Radcliffe Chambers
11 New Square Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
E: clerks@radcliffechambers.com
W: radcliffechambers.com

Radcliffe Chambers

# Servis-Terminal v. Drelle: a dissenting view
Josh Lewison, Radcliffe Chambers

**6 MAY 2025**

## Introduction

In Servis-Terminal v. Drelle [2024] EWCA Civ 62, the Court of Appeal was faced with a deceptively simple question: can a creditor bring a petition in England in reliance on a foreign judgment that has not previously been the subject of recognition proceedings? The Court of Appeal answered 'No'. This author considers that decision to have been wrong, and this article explains why.

The Case

Mr Drelle had been a director of Servis-Terminal LLC, a Russian company. Service-Terminal entered Russian insolvency proceedings and the Russian office-holder obtained a RUB 2 billion judgment against Mr Drelle from the Russian court. Servis-Terminal presented a petition in England for Mr Drelle's bankruptcy, and he was duly made bankrupt.

Mr Drelle appealed against the bankruptcy order first to the High Court, and more recently to the Court of Appeal.

## The Important Distinction

When looking at making a recovery on a foreign judgment, it is vital to keep in mind the distinction between *execution*, *enforcement* and *recognition*. The fundamental nature of bankruptcy proceedings is also crucial. Many of the cases, including some at the highest level, show a laxity in language that can obscure the true position.

Execution, properly understood, refers to the means by which orders of the court are carried into effect. It is a term that applies only to domestic judgments. Third party debt orders, charging orders and writs of possession are all examples of execution.

By contrast, enforcement is broader term that can refer to the execution of judgments, but also how obligations are compulsorily given effect. A claim to recover a debt is an enforcement action; a debt is never "executed" in the way that a domestic judgment is executed. A creditor cannot, for example, simply apply for a charging order in respect of a debt. They must first obtain a judgment.

Recognition stops short of enforcement, but involves the domestic court taking notice of the foreign judgment in some way. Recognition is principally addressed through res judicata and issue estoppel, which prevent re-litigation of issues decided by the foreign court, and *Henderson* abuse, which prevents litigation of issues that could and should have been raised before the foreign court.

The nature of bankruptcy proceedings was described by Lord Hoffman in *Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings* [2007] 1 A.C. 508 in these terms.

"The purpose of bankruptcy proceedings, on the other hand, 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. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings."

Those passages were cited by the Court of Appeal in *Drelle*. They at once state the principle and obscure it. Bankruptcy proceedings are, indeed, a collective process, but the proceedings are concerned with enforcement in the wide sense, not execution in the narrow sense. All manner of obligations are enforceable in a bankruptcy – debts, liabilities in contract and tort, and future and contingent obligations may all be proved. Thus, bankruptcy is not concerned merely with execution of judgments and the term "execution" is inapt in describing the process.

It is also said that bankruptcy is a class remedy: it operates for the benefit of the whole class of creditors of the bankrupt. Yet the bankruptcy jurisdiction cannot be invoked by an officious bystander, who spots that an individual is unable to pay their debts, or by every person to whom the bankrupt owes an obligation, even an obligation provable in the bankruptcy.

The bankruptcy jurisdiction is invoked by a creditor: one to whom a liquidated sum is due and owing. It is the question of status as a creditor on which the enforcement (not execution) of foreign judgments by bankruptcy petition depends.

## Enforcement of Foreign Judgments in England

The dawn of the enforcement of foreign judgments in England is obscure but had broken by the time of *Dupleix v. De Roven* (1705) 2 Vern. 540. There, the Lord Keeper held that a judgment obtained in France "must be considered as a debt by simple contract", that the relevant cause of action was *indebitus assumpsit* – broadly applicable to debts and contractual obligations – or *insimul computassent*, which was loosely comparable to a claim to the sum due on the taking of an account which one party had undertaken to pay to the other. Plainly, the English court was not executing the foreign judgment, but was enforcing it in the manner of a debt.

The judgment of Lord Mansfield in *Walker v. Witter* (1778) 1 Doug. K.B. 1 reinforces the distinction between execution of an English judgment and the enforcement of a foreign judgment. In that case, an action for debt was brought in England on a judgment rendered by the Supreme Court of Jamaica. The defendant entered a plea of *nul tiel record* – a defence normally deployed when a plaintiff failed to produce a record, such as a judgment, on which they relied. Lord Mansfield held that plea to have been improper, since "it was clear they did not mean that sort of record to which implicit faith is given by the courts of Westminster Hall." He went on to note that it was admitted that *indebitus assumpsit* would have lain and that the subject matter of the action was a simple contract debt. Two other justices, Ashhurst J and Buller J, held that wherever *indebitus assumpsit* lay, so, too, would an action for debt.

Thus, probably by the beginning of the 18th century and certainly no later than the final years of it, foreign judgments were enforceable by action in England in the manner of debts and not by execution in the manner of English judgments.

The distinction is also felt in the application of the doctrine of merger, recently explored by the Supreme Court in *Nasir v. Zavarco* [2025] UKSC 5. In England, a cause of action merges in the judgment. Many of the early cases cited in *Nasir* speak of something of an inferior nature (such as a debt) being merged into the judgment, which is of a higher nature. The same was not true of foreign judgments: a cause of action did not merge into a foreign judgment, since a foreign judgment was not a matter of record in England. That common law position has now been reversed by s. 34 of the Civil Jurisdiction and Judgments Act 1982.

So, too, the application of the Limitation Acts has illustrated the difference between foreign judgments and English ones. In *Berliner Industriebank v. Jost* [1971] 2 Q.B. 463, the parties were arguing, among other things, about whether a German judgment was time-barred. While they differed on when time had started running, both sides and the Court of Appeal were agreed that the relevant period was six years under s. 2(1)(a) of the Limitation Act 1939, which applied to simple contract. It was not suggested that the appropriate subsection was s. 2(4) (action on a judgment). Had the argument been open, it no doubt would have been taken, because the contract limitation period was six years, as opposed to twelve years for judgments, and there would have been no question of the limitation period having run.

The theory that a foreign judgment creates an obligation has been recognised at the highest level. In *Owens Bank v. Bracco* [1992] 2 A.C. 443, Lord Bridge held:

"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."

More recently, Lord Collins held in *Rubin v. Eurofinance* [2013] 1 A.C. 226 that the treatment of foreign judgments as creating an obligation as "purely theoretical and historical". But it is not easy to see why that is so: the treatment of foreign judgments in that way certainly has practical implications for limitation purposes, the mode of enforcement and, now, bankruptcy.

## Sovereignty and Execution

The arguments that seem most to have attracted the Court of Appeal in Drelle were based on ideas of sovereignty. First was the idea that foreign courts are sovereign only in their own territory. Second was a reference to the "Revenue Rule". Each of those arguments was misplaced.

Sovereignty of foreign courts was addressed, first, by reference to Rule 45 of *Dicey, Morris & Collins on the Conflict of Laws*, 16th Ed., which says in part: "A judgment of a court of a foreign country … has no direct operation in England, but may be enforceable (1) by claim or counterclaim at common law or under statute". The Court of Appeal referred to a passage to similar effect in *The Conflict of Laws*, Prof. Briggs KC, 5th Ed., which states piquantly: "state sovereignty ends at the border of the state".

The argument based on sovereignty only explains why a foreign judgment cannot be *executed* in England at common law. That is the "direct operation" to which *Dicey* refers. What is being *enforced* in England is the obligation that arises as a matter of English law when the foreign court renders its judgment, not the judgment itself. If sovereignty and territorial limits were as restrictive as the Court of Appeal thought, it ought to follow that foreign judgments could not even be enforced by action at common law. After all, if their effectiveness ends at the border, why should the English court take any notice of them at all?

The Revenue Rule is drawn from Rule 20 of *Dicey*, which provides relevantly: "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". The editors of *Dicey* identify two House of Lords authorities as justifying the rule on the basis that taxation is an exercise of sovereign power by a State, and that States do not exercise their own sovereignty in another State's territory.

The Revenue Rule has no application here. It is, at best, a comparator in the treatment of foreign States' sovereignty by the English courts.

What is apparent from the cases – an unbroken line of authority from at least 1705 to the present day – is that only English judgments have sufficient authority to permit execution, but foreign judgments have substance enough to allow enforcement.

## Back to Drelle

On the first appeal ([2024] EWHC 521 (Ch)), Richards J considered the *Dicey* rules in detail before coming at [46] to the conclusion that the supposed obstacle of no prior recognition of a foreign judgment "is no different in nature to the barrier to enforcement that faces a creditor who has an English trade debt, but no judgment."

Richards J had identified the crucial question: what counts as a "debt" under s. 267 of the Insolvency Act 1986? That section is couched in terms of a creditor being owed a "debt", which, among other things, must be "a liquidated sum". As has been seen, the English courts have consistently treated foreign judgments as creating an obligation, enforceable in England, to pay the sum adjudicated by the foreign court. It is hard to see how such an obligation can be distinguished from any other kind of debt.

The crucial weakness in the Court of Appeal's reasoning is the failure to distinguish properly between execution and enforcement. Once it is seen that a foreign judgment gives rise to an obligation to pay the sum due, it becomes plain that the creditor under the foreign judgment is owed a debt and thus has standing to invoke the bankruptcy regime for the benefit of all creditors.

That fault is particularly evident in paragraphs [39] and [40], where the Court discusses the principle that a foreign judgment may be used defensively, but not as a "sword". By defensive use, the Court was referring to the principle that an otherwise-unrecognised judgment is still conclusive of the matters it decides and may, for example, prevent another party from re-litigating a point: recognition. While it is correct that a foreign judgment may be used defensively in that way, it is wrong to suggest that such a judgment cannot be used offensively: plainly it can, because an action can be brought in England on it.

The Court may also have been led astray by argument about certain footnotes in *Dicey* and an article by Professor Briggs KC. Each of those footnotes was to the effect that a statutory demand might be served on the strength of a foreign judgment, but that if the validity of the debt were contested, the foreign judgment creditor would have to establish it by an ordinary action. The Court of Appeal disagreed, holding that no statutory demand could even be served. The footnotes appear in fact to be based on a misapprehension or elision of practice and procedure in relation to statutory demands. An individual debtor may apply to set aside a statutory demand on the ground that the debt is genuinely disputed on substantial grounds. That does not lead, in the case of an ordinary debt, straight to the creditor starting a claim to recover the debt. Rather, it leads to a hearing of the debtor's application, on which the court will decide whether the debt is indeed disputed, on a test equivalent to that for summary judgment.

Likewise, if a foreign judgment debtor disputes the validity of the judgment, that need not lead to the foreign judgment creditor simply commencing a claim to enforce it. A hearing on the debtor's application will allow the court to decide, on the same standard, whether there are grounds on which a foreign judgment may be impeached. The common law recognises limited grounds of defence to an action, such as lack of jurisdiction on the part of the foreign court under English conflict of law rules, fraud, and breach of public policy or natural justice. A court hearing an application to set aside a statutory demand would be tasked only with deciding whether there was a real prospect of such a defence succeeding. Merely raising the allegation of a defence is not enough.

## What Next?

At time of writing, no public information about any appeal to the Supreme Court has surfaced. In costs terms, issuing a claim for enforcement is likely to prove more cost-effective than attempting an appeal to the Supreme Court. There is thus a strong possibility that the law will be left in an unsatisfactory state.

Will the judgment be followed abroad? Some jurisdictions show a tendency to follow English decisions largely uncritically. But as the *Broad Idea v. Convoy Collateral* saga showed, what starts as a dissenting idea in a foreign jurisdiction can become the mainstream in England. So let us hope that the rest of the world can lead us back to the straight path.

Radcliffe Chambers

provide legal or other advice and you must not treat them or rely on them as such. Any views expressed are those of the author and not of Radcliffe Chambers, its members or staff, or any of them and the contents do not necessary deal with all aspects of the subject matter to which they pertain.

Radcliffe Chambers is a barristers' chambers specialising in commercial, insolvency, pensions, banking and finance, private client, property and charity law.

Radcliffe Chambers and its barristers are regulated by the Bar Standards Board of England and Wales ("BSB"). When practising as barristers, they are self-employed. They are registered with and regulated by the BSB, and they are required to practise in accordance with the Code of Conduct contained in the BSB Handbook.

If you do not wish to receive further marketing communications from Radcliffe Chambers, please email events@radcliffechambers.com.