISSUE

158. By his Notice of Objection, Mr Drelle seeks to argue (in the event ST succeeds on its appeal) Grounds 2, 3 and 4 which were argued before, and dismissed by, Richards J. The Court of Appeal declined to decide those grounds on the basis that it did not want to prejudice the Court when deciding any recognition proceedings. This Court should similarly decline to decide those Grounds. The arguments require the Court to conduct an examination into the approach of ICC Judge Burton when assessing the witness and expert evidence and the weight it should be given when reaching her overall evaluative conclusion. Not only are such matters quintessentially the preserve of the first instance tribunal, they also do not raise any important point of principle or practice, let alone of public importance.

Grounds of impeachment of foreign judgment

159. The common law grounds for impeaching a foreign judgment are set out in Rules 51 to 55 in Chapter 14 of *Dicey, Morris & Collins on the Conflict of Laws, 15th Ed* (**"Dicey"**). Rules 53, 54 and 55 of *Dicey* express the common law grounds of impeachment, namely, that the English court will not recognise a foreign judgment if it is impeachable for fraud, it would be contrary to public policy or where the judgment was obtained in breach of natural justice. Mr Drelle's case was that the Russian proceedings were infected by bias and judicial interference as a result of the interest of GPN in the outcome.

(Pages 1407-1426)

160. Allegations of improper interference with the judicial process or corruption will fall within the fraud exception: *Altimo Holdings and Investment Limited v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804 and *PJSC ("Rosgosstrakh") v Starr Syndicate Limited* [2020] EWHC 1557. Allegations of bias on the part of the foreign court are also likely to fall within the fraud exception, although there is obvious overlap with the public policy and breach of natural justice grounds.

(Pages 908-943)

161. The issue of bias was considered in detail in *Maximov v. Open Joint Stock Company Novolipetsky Metallurgichesky Kombinat* [2017] 2 C.L.C. 121. The claimant's case was that the Russian courts' decisions were so extreme and incorrect as not to be open to a Russian court acting in good faith, so that bias could be inferred.

162. In setting out the relevant legal test, Sir Michael Burton QC held (at [15]):

> *"(1) The fact that a foreign court decision is manifestly wrong or is perverse is not sufficient (see for example, Dicey, Morris and Collins, The Conflict of Laws (15th edn) at 14-163, OJSC Bank of Moscow v Chernyakov [2016] EWHC 2583 (Comm) and Erste Group Bank AG (London) v JSC VMZ Red October [2013] EWHC 2926 (Comm)). The decision must be so wrong as to be evidence of bias, or be such that no court acting in good faith could have arrived at it.* (Page 759)
>
> *(2) The evidence or grounds must be 'cogent'.*
>
> *(3) The decision of the foreign court must be deliberately wrong, not simply wrong by incompetence."* (emphasis added).

163. The Court noted that this was *"a heavy burden"* for the claimant to bear and this was even more so when the decisions were of three courts (at [53]-[54]). (Page 778)

164. The Court found that the first instance judge had reached *"unsupportable"* conclusions and relied on grounds that were *"hopeless" "borderline arguable at best"* and *"adventurous"*. The Court also noted that the parties *"were not given any opportunity to address her on…these points"* (at [55]-[56]). (Page 778-779)

165. The Court concluded that notwithstanding its *"severe criticism"* of the Judge's grounds and the fact that two of them were:

> *"unfairly not canvassed at first instance and had become almost writ in stone by the time they went up on appeal,* ***I am unpersuaded that these decisions are so extreme and perverse that they can only be ascribed to bias against the Claimant****"* (at [62]). (emphasis added). (Page 780)

166. This decision was cited in *PJSC* ***("Rosgosstrakh")*** *v Starr Syndicate Limited* (*ibid.*) at [98] to [99], in which Moulder J held that, on the issue of bias, the defendants would have to:

> *"establish on the evidence improper influence both of the KM Court [i.e. the court of first instance] and of the relevant appeal courts. The defendants will have to show that the courts were deliberately wrong and not merely incompetent and that is a high threshold"* [at 138(i)] (emphasis added). (Page 935)

Ground 2: standard of appellate review

167. Mr Drelle's second Ground of Appeal before the Court of Appeal was a challenge to the standard of appellate review applied by Richards J. As made clear in Mr Drelle's Grounds

of Appeal, Grounds 3 and 4 *"do not depend on whether or not the learned judge applied the correct standard of review"*. As such, Ground 2 appears to be an entirely academic exercise, which provides a further reason for this Court to not decide it.

168. Ground 2 is in any event without merit. The decision of ICC Judge Burton was an evaluative conclusion based on the documentary, witness and expert evidence before her, as to whether the Russian Judgment was disputed on bona fide and substantial grounds.

169. In *Creation Consumer Finance Ltd v Allied Fort Insurance Services Ltd and others* [2015] EWCA Civ 841 (an appeal against the granting of summary judgment), Sir Terence Etherton held at [103] that:

> *"The degree of respect given by the appeal court to the first instance judgment is likely to depend on the reason for the order granting summary judgment. If the reason turns on a pure point of law, without any material factual dispute, then the appeal court will simply decide whether the first instance decision was correct or incorrect. The position may be different where the first instance judge has made an evaluative judgment on the facts likely to be established at trial or has made a multi-factorial decision…Even if, however, that distinction is correct in theory it is unlikely in practice to be of significance since, on any footing, the appeal court will interfere if satisfied that the first instance judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him or her."* (Page 579)

170. It is clear from this paragraph that there is a sliding scale of *"deference"* with the least deference required for cases which turn on a *"pure point of law"* increasing in cases where the first instance judge has *"made an evaluative judgment on the facts"*.

171. Further, in *Malik v Henley Homes plc* [2023] EWCA Civ 726 (also an appeal against an order granting summary judgment) at [79], Nugee LJ held:

> *"The decision of a judge, at any rate like this, that a defendant has no real prospect of successfully defending a claim is an evaluative decision on the facts. It is not a pure point of law. In those circumstances I think we should only disturb his conclusion if it was one we are satisfied was not open to him."* (Page 749)

172. The Judge's direction at [79] was entirely in accordance with these principles and any criticism is both misplaced and immaterial given Mr Drelle's express position that Ground 2 has no bearing on Grounds 3 and 4.

<u>Ground 3: Treatment of Ms Zheglova's evidence</u>

173. Ms Zheglova is the former Chief Financial Officer of ST. She provided a witness statement in support of Mr Drelle's opposition to the Petition. She was also joined as a defendant in the Russian proceedings by ST on the grounds that she had acted in bad

faith and unreasonably in authorising the Loan. The claim against Ms Zheglova was dismissed.

174. Ms Zheglova's evidence in the English Bankruptcy proceedings was intended to support Mr Drelle's case that the Russian proceedings were pre-determined. She describes travelling to Nizhny Novgorod and meeting Ms Tatyana Lobanova (**"Ms Lobanova"**) on or around 26 January 2019 to find out *"who is really behind this claim"* (i.e. the proceedings brought by Mr Lisin against Mr Drelle). By this date, the proceedings had nearly concluded with the parties awaiting judgment. The new Chairman of the Commercial Court of the Yaroslavl region (i.e. where the proceedings against Mr Drelle were taking place) was Mr Vladimir Guschev (**"Mr Guschev"**). Ms Zheglova's evidence was that Mr Guschev had spent all of his career in Nizhny Novgorod.

175. Ms Lobanova was the general director of LCC Premier Audit and according to Ms Zheglova, was an appropriate person to speak to about the case because she had *"spent the majority of her career working in the Nizhny Novgorod region"* and *"would be acquainted with other professionals from the region"* [78].

176. Ms Zheglova describes that she met Ms Lobanova in café, and that Ms Lobanova then went to make some calls, returning after approximately one hour. Ms Zheglova describes at [83]:

> *"I understand that [Ms Lobanova] spoke with Mr Gushchev (sic). Ms Lobanova said that things do not look well for Mr Drelle. She said that GPN is pushing this claim forward. Given that GPN was behind the claim (which is understood to mean, a very influential and powerful company working closely with the highest levels of the Russian state), we cannot win this case. She said that the decision would be judgment against Mr Drelle for RUB 2 billion."* (Page 255)

177. ICC Judge Burton's conclusion on the weight to be attached to Ms Zheglova's evidence is at [117] of her Judgment:

> *"This Court must consider Ms Zheglova's witness statement in the context of the test that I have held this Court must apply. Her statement comprises evidence of the fact that her conversation with Ms Lobanova took place. It is not evidence of the truth of what Ms Lobanova is reported to have said and it is not evidence of the accuracy or truth of what Ms Lobanova is said to have learned from her conversation with Mr Guschev. It is "double hearsay" evidence. As such, it is not cogent evidence that there is a good arguable case that there has been a breach of natural justice. Moreover it only refers to the Arbitrazh Judgment. The case was re-examined in the Court of Appeal where Mr Guschev's alleged advance disclosure of the result has no bearing."* (Page 231)

178. In fact, as is clear from the above except of Ms Zheglova's statement, she did not expressly state that Ms Lobanova had spoken to Mr Guschev, just that it was her understanding that Ms Lobanova had done so.

The Cogency Issue

179. Mr Drelle criticises ICC Judge Burton's treatment of Ms Zheglova's evidence on the grounds that she wrongly disregarded it contrary to the principles established in *Long v Farrer* [2004] BPIR 1218, *Kireeva v Bedzhamov* [2022] EWCA Civ 35 at [38] to [39] and *Griffiths v TUI* [2023] UKSC 48 at [62], namely, that in the absence of cross-examination, it is only open to the court to reject witness evidence if it is *"manifestly incredible"* and the Judge had made no such finding. (Page 679)

180. ICC Judge Burton clearly had these principles in mind since she expressly cited *Long v Farrer* in her Judgment at [60].

181. At the heart of ICCJ Burton's judgment was her formulation of the 'Threshold Test' at [61]:

> *"Following Maximov it is not enough to find that there is a genuine triable issue that the Russian court(s) appear to have erred and/or that a properly constituted tribunal would not have found Mr Drelle to be liable. Evidence to the standard of a genuine triable issue of incompetence, if I were to find it, is not enough. I must find that there is before me, a substantial dispute as to whether the Russian Judgments are deliberately wrong or that the decision is so wrong as to be evidence of bias or to be such that no court acting in good faith could have arrived at it, and/or there must be a substantial dispute that the judgment is impeachable by fraud or that the proceedings were opposed to natural justice (the "Threshold Test")."* (Page 215)

182. ICC Judge Burton neither rejected nor excluded Ms Zheglova's evidence. She accepted her evidence as evidence of what she was told by Ms Lobanova but held that this was not sufficiently cogent evidence, as required by *Maximov* and *PJSC (Rosgosstrakh) v Starr Syndicate Limited* to raise a genuinely triable issue.

183. The test was not whether there was an evidential basis to support the proposition that the case had been predetermined, but whether there was sufficiently *cogent* evidence. ICC Judge Burton in no way doubted the *credibility* of the evidence for what it was—but what it was, she considered it to be insufficient.

184. Mr Drelle also claims that ICC Judge Burton was wrong to say that being double hearsay meant it was not cogent evidence, relying on section 1 Civil Evidence Act 1995, which provides that evidence may not be excluded on the ground that it is hearsay, of whatever

degree. That confuses admissibility and weight of evidence. ICC Judge Burton did not exclude Ms Zheglova's evidence; she rightly determined that the weight of the evidence was not sufficiently cogent. She used cogent in this context to mean that the evidence was insufficiently strong/compelling to meet the bar of being "cogent evidence".

185. Further, Mr Drelle wrongly asserts that the evidence *was* evidence that Mr Guschev had told Lobanova that the case against the Appellant had been pre-determined. This is simply incorrect. Ms Zheglova's evidence was that she "understood" that Ms Lobanova had spoken to Mr Guschev (not that Ms Lobanova reported that she had done so). In any event, the evidence was: (i) that GPN was "pushing" the claim forward, (ii) that as GPN is powerful and influential Mr Drelle could not win (*"we cannot win this case"*), and (iii) that the decision would be judgment against Mr Drelle for RUB 2 billion. The evidence was <u>not</u> that the case against Mr Drelle was pre-determined.

186. Given that the liquidation of ST was initiated by GPN (which was its main creditor), GPN was participating in the proceedings as a third party consistently with its substantive and procedural rights under Russian law and supporting the Respondent's claim against the Appellant, the statement that GPN was *"pushing the claim"* had no significance.

187. It was, therefore, plainly open to ICC Judge Burton to conclude—without rejecting it or disputing its credibility for what it was—that Ms Zheglova's witness statement did not disclose cogent evidence that the judgment had been obtained by fraud.

188. Mr Drelle criticises the decision of Richards J on the grounds that he impermissibly "identified the gaps" in Ms Zheglova's evidence in order to explain why it was not sufficiently cogent, in circumstances where those "gaps" had not been identified by ICC Judge Burton and nor were they subject of a Respondent's Notice. These criticisms are without merit since:

(1) Richards J was entitled to describe the gaps in Ms Zheglova's evidence even though ICC Judge Burton had not expressly done so. As the Judge recorded, ICC Judge Burton had clearly found that Ms Zheglova's evidence was not cogent, and the gaps in the evidence arose (as the Judge found) "*precisely because"* Ms Zheglova was reporting the gist of the Zheglova/Lobanova Conversation and Ms Lobanova in turn was reported the gist of the Lobanova/Guschev Conversation [90]. As he noted, ICCJ Burton was clearly *"troubled by the lack of specificity in the evidence"*. (Pages 177-178)

(2) Further, it was necessary to respond to Mr Drelle's assertion on appeal that Ms Zheglova's evidence <u>was</u> that the case against Mr Drelle was pre-determined. However, the evidence did <u>not</u> go that far and the Judge was entitled to explain why.

(3) The absence of a Respondent's Notice had no bearing at all on Mr Drelle's approach the hearing. As set out above, Mr Drelle made full submissions as to what Ms Zheglova's evidence said and why it raised a triable issue.

The Appellate Court Issue

189. Mr Drelle further contends that what occurred in the appellate level in the Russian proceedings is irrelevant to whether the Russian Judgment is impeachable for fraud.

190. First, it is relevant to note that it was Mr Drelle's case before ICC Judge Burton that she had to determine whether it was arguable that *all* of the Russian Judgments were impeachable. Indeed, Mr Kulkov's evidence dealt with alleged substantive and procedural errors on the part of the Arbitrazh Court of Appeal and not merely the Arbitrazh Court. In those circumstances, it is hardly surprising that ICC Judge Burton considered the relevance of the appeal judgments.

191. Secondly, there is no general principle that any appeal in the foreign proceedings is wholly "immaterial" even where bias is alleged. That much is clear from the way both *Maximov* and *Starr Syndicate Limited* were decided.

192. As noted by Sir Michael Burton KC in *Maximov*, at [53] and [54], the *"heavy burden"* a defendant bears to establish that a foreign court's decision could only have been arrived at as result of bias is heightened when there are several decisions from the foreign courts (*"This is the more so when the decisions were of three courts"*). This factor will necessarily be of even greater weight when any appeal is a complete rehearing of the case on its merits (as was the case with the appeal in the Arbitrazh Court of Appeal). (Page 778)

193. Thirdly, even if it is correct that the relevant judgment is only that of the Arbitrazh Court, ICC Judge Burton was plainly not satisfied that there was a genuinely triable issue that the judgment of the Arbitrazh Court itself was impeachable for fraud. As is clear from [138], the only evidence in support of political interference was Ms Zheglova's evidence, (Page 236) the letter written by the CEO of GPN and the anecdotal evidence of Mr Lough. Each had been separately rejected as sufficiently cogent grounds to establish a triable issue that the

judgment of the Arbitrazh Court was impeachable for fraud (at [117], [128] and [125] of the Judgment). (Pages 231 234)

Ground 4: Treatment of Expert Evidence

194. It is clear from ICC Judge Burton's judgment that she considered the expert evidence before her both individually and when put together with the other evidence she was shown. This is evident from a reading of the Judgment as a whole, and especially [131] which was directed at whether the Threshold Test was met. Richards J agreed and he was right to do so. (Page 235)

195. As to the criticisms of the approach to Mr Kulkov's evidence, there was no error in the approach by ICC Judge Burton. The fact is that Mr Kulkov's evidence was to the effect that the Russian Judgment was 'wrong' in that the court had failed to take into account matters that it should have taken into account, or had taken into account matters that it should not have taken into account. He also identified alleged 'substantive irregularities' on the law and procedural complaints. It is clear that none of the criticisms amounted to anything other than a case that the court was 'wrong'. As ICC Judge Burton correctly recognised, this was not enough.

196. The expert evidence of Mr Lough was overly general and anecdotal, directed at high profile cases involving critics of Mr Putin (i.e. Aleksey Navalny) which are irrelevant to Mr Drelle and failed to mention the fact that ST lost against Mr Drelle's co-defendants and that his claim for loss of profits was dismissed. It was open to ICC Judge Burton to conclude that his evidence both alone and when considered together with the other evidence she was shown did not meet the Threshold Test. Richards J was right to conclude that there was no error in ICC Judge Burton's approach.

L. CONCLUSIONS

197. For the reasons set out herein, the Court is respectfully requested to grant the Appeal.

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