<u>IN THE SUPREME COURT</u> **UKSC/2025/0094**

<u>ON APPEAL FROM THE COURT OF APPEAL</u>

B E T W E E N:

SERVIS TERMINAL LLC

(in liquidation in the Russian Federation)

<u>Appellant</u>

- and -

VALERIY ERNESTOVICH DRELLE

<u>Respondent</u>

RESPONDENT'S WRITTEN CASE

<u>Key:</u>

- *ST = The Appellant*
- *Mr Drelle = The Respondent*
- *AWC plus number = paragraph numbers in ST's written case*
- *SFI = the Statement of Facts and Issues*
- *The Russian Judgment = the Judgment of the Yaroslavl Court dated 24.5.19*
- *Unless otherwise stated, all emphases are added*

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A. INTRODUCTION

1. The parties agree that the central issue on the appeal is whether "*a bankruptcy petition, founded on non-payment of a sum ordered by a foreign Court, [can] be presented under section 264 of the Insolvency Act 1986 (the "**IA 1986**") where the foreign judgment has not been the subject of recognition proceedings in this jurisdiction*" (SFI §43).[1] Mr Drelle submits that the Court of Appeal was correct to hold that it may not.

2. The answer follows from a principle that has been part of English private international law for over 150 years: a foreign judgment has no direct operation in England. A foreign court's authority, carrying with it powers of enforcement and sanction, ends at the border of the state in which it sits. Before a foreign judgment can be deployed offensively in England, as ST sought to do here, it must itself first be recognised by the English court. Until that step is taken and a consequent English order for payment made, the sum awarded by the foreign court is not, and critically is not at the time the petition is presented, a "*debt*" owed or that is "*payable*" within the meaning of s. 267(2)(b) of the IA 1986. Notwithstanding the settled position at common law, ST nonetheless invites this Court to rule that a foreign judgment is to be treated differently when it comes to the presenting of a bankruptcy petition. There is no justification for such an approach, in law or in logic.

3. Section B of this written case sets out *inter alia* the established framework for the recognition and enforcement of foreign judgments, and explains why a foreign judgment that has not been recognised has no direct operation in England. Section C addresses the theoretical basis for the common law action on a foreign judgment, laying the ground for the rebuttal of ST's novel contention that such theory renders the common law action on the judgment redundant. Section D responds to each of ST's Grounds of Appeal. Section E addresses Mr Drelle's further grounds for upholding the Court of Appeal's order, for which the Court of Appeal had given permission, but which it did not resolve.

4. The Supreme Court is invited to dismiss the appeal for the reasons set out below.

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[1] As formulated by Court of Appeal: see, per Newey LJ at [2]. **[A/6/130]**

B. THE ENFORCEMENT AND RECOGNITION OF FOREIGN JUDGMENTS

B(1) Foreign judgments have no direct operation in England & Wales

5. The starting point, as stated in **Dicey**, Rule 45 **[C/61/1378]**, is that "*A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England…*"[2] (Page 1378)

6. The rule is founded on the principle that judicial adjudication is an exercise of state sovereignty[3], and state sovereignty ends at the border of the state. Thus, the "*first rule*" of foreign judgments is that they "*have, as such, no legal effect in England, for foreign judges have no authority in England. Except where Parliament has provided otherwise, foreign judgments cannot be enforced in England by execution, and no person is in contempt of court, or otherwise in peril in England if she fails to do what she has been ordered to do by a foreign judge.*"[4]

7. This is a "*general principle of international law*".[5] The state "*has the right to exercise jurisdiction within the limits of its sovereignty, but is not entitled to encroach upon the sovereignty of other states.*"[6]

8. It follows that a foreign judgment is regarded by the common law as "*completely effective within the territory of the sovereign, and as completely unenforceable outside it…*"[7] A foreign judgment can, in this jurisdiction, be disobeyed with impunity: *extra territorium jus dicenti, impune non paretur*.[8] The foreign court's authority, which carries with it powers of enforcement and sanction, does not follow the parties into a different state. The great 19th century jurist F. T. Piggott stated: "*a judgment debtor of a foreign state, leaving that foreign state, leaves behind the legal obligation (using this term in its strict sense) of obedience to that judgment: and that coming into this country, he cannot be considered a legal debtor here, but only a legal debtor of and in the foreign state.*"[9]

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[2] See also, **Briggs, Recognition of foreign judgments: a matter of obligation** (2013) LQR 129 (Jan) 87-100 ("**Briggs, 2013 LQR**") at 89: "*As Dicey said in his first edition: "A foreign judgment has no direct operation in England", and nothing material has changed.*" **[C/59/1353]** (Page 1353)

[3] E.g. see ***Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela*** [2021] UKSC 57; [2023] AC 156 ("***Maduro Board***") per Lord Lloyd-Jones at [157]: "*Although judicial rulings of a foreign state are manifestations of state sovereignty, … they… are not entitled to the deference which may be shown to legislative and executive acts of a foreign state.*" **[C/25/724]** (Page 724)

[4] **Briggs, The Conflict of Laws**, 5th edn, at 112 **[C/60/1364]**. See also, ***Owens Bank Ltd v Bracco*** [1992] 2 AC 443 per Parker LJ in the Court of Appeal at 457A-B: "*The foreign judgment, in the absence of statute, could have no direct operation in England and Wales because of the principle of the territoriality of a court's jurisdiction.*" **[C/33/873]** (Page 1364) (Page 873)

[5] ***Société Eram Shipping Co Ltd v Cie Internationale de Navigation*** [2003] UKHL 30; [2004] 1 AC 260 ("***Société Eram***") per Lord Hoffman at [54]; per Lord Millett at [78]-[80].

[6] ***Société Eram*** per Lord Millett at [78], citing Dr Mann's 'Further Studies in International Law' (1990), at p 4.

[7] **Briggs, 2013 LQR** at 88. **[C/59/1353]** (Page 1353)

[8] ***Sirdar Gurdyal Singh v Rajah of Faridkote*** [1894] AC 670 per the Earl of Selborne at 683.

[9] **F.T. Piggott, Foreign Judgments: Their effect in the English courts** (1879) ("**Piggott**") at 12 **[C/67/1580]**. See also, ***Sirdar Gurdyal Singh*** *supra* per the Earl of Selborne at 683: "*Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country.*" (Page 1580)

B(2) <u>"No direct operation"</u>

9. It does not follow from the limited territorial effect of a foreign judgment that an individual in this jurisdiction can never be obliged to do that which a foreign court has ordered (the *positive*, or *offensive*, effect). Nor does it follow that a foreign judgment can never be regarded as conclusively determining issues in dispute between the parties (the *defensive* effect). There is a general public interest in the finality of both domestic and foreign litigation.[10]

10. However, the order of a foreign court does not *automatically* have those positive and defensive effects. The necessary pre-condition for a foreign judgment to have those effects is a decision of the English court recognising or enforcing the foreign judgment once it is satisfied *inter alia* that the foreign court had jurisdiction to give the judgment and that the foreign judgment is unimpeachable. This is clear from **Dicey**, Rules 45-46.

11. **Dicey**, Rule 45 provides that: (Page 1378)

> "*A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) <u>has no direct operation in England but may</u>*
>
> *(1) be enforceable by claim or counterclaim at common law or under statute, or*
>
> *(2) be recognised as a defence to a claim or as conclusive of an issue in a claim.*"

12. By way of elucidation of **Dicey**, Rule 45(1) and (2) above, **Dicey**, Rule 46 provides that: (Page 1388)

> "*(1) Subject to the Exceptions hereinafter mentioned and to Rule 63 (international conventions), a foreign judgment in personam <u>given by the court of a foreign country with jurisdiction to give that judgment</u> in accordance with the principles set out in Rules 47 and 48, <u>and which is not impeachable</u> under any of Rules 52 to 55, <u>may be **enforced** by a claim or counterclaim</u> for the amount due under it if the judgment is*
>
> *(a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and*
>
> *(b) final and conclusive,*
>
> *<u>but not otherwise</u>.*"….
>
> *(2) A foreign judgment <u>given by the court of a foreign country with jurisdiction to give that judgmen</u>t in accordance with the principles set out in Rules 47 and 48, <u>which is not impeachable</u> under any of Rules 52 to 55 <u>and</u> which is final and conclusive on the merits, <u>is entitled to **recognition** at common law and may be relied on in proceedings in England</u>.*"

13. The common law's insistence that a foreign judgment has "*no <u>direct</u> operation in England*" must be read alongside the only routes, as expressed in **Dicey**, Rules 45-46(1) and (2), by which such a judgment may have operation (or per Professor Briggs *supra*, "*legal effect*").[11] Thus, "*no*

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[10] **Briggs, The Conflict of Laws**, 5th edn, at 112-113 **[C/60/1364] – C/60/1365]**. (Page 1364)

[11] See, ***Maduro Board*** per Lord Lloyd-Jones at [170] **[C/25/728]**: "*The focus of the present case therefore shifts to the status of the judgments of the STJ on which the Maduro Board relies. These judgments do not themselves attract the protection of* (Page 728)

direct operation" refers to the fact that a foreign judgment does not *itself* operate or have legal effect in this jurisdiction <u>*other than*</u> through, and for the purposes referred to in, **Dicey**, Rules 45 and 46(1) and (2).[12]

14. These Rules, therefore, make clear that (in a non-registration case) whether the claimant wishes to rely on the foreign judgment defensively (as a shield, by way of *res judicata*) or positively (as a sword, as here), it must <u>*first*</u> pass the tests set out in **Dicey**, Rules 46(1) or (2); viz. it must first be recognised or enforced by the English court.[13]

15. As to recognition, "*The common law will recognize a foreign judgment if it is the final and conclusive decision on the merits by a foreign court which had, as a matter of English private international law, 'international jurisdiction', and as long as there is no sustainable objection or defence to its recognition.*"[14] Obviously, and as is apparent from how **Dicey**, Rules 46(1) and (2) are expressed, a foreign judgment will not be enforced at common law unless it has been recognised. As Lord Rodger stated, "*Although analytically distinct, recognition and enforcement are, nevertheless, closely linked*." He was "*happy to accept that, in the words of Professor Briggs, "the logic of the law is that recognition is the necessary primary concern...": The Conflict of Laws, p 116.*"[15]

16. As to enforcement at common law, "*if the party in whose favour the judgment was given wishes to go further and have the losing party ordered to do the thing which the foreign court ordered him to do but which he has not yet done, that is, to use the foreign judgment as a sword, she will need an English judgment to that effect, and will need to commence original civil proceedings to obtain it*."[16] In the case of a foreign

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any act of state rule. <u>The question becomes whether, and if so to what extent, they should be recognised or given effect by courts in this jurisdiction</u>."

[12] Cf. s. 34 of the Civil Jurisdiction and Judgments Act 1982 which reflects these **Dicey** Rules. S. 34 "… *circumvents the anomaly in the common law that the judgment of a court other than a court in England and Wales could support a plea of res judicata in the form of a cause of action estoppel or an issue estoppel, where the judgment was in favour of the defendant, but not a plea of merger, where the judgment was in favour of the claimant. The statutory bar on further proceedings now operates whether the judgment is in favour of the defendant or the claimant*." ***Nasir v Zavarco Plc*** [2025] UKSC 5; [2025] AC 738 per Lord Hodge at [26].

[13] ***Maduro Board*** per Lord Lloyd-Jones at [161] **[C/25/725]**"*There is therefore no rule requiring an unquestioning acceptance by courts in the United Kingdom of the validity or legality of a foreign judgment. Rather, the status of a foreign judgment is left to be determined in accordance with domestic rules on the recognition and enforcement of foreign judgments.*" (Page 725)

[14] **Briggs, Conflict of Laws**, 5th edn at 122 **[C/60/1374]**. Recognition means "*treating the matter which was adjudicated by the foreign court as having been determined conclusively, once and for all… For a foreign judgment to achieve recognition as res judicata, qualifying conditions have to be met.*" (116) **[C/60/1368]** (Page 1374) (Page 1368)

[15] ***Clarke v Fennoscandia Ltd*** [2007] UKHL 56, 2008 S.C. (HL) 122 per Lord Rodger at [21]–[22] **[C/12/553]**. (The reference to *The Conflict of Laws* is to the first edition.) So it has been said that while the English court must recognise every judgment that it enforces, it need not enforce every judgment that it recognises: **Dicey**, 14-002 **[C/61/1378]**. (Page 553) (Page 1378)

[16] **Briggs, Private International Law in the English Courts** (Oxford Private International Law Series) (pp. 321-322) **[C/58/1350] – [C/58/1351]**. The distinction between enforcement and recognition is longstanding: see ***Reimers v Druce*** 53 ER 57; (1857) 23 Beav. 145 per Romilly MR at 59 distinguishing "*an application by the* (Page 1350)

money judgment, as in this case, that means that the claimant must bring an action at common law with a view to having the judgment recognised and obtaining such an English judgment and order for payment.[17] It is then that _English_ judgment and order which may be enforced in this jurisdiction, including by way of bringing bankruptcy proceedings or any other process to obtain the effects of what the foreign judgment ordered.

17. It can, therefore, be seen that the concept of enforcement is used in two discrete ways.[18]

18. ***First***, the enforcement of the *foreign* judgment itself, which may only be effected (in a non-registration case) by way of the action at common law: it is only in this way that the foreign judgment is itself "*enforceable*" under **Dicey**, Rule 45, and may be "*enforced*" under **Dicey**, Rule 46.

19. ***Secondly***, and assuming the claimant is successful in such action and obtains an English judgment, the subsequent enforcement of that *English* judgment through the suite of processes available in this jurisdiction.

20. The bringing of such proceedings at common law and the obtaining of such an English judgment are, therefore, the necessary first steps, not only procedurally but "*as a matter of substance*".[19] Unless there is such an English judgment, the avenues to enforcement in this jurisdiction, including by way of bankruptcy proceedings, will remain closed.

21. The proposition that (in non-registration cases) the action at common law is the *only* way that a foreign judgment is *itself* enforceable is clear from the words of **Dicey**, Rules 45 and 46(1) and (2) *supra*, and from case law at the level of the Court of Appeal and House of Lords/Supreme Court going back almost 100 years:

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successful party to enforce and obtain the fruits of it against the Defendant" from setting up the foreign judgment as a defence.

[17] **Briggs, 2013 LQR** at 88-89 **[C/59/1353] - [C/59/1354]**; and **Briggs, Conflict of Laws**, 5th edn at 117 **[C/60/1369]**, 120 **[C/60/1372]**; and, similarly, ***Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*** [1975] AC 591 per Lord Reid at 615D **[C/11/523]**, citing, and evidently agreeing with, the proposition stated in the report of the Foreign Judgments (Reciprocal Enforcement) Committee 1932, chaired by Greer LJ, in respect of what was to become the 1933 Act, that "*technically we do not enforce the foreign judgment as such*…". (Page 1353) (Pages 1369, 1372) (Page 523)

[18] **Briggs, Private International Law in the English Courts (Oxford Private International Law Series)** (p. 321-322) "*This procedure is usually, but really rather misleadingly, referred to as 'enforcing' the foreign judgment. As to that, an English judgment ordering payment of the sum which was due under the foreign judgment may be easy enough to obtain. When this happens, although the effect may be as though the foreign judgment were being 'enforced', it is important to see that it is actually the English judgment, and not the foreign one, which is used for the purposes of enforcement.*" **[C/58/1350]** (Page 1350)

[19] ***SAS Institute Inc v World Programming Ltd*** [2020] EWCA Civ 599; [2020] 1 CLC 816 per Males LJ at [85]. In that case, "*The Enforcement Judgment undoubtedly did decide that the English court will not permit its enforcement processes to be used by SAS to enforce the North Carolina judgment. Accordingly it is not open to SAS to obtain from the English court (for example) a third party debt order requiring payment to itself of debts owed here to WPL or a receivership order over WPL's assets here.*"

(1) Sir Wilfrid Greene MR (as he then was) stated in ***Re A Judgment Debtor*** [1939] 1 Ch 601 ("**Judgment Debtor**") at 604 **[C/39/1032]**: "*Of course, apart from statute, the only* (Page 1032) *way of enforcing the judgment of a foreign Court (and in the word "foreign" I include Courts other than the Courts of England, and therefore I include Scotch and Irish and Dominion Courts) was by action, and various defences could be set up to an action of that kind*."

(2) In ***Owens Bank Ltd v Bracco*** *supra*, Lord Bridge held at 484B **[C/33/900]**: "*A* (Page 900) *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*." There was no suggestion that there was any other way to enforce the foreign judgment.

(3) In ***Eliades v Lewis*** [2003] EWCA Civ 1758; [2004] 1 WLR 692, Potter LJ held at [49]: "… *whereas the provisions of the 1933 Act are available in respect of judgments of the courts of many foreign countries on the basis of reciprocity of treatment, and the provisions of the Civil Jurisdiction and Judgments Act 1982 and Council Regulation 44/2001/EC are available in respect of judgments of the courts in states which are parties to the Brussels and Lugano Conventions, enforcement at common law is the only enforcement process available in respect of the judgments of the courts of the United States because that country does not yet have a treaty with the United Kingdom for the reciprocal enforcement and recognition of judgments*."

(4) In ***NML Capital Ltd v Republic of Argentina*** [2011] UKSC 31; [2011] 2 AC 495 Lord Phillips recognised at [14] that "*Prior to the 1982 Act the common law provided two alternative remedies to a plaintiff who had obtained a judgment against a debtor in a foreign jurisdiction. He could bring a claim on the judgment or he could bring a claim on the cause of action in respect of which he had obtained the judgment*." The latter option was removed by s. 34 of the 1982 Act. It was not suggested that there were any other remedies available to a foreign judgment claimant.

(5) ***Rubin v Eurofinance SA*** [2012] UKSC 46; [2013] 1 AC 236 ("***Rubin***") concerned two cases in which the applicants sought to enforce orders (*in personam* and for liquidated sums) made in foreign insolvency proceedings in circumstances where the respondents were not present or resident (for the purposes of the 1933 Act) and did not submit (or may not have submitted[20]) to the jurisdiction of the foreign courts. The question was whether a special, more liberal, rule applied to orders made in insolvency

[20] The Supreme Court held in the second appeal that in fact the respondents had submitted to the jurisdiction.

proceedings. The Supreme Court held not: the **Dicey** rules applied just as much to insolvency proceedings as any other. Significantly, in describing the issues arising on the appeals, Lord Collins noted that had the respondents appeared and defended the proceedings "*the judgments would have been enforceable on the basis of the defendants' submission to the jurisdiction of the foreign court. Enforcement would have been at common law, or, in the New Cap case either under the common law, or under the 1933 Act which substantially reproduces the common law principles…*" (at [5] **[C/43/1121]**) There was no suggestion – by any of the Justices, nor it seems by any of the counsel in the case – that it would have been open to the applicants to enforce the foreign orders by the simple expedient of petitioning for the respondents' bankruptcy or winding up. (Page 1121)

(6) In ***Strategic Technologies PTE Ltd v Procurement Bureau of the Republic of China Ministry of National Defence*** [2020] EWCA Civ 1604; [2021] QB 999, Males LJ at [42]-[44] **[C/50/1270] – [C/50/1271]** held: "*At common law the means of enforcing the judgment of a foreign court is by an action on the judgment.*" The action at common law "*remains the only means of enforcing a judgment given by a court in a state (such as the United States of America) to which no reciprocal statutory arrangements apply.*" (Page 1270)

22. The proposition is also supported by academic commentary:

(1) **Dicey**, for example, at 14-011 **[C/61/1382]** : "*The statutes which deal with the enforcement of foreign judgments are of limited geographical application and the judgments of very many foreign countries, including important trading partners for the United Kingdom such as the United States, are not within their scope, because there are no treaty arrangements in place with these States for the reciprocal recognition and enforcement of judgments. There thus remains a considerable area within which enforcement at common law is the only process possible.*"[21] (Page 1382)

(2) **Halsbury's Laws of England**, "Conflict of Laws", Vol. 19 (2024) at 307: "*Subject to certain qualifications, a judgment in personam of a foreign court of competent jurisdiction is capable of recognition and enforcement in England. Apart from statute, such a judgment will not be enforced directly by execution or any other process, but will be regarded, for procedural purposes, as creating a debt*[22] *between the parties to it, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment. …*"

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[21] See also, at 11-207 (where a foreign judgment was not registrable "*the remedy open to a judgment creditor who wished to proceed against assets in England was an action in personam at common law against the judgment debtor…*") and 14-012 **[C/61/1383]** ("*A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. It must bring an action on the foreign judgment…*"). (Page 1383)

[22] The "*doctrine of obligation*" is addressed further below in Section C below.

(3) **Briggs, 2013 LQR**: "*A successful litigant with a foreign judgment in his favour cannot enforce that judgment in England. No measures of execution may be taken on the strength of it. The claimant must instead bring original proceedings before the English court, in order to obtain, speedily or eventually, an original English judgment, which alone is the judgment which can be enforced…*" (at 88**[C/59/1353]**) … "[The common law] "*requir*[es] *the successful party to obtain an English judgment which he might then proceed to enforce… foreign judgments may not be enforced; the role of a foreign judgment is to prepare the ground for the making of a local order.*" (at 89**[C/59/1353]**)[23] (Page 1353) (Page 1353)

(4) Indeed, as long ago as 1879, **Piggott** observed **[C/67/1570]**: "*The method pursued to obtain the benefit of a foreign judgment in this country is by bringing an action to enforce it*" (at 2). (Page 1570)

B(3) A bankruptcy petition cannot be founded on an unrecognised foreign judgment

23. Following on from the foregoing, there are therefore two independent reasons why a bankruptcy petition cannot be founded on an unrecognised foreign judgment.

24. ***First***, an unrecognised foreign judgment has no direct operation in this jurisdiction. As at the date of the presentation of the bankruptcy petition, the Russian Judgment had not been recognised by the English court. That is the critical date because that is the time prescribed by s. 267(2) of the IA 1986 when there must be a petitionable debt for the purposes of the section. It follows that, as at that date, the Russian Judgment could have no legal effect. (As Snowden LJ noted in the Court of Appeal at [61], Mr Drelle's "*only obligation to pay a liquidated sum upon which* [ST] *can rely arises from the fact that he has been ordered to do so by the* [Russian Judgment]." Hence, ST was reliant exclusively on the sum awarded under the Russian Judgment, as the petition made clear.)

25. Since there had been no recognition and no successful action on the judgment at common law, there was no *English* judgment and payment order, ordering Mr Drelle to pay the sum of RUB 2 bn. Even now, there is no such English judgment and order. The payment order under the Russian Judgment has no direct operation in this jurisdiction and in the absence of an English order ST could not, and cannot, rely upon it to present a bankruptcy petition.

26. ST's only answer to this is to rely on the "*doctrine of obligation*" to argue that a foreign judgment automatically gives rise to a true, legal obligation in this jurisdiction to comply with its terms, and to pay the sum of money ordered by the foreign court. However, that submission is impossible to reconcile with the fact that ST (rightly) does not challenge **Dicey**, Rules 45 and 46. It is, moreover, an argument that was not made below – or, at least, certainly not

[23] See also **Briggs, Private International Law in the English Courts** quoted at paragraph 16 above. (Page 1350)

with any vigour.[24] Mr Drelle addresses it in more detail in Section C below but, in short, Lord Collins was, with respect, correct to observe in ***Rubin*** that the doctrine of obligation is "*a purely theoretical and historical basis for the enforcement of foreign judgments at common law. It does not apply to enforcement under statute, and makes no practical difference to the analysis…*" (at [9] **[C/43/1122]**). The doctrine cannot bear the weight that ST seeks to place on it. (Page 1122)

27. ***Secondly***, bankruptcy (or insolvency) proceedings based on a judgment are a clear example of using the judgment as a sword, in that they are a method of enforcement[25] and even execution, so that to permit bankruptcy proceedings based on an unrecognised foreign judgement would be in contravention of **Dicey**, Rules 45 and 46(1) and (2):[26]

(1) In ***Re Crigglestone Coal Company Ltd*** [1906] 2 Ch 327 Buckley J **[C/38/1019]** (Page 1019) (as he then was) held at 330-331 that the unpaid creditor, entitled to a winding-up order against a company, had a right "*to an order by virtue of which the creditor, by the hands of a liquidator, is entitled to seize the assets of his debtor and administer them for the payment of himself and other creditors… The right of the unpaid creditor may be called, as Lord Bowen called it in In re Chapel House Colliery Co, a right to equitable execution. A creditor who obtains judgment, and issues execution at law, has a legal right to the means of satisfying his judgment… Subject… to what I shall presently say as to the representative position of the petitioner, it seems to me that the petitioning creditor has, as between himself and his debtor, a similar right ex debito justitiae to seize his debtor's assets by the hand of a liquidator and administer them for the benefit of his class.*" As Newey and Snowden LJJ observed in the Court of Appeal, respectively at [39] and [64], such collective execution is still a form of enforcement.

(2) It is clear also that in ***Judgment Debtor*** Sir Wilfrid Greene MR regarded a bankruptcy petition as a means of enforcing a foreign judgment, referring to the foreign judgment creditor's ability "*to enforce that judgment in bankruptcy*", which enforcement he recognised could only be done by first bringing an action at common law on the judgment

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[24] There is one passing reference to the "*obligation theory*" in ST's skeleton argument before Richards J. It was not pursued in oral submissions, and was not advanced before the Court of Appeal.

[25] "*Enforceable*" and "*enforced*", as used in the **Dicey** Rules, are thus not used as terms of art as, for example, in the order under consideration in ***International Tin Council*** [1989] Ch 309 (CA). See, per Nourse LJ at 332C-333C and 334C, recognising that in general terms insolvency proceedings are "*enforcement*" but as a "*term of art*" "*enforcement*" is limited to "*execution*".

[26] See also **Dicey** at 14-003 **[C/61/1378]** where the editors refer to the *offensive*, i.e. not *defensive*, way in which a (Page 1378) person with the benefit of a foreign judgment "*may seek to have that judgment executed or otherwise carried out as against the person against whom it is given. The claimant is then seeking to enforce the judgment.*" (The other two categories at 14-005 **[C/61/1379]** and 14-006 **[C/61/1379]** are in the nature of *defensive* deployment. See also at 11-207, that (Page 1379) where a foreign judgment was not registrable "*the remedy open to a judgment creditor who wished to proceed against assets in England was an action in personam at common law against the judgment debtor…*").

or by registering the foreign judgment (if registrable under statute) – see, at 604, 606, 608. **[C/39/1032]; [C/39/1034]; [C/39/1036]** (Pages 1032, 1034, 1036)

(3) ***Re Lines Bros (in liquidation) (No 1)*** [1983] Ch 1 per Lawton LJ at 14 **[C/40/1051]** and per Brightman LJ at 20 **[C/40/1057]**: referring to winding-up as "*a form*" or "*a process*" "*of collective enforcement*"; see also, per Brightman LJ at 20: "*If the creditor petitions to wind up a company, or claims in a liquidation initiated by others, he is not engaged in proceedings to establish the company's liability or the quantum of the liability (although liability and quantum may be put in issue) but to enforce the liability.*" (Page 1051) (Page 1057)

(4) In ***Shalson v DF Keane Ltd*** [2003] EWHC 599 (Ch) Blackburne J commented at [23] that he saw "*nothing improper in a creditor resorting to bankruptcy proceedings as a means of enforcing payment.*" **[C/46/1151]** See also, at [20]. (Page 1151)

(5) ***Cambridge Gas Transportation v Official Committee of Unsecured Creditors of Navigator Holdings*** [2007] 1 AC 508 ("***Cambridge Gas***") per Lord Hoffman at [14]-[15]: "*The purpose of bankruptcy proceedings… is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established… The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them.*"[27]

(6) In ***Blight v Brewster*** [2012] EWHC 165 (Ch); [2012] 1 WLR 2841 at [72], DHCJ Gabriel Moss QC described bankruptcy proceedings as "*a relief from the ability of creditors individually to execute upon the debtor's assets, in favour of a collective execution.*"

28. In accordance with **Dicey** Rules 45 and 46(1)-(2), and for the reasons set out in Section B(2) above, a foreign judgment is itself *only* enforceable by bringing a common law action on it. Since bankruptcy (and winding-up) proceedings are a method of enforcement, a sum awarded under an unrecognised foreign judgment may not be used to found a bankruptcy petition.

29. That conclusion is further supported (i) by analogy with the revenue rule, and (ii) by the fact that a foreign judgment registrable under the 1933 Act, but which is unregistered, also cannot found a bankruptcy petition. These are addressed in the next two sections.

[27] This description of insolvency proceedings was adopted by the Supreme Court in ***Rubin*** per Lord Collins at [102] and [106] **[C/43/1125]-[C/43/1126]**, and by the Privy Council in ***Singularis Holdings Ltd v PricewaterhouseCoopers*** [2014] UKPC 36; [2015] AC 1675 per Lord Sumption at [11]. (Page 1125)

B(4) The revenue rule

30. The revenue rule is the "*well-established and almost universal principle*" reflected in **Dicey** Rule 20, that the English courts "*have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State…*" (**Dicey**, 8-002). Its rationale is that the "*enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.*"[28]

31. Therefore, both the revenue rule and **Dicey** Rules 45 and 46(1) and (2) are concerned with the enforcement in this jurisdiction of foreign exercises of sovereign power;[29] as the Court of Appeal recognised below: they have a "*similar root*" (per Newey LJ at [42]) **[A/6/143]**. (Page 143)

32. ST accepts that a sum claimed by way of foreign revenue cannot be a petitionable debt for the purposes of s. 267 of the IA 1986. That concession is obviously rightly made: as the Privy Council held in ***Government of India***, a foreign revenue claim is not a provable debt: it is not a "*liability*" because, as a foreign exercise of sovereign power, it is not enforceable in an English court.[30] *A fortiori* such a sum would not be a petitionable debt.[31]

33. Of course, unlike a foreign revenue claim, which can never found a claim in this jurisdiction, a foreign judgment is itself enforceable by, but only by, the common law action on the judgment. The reason for the difference in treatment lies in the fact that, while both involve a foreign exercise of sovereign power, it is accepted that there are good reasons to enable a foreign judgment to be carried out against the foreign judgment defendant in this jurisdiction, provided the conditions for recognition and enforcement are met. In contrast, there are no good reasons why (in the absence of statutory intervention) the common law should ever enforce a foreign revenue claim.

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[28] ***Skatteforvaltningen (the Danish Customs and Tax Administration) (Respondent) v Solo Capital Partners LLP*** [2023] UKSC 40; [2024] AC 539 ("***Skatteforvaltningen***") per Lord Lloyd Jones at [21]-[22] **[C/47/1166]–[C/47/1167]** (citing ***Government of India v Taylor*** [1955] AC 491 **[C/17/642]** ("***Government of India***") per Lord Keith at 511); see also, per Lord Lloyd-Jones at [36] **[C/47/1172]**. The reason why the revenue rule was held not to apply, on the facts of ***Skatteforvaltningen***, was essentially because there were no taxes due: see [38]-[40] **[C/47/1173]**. (Page 1166) (Page 642) (Page 1172) (Page 1173)

[29] **Briggs, 2013 LQR** at 88. **[C/59/1353]** (Page 1353)

[30] See, per Viscount Simonds at 508, interpreting the meaning of "*liability*" pursuant to s. 302 of the Companies Act 1948 **[C/17/639]**; s. 382(1)(a) IA 1986, similarly depends on whether there is a "*liability*". (Page 639)

[31] Cf. ***McGuinness v Norwich and Peterborough Building Society*** [2011] EWCA Civ 1286; [2012] 2 All ER (Comm) 265 per Patten LJ at [14]-[16] **[C/28/791]-[C/28/792]**. (Page 791)

34. But this difference in treatment has no bearing on the point of principle arising from the common basis for the revenue rule and **Dicey**, Rules 45 and 46(1) and (2), that just as "*a foreign tax liability could not be regarded as a debt upon which a bankruptcy petition could be based*[, b]*y parity of reasoning, … the same must apply to an unregistered judgment of a foreign court*."[32] Therefore, just as the meaning of "*debt*" in s. 267 of the IA 1986 (i.e. a petitionable debt) must defer to the revenue rule, recognising that foreign revenue claims are exercises of sovereign authority and completely unenforceable, so too must it defer to the rule that an unrecognised foreign judgment, being also an assertion of sovereign power, has no direct operation or legal effect in this jurisdiction, save that it may only be enforced by the common law action on the judgment (per **Dicey**, Rules 45 and 46(1) and (2)).

B(5) <u>The Foreign Judgments (Reciprocal Enforcement) Act 1933</u>

35. The statutory schemes for the registration of foreign judgments provide "*a more direct process of registration*"[33]. However, the statutory schemes still follow essentially the same logic as the common law:[34] a foreign judgment has no direct operation in this jurisdiction but may be given operation by a process the result of which is, in effect, to incorporate the foreign court's decision into our legal order.

36. The earlier registration acts – the Judgments Extension Act 1868 and the Administration of Justice Act 1920 – gave a registered foreign judgment "*the same force and effect*" as an English judgment, but only for the purposes of execution.[35] However, neither Act removed the foreign judgment claimant's right to enforce a foreign judgment "*in the old way*" by bringing a common law action on the foreign judgment; thus, if a plaintiff wished to present a bankruptcy petition based on a foreign judgment sum, it was open to them to bring a common law action and then, if successful, present a bankruptcy petition based on non-payment of the *English* judgment.[36]

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[32] Per Snowden LJ in the Court of Appeal at [69]. **[A/6/152]** (Page 152)

[33] **Dicey**, at 14-013. **[C/61/1383]** (Page 1383)

[34] ***Black-Clawson*** per Viscount Dilhorne at 624H **[C/11/532]** and 625D **[C/11/533]** (citing §16 of the Greer Committee report ("*It was, however, desirable that such legislation, in laying down the conditions under which, in return for reciprocal treatment, the judgments of foreign countries should be enforced, should not depart from the substantive principles of the common law applicable to foreign judgments in general.*"); per Lord Wilberforce at 630B-D **[C/11/536]**. The Greer Committee described the 1933 Act as a change "*of procedure rather than of substance*" involving "*no radical alterations of the present position.*" (see, p. 6 of the report, referred to in ***Li v Yuan*** [2026] EWHC 242 (Comm) per HHJ Baumgartner at [59]). (Pages 532, 533) (Page 536)

[35] S. 4 of the 1868 Act; s. 9(3) of the 1920 Act. See, ***Judgment Debtor***, per Sir Wilfrid Greene MR at 604. **[C/39/1032]** (Page 1032)

[36] ***Judgment Debtor***, per Sir Wilfrid Greene MR at 604-606. **[C/39/1032]-[C/39/1034]** (Page 1032)

37. The "*main object of the* [Foreign Judgments (Reciprocal Enforcement)] *1933 Act was to facilitate the enforcement of commercial judgments abroad...*"[37] **[C/4/429]** Under the 1933 Act, "*Registration is available as of right…*" (though it may be set aside if certain conditions are met).[38] In addition and by way of an extension to the rights of holders of foreign judgments subject to the earlier Acts, once a foreign judgment was registered under the 1933 Act, its holder, in addition to being able to execute, could take "*proceedings*" on it (s. 2(2)(b) of the 1933 Act). Such "*proceedings*" include bankruptcy proceedings. (Page 429)

38. S. 2(2) of the 1933 Act provides that:

> "*(a) a registered judgment shall, for the purposes of execution, be of the same force and effect; and (b) proceedings may be taken on a registered judgment… as if the judgment had been a judgment originally given in the registering court and entered on the date of registration…*"

39. S. 6 of the 1933 Act provides:

> "**Foreign judgments which can be registered not to be enforceable otherwise.**
>
> *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.*"

40. In ***Judgment Debtor***, a bankruptcy notice was founded upon the judgment of a competent court in France which had been registered under the 1933 Act **[C/39/1029]**. The foreign judgment debtor advanced the ambitious submission that the only relief which the holder of a registered judgment could obtain was relief by way of execution, and therefore that the registered French judgment could not form the basis of a bankruptcy petition. (Page 1029)

41. The Court of Appeal unsurprisingly rejected that argument. Unlike the earlier Acts, s. 2(2) did not limit the steps that could be taken on a registered foreign judgment to execution. S. 2(2)(b) expressly provided that proceedings might be taken on the registered foreign judgment. As Sir Wilfrid Greene MR held: "*The language taken by itself, in my opinion, quite clearly includes proceedings by way of bankruptcy proceedings initiated by a bankruptcy notice or otherwise.*"[39]

42. That interpretation was "*strongly confirmed*" by s. 6 of the 1933 Act.[40] As the MR held, where a judgment is registrable under the Act "<u>*the only thing that the holder of such a judgment is entitled*</u>

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[37] ***Rubin*** per Lord Collins at [172] **[C/43/1129]**; ***Black-Clawson*** per Lord Reid at 616. **[C/11/524]** (Page 1129) (Page 524)

[38] **Dicey**, at 14-015.

[39] ***Judgment Debtor*** at 607 **[C/39/1035]**. See also at 606 **[C/39/1034]**: "*After providing for registration on application, s. 2, sub-s. 2, of the Act sets out the effect of registration.*"; and 608: "*When I look at s. 2 and find clear language used which, according to its ordinary meaning, would cover a bankruptcy notice…*" (Pages 1035, 1034)

[40] ***Judgment Debtor*** at 607 **[C/39/1035]**. This was therefore part of the *ratio* for rejecting the foreign judgment debtor's arguments. (Page 1035)

to do is to register it, and after registering it, of course, he obtains the rights which the Act expressly says shall follow upon registration." (at 608) **[C/39/1036]** The reference to "*the rights*" is a reference to the rights under s. 2(2), and in the context of that case, s. 2(2)(b) and the taking of bankruptcy proceedings. (Page 1036)

43. The MR added "*that Parliament was intending by this Act to provide that the only method of enforcing foreign judgments should be by registration. That being so, the holder of a registered judgment can do whatever s. 2 tells him that he can do.*" (at 608) **[C/39/1036]** (Page 1036)

44. By contrast, if the foreign judgment debtor was right, this would have produced the "*startling result*" that it would *never* be open to a registrable foreign judgment claimant to "*enforce that judgment in bankruptcy*": s. 6 prevented such enforcement before registration, and (on the foreign judgment debtor's analysis) s. 2(2) would prevent a bankruptcy petition being presented once registered (at 608) **[C/39/1036]**. That would have placed such foreign judgment creditors in a *worse* position than they were in before the 1933 Act, which result "*cannot possibly have been intended by the Legislature – namely, of depriving the holder of a foreign judgment of valuable rights with regard to its enforcement which he had previously possessed.*" (at 607-608) **[C/39/1035] – [C/39/1036]** (Page 1036) (Page 1035)

45. Therefore, the combined effect of ss. 2(2)(b) and 6 is that once the foreign judgment has been registered, proceedings, including bankruptcy proceedings, may be taken on it. But, by contrast, a foreign judgment which has not been registered is unenforceable and cannot form the basis of a bankruptcy petition. Such is what the words of the statute provide and is the *ratio* of ***Judgment Debtor***.

46. If it were the case that the holder of the foreign judgment could take bankruptcy proceedings *without* first registering the foreign judgment, that would obviously be contrary to ss. 2(2)(b), and 6, and would undermine the purpose of the statutory registration scheme. It plainly cannot have been the intention of the legislature that in relation to bankruptcy proceedings, the holder of a registrable foreign judgment, which had not been registered, should have the same rights as the holder of a foreign judgment which had been registered.

47. It is true that under the Bankruptcy Act 1914, an act of bankruptcy in relation to a judgment (s. 1(1)(g)) required an *English* judgment. Therefore, s. 6 of the 1933 Act prohibited the bringing of a common law action on a foreign judgment so as to obtain an English order which could then be enforced by a bankruptcy petition.[41] But that is not to the point since

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[41] AWC 89, 92. **[A/2/39]-[A/2/40]** (Page 39)

integral to the Court of Appeal's conclusion in ***Judgment Debtor*** is its analysis that ss. 2(2) and 6 make clear that Parliament's intention by the 1933 Act was to provide that the *only* method of enforcing foreign judgments should be by way of registration (as Newey LJ rightly held at [50] **[A/6/146] – [A/6/147]**). It follows that ***Judgment Debtor*** is authority for the proposition that a sum awarded under an unregistered, but registrable, foreign judgment cannot found a bankruptcy (or winding-up) petition. The registrable foreign judgment must first be registered. (Page 146)

48. It is also material that by contrast with the limited "*acts of bankruptcy*" set out in s. 1(1) of the Bankruptcy Act 1914, petitions to wind up companies were not so limited: see, ss. 168-169 of the Companies Act 1929.[42] Although ***Judgment Debtor*** was concerned with only a bankruptcy petition, nonetheless its conclusion as to the meaning of the 1933 Act would plainly apply to winding-up proceedings if it was sought to petition based on an unregistered foreign judgment. Such a course would plainly not be permitted under the 1933 Act. So, Sir Wilfrid Greene MR's *dicta* cannot be explained away by reference to the peculiarities of the "*acts of bankruptcy*" under the Bankruptcy Act 1914.

49. Further, the proposition that bankruptcy proceedings are "*proceedings for the recovery of a sum payable*" and that they may not be pursued based on an unregistered foreign judgment to which the 1933 Act applies, is supported by *obiter dicta* of Lord Collins in ***Rubin***:

> "*If insolvency proceedings are excluded from the 1933 Act, then enforcement would be at common law. If they are not excluded, then (as I have said) section 6 has the effect of excluding an action at common law on the judgment <u>and making registration under the 1933 Act the only method of enforcement of judgments within Part I of the Act.</u>*" (at [170]) **[C/43/1129]** (Page 1129)

50. See, further, ***Re Karnos Property Co Ltd*** [1989] 5 BCC 14 per Mervyn Davies J at 17: "*One may say that a petition is an "action" seeking not to recover a sum but to secure the winding up of a company. Certainly the petition seeks a winding-up order; but as well the petitioner (who is a creditor – see the North Bucks case) <u>also seeks recovery of his money or such part of it as may become his by virtue of a dividend</u>. A creditor petitioner does not petition for the satisfaction of seeing the demise of his company debtor but rather*

[42] S. 168(5) was the predecessor of what became s.122(1)(f) ("*A company may be wound up if - the company is unable to pay its debts.*"). S. 123 (Title – "*Definition of inability to pay debts*") of the IA 1986 largely replicates s. 169 of the 1929 Act. **[C/3/427]** (Page 427)

in the hope of recovering part at any rate of his debt by way of dividend. <u>A petition therefore, in my view, seeks to recover a sum</u>." The same applies, *mutatis mutandis*, to a bankruptcy petition.[43]

51. It cannot have been the intention of Parliament that the IA 1986 should have repealed or altered by a sidewind the provisions of the 1933 Act, in relation to bankruptcy petitions.[44] That is consistent with how Lord Collins expressed himself in ***Rubin*** *supra*. It is also consistent with the fact that there is not a single reported case which suggests that a sum found due under an unregistered foreign judgment subject to the 1933 Act may nonetheless found a bankruptcy or winding-up petition. Indeed, and consistently with the terms of the 1933 Act and ***Judgment Debtor***, in ***State Bank of India v Mallya*** [2025] EWHC 858 (Ch) the bankruptcy petition was presented only *following* the registration of the foreign judgment (see, per Mann J at [2]).

52. Therefore, it follows that a sum awarded under an unregistered foreign judgment does not give rise to a "*debt… payable… either immediately or at some certain, future time…*" within the meaning of s. 267 of the IA 1986.

B(6) <u>Conclusion: the correct interpretation of s. 267 of the IA 1986</u>

53. Parliament also cannot have intended by enacting the IA 1986 to sweep away how the common law has, for centuries, treated foreign judgments: viz. that they should have no direct operation in this jurisdiction, and that they are enforceable only by a common law action on the judgment recognising it and enforcing it by granting an English judgment and payment order. It is a principle of statutory interpretation that an Act must be "*read and applied in the context of the general body of law into which it is assimilated. Ordinary rules and principles of the common law will generally apply to, and may impliedly qualify, the express statutory provisions.*"[45]

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[43] See also ***Re International Tin Council*** [1989] Ch 309 per Nourse LJ at 332B-333B (citing Phillimore LJ in ***Re A Company*** [1915] 1 Ch 520): the petitioner pursuing bankruptcy proceedings is "*proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all the creditors…*"; and ***Re Crigglestone Coal Company Ltd*** [1906] 2 Ch 327 per Buckley J at 330-331 quoted at paragraph 27(1) above. **[C/38/1019] [[C/38/1020]** (Pages 1019, 1020)

[44] ***National Assistance Board v Wilkinson*** [1952] 2 QB 648 per Devlin J at 661: "*It is a principle of legal policy that changes to the law should be deliberate and carefully worked out, and that neither the common law nor statute should be altered by a mere sidewind. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account.*" For the reasons set out in paragraph 48 above, it does not have that effect as regards corporate winding-up in any event.

[45] **Bennion, Bailey and Norbury on Statutory Interpretation**, 8th edn, ("**Bennion**") at 25.1 **[C/57/1342]**. (Page 1342) See also, at 25.8 ("*In the context of the common law, the presumption against implied abrogation is bound up with the presumption against legislative interference with the common law.*") **[C/57/1344]** and at 26.7 **[C/57/1346]** (Pages 1344, 1346) (citing ***National Assistance Board v Wilkinson*** [1952] 2 QB 648 per Devlin J at 661, quoted at fn 44 above). See further, ***R v Secretary of State for the Home Department, ex p Pierson*** [1998] AC 539 per Lord Browne-Wilkinson at 573G-574A: "*…statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express*

Therefore, unless it expressly overrules the common law, a statute is to be "*construed with reference to the common law as understood*" at the time the statute was passed.[46]

54. Moreover, and as is common ground, the IA 1986 does not define a "*debt*" for the purposes of s. 267 of the IA 1986.[47] Nor does it define the expression "*payable to the petitioning creditor… either immediately or at some certain, future time…*". As the Court of Appeal held, there is nothing surprising in the IA 1986 deferring such matters to the general law (per Newey LJ at [44]) **[A/6/144]**; and just as the IA 1986 defers to **Dicey**, Rule 20, so too should it defer to **Dicey**, (Page 144) Rules 45 and 46(1) and (2)(see, Section B(4) above).

55. Therefore, as a matter of statutory construction having regard to the common law as it stood in 1986 (and as it stands today), an unrecognised foreign judgment does not give rise to a "*debt*" within the meaning of s. 267 of the IA 1986: a foreign judgment has no direct operation in this jurisdiction unless and until it is recognised and for a "*debt*" to arise there would first have to be an *English* order for payment in a common law action on the foreign judgment. Until then, there is nothing that can properly be regarded in this jurisdiction as being "*owed*" to the petitioning creditor (see, Section B(3) above).

56. For the same reasons, but separately, a sum ordered by a foreign court is not "*owed*" or "*payable to the petitioning creditor… either immediately or at some certain, future time…*" within the meaning of s. 267(1) and (2)(b) of the IA 1986. That is because a foreign judgment – or, on ST's case, the obligation to which it gives rise – is *only* enforceable by bringing a common law action on the judgment to obtain an *English* order recognising it and requiring the foreign judgment defendant to do that which the foreign court has ordered, and it is that English order alone which may then be enforced by *inter alia* bankruptcy proceedings. The foreign judgment (or obligation to which it theoretically gives rise) is "*not otherwise*"[48] enforceable.

57. At best, therefore, the foreign judgment claimant's claim (i.e. the common law action on the foreign judgment) is a contingent claim: unless and until the foreign judgment has been recognised and enforced by such common law action, the sum awarded under the foreign judgment cannot, in this jurisdiction, be regarded as owed or payable.[49]

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statutory provisions… As a result, Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication…"

46 ***Owens Bank Ltd v Bracco*** *supra* per Lord Bridge at 488E-F. **[C/33/904]** (Page 904)

47 See, AWC 25. **[A/2/22]** (Page 22)

48 **Dicey**, Rule 46. **[C/61/1388]** (Page 1388)

49 See, by way of analogy, ***Sunset Ltd v Al-Hindi*** [2023] EWHC 2443 (Ch). Where legislation provided that rent "*otherwise due*" from a tenant should "*be treated for all purposes as not being due from the tenant*" for so long as the

58. Further, it would be anomalous and surprising if (as ST contends) s. 267 of the IA 1986 entailed that a sum awarded under an unrecognised foreign judgment <u>*does*</u> give rise to a "*debt… payable… either immediately or at some certain, future time…*", when a sum awarded under an unregistered foreign judgment does not for two reasons:

(1) If the statutory words in s. 267 do not include a sum awarded under an unregistered foreign judgment because it has not been registered, then logic and parity of reasoning alone lead to the conclusion that a sum awarded under an unrecognised foreign judgment should also not support a bankruptcy petition. As set out above, the statutory registration scheme was modelled on the common law.

(2) Parliament cannot have intended that the holder of an unrecognised foreign judgment should be in a *better* position than the holder of an unregistered foreign judgment, or that the latter be in a worse position than the former. There is no rational justification for such disparity of treatment (and nothing in AWC 98-99 **[A/2/42]** (Page 42) properly suggests otherwise).

C. <u>THE DOCTRINE OF OBLIGATION</u>

C(1) <u>Introduction</u>

59. ST relies heavily on the "*Obligation Principle*" (the doctrine of obligation[50]) to argue that a foreign money judgment automatically or necessarily gives rise to an obligation on the part of the foreign judgment defendant to comply with its terms. Thus, ST contends, a foreign judgment creates a "*debt*", "*owed*" and "*payable…* " for the purposes of s. 267 of the IA 1986 (AWC 32 **[A/2/23]**). (Page 23)

60. There is a peculiar paradox to ST's argument. It relies on the doctrine of obligation – the theoretical principle which explains why the common law action on the judgment is available – as the very reason for its contention that the common law action need not be brought. Thus, it deploys the theory to defeat the very mechanism it was devised to justify.

61. In any case, as set out in more detail below, the doctrine of obligation, as expressed in the cases that created it, is in truth merely a device, developed at a time when English law was fettered by the old forms of action, to explain why the common law action lies. As with

landlord failed to serve notice of an address in England and Wales at which notices could be served on him by the tenant, then if the landlord had not served such a notice at the time of presenting the bankruptcy petition the debt was not payable immediately or at some certain, future time: see, per ICCJ Mullen at [7] and [22].

[50] **Dicey**, 14-007. **[C/61/1380]** (Page 1380)

other legal fictions, it can be "*likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building.*"[51]

C(2) The origin and development of the doctrine

62. The doctrine of obligation is the *theory*, developed in a series of cases in the late 19th century, to explain why English courts enforce foreign judgments.[52] By then it was (and indeed it had been since the 17th century) well established that an action *could* be brought on a foreign judgment. The form of action was originally *indebitatus assumpsit*[53] although it seems that at some later point the mode of pleading may have become (also) an action in debt.[54]

63. However, the theoretical basis for the action was unsettled. There was a line of authority that English courts enforced foreign judgments based on considerations of comity.[55] Another "*vexata questio*" was whether a foreign judgment could be conclusive, or was only ever evidence, of the question that it purported to determine.[56] As Blackburn J (as he then was) observed in ***Godard v Grey*** (1870-71) LR 6 QB 139 (at 149**[C/15/594]**), it was (Page 594) difficult to reconcile the notion that a foreign judgment was only *prima facie* evidence of the matters determined, with the mode of pleading which was based on a debt or an implied promise to pay.

64. The doctrine of obligation is generally attributed to two decisions of the Queen's Bench Division decided by Blackburn J on the same date: ***Godard v Grey*** and ***Schibsby v Westenholz*** (1870-71) LR 6 QB 155 **[C/45/1135]**. (Page 1135) Both cases relied upon the *dicta* of Parke B in the earlier case of ***Williams v Jones*** 153 ER 262; (1845) 13 M&W 628 that "*Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another,*

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[51] ***Republic of India v India Steamship Co (No. 2)*** [1998] AC 878 per Lord Steyn at 913A-B, citing Fuller, Legal Fictions (1967) at p. 70.

[52] **Dicey**, at 14-007. **[C/61/1380]** (Page 1380)

[53] ***Duplex v De Roven*** 23 ER 950; (1705) 2 Vern. 540 per Lord Keeper at [541]. See, also, ***Gage v Bulkeley*** 27 ER 824; (1744) Ridgeway Temp. Hardwicke 263 per Lord Hardwicke LC at [264]: "*you cannot in this kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction.*"

[54] ***Rubin*** per Lord Collins at [9] **[C/43/1122]**. (Page 1122) **Dicey** appears to cite ***Sadler v Robins*** 170 ER 948; (1808) 1 Camp. 253 as authority for the proposition that the form of action was originally in debt (see, at 14R-024 (footnote 95)), but, in fact, that case involved a claim in *assumpsit* (see per Lord Ellenborough at [256]).

[55] **Dicey**, at 14-007. **[C/61/1380]** (Page 1380)

[56] ***The Marquess of Donegall*** (1834) 6 ER 1232 per Lord Chancellor at 1234. See ***Hawksford v Giffard*** (1866) 12 App. Cas. 122 at 126-127 per Lord Herschell (giving the judgment of the Privy Council, on appeal from the Royal Court of Jersey) stated: "*This action is brought upon an English judgment, which, until a judgment was obtained in Jersey, was in that country no more than evidence of a debt, and their Lordships do not think it is competent in such an action to sue other persons jointly with the debtor, and to obtain a judgment against them for payment of the debt, merely on the allegation that they hold, as trustees, property of which the debtor is the beneficial owner.*"

a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced."

65. It is curious that these *dicta* should have formed the foundation for the law on the enforcement of foreign judgments, because ***Williams v Jones*** was not a case about foreign judgments at all. Rather, it was concerned with the enforcement of a judgment of a county court in Wales (an inferior court of record). While foreign courts were also regarded as inferior courts of record,[57] the enforcement of Welsh judgments obviously does not raise the issues of territoriality and sovereignty that apply to foreign judgments.[58]

66. Nevertheless, notwithstanding those somewhat shaky foundations and the further issues identified below, the doctrine of obligation had, at the time it was adopted in ***Godard v Grey*** and ***Schibsby v Westenholz***, the following apparent advantages:

(1) It explained why the form of action was a plea in debt or *indebitatus assumpsit*. See, per Blackburn J at 149-150 **[C/15/594]–[C/15/595]**: "*Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shews that the 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, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that cause of action.*"[59] (Page 594)

(2) It helped explain why a foreign judgment is not "*merely prima facie*" evidence of the matters decided and therefore resolved that particular controversy (at 149-150).

(3) It sought to put to bed the idea that foreign judgments are enforced based on some notion of comity in relation to the foreign court.[60]

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[57] ***Walker, Assignees of Bean*** 99 ER 1; (1778) 1 Doug KB per Lord Mansfield at 4.

[58] ***Russell v Smyth*** 152 ER 343; (1842) 9 M&W 810 **[C/44/1130]** – the other decision of Parke B, cited in ***Schibsby*** (at 159 **[C/45/1139]**) to support the obligation theory – concerned an action on a decreet of the Court of Session. Scottish judgments are undoubtedly foreign judgments. However, England and Scotland, of course, had as at 1842 a shared Sovereign and a shared final appellate court, so, again, that case did not give rise to the same issues as to the limitations of state sovereignty as other foreign judgments. (Page 1130) (Page 1139)

[59] An example, it might be thought, of the procedural tail wagging the substantive dog.

[60] See, ***Godard v Grey*** per Blackburn J at 152 **[C/15/597]**; ***Schibsby v Westenholz*** per Blackburn J at 159 **[C/45/1139]**. (Page 597) (Page 1139)

67. However, the doctrine of obligation was still only ever the *theory* that was employed to justify the common law action. Lord Bridge made much the same point in ***Owens Bank Ltd v Bracco*** *supra* when he said at 484B **[C/33/900]**: "*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.*" (Page 900)

68. Moreover, Lord Bridge's words make clear, consistently with **Dicey** Rules 45-46, that the "*legal obligation*" will not be enforced in any way other than by an action on the judgment. There is nothing to suggest that Lord Bridge was intending to depart from those longstanding rules of the common law. This also illustrates the artificiality in ST's seeking to separate out the "*legal obligation*" from the foreign judgment itself. It is, of course, that artificial separation which gives rise to the paradox referred to above.

69. Aside from this, it would be wrong to conclude that, because it might (or was thought at the time to) have provided a satisfactory explanation for the common law action in the 19th century, and at a time before the Judicature Acts abolished the constraining forms of action, the doctrine of obligation can or should provide meaningful guidance for the further development of the law. For example:

(1) It does not explain *why* there is an obligation in this jurisdiction to comply with a foreign judgment:[61] "*It is reasoned that a foreign judgment should be enforced because it imposes on the party against whom it was given an obligation to pay the judgment sum. To the question why we should treat the foreign judgment as creating that obligation and why that obligation should be enforced domestically, no intelligible answer is given*".[62]

(2) It also cannot explain *which* foreign judgments give rise to the obligation: because it is undoubtedly not the case that there is an obligation to comply with *every* foreign judgment by a court of competent jurisdiction (it might be impeached for fraud, breach

[61] See, ***Adams v Cape Industries*** [1990] Ch 433 per Slade LJ at 552G **[C/9/506]**, stating that "*the cases give virtually no guidance on this essential question*". (Page 506)

[62] **Ho, H.L.: Policies underlying the enforcement of foreign commercial judgments** (1997) ICLQ 46, 443-462 ("**Ho**") at 445. **[C/64/1525]** (Page 1525)

of natural justice etc, and these are questions that must be resolved *before* recognition of the foreign judgment as *res judicata*[63]).

(3) As an explanation for the recognition and enforcement of foreign judgments, the doctrine of obligation is therefore "*question-begging*"[64] and "*presuppose*[s] *what it is supposed to explain*".[65] That is perhaps unsurprising as the reason for its adoption depended, at least in part, upon the technical mode of pleading.

70. Even as long ago as in 1879, F. T. Piggott wrote that: "*a judgment debtor of a foreign state, leaving that foreign state, leaves behind the legal obligation (using this term in its strict sense) of obedience to that judgment: and that coming into this country, he cannot be considered a legal debtor here, but only a legal debtor of and in the foreign state.*" (**Piggott**, at 12) **[C/67/1580]** (Page 1580)

71. Thus, with respect, Lord Collins was right to observe in ***Rubin*** at [9] that the doctrine of obligation is "*a purely theoretical and historical basis for the enforcement of foreign judgments at common law. It does not apply to enforcement under statute, and makes no practical difference to the analysis…*" **[C/43/1122]** (Page 1122)

72. In so stating, Lord Collins was expressing a view which would have chimed with that held by the US Supreme Court judge, Gray J, over 100 years previously, when (in giving the opinion of the majority of the court at 162) in ***Hilton v Guyot*** 159 U.S. 113 (1895) he described the obligation theory as (at 201 **[C/55/1317]**) a "*remnant*" of an "*ancient fiction*", (Page 1317) adding that it is "*hardly a sufficient guide at the present day in dealing with questions of international law, public or private, and of the comity of our own country, and of foreign nations*".[66] If it was in 1895 "*hardly a sufficient guide*", the intervening 130 years have not improved its quality.

73. Further, the doctrine of obligation cannot be understood so as to establish what ST seeks:

(1) If there was, in fact, an *automatic* obligation to comply with an unrecognised foreign judgment in this jurisdiction, then foreign judgments *would* have direct operation in this

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[63] See, for example, **Dicey** Rule 46: it is only a foreign judgment that is final and conclusive on the merits "*and not impeachable under any of Rules 52 to 55*" that is conclusive as to any matter thereby adjudicated upon **[C/61/1388]**. See also, **Briggs, Conflict of Laws**, 5th edn, "*If the court was competent… whether its judgment will in fact be recognised as res judicata will depend on the further question of whether any of the admissible objections, or defences, to recognition may be invoked by the losing party.*" (121-122) **[C/60/1373]–[C/60/1374]** (Page 1388) (Page 1373)

[64] **Ho** at 445. **[C/64/1525]** (Page 1525)

[65] **Hardy: The effects of recognized foreign judgments in civil and commercial matters** (2013) ICLQ 62, 441-461 ("**Hardy**") at 449.

[66] Adding at 201: "*In **Abouloff v. Oppenheimer** (1882), Lord Coleridge and Lord Justice Brett carefully avoided adopting the theory of a legal obligation to pay a foreign judgment as the test in determining how far such a judgment might be impeached. 10 Q.B.D. 295, 300, 305.*" See also, **Ho**: "*The modern complacency with [the] explanation is very odd, for surely it must be obvious that the explanation is inadequate, misleading and simplistic.*" (at 443) **[C/64/1523]** (Page 1523)

jurisdiction, for they would compel persons in this jurisdiction to comply with them and those persons would be in peril (not least from bankruptcy or winding-up proceedings) if they did not do so. But that cannot be right: the limited territorial effect of foreign judgments is long and well-established, and reflected in **Dicey**, Rules 45 and 46.

(2) In addition, recognition – described by Lord Rodger as "*the necessary primary concern*" – would be rendered meaningless. The purpose of recognition is to determine which foreign judgments are to be treated as *res judicata* and, *therefore*, as giving rise to an obligation in this jurisdiction.[67] If there was already a true, legal obligation to comply with the foreign judgment, arising automatically and giving rise without more to a payable debt, then there would be no need for recognition, let alone the action on the foreign judgment at common law at all.

(3) It is moreover difficult to understand the need for the statutory registration schemes, which are premised on the notion that a foreign judgment has, as such, no direct operation in this country and therefore needs to be registered to be granted "*the same force and effect as if it had been a judgment originally given in the registering court*"[68] (and, of course, an English judgment *does* give rise, automatically, to a true legal obligation to comply with its terms). That statutory form of words is necessary precisely because the unregistered judgment does not already have that force and effect. If the obligation theory already rendered the foreign judgment immediately enforceable in England, then s. 2(2) of the 1933 Act adds nothing.

74. ST's argument, which in effect collapses the fundamental distinction between foreign and domestic judgments, therefore proves too much. Its novel deployment of the obligation theory to render the common law action and recognition all superfluous as regards enforcement of a foreign judgment, cannot be right. The obligation theory explains why the common law action lies; it does not dispense with the need to bring it.

75. The correct view, as reflected in **Dicey**, Rules 45 and 46(1) and (2), is that any true legal obligation arises only in consequence of the English court's recognition and enforcement of the foreign judgment at common law. The prior determination of the English court in favour

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[67] See, for example, ***Cambridge Gas*** per Lord Hoffman at [13]. See also, **Briggs, Conflict of Laws**, 5th edn at 116 (fn 14 above). **[C/60/1368]** (Page 1368)
[68] S. 2(2) of the 1933 Act. **[C/4/430]** (Page 430)

of the foreign judgment claimant, by way of recognition or enforcement under **Dicey**, Rules 45 and 46(1) or (2), is the necessary pre-condition for any true legal obligation to arise.[69]

D. THE APPELLANT'S CASE

D(1) Ground 1: "unrecognised unimpeachable foreign money judgment creates a "debt""

76. The question is not, as ST has formulated it under Ground 1, whether an "*unrecognised unimpeachable foreign money judgment*" can found a bankruptcy petition. That is because at the date of presentation of the petition, there was no prior decision of an English court recognising or enforcing the foreign judgment within the meaning of **Dicey**, Rules 45 and 46 which would necessarily have included a determination that it was "*unimpeachable*" under any of **Dicey**, Rules 52-55. Further, whether there is a genuine and substantial dispute about impeachability is the subject of Mr Drelle's further grounds to support the Court of Appeal's order. Accordingly, the central issue must be neutral as to whether the foreign judgment is impeachable. ST chose not to bring an action at common law on the Russian judgment to have it recognised before presenting the bankruptcy petition, and it is not therefore entitled to assume, for the purposes of the central issue, that the judgment is unimpeachable.

77. In any case, there are three fundamental problems with Ground 1:

(1) ***First***, it completely ignores **Dicey**, Rule 45 and the general principle of international law that an exercise of adjudicative power in one sovereign state has no effect in another. ST rightly does not challenge **Dicey**, Rule 45. Yet it is notable that ST's written case mentions the rule only twice, when summarising the issues (AWC 5-6) **[A/2/18]**. (Page 18)

(2) ***Secondly***, it depends *entirely* on the "*Obligation Principle*" meaning that an unrecognised foreign judgment automatically, and without more, gives rise to a true legal obligation to comply with the order of the foreign court and so as to give rise to a "*debt*" "*owed*" and "*payable …*". For the reasons set out in Section C above, that is wrong.

(3) ***Thirdly***, notwithstanding ST's apparent concession that an unenforceable debt is not petitionable (AWC 30-31 **[A/2/23]**), it largely assumes that the meaning of a "*debt…* (Page 23)

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[69] **Briggs**, **Conflict of Laws**, 5th edn: "*The foreign judgment, if it satisfies the requirements of the common law, is understood to create an obligation, a tie of law, by which the parties are bound and to which each may hold the other.*" (at 121 **[C/60/1373]**; (Page 1373) see also at 116 quoted at fn 14 above **[C/60/1368]**). Cf. in the BVI, in ***JJW Hotels & Resorts Holding Inc v Rhodes*** BVIHC (Com) 2025/0296 (BVI), 31.3.26, Mithani J (following the Court of Appeal's decision) at [38] **[C/56/1325]**. In §31 of the GOA, ST stated that the Court of Appeal's decision was "*contrary to the position taken in other common law jurisdictions*", but this is not pursued, let alone developed, in the AWC. Mr Drelle therefore assumes it has been abandoned. (Page 1368) (Page 1325)

payable… either immediately or at some certain, future time" is free-standing and divorced from general principles of common law and statute. For the reasons set out above, that is also wrong.

78. To the extent that ST seeks to construe "*debt*" in s. 267 of the IA 1986 by reference to the definition of a "*bankruptcy debt*" in s. 382(1) of the IA 1986, which includes any "*liability*" (as referred to), ST is wrong: s. 267, which governs petitioning, gives no definition of "*debt*".[70] S. 382(1) is thus of no relevance to Ground 1.

79. As to provable debts (AWC 28) **[A/2/22] – [A/2/23]**, there are three reasons why any ability to prove in bankruptcy does not assist in the determination of the central issue in this appeal: (Page 22)

(1) As set out above, an unrecognised foreign judgment has no direct operation in this jurisdiction; moreover, it does not give rise to a "*debt*" – i.e., a present obligation to pay the sum ordered by a foreign judgment. However, it is undoubtedly the case that a foreign judgment does give rise to a cause of action – the common law action on the judgment – and so a foreign judgment claimant would be relying upon *that English claim* to prove in bankruptcy (rule 14.2 of the Insolvency Rules). It would then be for the trustee-in-bankruptcy to assess the likelihood of the claim succeeding before the English court.

(2) Again as set out above (see, paragraph 57), even if there is an obligation – under the "*Obligation Principle*" – the obligation is at best a contingent one: and so, while not petitionable, it would nonetheless be provable.

(3) In any event, there is a critical distinction between, on the one hand, using an unrecognised foreign judgment in order to petition for bankruptcy, which undoubtedly uses the foreign judgment as a sword, and on the other hand, relying upon the foreign judgment, and the English law claim to which it gives rise, to present a proof in circumstances where the bankruptcy order has *ex hypothesi* already been made.

D(1)(a) "Misunderstanding of *Rubin*"

80. It is, with respect, ST, and not the Court of Appeal, that misunderstands ***Rubin***. Lord Collins was, for the reasons set out above, correct to say at [9] that the "*Obligation Principle*" was "*a purely theoretical and historical basis for the enforcement of foreign judgments at common law*";

[70] ***McGuinness v Norwich and Peterborough Building Society*** *supra* at [14]-[16] **[C/28/791]–[C/28/792]**. (Page 791) Further, for a debt or liability to qualify as a "*bankruptcy debt*" under s. 382(1)(a), it must be one to which the bankrupt was subject "*at the commencement of the bankruptcy*", i.e. which commences (per s. 278) after the bankruptcy order has been made.

moreover, his Lordship held that the doctrine of obligation "*makes no practical difference to the analysis*…" and not just the "*analysis" __in__ **__Rubin__**" (the underlined words having been added by ST at 37 **[A/2/25]**), because otherwise it would have been superfluous for Lord Collins to have gone on to say: "…*nor, in my judgment, to the issues on these appeals."* The fact that Lord Collins *__was__* seeking to "*cut down or undermine*" the doctrine of obligation (AWC 35) **[A/2/25]** is demonstrated by the fact that, following the part quoted by ST at AWC 37 **[A/2/25]**, Lord Collins went on to say "*__But__, this is a purely theoretical and historical basis*…". (Page 25)

81. As already addressed above, ST's argument based on the "*Obligation Principle*" is wrong, and Lord Collins' *dicta* do not support it (cf. AWC 35) **[A/2/25]** .

D(1)(b) "Irrelevance of the Revenue Rule and the Penalty Rule"

82. The revenue rule is not irrelevant; nor did the Court of Appeal "*conflate*" a foreign revenue claim with an unrecognised foreign judgment (AWC 40-41) **[A/2/26]**. (Page 26)

83. ST (at AWC 42) **[A/2/26]** seeks to re-interpret, and narrow, the rationale for the revenue rule, by submitting that it can be explained by its common characteristics with a foreign penal claim, in that both are actions on behalf of a government. That is, with respect, a surprising submission because only two and a half years ago, the Supreme Court confirmed that the rationale for the revenue rule is that a foreign revenue claim *__is__* an assertion of sovereign authority.[71] Thus the revenue rule is a "*particular manifestation*" of a more fundamental rule, which underlies the common law's treatment of both foreign revenue claims and foreign judgments: namely, that a foreign exercise of sovereign power is territorially limited.[72]

84. Further, the fact that **Dicey**, Rule 20 and Rule 45 are not *identical* does not mean there is "*no relevant analogy*" to be made (cf. AWC 41, 46) **[A/2/26] [A/2/28]**. They share a similar root and the analogy is, for the reasons set out in Section B(4) above, a good one. (Page 28)

85. Moreover, ST overlooks the primary significance of the revenue rule: as the Court of Appeal held, if a foreign revenue claim does not give rise to a petitionable debt (notwithstanding that it might otherwise be said to be a claim for the payment of a liquidated sum which is said to be immediately payable), then that "*tends to support the contention that an unrecognised foreign*

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[71] ***Skatteforvaltningen*** *supra* per Lord Lloyd-Jones at [22] **[C/47/1167]**. Indeed, many claims by foreign governments for wrongs done to foreign governments (and thus not "*to individuals*") *are* permissible. So, this cannot be the only feature of a foreign revenue claim that is relevant (as, indeed, ST seems to implicitly recognise at AWC 73 **[A/2/35]**). (Page 1167) (Page 35)

[72] **Briggs, 2013 LQR** at 88. **[C/59/1353]** (Page 1353)

judgment, which has no "direct operation" because it arises from an exercise of sovereign power, is likewise not to be seen as giving rise to a "debt" capable of founding bankruptcy proceedings."[73]

D(1)(c) "Confusion between debt and remedy"

86. ST's submission is that the Russian Judgment "*created an immediately payable debt*" in Russia, and that Mr Drelle's obligation arising from the Russian judgment to pay the sum awarded under it carried over from Russia into an immediately enforceable obligation in this jurisdiction (**[A/2/29] – [A/2/30]** 50-51 and 56 **[A/2/31]**). That submission is wrong for several reasons. (Pages 29, 31)

87. ***First***, it is contrary to **Dicey**, Rules 45 and 46(1) and (2) as already addressed above. There is no such immediately payable debt or true, legal obligation which crosses over from Russia to England & Wales. See also **Piggott** as cited in paragraph 8 above. ST's submission ignores the nature of foreign judgments at common law and wrongly collapses foreign into domestic judgments. It is unsurprising that ST has cited no authority for its submission.

88. The fallacy of ST's submission may be illustrated by the decision of the House of Lords in the ***Government of India*** case**[C/17/622]** where there clearly was an immediately payable obligation *in India* to pay the Indian revenue claim; but what mattered for the English court was whether the claim was enforceable *in England*. That question was determined by application of English rules of conflicts of laws. The House of Lords held that the claim was barred, irrespective of the position in India. (Page 622)

89. ***Secondly***, and relatedly, ST's argument depends on the plainly wrong contention, which is contrary to authority, that the legal obligation to be enforced is one governed by (here) Russian law.[74] As was made clear by Parker LJ in the Court of Appeal in ***Owens Bank Ltd v Bracco*** *supra* at 457C-D, when referring to the "obligation" theory and the action at common law, "*the right, which the plaintiff seeks to enforce in such proceedings,*[75] *is a right created and defined by <u>English</u> law and not by foreign law*." Therefore, " *in order for the foreign judgment to be enforced in this country, it is essential that the foreign court should have had jurisdiction over the defendant, not in the sense of the foreign law but according to the rules of our law:..*".

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[73] Per Newey LJ at [42]-[43] **[A/6/143]-[A/6/144]**; see also, per Snowden LJ at [65]-[69] **[A/6/151]-[A/6/152]**. (Pages 143, 151)

[74] This follows from AWC 50, 51 and 56. **[A/2/29]-[A/2/31]** (Page 29)

[75] "*such proceedings*" being a reference to the common law action on the judgment; see, at 457B **[C/33/873]**: "*The first method of enforcement here of a foreign judgment was by an action upon the judgment. The foreign judgment, in the absence of statute, could have no direct operation in England and Wales because of the principle of the territoriality of a court's jurisdiction…*". (Page 873)

90. If ST were right that the obligation was subject to foreign law, then the question whether the foreign court had jurisdiction or whether the foreign judgment was impeachable, would be decided according to *foreign law*, and not English law (and as reflected in the **Dicey** Rules). That is why, unlike in the case of contractual obligations, there is no separate **Dicey** Rule (or provision in Rome I or Rome II) for identifying the law applicable to foreign judgments.

91. ***Thirdly***, ST's contention overlooks the fundamental differences between a foreign contract and a foreign judgment. ST is wrong to submit that "*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*." (AWC 50(4) **[A/2/29]**; ST's emphasis) A contract derives its force from the parties' agreement; the English court will apply foreign law to a contract if that is the consequence of *English* rules on the conflict of laws (as ST's quotation of ***Holman v Johnson*** 98 ER 1120 (KB) **[C/19/650]** at AWC 44 **[A/2/28]** makes clear). ST's reliance on ***De La Vega v Vianna*** (1830) 109 ER 792 **[C/14/581]** (AWC 52) **[A/2/30]** is misplaced: in that case, the debt "*was contracted*" in Portugal; it did not arise under a foreign judgment. The case has no relevance to the issues here. (Page 29) (Pages 650, 28) (Page 581) (Page 30)

92. By contrast, a foreign judgment derives its force from the sovereign authority of the foreign court and, as a result, it has no direct operation in this jurisdiction. Recognition and enforcement of foreign judgments depend upon *English* rules on the conflict of laws, most obviously here, **Dicey**, Rules 45 and 46(1) and (2).[76] Further, it is an "*internationally accepted principle that enforcement of a judgment is a matter for the courts of the state where the asset against which it is sought to be enforced is located.*"[77]

93. ST's reliance on ***In Re McGreavy*** is misplaced, and the Court of Appeal was right to distinguish it (per Newey LJ at [51]-[52] **[A/6/147]**). In that case, the unpaid rates that formed the basis of the bankruptcy petition were to be regarded as "*due and payable*" (see, per Somervell LJ at 274 **[C/41/1070]**), notwithstanding that the local authority could not bring a claim to recover unpaid arrears, but only an action in distress (at 273-274 **[C/41/1069] – [C/41/1070]**). The fact of such limitation did not negate the fact that the unpaid rates were "*due and payable*". The case, therefore, proceeds on the basis of an *already existing* English law obligation which had given rise to a payable debt. By contrast here, for the reasons set out above, there was no payable debt in English law. (Page 147) (Page 1070) (Page 1069)

[76] ***USA v Inkley*** [1989] QB 255 per Purchas LJ at 265; **Briggs, Conflict of Laws**, 5th edn, at 120 **[C/60/1372]**. (Page 1372)
[77] ***SAS Institute Inc v World Programming Ltd*** *supra* per Males LJ at [83].

94. Contrary to ST's submission, there was no "*confusion between Debt and Remedy*". For the reasons set out above, it is clear from the English rules on the conflict of laws that a foreign judgment has no operation in this jurisdiction unless and until it is recognised, and is enforceable, and may be enforced, only by a common law action on the judgment, and not otherwise.

D(2) <u>Ground 3: "Foreign exercise of sovereign power"</u>

95. Ground 3 seeks to challenge the distinction drawn by the Court of Appeal between using a foreign judgment as a sword as opposed to a shield, on the basis that (i) the distinction is said to be "*misleadingly stark*" (though it is never truly explained why), and (ii) English courts routinely give "*due effect*" to foreign law when adjudicating disputes (AWC 60**[A/2/32]**, 63-69 **[A/2/33] – [A/2/34]**). It is not a promising start to ST's argument that the distinction was not devised by the Court of Appeal: it is inherent in **Dicey**, Rule 45. (Pages 32, 33)

96. Ground 3 is also something of an Aunt Sally: it seeks to interpret "*enforcement*" as occurring whenever a foreign judgment or foreign law is given "*due effect in England*" (**[A/2/32] [A/2/34]** 63, 69) or "*appropriate effect*" (AWC 68 **A/2/33]**) and then to point out that English courts routinely give effect to foreign law in particular cases. But this has nothing to do with the recognition and enforcement of foreign judgments in a case such as this, as reflected in **Dicey**, Rules 45 and 46. Moreover, it seems to collapse the distinction between recognition and enforcement. (Pages 32, 33, 34)

97. For the reasons already set out above, the Court of Appeal rightly held that a foreign judgment cannot be enforced *as such*: the foreign judgment claimant must bring an action on the judgment and it is then the resulting English order that can be enforced (by execution, bankruptcy proceedings, or however else the foreign judgment claimant chooses to use it).[78]

98. The cases cited by ST in **[A/2/33]** 68 do not assist it.

(1) In ***Lazard Bros. & Co. v Midland Bank Ltd*** [1933] AC 289 both sides' experts on Soviet law agreed that the Industrial Bank had, under Soviet law, ceased to exist in Russia. Thus the writ, judgment and garnishee proceedings had to be set aside. As Lord Wright stated (at 302) **[C/23/696]** "*No question here is involved of the extraterritorial effect of legislation, confiscatory or otherwise, since the dominant fact is the dissolution of the corporation, which depends on territorial enactments of the country of incorporation according to which either the existence or the non-existence of the corporation is recognized by the law of other countries.*" It is in that sense that (Page 696)

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[78] See, per Newey LJ at [13], [39] and [55] **[A/6/131], [A/6/143], [A/6/148]**; per Snowden LJ at [64] **[A/6/150]**. (Pages 131, 143, 148, 150)

the words cited in at AWC 68(1) **[A/2/33]** are to be understood. The English court was doing no more than accepting as a proved fact of Soviet law that the corporation did not exist. It is but an example of the settled practice of our courts recognising the power of other sovereign states to create and exercise authority over entities subject to their jurisdiction.[79] It has nothing to do with the enforcement of foreign judgments at common law. (Page 33)

(2) The 1764 case of ***Solomon v Ross*** **[C/49/1223]** is merely an example of the common law recognising the effect of foreign personal bankruptcies declared under the law of the domicile status and standing of the Dutch curators as trustees.[80] Again, it has nothing to do with the enforcement of foreign judgments at common law. (Page 1223)

99. English courts apply foreign law when, as a result of the application of *English* rules on conflict of laws,[81] it is determined to be the law applicable to the relevant legal category (see, **Dicey**, 1-027). Foreign law is proved, *as a fact*, and then applied *by the English court* resulting in *an English order* either dismissing the claim or ordering a party to do something (e.g. pay a sum of money). That is very different to a party seeking to give direct operation or effect in this jurisdiction to a foreign judgment, which cannot be done and where **Dicey**, Rules 45 and 46(1) and (2) apply.

100. ST rightly accepts that there may be no execution of a foreign judgment "*as if it were an English judgment*" (AWC 62) **[A/2/32]**. That can only be because it accepts the correctness of **Dicey**, Rules 45 and 46(1)-(2). But if that is the case, ST does not explain how petitioning for bankruptcy on the basis of an unrecognised foreign judgment (i) is anything other than seeking to give "*direct operation*" or legal effect to the foreign judgment; or (ii) is not going beyond what is explicitly permitted by **Dicey**, Rules 45 – 46(1)-(2); or (iii) is, therefore, not treating the foreign judgment as if it indeed it was an English judgment. (Page 32)

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79 See the explanation in ***The Law Debenture Trust Corpn. plc v Ukraine*** [2023] UKSC 11; [2024] AC 411 at [29] **[C/51/1283] – [C/51/1284]** per Lords Reed PSC, Lloyd-Jones, Kitchin JJSC with whom Lord Hodge DPSC agreed. See also ***Maduro Board*** at [135]: the rule that "… *courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state*." **[C/25/720]** (Page 1283) (Page 720)

80 See the explanation in ***Rubin*** per Lord Collins at [11] **[C/43/1122]** and [32] **[C/43/1124]**. (Page 1122)

81 See, per Lord Mansfield in ***Holman v Johnson*** at 1121, quoted by ST at §44 of its written case: "*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*…"**[C/19/651]** (Page 651)

D(3) Ground 4: "No "Direct" Operation, Effect, Execution or Enforcement"

101. Aside from the fact that Ground 4 persists in the wrong assumption that the foreign money judgment is – before recognition by the English court – "*unimpeachable*", it seeks to draw a distinction, apparently for the purpose of avoiding the application of **Dicey**, Rules 45 and 46(1)-(2), between "*execution of a judgment*" and "*enforcement of a claim*" (AWC 71, 75, 77, 79-81) **[A/2/34] – [A/2/37]**. ST thus contends that the institution of bankruptcy proceedings is not "*execution or direct enforcement, etc., of the foreign judgment creditor's (and indeed any other creditor's) claim*" (AWC 77 **[A/2/36]**). (Page 34) (Page 36)

102. ST's contention proceeds, with respect, from a misreading or misunderstanding of **Dicey**, Rules 45 and 46(1) - (2). As submitted already above, the foreign judgment has no direct *operation*, or legal effect, in this jurisdiction. All that the foreign judgment claimant can do is that which is permitted by those Rules.

103. The ancient case of ***Dupleix v De Roven*** (1705) 2 Vern. 540 (AWC 79 **[A/2/37]**) does not assist ST. In fact it is consistent with Mr Drelle's case inasmuch as the Lord Keeper stated that the plaintiff could "*maintain no action here, but an indebitatus assumpsit*" (i.e., the common law action on the judgment, in the then form of *indebitatus assumpsit*). The foreign judgment in that case was enforceable *only* by way of the action at common law. (Page 37)

104. Such being the case, the various differences advanced by ST as between "*enforcement*" and "*execution*" or "*direct enforcement*" and "*direct execution*" are all distinctions without a difference. Moreover, this can also be seen from considering the nature of execution. "[E]*xecution*" has been described as "*an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim.*"[82] Bankruptcy and winding-up proceedings similarly involve the seizure by the state of the alleged debtor's assets to satisfy creditors' claims; the only difference is that the assets are seized to satisfy creditors' claims as a class, and not the claim of one individual creditor only. That is why it is often described as a form of "*collective execution*". It is certainly a no less coercive or intrusive incursion upon the debtor's right to the free enjoyment of his assets than the methods of execution available under the CPR.[83]

105. Moreover, ST accepts that the enforcement of a foreign judgment (other than petitioning for bankruptcy, or winding-up) requires it first to be recognised at common law or registered (as the case may be). There is no good reason why that requirement should fall away if the

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[82] In ***Société Eram*** *supra* per Lord Hoffman at [54].

[83] Indeed, it might be thought to be more intrusive than, for example, an attachment of earnings order because upon the bankruptcy order all of the debtor's property vests in the trustee in bankruptcy.

claimant desires instead to invoke this country's collective bankruptcy or insolvency procedures.

106. ST submits that a bankruptcy order invokes "*a proceeding governed by English law and overseen by an English statutory officeholder*" and that enforcement through bankruptcy proceedings is "*mediated entirely through and governed entirely by English law processes*" (AWC 76-77 **[A/2/36]**). (Page 36) Quite so. But the other methods of execution similarly involve English law, are mediated through and governed by English processes, and may involve English officers. Indeed, English money judgments, while enforceable pursuant to the methods identified in AWC 78 **[A/2/36]**, are <u>*also*</u> enforceable (and routinely enforced) through bankruptcy or winding-up proceedings. That demonstrates what is in any event obvious: execution is merely a subset of enforcement.

107. ST also understates the significance of recognition (AWC 82 **[A/2/37]**). The purpose of (Page 37) recognition proceedings is not merely to "*take notice of the foreign judgment in some relevant way*". Recognition is, as stated above, the "*necessary primary concern*". The purpose of recognition proceedings is to determine if the foreign judgment (i) was given by a foreign court with jurisdiction to give the judgment in accordance with the principles set out in **Dicey**, Rules 47 and 48, (ii) is not impeachable under any of **Dicey**, Rules 52 to 55, and (iii) is final and conclusive on the merits.[84] It is only if, in the case of a foreign money judgment, the English court has determined those matters in favour of the foreign judgment claimant, that effect can be given to the foreign judgment resulting in the derivative English order for payment.

108. One of the fundamental problems with the argument that a bankruptcy court can equally consider whether the conditions for recognition are met (AWC 84 **[A/2/38]**), is that there (Page 38) needs to have been <u>*at the time the petition is presented*</u> a "*debt*" that is "*payable either immediately or at some certain, future time*": s. 267(2) of the IA 1986. If – as ST suggests – it is the bankruptcy court that is to decide whether the foreign judgment is to be recognised, that can obviously only occur <u>*after*</u> the petition has already been presented. But that is too late.

109. In any case, the purpose of bankruptcy proceedings is to *enforce*, not to *establish* rights: they "*d*[o] *not either create new substantive rights in the creditors or destroy old ones*…"[85] Thus, and aside from the fact that, as ST accepts (AWC 86 **[A/2/39]**) there is the "*well-established principle of* (Page 39) *procedure that the insolvency court is not the forum to resolve disputes*", it is not for *the bankruptcy court*

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[84] See **Dicey**, Rule 46(2). **[C/61/1389]** (Page 1389)

[85] ***Wight v Eckhardt Marine GmbH*** [2003] UKPC 37; [2004] 1 AC 147 per Lord Hoffman at [27] (in the context of winding-up proceedings, but the same principles apply) **[C/53/1296]**. See also, ***Cambridge Gas*** per (Page 1296) Lord Hoffman at [14]-[15].

to address the issue of whether a foreign judgment should be recognised or enforced within the meaning of **Dicey**, Rules 45 and 46(1) and (2). To be entitled to present a bankruptcy petition, the foreign judgment must *already* have been recognised and the foreign judgment claimant must *already* have an English order for payment.

D(4) <u>"The position under the 1933 Act"</u>

110. This has already been addressed for the most part in Section B(5) above.

111. The *dicta* of Nicholls LJ in ***In re a Debtor (No. 1 of 1987)*** relating to the IA 1986 (AWC 93 **[A/2/40]**) are of no relevance to the interpretation of ss. 2(2) and 6 of the 1933 Act. (Page 40)

112. As for the Privy Council case of ***Sian Participation Corp (in liquidation) v Halimeda International Ltd*** [2024] UKPC 16; [2025] AC 1321 ("***Sian***") **[C/48/1182]**, that case is (Page 1182) about the interplay between insolvency and arbitration: specifically, whether a creditor's winding-up petition based on a disputed debt arising under a contract containing an arbitration clause, should be stayed or dismissed, and whether such a petition is a "*claim*".[86] It is not concerned with the recognition or enforcement of foreign judgments, nor with any registration regime for such judgments.

113. The Board in ***Sian*** repeated the well-established proposition that the process of seeking and obtaining a winding-up order does not require or involve the pursuit or adjudication of a "*claim*" (or "*action*") within the meaning of the UK and BVI Arbitration Acts.[87] Accordingly, it does not bear on the interpretation of the 1933 Act, including s. 6, as to which Mr Drelle relies on the submissions as in Section B(5) above. Put simply the fact that petitioning under the insolvency legislation is not a "*claim*" or "*action*" for the purpose of the Arbitration Acts here and in the BVI does not mean that "*proceedings for the recovery of a sum payable under a foreign judgment*" in s. 6 of the 1933 Act do not encompass bankruptcy proceedings.

114. ST submits (AWC 99 **[A/2/42]**) that if Parliament had intended that the holders of (Page 42) unrecognised and unregistered judgements (or, as it puts it, non-registrable and registrable judgments) be treated "*the same way for all purposes*", it could have "*made all foreign judgments registrable*".

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[86] Within the meaning of the Arbitration Act 1996, or the equivalent "*action*" within the meaning of the Arbitration Act 2013 (BVI).

[87] Given the particular rules of interpretation where a statute is based on an international treaty or convention, including that there is the "*broad international consensus that the approach to the interpretation of arbitration agreements should be pro-arbitration and expansive*": see at [44]-[49] **[C/48/1203] – C/48/1206]** in ***Sian***. (Page 1203)

115. The first difficulty with this submission is that the question is not whether Parliament intended the two categories to be treated identically for all purposes; it is whether Parliament intended by s. 267 to enable the holder of an unrecognised foreign judgment to petition without any prior recognition step, albeit that the holder of an unregistered foreign judgement could not. For the reasons set out above, it plainly did not.

116. The second difficulty is that Parliament could not in any event "*have made all foreign judgments registrable*" for two reasons. ***First***, the 1933 Act is founded on reciprocity — the Act's long title and s.1(1) make clear that registration is extended to a foreign country only where substantial reciprocity of treatment is assured as regards the enforcement of United Kingdom judgments in that country. Parliament could not extend the Act to states unwilling to reciprocate. ***Secondly***, and more fundamentally, the premise of ST's submission is false: the common law *already* applied to judgments from non-reciprocating countries. A creditor holding such a judgment was not left without remedy; it could bring an action on the judgment and, upon obtaining an English judgment, enjoy the same fruits available to the holder of a registered judgment. The 1933 Act replaced the common law action for judgments from reciprocating countries by way of a faster and simpler registration procedure.

D(5) <u>Ground 2: "Article 13 of the Model Law"</u>

117. The argument advanced by ST in Ground 2 is that the Model Law, as enacted in the UK in Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("**CBIR 2006**") **[C/6/453]**, (Page 453) requires it to be treated as if it is the holder of an *English* judgment; even though it is not the holder of an *English* judgment, but only an (unrecognised) foreign judgment (AWC 137 (Page 55) **[A/2/55]**, 157 **[A/2/59]**). For the reasons set out below, such argument is wrong and (Page 59) proceeds on contorted and fallacious reasoning to support the proposition that "*foreign creditor*" in Article 13(1) of the Model Law does not mean a creditor that is not "*in Great Britain*", but instead means a creditor "*whose claim arises pursuant to a foreign law*" (AWC 128 (Page 52) **[A/2/52]**).

118. ***First***, Article 13 is merely a non-discrimination provision, providing that "*foreign creditors*" have the same rights as "*creditors in Great Britain*" regarding the commencement of, and participation in, a proceeding under "*British insolvency law*". It says nothing about the proper law of the claims of any creditors, let alone "*foreign creditors*". Article 13 is concerned only with contrasting two types of creditor: those "*in Great Britain*" and those that are not, i.e. "*foreign*". That is confirmed by Article 1(1)(d), setting out the scope of the Model Law, which

provides that it applies where "*creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under British insolvency law*". It would be very odd if a creditor *in* Great Britain, but whose claim was governed by foreign law, should therefore be a "*foreign creditor*", but that is where ST's argument leads.

119. Article 14 confirms that ST's argument is wrong. The UNCITRAL Guide to Enactment and Interpretation makes clear (at §121) **[C/68/1650]** that Article 14 is "*a corollary to the principle of equal treatment established by article 13,* [requiring] *that foreign creditors should be notified whenever notification is required for creditors in the enacting State.*" As ST is forced to accept (AWC 148 **[A/2/57]**), it is clear beyond doubt that in Article 14 "*foreign creditors*" means "*creditors that do not have addresses in Great Britain.*" There is no good reason – and indeed it would be irrational, unless otherwise made explicit – for "*foreign creditors*" to have different meanings in the different Articles. Indeed, the fact that Article 13 and 14 originated as a single provision confirms what is in any event obvious: "*foreign creditor*" means the same thing in both Articles.[88] (Page 1650) (Page 57)

120. ***Secondly***, it would be surprising if Article 13 had the interpretation contended for by ST, because it is well established that the Model Law is intentionally limited in scope to the *procedural aspects* of cross-border insolvency, and does not attempt a substantive unification of insolvency law; it follows that any changes to substantive rights will only be done *explicitly*: see ***Re OJSC International Bank of Azerbaijan*** [2018] EWCA Civ 2802; [2019] BCC 452 per Henderson LJ at [88]-[91] **[C/32/853] – [C/32/854]**, not cited by ST.[89] In fact, a good example of the Model Law altering substantive law *explicitly* is Article 13(3), reversing the revenue rule in English insolvency proceedings. Further, it is difficult to see what the point of Article 13(3) is if ST is right in its interpretation that all foreign claims must be treated the same as equivalent domestic claims; on its case, the creditor with a foreign revenue claim (barred at common law) is to be treated as a creditor with an English revenue claim (not barred at common law). (Page 853)

121. In this regard, ST's argument, that a creditor with a foreign money judgment is entitled to be treated as if they held an English money judgment, would have the effect of overriding the common law and statutory rules regarding the recognition and registration of foreign judgments, both as to whether the foreign court had jurisdiction over the defendant and

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[88] Cf AWC 152 **[A/2/58]**. This is not a case where it "*makes no sense or does not reflect any rational policy*" to give the term the same meaning in both places (cf AWC 112 **[A/2/46]**). (Page 58) (Page 46)

[89] See also, the Guide at §21 **[C/68/1614] – [C/68/1615]** and ***Rubin*** per Lord Collins at [142]-[144] **[C/43/1127] – [C/43/1128]**. (Page 1614) (Page 1127)

whether the foreign judgment was impeachable. Plainly that is not what the Model Law provides or can have intended. ST appears to be sensitive to this point: see AWC 139 (Page 55) **[A/2/55]**.[90] However, that does not help it because the issue is not whether "*the claim of an English money judgment creditor may be challenged*" but rather whether a foreign judgement should be recognised and enforced at common law, or indeed under the 1933 Act.

122. ***Thirdly***, ST submits (AWC 101 **[A/2/43]**) that "*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"*." This is the foundational step in ST's argument. However, despite appearing in quotation marks, "*an equivalent local claim*" is language that appears nowhere in Article 13 of the Model Law. Rather, it is a phrase which appeared in italics in square brackets in the 1997 text of the Model Law, as referenced at AWC 127 **[A/2/51]**. The second paragraph of Article 13 of the Model Law, as in fact set out in Schedule 1 to the CBIR 2006, makes no reference to "*an equivalent local claim*" and instead refers to "*the claim of a foreign creditor*" not being given "*a lower priority than that of general unsecured claims solely because the holder of such a claim is a foreign creditor*". Thus the language *in fact* used in the Model Law in the CBIR 2006, far from supporting ST's argument (e.g. AWC 114 **[A/2/46]**, 118-120 **[A/2/49] – [A/2/50]**) that Article 13 refers to a "*foreign creditor*" whose claim "*arises pursuant to a foreign law*", is against it. (Page 43) (Page 51) (Pages 46, 49)

123. ***Fourthly***, ST continues to make much of the original text, in relation to Article 13(2) (AWC 133 **[A/2/53]**), which provides that the principle of non-discrimination articulated in Article 13(1) "*does not affect the ranking of claims*" under the laws of the enacting State relating to insolvency "*except that the claims of foreign creditors*" shall not be ranked lower than "*the class of non-preference claims*" [under the laws of the enacting State], although "*a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim… has a rank lower than the general non-preference claims*". (The alternative text makes similar provision save that it preserves the right of the enacting State to exclude "*foreign tax and social security claims*") But all that the "*original*" Article 13(2) shows is that when the drafters intended to refer to foreign (or local) *claims*, they made that clear.[91] Article 13(2), in whatever version, does not result in the interpretation of "*foreign creditor*" in Article 13(1) for which ST argues. (Page 53)

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[90] Arguing that the grounds for challenging an *English* judgment will remain available.

[91] There is nothing to support ST's submission that "*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… is "foreign"*" (AWC 130 **[A/2/52]**). (Page 52)

124. ST is therefore wrong to argue that (in Article 13 or generally) "*foreign*" is a "*proxy*" for "*foreign law*" (AWC 120-122 **[A/2/50] – [A/2/51]**). It is clear that "*foreign*" can describe "*law*" (see, Article 5), it is also clear that "*foreign*" can refer to the location (as ST accepts: see, AWC 132(2) **[A/2/53]**; see also, "*foreign newspapers*" in Article 14(2) where "*foreign*" has nothing to do with foreign law). The obvious point is that "*foreign*" takes its meaning from the context in which it is used. In Article 13(1), "*foreign*" takes its meaning, as above, from the contrasting expression "*in Great Britain*". (Page 50) (Page 53)

125. ***Fifthly***, ST relies on comments in the *travaux* and the Guide about providing an alternative mechanism for the recognition of foreign insolvency proceedings, to avoid local approaches "*based purely on the doctrine of comity or on exequatur*" (the civil law process to formally recognise a foreign judgment and make it enforceable). They are concerned with the recognition of foreign insolvency proceedings (see, Chapter III of the Model Law ("*recognition of a foreign proceeding and relief*")) and therefore do not assist in the proper interpretation of Article 13.

126. ***Sixthly***, ST's argument assumes that its claim – i.e. the action on a foreign judgment – is one governed by Russian law, but for the reasons set out above (see, Section D(1)(c) above) that assumption is wrong. It is an English cause of action, governed by English law.

127. Thus, all that Article 13(1) of the Model Law does is to provide, by reference to the case at hand, that a Russian holder of a Russian judgment is to be treated no differently from the English holder of a Russian judgment. Thus, just as a "*creditor in Great Britain*" with a claim arising from an unrecognised foreign money judgment cannot petition for the foreign judgment debtor's bankruptcy (for all the reasons set out above) so too a "*foreign creditor*", such as ST, with the benefit of a foreign money judgment, also cannot so petition. Ground 2 therefore is not "*sufficient to dispose of the appeal*", nor does it constitute an "*alternative*" to Grounds 1, 3 and 4 (AWC 102 **[A/2/43]**). It is, in any event, misconceived. (Page 43)

E. THE RESPONDENT'S GROUNDS OF APPEAL

E(1) Introduction

128. If (contrary to the above) a bankruptcy petition can be presented on the basis of an unrecognised foreign judgment (the "**petitionability issue**"), the Court of Appeal's order, allowing the appeal and setting aside the bankruptcy order, should nevertheless be upheld because ICCJ Burton erred in concluding that the debt was not subject to a genuine and substantial dispute, and Richards J erred in upholding her decision, for the reasons set out

in the grounds of appeal appended to Mr Drelle's notice of acknowledgment and below. Accordingly, ST's appeal should be dismissed in any event for the reasons which follow.

129. There is no merit to ST's contention (AWC 158 **[A/2/59]**), made for the first time in its written case, that this Court should decline to decide Mr Drelle's grounds, on the basis that they do not raise an important point of principle or practice, or of public importance.[92] (Page 59)

130. ***First***, Mr Drelle exercised his right pursuant to the Supreme Court Rules 2024 ("**SCR**"), r. 22(3) to argue that the Court of Appeal's order should be upheld on grounds different to those relied upon by the Court of Appeal, stating so clearly in the notice of acknowledgment. As the rules make clear, he did not need to cross-appeal, and accordingly he does not need to demonstrate a point of general public importance before the grounds will be heard.[93]

131. ***Secondly***, Mr Drelle obtained permission to appeal from the Court of Appeal to appeal to it on these grounds. But the Court of Appeal ruled that it did not need to decide Mr Drelle's further grounds because he had won before it on the petitionability issue; that was sufficient to dispose of the appeal in his favour (per Newey LJ at [57] **[A/6/149]**). If ST succeeds on the petitionability issue, then Mr Drelle is entitled to have this Court hear and determine the very grounds for which he had secured permission from the Court of Appeal but which it had never determined. Yet ST's surprising submission would have this Court treat Mr Drelle as if he had lost on those grounds. That is manifestly unjust. (Page 149)

132. Accordingly, the Supreme Court should hear and determine these grounds.

E(2) <u>Summary</u>

133. This is not a case – like, for example, ***Maximov v Novolipetsky Metallurgichesky Kombinat*** [2017] EWHC 1911 (Comm); [2017] 2 CLC 121 ("***Maximov***") **[C/27/750]** – where Mr Drelle's case that the Russian Judgment is impeachable for bias/fraud depended *<u>only</u>* on inference from alleged procedural and substantive errors on the part of the Russian court.[94] In this case: (Page 750)

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[92] There was (rightly) no suggestion when Mr Drelle filed the notice of acknowledgment, nor in the many months that followed, nor when agreeing the SFI (see, §45), that it objected to Mr Drelle raising or relying upon these grounds of appeal.

[93] Cf. a cross-appeal: SCR, r. 23.

[94] C.f. ***Maximov*** per Sir Michael Burton GBE at [2] **[C/27/752]** and [53] **[C/27/778]**. (Pages 752, 778)

(1) Mr Drelle's expert on Russian law, Mr Kulkov, identified a swathe of procedural and substantive issues with the Russian proceedings, which were "*largely disputed*" by ST's expert,[95]

(2) Those errors could not be divorced from, and supported, the evidence of Mr Drelle's expert on state interference/bias in Russian proceedings, Mr Lough **[B/6/264]**. (Page 264) ICCJ Burton found Mr Lough's report "*uncomfortable reading*". That is unsurprising, not least given his conclusion that "*with GPN driving the case, Mr Drelle stood no chance of winning in court*" (per ICCJ Burton at [21] **[A/13/198]**, [125] **[A/13/234]**). (Pages 198, 234)

(3) That was not all. There was evidence that Mr Dyukov – GPN's CEO and a close personal friend of President Putin, and who is now subject to UK sanctions – had taken a "*keen interest*" in "*the affairs of ST*" (per ICCJ Burton at [128] **[A/13/234]**). Mr Dyukov (Page 234) had written a letter to the Major General of the Police "*strongly urg*[ing]" a criminal investigation into Mr Drelle's conduct, which was said to have caused damage to "*Public Joint Stock Company Gazprom Neft <u>and thereby the Russian Federation</u> as Gazprom Neft PJSC's controlling shareholder because the participation interest held by Gazprom PJSC in Gazprom Neft PJSC is over 95%*". Predictably, criminal proceedings were duly brought against Mr Drelle **[B/5/260]**. (Page 260)

(4) Perhaps most significantly, however, Ms Zheglova, *ST's* finance officer, gave evidence **[B/3/244]** (as ICCJ Burton summarised it) "*that she was informed by a well-placed* (Page 244) *third party, that the chairman of the Commercial Court had informed the third party that the case against Mr Drelle was pre-determined.*" (at [21]; see also, [115])

134. That evidence, which had to be assessed <u>*in the round*</u>, should have been enough to give rise to a genuine and substantial dispute that the Judgment was impeachable for bias/fraud, particularly given the low bar that this threshold sets for an alleged debtor.[96] The judges below (ICCJ Burton and Richards J) essentially failed to see the wood for the trees, and wrongly concluded that there was no genuine and substantial dispute, for the reasons set out in more detail below.

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[95] This alone should have alerted ICCJ Burton that the impeachability of the Judgment was a matter that could only properly be determined at trial: c.f. ***Joint Stock Company "Aeroflot-Russian-Airlines" v Berezovsky*** [2014] EWCA Civ 20 ("***Berezovsky***") per Arden LJ at [45].

[96] ***Gohil v Gohil (No 2)*** [2015] UKSC 61; [2016] AC 849 per Lord Neuberger P at [49]-[50] **[C/16/618]-[C/16/619]**; ***Berezovsky*** per Arden LJ at [4] (a genuine and substantial dispute being equivalent to the summary judgment threshold). (Page 618)

E(3) Respondent's Ground 2: standard of appellate review

135. Richards J held that, unless the ICCJ could be shown to have erred in law (e.g. by wrongly rejecting Ms Zheglova's evidence on the basis that it was hearsay), he "*should show a high degree of deference to the Judge's conclusion and not interfere with it unless I consider it was not open to the Judge…*" (at [79] **[A/9/174]**). There is simply no authority for showing a "*high degree of deference*" to the first instance judge's conclusions on a summary judgment (or equivalent) application; and the question is not merely whether the judge's conclusion was "*not open*" to them. (Page 174)

136. The correct test is as identified by Sir Terence Etherton C in ***Creation Consumer Finance Ltd v Allied Ford Insurance Services Ltd*** [2015] EWCA Civ 841 ("***Creation Consumer***") at [103] **[C/13/579]** (quoted by ST at AWC 169 **[A/2/61]**). Thus (i) there *may* be a distinction between errors of law and evaluative decisions on the facts likely to be established at trial, but (ii) "*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) (Page 61)

137. ST quotes from ***Malik v Henley Homes plc*** [2023] EWCA Civ 726 (AWC 171 **[A/2/61]**) on which Richards J relied (see, at [76]-[79] **[A/9/173]-[A/9/174]**). The comments of Nugee LJ at [79] were expressly *obiter* (see, [78]) **[C/26/748]-[C/26/749]**, and it is not clear that ***Creation Consumer*** was cited. *Malik* does not provide support for according a judge at first instance a "*high degree of deference*", as compared to "[a]*ppropriate respect*" and "*a degree of reticence*". Moreover, the conclusion that the first instance judge's conclusion could only be interfered with "*if it was one that we are satisfied was not open to him*" was limited to the particular circumstances of that case ("*at any rate in a case like this*"), and the Court of Appeal cannot have intended (in *obiter* comments) to have overruled the further grounds identified by the Court of Appeal in ***Creation Consumer***. (Page 61) (Page 173) (Page 748)

138. As a result, Richards J wrongly set himself an overly high threshold before he could interfere with the decision of ICCJ Burton. This error permeated the entirety of his judgment.

E(4) Respondent's Ground 3: Ms Zheglova's evidence

E(4)(a) Introduction

139. Ms Zheglova gave evidence that Ms Lobanova **[B/3/244]** (the general director of the only audit firm of Nizhnyy Novgorod and in the list of the 100 largest audit and consulting firms in Russia) spoke to Mr Guschev (the Chairman of the Commercial [i.e. Arbitrazh] Court of (Page 244)

the Yaroslavl Region, who has a decisive role in deciding major cases in Russia and with whom the judges allocated to decide cases involving large companies, particularly state-owned companies such as GPN, would discuss such cases and consult on the outcome). Ms Lobanova reported that conversation to Ms Zheglova as follows:[97]

> "… *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…*"

140. This conversation took place on or around 26.1.19 and therefore at a time when the proceedings against Mr Drelle were ongoing.[98]

141. Ms Zheglova's evidence was critical. Mr Drelle was not simply running an argument that one cannot get justice in the Russian courts, nor even that one cannot get justice against State-backed companies such as GPN, nor even that one cannot get justice when the CEO of such a company has demonstrated a "*keen interest*" and such a company is driving the proceedings. Rather, it was that there was also specific witness of fact evidence that the claim against Mr Drelle had been pre-determined against him.

142. Ms Zheglova's evidence was not tested in cross-examination (despite Mr Drelle having offered ST the opportunity to cross-examine her). Nor did ST advance any evidence to contradict it. It is well established that it was therefore only open to the ICCJ to have disregarded her evidence if it was "*manifestly incredible*".[99] It was not manifestly incredible. Indeed, ICCJ Burton made no such finding.[100] The evidence therefore plainly gave rise to (at least) a triable issue.

143. However, ICCJ Burton discounted or disregarded Ms Zheglova's evidence for two wrong reasons. ***First***, that Ms Zheglova's evidence was not "*cogent*" for the *sole* reason ("*As such*…") that it was double hearsay. ***Secondly***, because it only impugned the Russian Judgment, and not any of the Russian appellate courts (see, per ICCJ Burton at [117]).

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97 Zheglova at §§69-85 and 89. **[B/3/253] – [B/3/256]** (Page 253)

98 See, Mr Drelle's unchallenged evidence in his third witness statement dated 4.10.21 at §61: "*The meeting with Ms Zheglova took place at the end of January 2019, and the Russian Court's judgment was only issued in late May 2019, and in between there were a number of Court hearings.*" It is clear from the Judgment itself that the Arbitrazh Court made a number of rulings on the 28.1.19 and 19.3.19 (before giving the Judgment on 24.5.19) **[B/4/259]**. (Page 259)

99 ***Kireeva v Bedzhamov*** [2022] EWCA Civ 35 per Newey LJ at [38]-[39]. **[C/22/679]** (Page 679)

100 Cf. per Newey LJ in ***Kireeva*** at [38]: "…*what the Judge needed to ask himself was whether Mr Bedhzamov's evidence could be rejected without cross-examination because it was manifestly incredible. As I read his judgment, he did not in fact answer that question… However, the Judge was not entitled to dismiss Mr Bedzhamov's evidence "on the balance of probabilities". The real issue was whether Mr Bedzhamov's account was incredible and the Judge made no finding to that effect.*" **[C/22/679]** (Page 679)

E(4)(b) "Double hearsay" and therefore "not cogent"

E(4)(b)(i) ICCJ Burton

144. ICCJ Burton clearly rejected Ms Zheglova's evidence _on the basis that_ it was "*double hearsay*" evidence. She held (at [117] **[A/13/231]**; emphasis added): (Page 231)

> "*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.*"

145. The fact that evidence is hearsay or even double hearsay is not a proper basis to discount it: the evidence was admissible under s. 1 of the Civil Evidence Act 1995 and it was not manifestly incredible. It was therefore not the type of "*fairly extreme case for untested paper evidence to be rejected on that basis*".[101] ICCJ Burton was accordingly wrong in law not to have accepted Ms Zheglova's evidence, and should have held that it gave rise to a serious issue that the Judgment was impeachable for bias/fraud.[102]

146. It follows that (in addition to the errors set out in the next section below) Richards J was wrong to uphold the decision of the ICCJ. In doing so, Richards J held at [120] **[A/9/183]** (Page 183) that the ICCJ had directed herself correctly, by reference to ***Long v Farrer*** *supra*, that she should not disbelieve the evidence "*unless satisfied that it was implausible.*" But that was the wrong test: the evidence had to be "*manifestly incredible*", a far higher threshold.

147. Further, ST is wrong to submit (AWC 183 **[A/2/63]**) that the "*test was not whether there was* (Page 63) *an evidential basis to support the proposition that the case had been predetermined, but whether there was sufficiently* cogent *evidence*": the test *was* whether there was an evidential basis, in the sense of disclosing a serious issue, to support the proposition that the case had been predetermined.

148. The need for "*cogent*" evidence (articulated in ***Maximov***, see per Sir Michael Burton GBE at (Page 759) [15] **[C/27/759]**) cannot be read as imposing some *enhanced* standard of proof on the debtor, rather than reflecting the inherent probabilities of the case:[103] bias is inherently less probable than justice, though, of course, that assumption is truer in some jurisdictions than others (and the evidence of Mr Lough should have led to the conclusion that it is rather more likely

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[101] ***Long v Farrer & Co*** [2004] BPIR 1218 per Rimer J at [61].

[102] It is perhaps not surprising that the ICCJ made this error in circumstances where ST had submitted before her that double hearsay evidence is inadmissible (which submission it accepted to be wrong in the hearing before Richards J: see, at [84]) **[A/9/176]**. (Page 176)

[103] It is well established that there is only one standard of proof: the balance of probabilities (***Re B (Children)*** [2008] UKHL 35; [2009] 1 AC 11 per Lord Hoffman at [13]-[15]).

in Russia, certainly in proceedings involving a State actor, GPN; see, per ICCJ Burton at [121] **[A/13/231] – [A/13/232]**). "*Cogency*" cannot be used to obscure the fact that the *ultimate* question remained whether there was a genuine and substantial dispute that the Judgment was impeachable. (Page 231)

149. It may also be noted that if, as ST submits (AWC 183 **[A/2/63]**), ICCJ Burton "*in no way doubted the credibility of the evidence for what it was*", then it is difficult, if not impossible, to see how she was able to conclude that there was no such genuine and substantial dispute. But that interpretation is inconsistent with what ICCJ Burton actually said at [117] **[A/13/231]**: that Ms Zheglova's evidence was *not* evidence of the truth of the conversation with Ms Lobanova, and what she had learned from Mr Guschev. (Page 63) (Page 231)

E(4)(b)(ii) Richards J

150. In upholding the decision of the ICCJ, Richards J wrongly *re-interpreted* her reasons. He held that she had discounted Ms Zheglova's evidence *not* for the reasons she had in fact given (that it was double hearsay and, as such, not cogent), but on the basis that, even if Ms Lobanova's report was "*completely accurate*", it was not "*sufficiently*" cogent (per Richards J at [85]-[86] **[A/9/176]**). That was of itself a surprising conclusion: if Ms *Lobanova's* report was "*completely accurate*", then that was very cogent evidence of predetermination. He held wrongly (as addressed above) that he was obliged to accord it a high degree of deference. (Page 176)

151. Richards J identified a series of alleged "*material gaps in the evidence*" (at [87-88] **[A/9/176]**) and, in doing so, effectively *re-interpreted* Ms Zheglova's evidence in a way that was wrong, unfair and impermissible, not least because it contradicted ICCJ Burton's *correct* interpretation that it demonstrated that the Arbitrazh proceedings which led to the Judgment had been pre-determined against Mr Drelle (see, at [21] **[A/13/198] – [A/13/199]**, [115]-[117] **[A/13/230] – [A/13/231]**, [138i)] **[A/13/236]**). It was not open to Richards J to re-interpret Ms Zheglova's evidence in the absence of a Respondent's notice contending that ICCJ Burton had wrongly interpreted that evidence, and in the absence of a finding that ICCJ Burton *had* wrongly interpreted it. (Page 176) (Pages 198, 230, 236)

152. It was moreover wrong and unfair because Richards J held:

(1) At [87] **[A/9/176]** that "*to be "cogent", Ms Zheglova's evidence needed to point in favour of the proposition that the Arbitrazh Court had made up its mind in advance to decide the case in favour of GPN.*" But that is precisely what it pointed to. To conclude otherwise requires a strained interpretation that moreover ignores Zheglova §89: "… *I believe that the Court clearly did not* (Page 176)

handle the matter in a fair manner and Mr Drelle's court case was decided in advance (as it was confirmed to me…".

(2) At [88i)] **[A/9/177]** that "*there is no attempt to report either what Ms Lobanova actually said to Ms Zheglova, or what Mr Guschev actually said to Ms Lobanova. What is relayed is simply the gist of both conversations.*" But that was wrong and unfair. There was plainly an attempt to report what Mr Guschev had said to Ms Lobanova, as it was reported by her to Ms Zheglova. In any event, even if only the gist of the conversation was given, the effect was still as correctly summarised by the ICCJ at [21]. Moreover, it was not a reason to dismiss the evidence before a trial and its being tested in cross-examination. (Page 177)

(3) At [88ii)] **[A/9/177]** that "*It is not clear whether the statement that "we cannot win this case" is something that Mr Guschev said, or whether it was simply Ms Lobanova's opinion on the matter.*" Again, that is wrong: as set out above, Ms Zheglova was reporting what Mr Guschev had said to Ms Lobanova (that the case had been predetermined). In any event, this is the kind of point that would only justify dismissing Ms Zheglova's evidence if it had been put to her at a trial in cross-examination (ST having spurned the chance to cross-examine her at the hearing), and her response had been unsatisfactory. (Page 177)

(4) At [88iii)] **[A/9/177]** that "*It is quite possible to read Ms Zheglova's witness statement as meaning that the "negative outcome" was that GPN… was in fact focusing on securing a contribution from Mr Drelle to ST's bankruptcy.*" But that rather requires one to ignore the words that followed ("*Given that GPN was behind the claim… we cannot win this case. She said that the decision would be judgment against Mr Drelle for RUB 2 billion…*") The "*negative outcome*" was obviously that the case was predetermined and that Mr Drelle would lose (to the tune of RUB 2 billion). Moreover, it was plainly wrong to dismiss Ms Zheglova's evidence based on a "*possible*" reading of it. (Page 177)

(5) At [88iii)] **[A/9/177]** that "*If Mr Guschev was simply confirming that GPN was behind the claim against Mr Drelle, it is quite possible that the view that Mr Drelle "cannot win" represented the opinion of Ms Zheglova and/or Ms Lobanova rather than a statement of Mr Guschev.*" And, further, at [88iv)] that "*Moreover, the wording in paragraph [83] of Ms Zheglova's witness statement reads most naturally as an expression of Ms Lobanova's opinion. The words "she said" appear at the beginning of the second sentence and of the fourth sentence. Therefore, the conclusion that there would be "judgment against Mr Drelle for RUB 2 billion" is expressly said to be a statement made by Ms Lobanova rather than by Mr Guschev. One might expect that if Ms Zheglova was intending to make the eye-catching assertion that the Chairman of the Court had told Ms Lobanova that Mr Drelle "cannot win", that* (Page 177)

would have been said expressly." ***First***, it was wrong for the judge to dissect Ms Zheglova's evidence in this way, as if it were a statute. ***Secondly***, yet again, it was wrong to dismiss her evidence based on a "*possible*" reading of it. ***Thirdly***, it is plain that Mr Guschev did not simply confirm that GPN was behind the claim, as demonstrated not least by Ms Lobanova's report of the pre-ordained outcome: how could Ms Lobanova have predicted the outcome?[104] Finally, these were points that could only fairly be relied upon if they had been put to Ms Zheglova at a trial in cross-examination.

(6) At [91] **[A/9/178]** that "*Even if Mr Guschev was the source of the "cannot win" statement, that would not lead inexorably to the conclusion that the case had been predetermined. By the time of the Lobanova/Guschev Conversation, the case against Mr Drelle had been proceeding for some time. To be "cogent" at least it needed to set out some basis for a conclusion that the case had been predetermined. The judge was entitled to conclude that, even if Mr Guschev was indiscreetly and inappropriately commenting on the outcome in advance, that was not on its own evidence of predetermination.*" ***First***, Ms Zheglova's evidence did not have to lead "*inexorably*" to that conclusion (not even at a trial). ***Secondly***, this was not a case of releasing the result of a trial which had already been (fairly) determined (and ICCJ Burton did not make any such finding): the evidence was clearly that the case had been pre-determined against Mr Drelle. Moreover, as set out above, the proceedings had not at that stage concluded.[105] (Page 178)

(7) At [93] **[A/9/178]** that Ms Zheglova's account was "*light indeed on detail as to why the various conversations reported raised a clear and cogent case to the effect that the Arbitrazh Court had made up its mind in advance.*" But it was not for *Ms Zheglova* to argue the case, or why a court should believe what she reported Ms Lobanova had stated. (Page 178)

153. Further, Richards J (at [90]) **[A/9/177] – [A/9/178]** wrongly assumed that the ICCJ must have had these points in mind, when there is nothing, with respect, in her judgment to support that. ***First***, the reason why those reasons were not "*spelled out*" in detail is because they were *__not__* the ICCJ's reasons. ***Secondly***, she did not say anything to indicate that she was troubled by an alleged lack of specificity. ***Finally***, the points in [88] as addressed above were not those identified by the ICCJ and, moreover, it was wrong for the judge to provide "*a* (Page 177)

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[104] Ms Lobanova was merely the messenger reporting to Ms Zheglova what she had been told by Mr Guschev. See also at Zheglova §84, where she says that she left the café and "*I reported this conversation*" to Mr Drelle. "*This conversation*" is obviously a reference to the conversation which she describes in the previous paragraph **[B/3/255]**. (Page 255)

[105] ICCJ Burton was therefore wrong to say at [116] **[A/13/231]** that "*Mr Kulkov's Report states that regardless of that the claim had largely been heard by the time of the alleged conversation, the fact that the outcome might have been known in advance was an indicator of a breach of natural justice.*" That was not Mr Kulkov's evidence: all he was doing was repeating, and rejecting, a wrong assertion which had been made by ST's solicitor (see, his report at §231 **[B/7/307]**). (Page 231) (Page 307)

rationale" for a conclusion the ICCJ had not reached, based on reasons she had not expressed, and which was contrary to the conclusion she did reach (per ICCJ Burton at [117] **[A/13/231]**). (Page 231)

154. Richards J therefore in effect, wrongly conducted a re-hearing and a mini-trial. It was unfair to Mr Drelle as a party, and it was also unfair to Ms Zheglova as a witness.

155. Finally, even if Richards J's re-interpretation was both plausible *and* permissible, it did not mean that there was not a triable issue, not least because (i) Mr Drelle's interpretation is at least equally plausible (and, notably, had been adopted by the ICCJ), (ii) it had not been tested in cross-examination, and Ms Zheglova had not been given the opportunity to respond to the various points made by the judge at [88] **[A/9/177]**,[106] and (iii) even if the evidence was "*insufficiently*" cogent on its own, it had to be assessed together with the expert evidence of Mr Kulkov and Mr Lough. (Page 177)

E(4)(c) Irrelevance of bias/fraud in appellate courts

156. The judgment that was sought to be enforced was the decision of the Yaroslavl Court, the Russian Judgment. The question was therefore whether *that judgment* was impeachable for bias/fraud (see, **Dicey**, Rule 53).

157. The relevance of foreign appellate decisions is limited to complaints of procedural errors, the question being (i) whether an appeal has cured a breach that occurred in the judgment sought to be enforced, or (ii) whether a defendant can seek to impugn the judgment based on a breach when he could have, but did not, avail himself of a remedy that would or might have cured it (e.g. on appeal).[107]

158. Those principles do not apply to judgments that are impeached on the grounds of fraud.[108] That is well established, and was rightly accepted by Richards J (at [124]) and is also rightly not challenged by ST (AWC 191-193 **[A/2/65]**). Thus: (Page 65)

(1) A foreign judgment may be impeached for fraud even though no newly discovered evidence is produced and even though fraud was argued in, or even was rejected by, the foreign court.[109] As Staughton LJ held in ***Jet Holdings Inc v Patel*** [1990] 1 QB 335 (at

[106] If there were doubts about the import of her evidence, they should have been resolved in favour of the Respondent: cf. ***Gohil*** per Lord Neuberger at [49]-[50] **[C/16/618]-[C/16/619]**. (Page 618)

[107] See for example, ***Adams v Cape Industries*** per Slade LJ at 569B-E; 570C-E **[C/9/508]-[C/9/509]**. (Page 508)

[108] It is common ground that alleged bias or predetermination on the part of the foreign court is effectively, or is to be treated as equivalent to, an allegation of fraud: AWC 160 **[A/2/59]**. (Page 59)

[109] ***Abouloff v Oppenheimer & Co*** (1882) 10 QBD 295. The House of Lords held in ***Owens Bank Ltd v Bracco*** that ***Abouloff*** continues to represent the common law (*supra* at 465G-469E) **[C/33/881]-[C/33/885]**. (Page 881)

344E-345G) "*the foreign court's views on fraud are neither conclusive nor relevant…*"**[C/20/663]-[C/20/664]** (Page 663)

(2) Further, a foreign judgment is impeachable for fraud even if the litigant did not use an available remedy in the foreign court.[110]

159. ICCJ Burton was therefore wrong to dismiss Ms Zheglova's evidence since it had "*no bearing*" on the decisions of the appellate courts (see, e.g., at [117] **[A/13/231]** and [131] **[A/13/235]**).[111] (Pages 231, 235)

160. Further, Richards J was, with respect, wrong to hold at [129] **[A/9/185]** that the ICCJ "*was not concluding that the subsequent appeals wiped the slate clean of a fraud that had infected the Judgment…*", since that *is* precisely the effect of her conclusion at [117] **[A/13/231]**. Richards J was also wrong to hold (also at [129] **[A/9/185]**) that "…*Rather, she made her conclusions about the appeals process having already concluded that Ms Zheglova's evidence was insufficiently cogent to demonstrate a triable issue of fraud in the first place. Perhaps there was no need to mention the judgment in the Russian Court of Appeal having reached that conclusion…*" But the Russian courts did not have Ms Zheglova's evidence and therefore made no decisions in respect of it. (Page 185) (Page 231) (Page 185)

E(5) Respondent's Ground 4: Mr Kulkov and Mr Lough

E(5)(a) Introduction

161. The core error – on the part of both the ICCJ and the judge – was that they failed properly to step back and consider whether the evidence, assessed *in the round*, gave rise to a triable issue that the Judgment was impeachable for bias/fraud.

162. The closest the ICCJ came was at [131] **[A/13/235]** of her judgment, but (i) her assessment was infected by her wrong dismissal of Ms Zheglova's evidence as "*hearsay*", and her wrong dismissal of Mr Lough's evidence as "*anecdotal*" (see, further, below), (ii) it was also wrongly premised on the assumption that Mr Drelle needed to show that *each* of the appellate courts was affected by bias/fraud (wrong for the reasons set out above), (iii) the judge appears wrongly to have interpreted "*cogency*" as imposing an elevated standard of proof, and (iv) her (Page 235)

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[110] ***Adams v Cape Industries*** per Slade LJ at 569**[C/9/508]**. (Page 508)

[111] ST relies on ***Maximov*** (AWC 192 **[A/2/65]**), per Sir Michael Burton GBE at [53]-[54] **[C/27/778]** referring to a "*heavy burden*" on a party to show that a foreign judgment was not merely wrong but "*so perverse… that they could not have been arrived at in good faith or otherwise than by bias*" which would be all the more difficult where those decisions were upheld on appeal. Unlike this case, the claimant in ***Maximov*** sought to infer bias from judicial errors alone. In any event, if ***Maximov*** stands for the proposition that the decision of each and every appellate court must also be impeached, then it was wrongly decided and contrary to the authorities cited at paragraph 158 above. (Page 65) (Page 778)

final assessment – "*the most that I have seen is a keen interest by GPN's CEO to pursue Mr Drelle via criminal proceedings, anecdotal evidence that the Russian courts would be reluctant and/or highly unlikely to rule against GPN and hearsay evidence that the Arbitrazh Proceedings were pre-determined*", but that this was insufficient to raise a triable issue – was startling and, with respect, wrong (see also [138] **[A/13/236]** which was wrong for the same reasons). There was plainly enough to raise a triable issue. (Page 236)

163. Despite understanding that Mr Drelle's case was that the evidence of Mr Kulkov, Mr Lough and Ms Zheglova had to be looked at together (see, at [102] **[A/9/180]**), Richards J singularly failed to do that, instead surprisingly, and wrongly, asking himself whether each of Mr Kulkov and Mr Lough's evidence was *of itself* sufficient to disclose a serious issue that the Russian Judgment was impeachable (see, e.g., [103] **[A/9/180]**, [107] **[A/9/181]**, [115] **[A/9/182]**). Moreover, he failed to engage with ICCJ Burton's errors (as identified above) because of the "*high degree of deference*" that he felt he should show to her decision ([121] **[A/9/183]**). (Page 180) (Pages 180, 181, 182, 183)

E(5)(b) Mr Kulkov

164. Mr Kulkov identified a swathe of substantive and procedural errors which were "*largely disputed*" by ST's expert **[B/7/283]** (per ICCJ Burton at [60] **[A/13/215]**). ICCJ Burton "*dissected*",[112] piecemeal, the substantive errors identified by Mr Kulkov and concluded that none was individually sufficient to demonstrate a genuine and substantial dispute that the Judgment was "*deliberately wrong*".[113] (Page 283) (Page 215)

165. The ICCJ then addressed the "*alleged procedural defects*", individually and (this time) cumulatively, and concluded that they did not give rise to a genuine, triable issue that there was a breach of natural justice.[114]

166. The ICCJ therefore treated each individual error as if this were a case, like ***Maximov***, where the inference of bias/fraud is said to arise *solely* from such errors. What the ICCJ should have done, and failed properly to do, was to consider the alleged errors (individually or cumulatively) against the background of, and together with, the evidence of Mr Lough, the Dyukov letter and Ms Zheglova's evidence. As a matter of logic, if the Russian court did

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[112] Her own words: per ICCJ Burton at [75] **[A/13/218]**. (Page 218)
[113] Per ICCJ Burton at [74]-[75] **[A/13/218]**, [79] **[A/13/219]**, [86] **[A/13/222]**, [95] **[A/13/225]**. (Pages 218, 219, 222, 225)
[114] Per ICCJ Burton at [103]-[118] **[A/13/227]-[A/13/231]**. (Page 227)

make the errors of law or procedure identified by Mr Kulkov[115] – and whether or not each was individually or even cumulatively sufficient to give rise to a triable issue – that was at the very least supportive of the other evidence (Mr Lough, the Dyukov letter, Ms Zheglova) and therefore Mr Drelle's case that the Russian Judgment was impeachable for bias/fraud.

167. Richards J similarly failed properly to consider the evidence in the round. For example, he held that "…*even if Mr Kulkov was correct, and there was a large number of errors in the Judgment, that would not in itself be enough to establish a triable issue that the Judgment could be inferred to be impeachable for fraud. As made clear in Maximov, something extra would be needed, namely evidence that supports the proposition that the Judgment was deliberately wrong.*"[116] Tellingly, here there *was* "*something extra*": the evidence of Mr Lough, the Dyukov letter and, above all else, the evidence of Ms Zheglova.

E(5)(c) Mr Lough

168. Mr Lough's report made for "*uncomfortable reading*" **[B/6/264]**.[117] That is not surprising. He gave evidence *inter alia*: that "*Threats to judicial independence are reported to be particularly acute in cases where powerful political or economic actors have an interest in an outcome of a case…*" (quoting a report by the International Commission of Jurists in 2010); he was "*in no doubt that a judge would take a great personal risk by ruling against GPN or any other major state company so intimately connected with the Kremlin…*"; that "*with GPN driving the case, Mr Drelle stood no chance of winning in court*" (per ICCJ Burton at [21] **[A/13/198]**, [121] **[A/13/231]**, [122] **[A/13/232]**). That was powerful evidence strongly supportive of Mr Drelle's case. (Page 264) (Pages 198, 231, 232)

169. ICCJ Burton, however, dismissed Mr Lough's evidence on the following bases:

(1) ***First***, that "*the most salient examples*" of interference in Russian proceedings which had been identified by him concerned critics of the state, state interference in nationalisation of energy resources and criminal proceedings (per ICCJ Burton at [123], [125] **[A/13/233]-[A/13/234]**). She contrasted those with Mr Drelle's case which did "*not appear to me to carry the same level of state financial and political interest*" (at [125]). (Page 233)

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[115] And the ICCJ never held that it did not: only that the evidence was insufficient to demonstrate that the Judgement was deliberately wrong (applying ***Maximov***).

[116] At [103] **[A/9/180]**. See, further, at [104] **[A/9/180]**: "*the Judge was entitled to require some cogent evidence of the extra ingredient beyond a list of the alleged errors… those alleged errors did not raise a sufficiently triable issue on the extra ingredient so as to satisfy the Threshold Test.*" And at [107] **[A/9/181]**, *holding that the Respondent "has struggled to show a triable issue to the effect that the Judgment was deliberately wrong solely by reference to alleged errors in the Judgment.*" (Pages 180, 181)

[117] Per ICCJ Burton at [125] **[A/13/234]**. (Page 234)

(2) However, those were expressly only "*the most salient examples*". Moreover, in rejecting their relevance the ICCJ was effectively preferring the "*more nuanced assessment*" of ST's expert (see, per Richards J at [110] **[A/9/182]**). That was inappropriate in the absence of cross-examination of the experts. (Page 182)

(3) Further, that conclusion required the ICCJ to ignore the significance of the Dyukov letter. Dyukov's interest in ST/Mr Drelle was dismissed as "*perhaps not surprising when so much money had been lost*" ([128] **[A/13/234]**). The ICCJ failed to recognise that the Dyukov letter demonstrated precisely the "*state financial and political interest*" that she had, only three paragraphs previously, identified as missing. (Page 234)

(4) ***Secondly***, on the basis that it was "*anecdotal*" [131] **[A/13/235]**. It is not clear what the ICCJ meant by "*anecdotal*", nor why it meant that Mr Lough's evidence did not give rise to a triable issue. She was wrong to reject it on this basis. (Page 235)

170. Further, Mr Lough's evidence had to be assessed together with, in particular, Ms Zheglova's evidence. Both the ICCJ and Richards J failed to consider all the evidence in the round. Although Richards J rightly held that Mr Lough's evidence "*was certainly capable of supporting Mr Drelle's case since it suggested that judges in Russia might exercise partiality in favour of GPN*" he then went wrong by holding that the ICCJ "*was entitled to conclude that his evidence was insufficient <u>on its own</u> to establish a triable issue since it said nothing about how the particular proceedings against Mr Drelle had been conducted.*" (per Richards J at [115]; emphasis added**[A/9/182]**). (Page 182)

F. <u>CONCLUSION</u>

171. For all the reasons set out above, the Supreme Court is invited to dismiss the appeal.

CHARLES SAMEK K.C.

Littleton Chambers; 13.5.26 **BLÁTHNAID BRESLIN**