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UPDATE

Unrecognised Foreign Judgments and Awards and Liquidation Proceedings in the British Virgin Islands

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In *Servis-Terminal LLC v Drelle* [2025] EWCA Civ 62, the English Court of Appeal held that a bankruptcy petition cannot be presented based on an unsatisfied foreign judgment where the foreign judgment has not been recognised in that jurisdiction. This update considers the effect that decision may have on statutory demands and applications for the appointment of liquidators based on unrecognised foreign judgments in the British Virgin Islands.

The Hierarchy of the Courts of the Eastern Caribbean

The Eastern Caribbean Supreme Court consists of two divisions, a Court of Appeal and a High Court of Justice. The Court of Appeal hears appeals from the decisions of the High Court in Member States and Territories of the Eastern Caribbean, including the British Virgin Islands (the **BVI**). The Judicial Committee of the Privy Council is the court of final appeal for the Member States and Territories.

Decisions of the Courts of England and Wales in relation to identical or similarly worded statutes are of persuasive authority whereas decisions of the Eastern Caribbean Court of Appeal and the Privy Council are binding and therefore of authoritative force in the BVI.

The Statutory Insolvency Regime in the BVI

The combined effect of sections 8 and 155 of the Insolvency Act, Revised Edition 2020 of the BVI (the **Act**), is that a company is deemed to be insolvent and liquidators may be appointed if a statutory demand for payment of a '*debt that is due and payable at the time of the demand*' is made upon it and the demand is not complied with nor set aside by the Court within 21 days. One of the grounds upon which a statutory demand may be set aside is that there is a genuine and substantial dispute as to the existence of the debt.

A 'liability' is defined by section 10 of the Act as meaning a liability to pay money or money's worth including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, and liability includes a debt. The liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. For the purposes of the Act, an illegal or *unenforceable* liability is deemed not to be a liability.

Insolvency Proceedings in the BVI based upon Unenforced Judgments or Awards

The leading authority in the BVI in relation to unrecognised foreign judgments and awards and insolvency is the judgment of the Privy Council in *Vendort Traders Inc v Evrostroy Grupp LLC* [2016] UKPC 15.

Vendort Traders Inc (**Vendort**) was a company incorporated in the BVI. On 24 May 2012, Evrostroy Grupp LLC (**Evrostroy**) served a statutory demand on Vendort in respect of a debt said to be due under a final award made on 1 November 2011 (the **Award**) in an arbitration under the rules of the London Court of International Arbitration. The arbitration concerned a share purchase agreement (the **SPA**) under which Vendort agreed to buy shares in a Russian company from Evrostroy.

Vendort applied to the High Court to set aside the demand on the basis that there was a genuine and substantial dispute as to whether any debt was due and payable. One of its arguments was that there was no debt owing because the Award had not been recognised and enforced in the BVI and an unenforceable award could not form the basis of a statutory demand. The application was dismissed by the High Court.

In a judgment delivered on 26 May 2014 upholding the High Court's judgment, the Eastern Caribbean Court of Appeal held that it was well established that the service of a statutory demand or even subsequent winding up proceedings based on an unsatisfied statutory demand does not constitute enforcement proceedings. The Court of Appeal held that:

> '*... it is not necessary for an arbitration award to be first enforced before a statutory demand can be presented in reliance on it. Indeed, it is of critical note that there is no statutory provision or common law principle obtaining in this jurisdiction which prohibits an award holder from serving a statutory demand or a winding up petition based on an unenforced foreign arbitration award or judgment. The effect of section 28 of the Arbitration Act*[1] *is to merely set out the procedure for enforcing a non-Convention arbitration award; it cannot be read as compelling the award holder to enforce the award before relying on it for the purpose of serving a statutory demand or presenting a winding up petition. It simply does not go that far. Section 28 becomes necessary in cases where an award holder wishes to levy execution and therefore must first enforce the foreign award in this jurisdiction before doing so. An award by itself establishes that a debt is immediately owed; immediately enforcing such debt is an entirely different thing.*'

Vendort's appeal to the Privy Council was also unsuccessful. The Board considered that the reasoning of the Courts below had been correct. In its opinion delivered in a judgment dated 13 June 2016, it held that:

> '*... An unenforceable liability could not properly be made the subject of a statutory demand. But the award gave rise to an enforceable debt as soon as it was issued. Moreover, it was conclusive evidence as between the parties that an enforceable debt was due in respect of the price of the shares. The only relevance of an order under section 28 is that it makes available the court's procedural facilities for satisfying that debt. The order recognises the enforceability of the debt, but the source of its enforceability in not the order but the contract.*'

The English Court of Appeal Decision

Section 267 of the English Insolvency Act 1986 provides for a bankruptcy petition to be presented in respect of a 'debt' which '*is for a liquidated sum payable to the petitioning creditor ... either immediately or at some certain, future time, and is unsecured*'.

Servis-Terminal LLC (**STL**) had obtained a judgment against Mr Drelle before a Russian Court. The proceedings against Mr Drelle, STL's former chief executive officer, were founded on article 53(3) of the Civil Code of the Russian Federation. It was alleged by STL that Mr Drelle had failed to act in good faith or reasonably when, as a director of the company, he had procured it to make a loan of RUB 2 billion to another company. Judgment was entered against him for that sum.

STL's judgment had not been the subject of any recognition proceedings in England. It nevertheless served a statutory demand on Mr Drelle based upon the judgment debt and subsequently petitioned for his bankruptcy. ICC Judge Burton held that the debt claimed in the petition was not subject to a genuine and substantial dispute and made a bankruptcy order. An appeal against the making of that order was dismissed by Richards J. However, in a judgment delivered on 31 January 2025, the English Court of Appeal allowed an appeal by Mr Drelle against the judgment of Richards J.

The English Court of Appeal considered whether the Russian judgment was capable of providing the basis for a bankruptcy petition unless and until it was recognised in England. At the forefront of the Court of Appeal's consideration was the general principle as stated in rule 45 of *Dicey, Morris & Collins on the Conflict of Laws, 16th ed.*, that a foreign judgment '*has no direct operation in England*'. That has, among others, the consequence that '[a] *judgment creditor seeking to enforce a foreign judgment in England at*

[1] Which provided that '*An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment of order of the High Court to the same effect, and where leave is so given judgment may be entered in terms of the award*'.

common law cannot do so by direct execution of the judgment' but '*must bring an action on the foreign judgment*'.

The English Court of Appeal accepted that insolvency proceedings are not a form of 'direct execution'. However, it held that:

> '*... such proceedings involve "collective enforcement of the admitted or proved debts" of the relevant individual or company...While, therefore, a creditor who presents a bankruptcy or winding-up petition in respect of a judgment debt may not be engaged in "direct execution", it is still seeking enforcement.*'

Following a review of relevant case law and academic commentary, Newey LJ, who delivered the leading judgment concluded as follows:

> '*Drawing some threads together, it seems to me that, where there is no statutory provision to contrary effect, a bankruptcy petition cannot be presented in respect of a foreign judgment which has not been the subject of recognition proceedings. While an unrecognised judgment may be determinative for certain purposes, it will have "no direct operation" in this jurisdiction and so cannot be used as a "sword", whether as regards "direct execution" or as the basis of a bankruptcy petition. An obligation to make a payment imposed by an unrecognised foreign judgment is not enforceable as such in this jurisdiction and, in the eyes of the law of England and Wales, does not constitute a "debt" for the purposes of section 267(1) or section 267(2)(b) of the 1986 Act. A foreign tax will not give rise to such a "debt". No more will an unrecognised foreign judgment, which similarly involves an exercise of sovereign power. That conclusion is, moreover, consistent with the position under the 1933 Act, as explained in Judgment Debtor. It is also reinforced by section 267(1)(b)'s requirement that the "debt" in respect of which a bankruptcy petition is presented should be "payable ..., either immediately or at some certain, future time". A sum for the payment of which a foreign judgment provides is not, as it appears to me, to be regarded as so "payable" if the judgment is unenforceable unless and until recognised by a Court in this jurisdiction.*'

In his concurring judgment, Snowden LJ said:

> '*... in the same way as a person who relies upon a foreign judgment cannot invoke the individual enforcement mechanisms of the English court for his own benefit unless and until he obtains an English judgment, or registers the foreign judgment or has some other basis under a statute or treaty that permits its enforcement, so also such a person should not be able to invoke the collective enforcement mechanisms of bankruptcy or winding up proceedings in the English court unless and until he obtains an English judgment, or registers the judgment or has some other basis under a statute or treaty permitting such enforcement of the foreign judgment.*'

Conclusion

At first glance, the decisions of the Eastern Caribbean Court of Appeal and the Privy Council in *Vendort* and the decision of the English Court of Appeal in *Drelle* appear to be diametrically opposed in relation to their approach to the question of whether there is a need to obtain recognition of a foreign judgment or award before it is able to form the basis of a statutory demand or insolvency proceedings.

However, the apparent divergence in approach may be able to be explained by the fact that the Award in *Vendort* concerned a debt payable under a contract (the SPA). The Award itself did not give rise to the debt but was conclusive evidence that there was no genuine and substantial dispute as to its existence.

On the other hand, the judgment in *Drelle* did not concern a debt claim. Rather, it concerned a liability arising under an enactment. That judgment would only give rise to an enforceable debt in England if and when the judgment was recognised in that jurisdiction.

The different outcomes in the BVI and English proceedings nevertheless illustrate the need to carefully consider the nature of the foreign judgment or award in deciding whether it can form the basis of a statutory demand or an application for the appointment of liquidators without recognition first being obtained.

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