



GLOBAL GUIDE 2017

# **ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS**

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# Enforcement of judgments and arbitral awards in the British Virgin Islands: overview

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## JUDGMENTS: LEGAL FRAMEWORK

### Domestic framework

#### 1. What is the applicable domestic legislative framework for enforcement of judgments?

##### Domestic

Enforcement of domestic judgments is largely governed by the Eastern Caribbean Civil Procedure Rules 2000 (CPR). A judgment creditor can apply to court requesting an enforcement order under CPR Part 43. CPR Part 45 sets out how different types of judgments can be enforced.

Other relevant legislation includes the Judgments Act 1907 and the Debtors Act 1888.

##### Foreign

Recognition of foreign judgments is principally governed by the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act) and the common law.

The Reciprocal Enforcement Act applies to judgments given in the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in Scotland, and the courts of the Bahamas, Barbados, Belize, Trinidad and Tobago, Guyana, St Lucia, Grenada, Jamaica, and New South Wales (Australia).

There is another relevant statute, the Foreign Judgments (Reciprocal Enforcement) Act 1964. However there is a commonly held view (not tested in court) that the relevant foreign jurisdictions have not been properly designated and that it is not effective. Therefore, it is not considered further in this article.

Once foreign judgments have been recognised as enforceable in the British Virgin Islands (BVI), the same enforcement remedies are available as for domestic judgments (under the CPR and otherwise).

### International conventions/agreements

#### 2. What international conventions and agreements on enforcement of judgments is your jurisdiction a party to?

The BVI is not a party to any international conventions or agreements in relation to the enforcement of domestic or foreign court judgments.

### Definitions

#### 3. What is the definition of judgment in your jurisdiction for the purpose of enforcement proceedings?

##### Domestic

"Judgment" is defined in the Judgments Act 1907 as an order for the payment of money or costs or any other order having the operation of a judgment.

##### Foreign

"Judgment" is defined in the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act) as any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable.

Under the Reciprocal Enforcement Act and the common law, a judgment must be a final and conclusive money judgment to be directly enforceable.

### Enforceable/excluded types of judgment

#### 4. What types of judgment in commercial matters are enforceable, and what types are excluded?

##### Domestic

**Enforceable.** Enforceable domestic judgments include:

- Money judgments.
- Non-money judgments.
- Default judgments.
- Interim measures.
- Injunctions/judgments prohibiting acts.

**Excluded.** No types of domestic judgment are excluded. Judgments/orders made at an *ex parte* hearing will be subject to a return date hearing on notice to the defendant/respondent at which the matter can be reconsidered by the court *inter partes*.

## ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS

### Foreign

**Enforceable.** Only money judgments for a debt or a definite sum are capable of being enforced under the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act).

Similarly, only money judgments for a debt or a definite sum can be treated as final and conclusive under the common law. The judgment creditor can apply for summary judgment on the foreign judgment as a cause of action under the doctrine of obligation by action.

As long as this test is met, a foreign default judgment can be enforced, subject to considerations such as due service, fairness and public policy (see Questions 12 to 14).

**Excluded.** Non-money judgments are not directly enforceable under the Reciprocal Enforcement Act.

Similarly, under the common law, the doctrine of obligation by action does not arise. However, if a party has a non-money foreign judgment based on a cause of action recognised by BVI law and from proceedings between identical parties with identical issues, it is possible to rely on the equitable doctrine of estoppel to obtain summary judgment in the BVI on the basis that it would be an abuse of process for the claim to be re-litigated. See Question 5.

In addition, foreign judgments granting provisional measures are not directly enforceable. However, the court has jurisdiction to grant standalone injunctive relief (such as freezing injunctions) to assist foreign proceedings in appropriate circumstances (see *Black Swan Investment v Harvest View* [2010] 2 JBVIC 2301).

## JUDGMENTS: PROCEDURE FOR ENFORCEMENT

### Overview

#### 5. What is the general outline of enforcement proceedings?

##### Domestic

A domestic judgment is recognised the moment it is made and becomes enforceable immediately unless subject to a condition. Under the Eastern Caribbean Civil Procedure Rules 2000 (CPR) Part 43, once a domestic judgment has become enforceable, a judgment creditor must apply to request an enforcement order from the court.

A judgment subject to the fulfilment of a condition cannot be enforced unless that condition has been fulfilled or the court gives permission. A judgment must be properly served on the judgment creditor before it can be enforced.

CPR Part 45 sets out types of enforcement remedies available in relation to a money judgment, including:

- Charging order.
- Garnishee order.
- Judgment summons.
- Order for the seizure and sale of goods.
- Appointment of a receiver.

It also sets out enforcement remedies for certain non-money judgments, such as an order for possession of land and an order for delivery of goods. See Question 18.

The beneficiary of an injunction/judgment prohibiting acts can apply for a committal order or sequestration order to help police that judgment.

In many cases, a judgment creditor with a money judgment against a BVI company will seek to enforce the judgment by applying to the court to appoint a liquidator over the judgment debtor company under the Insolvency Act 2003.

### Foreign

A judgment from a jurisdiction subject to the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act) can be registered in the BVI for enforcement as if it were a BVI judgment. The foreign judgment is registrable within 12 months of the date of judgment, unless the BVI court grants a longer period on the basis that it is just and convenient to do so.

A judgment creditor must apply to court under CPR Part 72, including an affidavit containing the necessary confirmations and statements about the judgment (such as the amount of interest that has become due) along with a verified/certified copy of the foreign judgment and a certified/authenticated translation into English if necessary. The application can be made without notice to the judgment debtor. The court can order the judgment creditor to give security for costs in relation to any proceedings that can be brought to set aside the registration. Once a foreign judgment is registered, it can be enforced like any other BVI judgment.

Judgments from jurisdictions not subject to the Reciprocal Enforcement Act cannot be registered. The judgment creditor must claim on the judgment debt as a cause of action under common law. This involves commencing proceedings under CPR Part 8, and serving the judgment debtor under CPR Part 5 or Part 7. The judgment debtor must reply or acknowledge service within 14 days if served within the jurisdiction or within 28 days if served outside the jurisdiction. If the judgment debtor does not acknowledge service, the judgment creditor can apply for default judgment. If the judgment debtor does acknowledge service, the judgment creditor will apply for summary judgment on the basis of the doctrine of obligation by action or estoppel. If judgment is made on that basis, it can be enforced like any other BVI judgment.

In practice, if the judgment debtor is a BVI company, the judgment creditor will often use the foreign judgment to appoint liquidators and seek to wind it up on the basis of insolvency. It may be that formal recognition/registration of the foreign judgment is not necessary and it can be effectively enforced through a claim in liquidation proceedings.

It is not a requirement to appoint counsel to enforce judgments in the BVI, but the procedures are complex so it is advisable. The applications above are made to the High Court. Fees payable include:

- *Inter partes* court application fees of US\$300.
- Ex parte application fees of US\$500.
- Affidavit filing fee of US\$100 (plus US\$25 for an exhibit).

Applications to register foreign judgments under the Reciprocal Enforcement Act can take three to four months depending on court availability. Applications under the common law for judgments from other jurisdictions involving foreign defendants will take longer because the proceedings must be served outside the jurisdiction and summary judgment must be sought and ordered.

### **Foreign judgments: formal/simplified proceedings**

#### **6. Is the enforcement of a foreign judgment subject to formal proceedings or simplified procedures?**

Judgments from jurisdictions subject to the Reciprocal Enforcement of Judgments Act 1922 can be registered under simplified proceedings.

Judgments from other jurisdictions cannot be registered and require formal proceedings (see *Question 5*).

#### **7. Must applicants institute a new action on the foreign judgment in the form of main proceedings instead of making an application for enforcement based on the judgment?**

Judgments from jurisdictions not subject to the Reciprocal Enforcement of Judgments Act 1922 require a new action on the foreign judgment in the BVI court (see *Question 5*).

### **Form of application**

#### **8. What documents and information must be provided with an application for enforcement?**

##### **Domestic**

When commencing enforcement proceedings, the judgment creditor must include a copy of the relevant domestic judgment. Under the Eastern Caribbean Civil Procedure Rules 2000 (CPR) 43.7, if the court has given judgment for a sum in a foreign currency, the judgment creditor must file a certificate stating the exchange rate at the close of business on the previous business day.

##### **Foreign**

An application under CPR Part 72 for registration of a foreign judgment under the Reciprocal Enforcement of Judgments Act 1922 must include an affidavit containing the necessary confirmations and statements regarding the judgment (such as the amount of interest that has become due) along with a verified/certified copy of the foreign judgment and a certified/authenticated translation into English if necessary.

A common law claim on a foreign judgment from a jurisdiction not subject to the Reciprocal Enforcement Act must include the documents required by CPR Part 8 to start proceedings in the usual manner, such as a claim form and statement of claim. An affidavit must also be included, exhibiting a verified/certified copy of the foreign judgment and a certified/authenticated translation into English if necessary.

#### **9. What information must be included in the application regarding the judgment, the claim as awarded in the judgment, the facts and legal grounds of the case, and that the judgment is no longer appealable?**

##### **Domestic**

An application to enforce a domestic judgment in any of the ways set out in the Eastern Caribbean Civil Procedure Rules 2000 Part 45 (see *Question 18*) requires an affidavit that provides:

- Brief details of the judgment.
- Details of the claim as awarded in the judgment.
- The facts and legal grounds of the case.

##### **Foreign**

An application under the Reciprocal Enforcement of Judgments Act 1922 must include an affidavit that provides:

- Brief details of the judgment (such as details of the claim as awarded in the judgment).
- The facts and legal grounds of the case.
- Details of service and appearances by the judgment debtor.
- Whether the judgment is appealable and/or subject to an appeal.

A common law claim in relation to judgments not subject to the Reciprocal Enforcement Act must include a similar affidavit.

## **CHALLENGING ENFORCEMENT**

### **Service**

#### **10. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?**

##### **Domestic**

The court will not review the nature of service of proceedings in relation to a domestic judgment at the enforcement stage unless it is raised by the judgment debtor. However, a judgment must be duly served on the judgment debtor before it can be enforced.

##### **Foreign**

A foreign judgment will not be registered under the Reciprocal Enforcement of Judgments Act 1922, or be considered valid under a common law claim, if the judgment debtor was not duly served with the process of the foreign court.

The judgment creditor must provide evidence of due service in the affidavit supporting the application/claim in order to satisfy the court.

**Final/provisional judgments****11. Must a judgment be final and have conclusive effect, and what is the effect of pending appeal proceedings?****Domestic**

Under the Eastern Caribbean Civil Procedure Rules 2000 (CPR) 60.3, making an appeal against a domestic judgment does not stay proceedings. Therefore, a judgment creditor can continue to apply to enforce a domestic judgment unless the judgment debtor has successfully applied for a stay of execution.

**Foreign**

Under both the Reciprocal Enforcement of Judgments Act 1922 and enforcement by way of common law claim, it is up to the judgment debtor to satisfy the court that an appeal is pending or that it is entitled and intends to appeal against the judgment. Therefore, a foreign judgment can be registered under CPR 72 without notice, and the judgment debtor must apply to set this aside and persuade the court that it is just and convenient to do this pending the appeal in the foreign jurisdiction. Enforcement by common law claim is made on notice so the judgment debtor has the chance to raise the nature of the appeal at any summary judgment hearing and/or other hearing of the claim.

**Foreign judgments: jurisdiction****12. Is the enforcing court entitled to consider the grounds on which the court assumed jurisdiction (and if so, on what jurisdictional grounds can enforcement be refused)?**

The court will consider the grounds on which the foreign court assumed jurisdiction, on the basis of:

- Due service.
- Appearances/submission to the jurisdiction.
- Public policy reasons.

See *Questions 10 and 13*.

**13. If the court assumed jurisdiction on the basis of an exorbitant ground of jurisdiction, can the enforcing court review the judgment on that ground?****Exorbitant ground of jurisdiction**

A foreign judgment will not be registered under the Reciprocal Enforcement of Judgments Act 1922/Eastern Caribbean Civil Procedure Rules 2000 Part 72 if the:

- Foreign court acted without jurisdiction.
- Judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the foreign court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court.
- Judgment debtor was not duly served with the process of the foreign court and did not appear in those proceedings, notwithstanding the fact that the judgment debtor was ordinarily resident or carrying on business in the foreign jurisdiction.

- Judgment was in respect of some cause of action that, for reasons of public policy or for some similar reason, could not have been entertained in the BVI court.

Similar considerations apply under the common law, and principles of fairness or "natural justice" such as due service of proceedings and notice of hearings, are relevant. The BVI court will not simply accept a foreign court's own determination of its jurisdiction. If the foreign court has taken exorbitant jurisdiction (in the eyes of the BVI court), then for reasons of fairness and public policy, the BVI court can refuse to register/enforce the foreign judgment. If the foreign court assumed jurisdiction despite a valid arbitration agreement or jurisdiction clause in favour of another court, the BVI court will probably refuse to register/enforce the foreign judgment.

**Voluntary acknowledgement**

Voluntary appearances in the foreign court or submission to the foreign jurisdiction will not automatically make a foreign judgment registrable/enforceable if broader considerations of due service, fairness and public policy have more weight.

**Foreign judgments: review of judgment****14. Can the enforcing court review the judgment as to its substance if all formalities have been complied with and if the judgment meets all requirements?**

The enforcing court will not review the judgment unless there is an overriding public policy reason. For example:

- The BVI court will not enforce the public laws of another state, therefore, a foreign judgment that enforces a foreign tax law will not be enforced.
- Because gambling is illegal in the BVI, a judgment based on the gambling laws of another state will not be enforced.
- A foreign judgment contrary to the Trustee Act 1961 relating to BVI trusts, will not be enforced.
- Punitive damages may be unenforceable.

The BVI court will not register/enforce a foreign judgment obtained by fraud. Therefore, it may be necessary to consider the substance of the claim if these allegations are made by the judgment debtor.

**Foreign judgments: public policy****15. Can enforcement of a judgment be refused on grounds of public policy? Does public policy include matters of substantive law?**

Public policy considerations are not just limited to procedural deficiencies such as due service. See *Question 14*.

**16. In what circumstances and against which types of judgments has the principle of public policy generally been applied?**

See *Question 14*.

### **Domestic and foreign: other conditions for recognition and enforcement**

#### **17. What other conditions exist to enforce and recognise a judgment/ refuse recognition and enforcement?**

##### **Domestic**

A domestic judgment that is subject to the fulfilment of a condition cannot be enforced unless that condition is fulfilled or the court gives permission. Other than that, the court will not examine the domestic judgment further, unless issues are raised by the judgment debtor.

##### **Foreign**

The relevant conditions around registration and enforcement of a foreign judgment are considered in *Questions 12, 13 and 14*.

### **JUDGMENTS: METHODS OF ENFORCEMENT**

#### **18. What is the enforcement procedure after a declaration of enforceability is granted?**

The Eastern Caribbean Civil Procedure Rules 2000 (CPR) Part 45 set out types of enforcement remedies available in relation to a money judgment, including the following:

- Charging order (*CPR Part 48*).
- Garnishee/attachment order (*CPR Part 50*).
- Judgment summons (*CPR Part 52*).
- Order for the seizure and sale of goods (*CPR Part 46*).
- Order for the possession and sale of land (*CPR Part 53*).

The court can also appoint a receiver (*CPR Part 51*).

The beneficiary of the following can apply for a committal order or sequestration order to help police them (*CPR Part 53*):

- An injunction.
- Judgment prohibiting acts.
- Order of payment of monies into court.

These remedies are available in relation to both domestic judgments and foreign judgments (once registered/recognised).

### **JUDGMENTS: INTERIM REMEDIES AND INTEREST**

#### **Interim remedies**

#### **19. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?**

The Eastern Caribbean Civil Procedure Rules 2000 (CPR) Part 17 provides for interim remedies that the court can order, including freezing and search orders. CPR Part 49 provides for stop notices/orders that can help prevent certain steps being taken in relation to shares belonging to BVI companies.

Under section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap 80), the court can grant an injunction or appoint a receiver if it is just and convenient to do so. Also, a creditor can apply to court to appoint a provisional liquidator over a company in certain circumstances under the Insolvency Act 2003.

All of these measures can assist with protecting assets subject to a judgment. Also, a judgment creditor can apply for an order for oral examination of the judgment debtor to assist with deciding the best method of enforcement (*CPR Part 44*).

Once a foreign judgment is recognised, it can be enforced in the same way as a domestic judgment, including interim remedies if appropriate.

Before registration/recognition, a foreign claimant can apply to the court for a remedy such as a freezing injunction to assist with the foreign proceedings (*see Question 4*).

#### **Interest**

#### **20. Is the judgment creditor entitled to interest? If so, on what basis is it calculated?**

##### **Domestic**

Under the Judgments Act 1907, domestic judgment debts carry interest at a rate of 5% a year from the date of judgment until satisfaction of the debt.

##### **Foreign**

Foreign judgments will carry the same rate of interest under the Judgments Act, unless the BVI court decides to accept a rate of interest applied by the foreign court. As a matter of public policy, the BVI court may not accept a punitively high interest rate.

#### **Currency**

#### **21. Must the value of a foreign judgment be converted into the local currency?**

When applying to register or enforce a judgment given in a different currency to the BVI, the party must file a certificate stating the exchange rate at the close of business the previous business day.

### **ARBITRAL AWARDS: LEGAL FRAMEWORK**

#### **Domestic framework**

#### **22. What is the applicable domestic legislative framework for enforcement of arbitral awards?**

##### **Domestic**

The enforcement of arbitral awards is governed by the Arbitration Act 2013 (Arbitration Act), which came into force on 1 October 2014.

The Arbitration Act introduces the UNCITRAL Model Law on International Commercial Arbitration 1985 to the BVI with some minor exceptions. As the Arbitration Act was only recently brought into force, there is very little case law or guidance on its provisions.

## ONLINE RESOURCES

## Eastern Caribbean Supreme Court Civil Procedure Rules 2009

W [www.eccourts.org](http://www.eccourts.org)

**Description.** The BVI's Civil Procure Rules. The online version may not be up to date with recent amendments, practice directions and judicial orders on procedure.

## British Virgin Islands Arbitration Act 2013

W [www.bvifsc.vg/Portals/2/Arbitration%20Act,%202013.pdf](http://www.bvifsc.vg/Portals/2/Arbitration%20Act,%202013.pdf)

**Description.** This website provides access to the Arbitration Act.

There is no distinction between domestic and foreign arbitral awards in the Arbitration Act. However, there is a distinction between awards under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and non-New York convention awards.

## Foreign

See above, *Domestic*. There is a distinction between awards under the New York Convention and non-New York convention awards.

## International conventions/agreements

## 23. What international conventions and agreements on enforcement of arbitral awards is your jurisdiction a party to?

On 25 May 2014, in order to complement the Arbitration Act 2013 coming into force, the BVI became a party to the New York Convention.

## Definitions

## 24. What is the definition of an arbitral award in your jurisdiction for the purpose of enforcement proceedings?

There is no specific definition of "arbitral award" in the Arbitration Act. However, section 81(1) refers to the enforceability of "an award, whether made in or outside the Virgin Islands, in arbitral proceedings by an arbitral tribunal".

There is a distinction between a New York Convention award (an arbitral award made in a state or territory that is a party to the New York Convention) and a non-New York Convention award.

## ENFORCEABLE/EXCLUDED TYPES OF ARBITRAL AWARD

## 25. What types of arbitral awards are enforceable, and what types are excluded?

## Domestic

There is no distinction between domestic and foreign arbitral awards.

**Enforceable.** Any award, whether New York Convention or otherwise, can *prima facie* be enforced, subject to the considerations and BVI court's discretion (see *Questions 31 to 35*).

As a starting point, arbitral awards are more broadly enforceable than foreign court judgments that (generally) must be final and conclusive money judgments.

Awards containing injunctions or prohibiting a party from carrying out certain acts are enforceable. However, the parties must have agreed that the arbitral tribunal can make such orders. If there was no such agreement, then the party against whom the injunction or order was made will have a defence to the enforcement application in the BVI.

The party with the benefit of the award must apply to the BVI court for leave to enforce it under Part X of the Arbitration Act before taking any enforcement action. Once leave has been granted, the award has the same effect as a judgment or order of the BVI court.

## Foreign

See above, *Domestic*.

## ENFORCEMENT PROCEEDINGS

## Procedure

## 26. What is the procedure for making an application to enforce an arbitral award?

## Domestic awards

There is no distinction between a domestic and a foreign arbitral award. However, there is a distinction between a New York Convention award (an arbitral award made in a state or territory that is a party to the New York Convention) and a non-New York Convention award.

**Convention Awards.** A New York Convention award can be enforced in the BVI by:

- Instituting an action in the court.
- Applying to seek leave of the court.

To institute a claim in the BVI, a party must start proceedings under the Eastern Caribbean Civil Procedure Rules 2000 (CPR) Part 8 with a claim form, statement of claim and affidavit (exhibiting the arbitral award). If the party against whom enforcement is sought is a foreign defendant, this will involve applying for leave to serve out of the jurisdiction. Therefore, in most cases it is much more straightforward to use the second available method and apply to seek leave from the court to enforce the award.

An application for leave is made under CPR 43.10 (which relates to enforcement of awards made by outside bodies). This is similar to an application for registration of a court judgment under the 1922 Act. Once the award is registered, then it can be enforced as if it was a BVI court judgment.

The application for leave is made by way of application notice, supported by affidavit evidence. The application can be made without notice to the other party to the arbitral award. It is not a requirement to appoint counsel to enforce judgments in the BVI, but the procedures are complex so it is advisable. The application is made to the High Court. Fees can include court fees of:

- US\$300 for an *inter partes* application.
- US\$500 for an *ex parte* application.
- Filing fee of US\$100 for an affidavit (plus US\$25 for an exhibit).



Under CPR 43.10(5) the applicant must:

- Exhibit the award (or a copy of it) to the affidavit.
- Give an address for service for the person against whom the applicant seeks to enforce the award.
- If the award is for the payment of money, certify the amount remaining due to the applicant.

Further guidance is given on the necessary affidavit and exhibits (*section 85, Arbitration Act*). The applicant must include:

- The duly authenticated original award or a duly certified copy of the original award.
- The original arbitration agreement or a duly certified copy of the arbitration agreement.
- If necessary, a translation of the award into English certified by an official or sworn translator or by a diplomatic or consular agent.

Applications for leave to enforce can take three to four months, depending on court availability. Applications made by instituting an action will take much longer if foreign defendants are involved and the proceedings must be served out of the jurisdiction.

If leave to enforce is granted, the order must be served on the other party who can then apply to appeal and set aside that decision.

**Non-New York Convention awards.** These can only be enforced by applying to seek leave from the court. This is done in the same way as for New York Convention Awards. The only difference is that the BVI court has slightly broader powers to refuse leave (*see Question 33*).

#### Foreign awards

See above, *Domestic*.

### 27. Can parties seek to enforce only part of the award?

If leave is granted, the award is enforceable in the same way as a judgment or order of the BVI court, and the court can enter judgment under the award. If only parts of the award are relevant to the BVI, the court can agree to enforce only part of it if the matters are separable.

An award containing decisions on matters not submitted to arbitration can be enforced to the extent that the award contains decisions on matters submitted to arbitration that can be separated from the matters not submitted (*sections 83(3) and 86(4), Arbitration Act*).

#### Form of application

### 28. What documents and information must be provided with an application to enforce an award?

See *Question 26*.

### 29. What information must be included in the application?

See *Question 26*.

The affidavit in support of the application must set out briefly the background facts and legal grounds of the case.

It is not compulsory to set out details about due service of the proceedings and details of any appeal regarding the award. However, because the leave hearing is made without notice, it may be better to head off any potential defences that may be raised later during an appeal by the party seeking to set aside the decision.

## CHALLENGING ENFORCEMENT

### Service

#### 30. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?

##### Domestic

Enforcement can be refused if the person against whom the arbitral award is invoked proves that (*sections 83(1)(c) and 86(2)(c), Arbitration Act*):

- They were not given proper notice of the appointment of the arbitrator or of the arbitral proceedings.
- They were otherwise unable to present their case.

Therefore, the BVI court will consider service if it is relevant, particularly at any hearing to set aside leave to enforce.

##### Foreign

See above, *Domestic*.

### Pending challenge proceedings

#### 31. What is the effect of pending challenge proceedings to the award?

##### Domestic

Enforcement can be refused if the person against whom the arbitral award is invoked proves that the award (*sections 83(1)(f) and 86(2)(f), Arbitration Act*):

- Has not yet become binding on the parties.
- Has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

If an application to set aside or suspend an arbitral award is made to a competent authority in the country in which the award was made, the BVI court can (*sections 83(4) and 86(5), Arbitration Act*):

- Adjourn the proceedings for enforcement of the award.
- Order the person against whom the enforcement is invoked to give security.

##### Foreign

See above, *Domestic*.

**Review/opposition****32. Can the enforcing court review an award if all formalities were complied with and if the award meets all requirements?****Domestic**

As explained in *Question 26*, it is necessary to include an original or certified copy of the arbitral award and arbitration agreement, along with a translation. Other than these formalities, the BVI court will not review the award or any other formalities unless a party raises grounds as a defence against enforcement.

**Foreign**

See above, *Domestic*.

**33. What are the grounds for refusing enforcement?****Domestic**

**Both New York and non-New York Convention awards.** The court can refuse enforcement if the person against whom it is invoked proves that:

- They were under some incapacity.
- The arbitration agreement was not valid.
- They were not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present a case.
- The award deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or if no agreement, the law of the country where the arbitration took place.
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

Given that the burden is on the defendant to show otherwise, the starting point under the Arbitration Act (especially in relation to New York Convention awards) is that enforcement is mandatory unless otherwise shown.

The court can refuse enforcement on its own volition if (*sections 83 and 86, Arbitration Act*):

- The award is in respect of a matter that is not capable of settlement by arbitration under the laws of the BVI.
- Enforcement of the award would be contrary to public policy.

**Non-New York Convention awards only.** In relation to Non-New York Convention awards, the court can refuse enforcement for any other reason it considers it just to do so (*section 83(2)(c), Arbitration Act*). Therefore, the court has more discretion in relation to these awards.

**Foreign**

See above, *Domestic*.

**Public policy****34. Which country's public policy applies? Does the court approach the issue differently depending on whether the award is a domestic or foreign award?****Domestic**

Public policy is not limited to procedural deficiencies. The court can, on its own volition, consider substantive issues, such as whether the arbitral award seeks to enforce the public laws of another state (such as taxation) or if the acts/laws relating to the arbitral award are illegal in the BVI (such as gambling). It will probably take the same approach as if it is considering the enforcement of a foreign court judgment.

See *Question 14*.

**Foreign**

See above, *Domestic*.

**35. In what circumstances and against which awards has the principle of public policy generally been applied?**

See *Questions 34 and 14*.

**ACTUAL ENFORCEMENT****36. What is the execution procedure when a declaration of enforceability is granted?**

See *Question 18*.

Once leave of the court has been given, the arbitral award is enforceable in the same way as a judgment or order of the court. The same enforcement remedies are available.

**37. Can defendants oppose the execution procedure, and if so, on what grounds/defences?****Domestic**

The defendants can appeal and seek to set aside the leave of the court to allow enforcement.

The claimant must apply to the court for specific enforcement orders (listed in *Question 18*). If, for instance, the claimant applied for a charging order under Eastern Caribbean Civil Procedure Rules 2000 Part 48, the defendant will have the right to challenge that application in the usual way.

**Foreign**

See above, *Domestic*.

## ARBITRAL AWARDS: INTERIM REMEDIES AND INTEREST

### *Interim remedies*

#### 38. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?

##### **Domestic**

Section 43 of the Arbitration Act allows the court to grant interim measures in relation to arbitral proceedings that have been or are going to be commenced in or outside the BVI. The interim measures include freezing injunctions to assist with arbitral proceedings (if they are capable of giving rise to an arbitral award that can be enforced in the BVI). As such, applications can be made in to the court in relation to foreign arbitral proceedings to protect judgment assets, in a similar way to the *Black Swan* jurisdiction in support of foreign court proceedings (see *Question 4*).

A party wishing to enforce an arbitral award against a BVI company can apply to the court as a creditor, relying on the award as evidence of its insolvency and seeking to appoint a liquidator over the company.

##### **Foreign**

See above, *Domestic*.

### *Interest*

#### 39. Is the creditor entitled to interest? If so, on what basis is it calculated?

##### **Domestic**

If leave is granted by the court, arbitral awards are treated like court judgments. As such, judgment debts under an arbitral award will carry the same 5% rate of interest under the Judgments Act 1907, unless the court decides to accept a rate of interest applied by the arbitral tribunal. See *Question 20*.

##### **Foreign**

See above, *Domestic*.

### *Currency*

#### 40. Is it required to convert the value of foreign awards into the local currency?

When applying to enforce an arbitral award judgment given in a different currency to the BVI, a party must file a certificate stating the exchange rate at the close of business the previous business day.

## JUDGMENTS AND ARBITRAL AWARDS: PROPOSALS FOR REFORM

#### 41. Are any changes to the law currently under consideration or being proposed?

##### **Judgments**

There are currently no changes to the law being considered. However, the fact that the Foreign Judgments (Reciprocal Enforcement) Act 1964 (arguably) has not been properly brought into force and that the Reciprocal Enforcement of Judgments Act 1922 only applies to money judgments is something that might be remedied by amended by the legislature in due course. It is a longer and more unwieldy procedure to seek enforcement by way of fresh claim, rather than registration on the leave of the court.

##### **Arbitral awards**

The Arbitration Act has only recently come into force and represents a modern and recently reformed legislative framework. The BVI is certainly seeking to embrace international arbitration, as seen by the opening in November 2016 of the BVI International Arbitration Centre, providing modern facilities in the centre of Tortola.

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- Acting for the applicant US noteholders in relation to the OAS bankruptcy which involved parallel proceedings in the BVI, New York and Brazil.
- Acting for Bank of America in relation to their exposure to China Fishery Group Limited, a complicated offshore structure responsible for around US\$1.7 billion of fishing industry businesses run out of Peru, Russia and Samoa.
- Representing Grant Thornton as the joint liquidators of companies relating to the Tchenguiz Discretionary Trust, a large contentious trust insolvency dispute.

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# Enforcement of judgments and arbitral awards in the Cayman Islands: overview

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## JUDGMENTS: LEGAL FRAMEWORK

### Domestic framework

#### 1. What is the applicable domestic legislative framework for enforcement of judgments?

##### Domestic

Under section 31 of the Judicature Law, the Grand Court of the Cayman Islands has jurisdiction to deal with the enforcement of judgments, orders, decrees and directions. Domestic judgments are automatically enforceable in the Cayman Islands within six years from the date of their delivery.

##### Foreign

The Cayman Islands has enacted the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (Reciprocal Enforcement Law), which provides a statutory regime for the enforcement of foreign judgments. However, to date this regime has only been extended to judgments from Australia and its external territories.

Under the Reciprocal Enforcement Law, a judgment creditor can apply to register a foreign judgment in the Cayman Islands. Once registered, a foreign judgment is deemed to have the same force and effect as if it were originally made by the Grand Court of the Cayman Islands.

Judgments from all other countries are enforceable at common law. That is, the creditor can sue on the judgment debt as an unpaid debt obligation in a fresh proceeding brought in the Cayman Islands.

### International conventions/agreements

#### 2. What international conventions and agreements on enforcement of judgments is your jurisdiction a party to?

The Cayman Islands is not party to any international conventions or agreements about the reciprocal enforcement of judgments.

The Cayman Islands is a British overseas territory, and the UK can extend (although it has not yet) its ratification of treaties to the Cayman Islands by an Order in Council.

The Cayman Islands is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). See *Questions 22 to 40* about the enforcement of arbitral awards.

### Definitions

#### 3. What is the definition of judgment in your jurisdiction for the purpose of enforcement proceedings?

##### Domestic

For the purposes of enforcement, a domestic judgment includes all decisions given by a court or tribunal including default judgments, decrees, orders, non-money judgments and interim measures.

##### Foreign

For the purposes of enforcement at common law, a foreign judgment is generally enforceable where:

- It is a final and conclusive judgment or order.
- Made for the payment of a sum of money.
- Made by a foreign court of competent jurisdiction.
- Made in proceedings for compensation or damages to an injured party.

Certain non-monetary foreign judgements are also enforceable at common law (*see Question 4*).

A foreign judgment is defined in the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) to mean "a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party".

### Enforceable/excluded types of judgment

#### 4. What types of judgment in commercial matters are enforceable, and what types are excluded?

##### Domestic

**Enforceable.** All types of domestic awards, judgments and orders are enforceable, whether they are final and conclusive, preliminary or interim. These include:

- Money judgments.
- Non-money judgments.
- Default judgments.
- Interim measures.
- Injunctions/judgments prohibiting acts.

## ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS

**Excluded.** There are no specific domestic judgments that are excluded from recognition and enforcement.

### Foreign

**Enforceable.** The following types of judgments are enforceable:

**Money judgments.** Foreign money judgments are enforceable at common law in the Cayman Islands, provided the foreign judgment in question meets the requirements set out in *Question 3*. Money judgments can be enforced under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (Reciprocal Enforcement Law), provided that:

- the judgment debtor was properly served in accordance with the law of the foreign country;
- the judgment originates from one of the jurisdictions to which the Reciprocal Enforcement Law applies (the Reciprocal Enforcement Law currently applies only to Australian judgments);
- the foreign judgment in question is final and conclusive;
- there is a sum of money payable;
- the foreign judgment was given after the Reciprocal Enforcement Law came into force;
- registration is sought within the limitation period of six years from the date of the judgment; and
- at the date of the application, the judgment has not already been wholly satisfied or enforced, and is still capable of enforcement in the country of the foreign judgment..

**Declaratory judgments.** These judgments cannot be enforced under the Reciprocal Enforcement Law, but can be enforced at common law if they meet the relevant conditions.....

**Excluded.** As a matter of public policy, the Grand Court of the Cayman Islands will not uphold a foreign judgment, whether at common law or under the Reciprocal Enforcement Law, if it is repugnant to the Cayman Islands system of law, such as a foreign tax judgment. Furthermore, the court will not enforce judgments that relate to the penal laws of another country, or that impose punitive damages.

Under the Trusts Law, a foreign judgment will not be enforced if it holds that Cayman Islands trusts or dispositions in respect of them are void or liable to be set aside either because the foreign law does not recognise the trust concept or because of heirship, matrimonial or certain other rights that will not be enforced by the foreign court.

## JUDGMENTS: PROCEDURE FOR ENFORCEMENT

### Overview

#### 5. What is the general outline of enforcement proceedings?

##### Domestic

The procedure for enforcement of domestic judgments is set out in O.45 to O.52 of the Grand Court Rules (1995) (the Rules), and the Judicature Law (as revised). A domestic judgment is recognised the moment it is made and becomes enforceable immediately unless it is subject to a condition.

A money judgment can be enforced by means of:

- A writ of fieri facias.
- Garnishee proceedings.
- A charging order.
- The appointment of a receiver.
- An order for committal.
- A writ of sequestration.
- An attachment of earnings order.

A judgment for the delivery up of goods can be enforced by an order of committal, a writ of sequestration or a writ of delivery up.

An *in personam* judgment can be enforced (with leave) by a writ of sequestration against the property of the relevant individuals, or an order for committal.

A judgment for the possession of land can be enforced by a writ of possession (with leave), an order for committal or a writ of sequestration.

### Foreign

**Common law.** The procedure for enforcement of a foreign judgment at common law involves starting a fresh proceeding in the Cayman Islands by filing a writ of summons asserting an action arising from the entry of the foreign judgment. The action must be brought in the financial services division of the Grand Court. As the court will ordinarily not hear the merits of the dispute that gave rise to the foreign judgment, actions to enforce foreign judgments are usually suitable for summary judgment.

Once filed, the writ of summons must be served on the judgment debtor in the ordinary way (noting additional requirements if the judgment debtor resides outside of the Cayman Islands). The judgment debtor has a time limit within which it must acknowledge service or file a defence, and if this is not done, the claimant can apply for judgment to be entered against the judgment debtor by default.

Once the judgment creditor obtains judgment in the new proceeding, the full range of domestic enforcement procedures is available.

**Foreign Judgments Reciprocal Enforcement Law (1996 Revision).** Where the Reciprocal Enforcement Law applies (to Australian judgments only) the judgment creditor must apply to the Grand Court of the Cayman Islands to have the judgment in question registered in the Cayman Islands. This application is made ex parte by originating summons unless the court directs the summons to be served on the judgment debtor.

The judgment debtor has a limited time within which to apply to set aside registration on grounds including that:

- The judgment in question was obtained by fraud.
- The judgment debtor did not receive proper notice of the foreign proceedings.
- The foreign court did not have jurisdiction to decide the matter.
- That enforcement will be contrary to public policy.
- The rights under the foreign judgment do not vest in the person seeking to enforce it.

If registration is not challenged by the judgment debtor, or if it is confirmed, the registered judgment is treated as if it were a judgment of the Grand Court.

**Timing and cost.** Enforcement proceedings, whether by way of a fresh proceeding or by application to register a foreign judgment, can take several months, depending on the length of time required to effect service. Interim relief can be sought to preserve assets pending enforcement, if required.

Security for costs is not required as a matter of course in enforcement proceedings. However, a defendant can apply for this security, and it is commonly given as a pre-requisite for interim relief.

The court fee to start a new claim or to file a registration application is CI\$5,000.

Appeals can be brought against:

- Fresh proceedings.
- Refusal to set aside registration of a foreign judgment under the Reciprocal Enforcement Law.
- Specific enforcement permitted by the court.

Appeals can be founded on a number of bases applicable to any action or application including:

- Issues of fact.
- Points of law.
- Quantum of damages.
- Excess of jurisdiction.

The Cayman Islands Court of Appeal will investigate alleged errors of law and errors of principle, provided that they are at least arguable.

### **Foreign judgments: formal/simplified proceedings**

#### **6. Is the enforcement of a foreign judgment subject to formal proceedings or simplified procedures?**

Formal proceedings are required for enforcement at common law.

An application to register a foreign judgment, which is the process in instances where the Reciprocal Enforcement Law applies, is a simplified enforcement procedure.

#### **7. Must applicants institute a new action on the foreign judgment in the form of main proceedings instead of making an application for enforcement based on the judgment?**

A fresh action must be commenced for enforcement at common law.

An application for registration of a foreign judgment is necessary if the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) applies.

### **Form of application**

#### **8. What documents and information must be provided with an application for enforcement?**

##### **Domestic**

There is no requirement to make an application for enforcement prior to seeking to enforce a domestic judgment.

##### **Foreign**

An application made by ex parte summons to register and enforce a judgment must be supported by an affidavit (*section 4, Foreign Judgments Reciprocal Enforcement Law (1996 Revision)*):

- Exhibiting the judgment or a certified copy, and where the judgment is not in English, a notarised translation.
- Stating the name, trade or business and the last known place of abode or business of the judgment creditor and the judgment debtor.
- Stating that the judgment creditor is entitled to enforce the judgment.
- Confirming that the judgment remains unsatisfied.

For registration under the Reciprocal Enforcement Law, the judgment must be converted into Cayman Islands dollars, at the rate of exchange prevailing at the date the judgment was given in the foreign court.

The documentary requirements for recognition and enforcement of a foreign judgment at common law are similar to those requirements set out in section 4 of the Reciprocal Enforcement Law. In either case, a certified English translation of the judgment or other supporting documents will be required if they are in a foreign language. English is the only language that is recognised in the Cayman Islands.

For enforcement at common law, the new proceedings can be expressed in a foreign currency. Conversion to local currency will be effected either when the local judgment is entered, or at the time of enforcement.

#### **9. What information must be included in the application regarding the judgment, the claim as awarded in the judgment, the facts and legal grounds of the case, and that the judgment is no longer appealable?**

##### **Domestic**

All types of domestic awards, judgments and orders are enforceable. There is no legal requirement under Cayman Islands law to include any information in respect of the judgment, the claim as awarded in the judgment, the facts and legal grounds of the case or whether the judgment is appealable in an application for enforcement.

##### **Foreign**

A copy of the foreign judgment (including a certified translation) must be exhibited to the affidavit in support of the application to register the judgment under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) Law (*see Question 8*). In addition, the amount of the claim as awarded must be specified in the application. There is no specific requirement to include factual and legal grounds.

## CHALLENGING ENFORCEMENT

### Service

#### 10. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?

##### Domestic

The Cayman Islands court will not review the nature of service of proceedings in relation to a domestic judgment at the enforcement stage, unless it is raised by the judgment debtor. Any issues around service must be addressed as part of the underlying domestic proceedings.

##### Foreign

When considering enforcement of a judgment at common law, the Cayman Islands court will not consider the merits of the dispute giving rise to the foreign judgment. However, if the judgment debtor's defence raises issues about service failure in relation to the foreign proceedings, that can be a basis for the Cayman Islands court to refuse to permit enforcement.

Under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), service failure in the foreign proceedings is a statutory ground to set aside registration of a foreign judgment.

### Final/provisional judgments

#### 11. Must a judgment be final and have conclusive effect, and what is the effect of pending appeal proceedings?

##### Domestic

A domestic judgment is enforceable within the Cayman Islands whether it is:

- Preliminary.
- Provisional.
- An interim ruling.
- Final and conclusive.

However, the Cayman Islands court can grant a stay of execution pending appeal either unconditionally or with conditions.

##### Foreign

All enforceable foreign judgments must be final and conclusive in the court that gave the judgment. This is the case regardless of whether enforcement is at common law or falls under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision).

If the judgment in question is under appeal in a foreign court, it can still be final and conclusive for the purposes of recognition by the Cayman Islands court. However, each application will be considered on its merits and the court of the Cayman Islands has unfettered discretion about whether it will allow enforcement. It is open to the Cayman court to stay any application for registration or enforcement pending determination of the foreign appeal.

Enforcement by common law claim is on notice, so the judgment debtor has the chance to raise the nature of the appeal at any summary judgment hearing and/or other hearing of the claim.

### Foreign judgments: jurisdiction

#### 12. Is the enforcing court entitled to consider the grounds on which the court assumed jurisdiction (and if so, on what jurisdictional grounds can enforcement be refused)?

When considering whether a foreign judgment will be enforceable in the Cayman Islands, the court is entitled to consider the grounds on which the court assumed jurisdiction. For a judgment to be enforced at common law, the court must be satisfied that the court issuing the judgment had jurisdiction over the defendant and that the judgment debtor:

- Was present in the foreign jurisdiction at the time when the proceedings were instituted.
- Participated as a claimant or counter-claimant in the foreign proceedings.
- Voluntarily appeared in the foreign proceedings as a defendant.
- Submitted to the foreign court's jurisdiction as a defendant by prior agreement.

It is not enough that the foreign court is vested with jurisdiction under the foreign legal system. It must also have jurisdiction according to common law rules of conflict of laws.

For enforcement under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (Reciprocal Enforcement Law), the Cayman Islands court can consider the grounds on which the foreign court assumed jurisdiction and can set aside registration where it is shown that the foreign court lacked the required jurisdiction. The foreign court will have had the required jurisdiction if the judgment debtor (*section 6, Reciprocal Enforcement Law*):

- Voluntarily submitted to the jurisdiction of the foreign court as evidenced by a voluntary appearance at court.
- Agreed to submit to the jurisdiction of the foreign court in respect of the subject matter of the proceedings, prior to their commencement.
- Resided in the country of the foreign court or carried on business there at the time the proceedings were instituted.
- Was a claimant or a counterclaimant in the proceedings in the foreign court.

#### 13. If the court assumed jurisdiction on the basis of an exorbitant ground of jurisdiction, can the enforcing court review the judgment on that ground?

##### Exorbitant ground of jurisdiction

The court will not review a judgment specifically on the basis that it has been granted on an exorbitant ground of jurisdiction. However the court will refuse to enforce a foreign judgment where it does not comply with the grounds for recognition either under the common law or the Foreign Judgments Reciprocal Enforcement Law (1996 Revision).

##### Voluntary acknowledgement

The Cayman Islands court can still analyse the grounds even if the defendant voluntarily acknowledged the jurisdiction, if the jurisdiction of the foreign court came into dispute once proceedings had been issued.



**Foreign judgments: review of judgment****14. Can the enforcing court review the judgment as to its substance if all formalities have been complied with and if the judgment meets all requirements?**

At common law, the Cayman Islands court will not review the substance of the foreign judgment unless there is an overriding public policy reason. For example, it is alleged to have been procured by fraud or is contrary to public policy.

If enforcement is sought under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), the court will review the foreign judgment under the grounds set out in section 6 (see *Question 12*).

**Foreign judgments: public policy****15. Can enforcement of a judgment be refused on grounds of public policy? Does public policy include matters of substantive law?**

When exercising its discretion to enforce a judgment, the court will have regard to whether the foreign judgment or its enforcement breaches public policy. However, the scope of this review is very narrow and refusal on the grounds of public policy will only arise where there has been a fundamental breach of the most basic notions of justice.

Public policy does not include matters of substantive law.

**16. In what circumstances and against which types of judgments has the principle of public policy generally been applied?**

On public policy grounds, the court will not enforce a judgment debt from a foreign court in respect of taxes, fines or other penalties. Nor will it enforce a judgment where the effect is to assist a foreign state to collect tax.

The court will not aid an attempt by a foreign state to act in excess of its jurisdiction by enforcing sovereign acts of that state outside its own territory (see *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd & others [2008 CILR 267]*).

**Domestic and foreign: other conditions for recognition and enforcement****17. What other conditions exist to enforce and recognise a judgment/ refuse recognition and enforcement?****Domestic**

Generally, the Cayman Islands court will not examine the domestic judgment further, unless issues are raised by the judgment debtor.

A judgment is enforceable automatically in the Cayman Islands for six years from the date of delivery of the judgment (*section 30, Limitation Law (1996 Revision)*). Execution is not possible after expiry of this time limit.

**Foreign**

Opposition to enforcement at common law typically takes the form of substantive defences raised in the fresh proceedings. Challenges include that the:

- Foreign judgment was obtained by fraud.
- Foreign court was not competent to pronounce the judgment.
- Foreign judgment was obtained in proceedings contrary to natural justice.
- Enforcement will be contrary to public policy.

The grounds on which a defendant can challenge the authority of a foreign judgment include that (*section 6, Foreign Judgments Reciprocal Enforcement Law (1996 Revision)*):

- The foreign court lacked jurisdiction over the defendant.
- The foreign judgment was obtained by fraud or proceedings contrary to natural justice.
- Enforcement of the foreign judgment will be contrary to public policy (that is, the foreign law is repugnant to Cayman Islands law).
- The judgment debtor did not receive proper notice of the foreign proceedings in time to defend and did not appear.
- The rights under the judgment in question are not vested in the person who made the application.

**JUDGMENTS: METHODS OF ENFORCEMENT****18. What is the enforcement procedure after a declaration of enforceability is granted?**

Once judgment has been issued by the court in the proceedings brought for the purposes of enforcing a foreign judgment at common law, or once a foreign judgment has been registered in the Cayman Islands under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), it can be enforced in the same way as any other judgment of a Cayman Islands Court.

Domestic enforcement options are set out above in *Question 5*.

**JUDGMENTS: INTERIM REMEDIES AND INTEREST****Interim remedies****19. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?**

The Cayman Islands court can order a variety of provisional measures pending enforcement of either domestic or foreign judgments. Interim measures include:

- Mandatory interim injunctions including:
  - Anton Pillar orders;
  - orders appointing receivers;
  - orders appointing provisional liquidators;
  - orders for interim payments;
  - orders for detention or inspection and preservation of property.
- Freezing injunctions.

## ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS

### Interest

#### 20. Is the judgment creditor entitled to interest? If so, on what basis is it calculated?

##### Domestic

The court can award interest at such rate as it considers appropriate. A domestic judgment will accrue interest automatically from the date of its award, unless the court orders otherwise. The interest rate applied is prescribed in the Judgement Debts (Rates of Interest) Rules and differs depending on the currency in which the judgment is expressed.

##### Foreign

Even if the foreign judgment does not award interest, the corresponding Cayman Islands judgment will automatically accrue interest at the standard judgment interest rate from the date of its award, unless ordered otherwise.

Similarly, a foreign judgment registered under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) accrues interest from the date of registration. Judgment creditors can include in their enforcement action any accrued interest due under the law of the foreign court up to the time of registration.

### Currency

#### 21. Must the value of a foreign judgment be converted into the local currency?

For common law enforcement, the new main proceeding can be expressed in the foreign currency. Conversion to the local currency will be effected either when the local judgment is entered or at the time of enforcement.

For judgments registered under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), the judgment must be converted into Cayman Islands dollars.

## ARBITRAL AWARDS: LEGAL FRAMEWORK

### Domestic framework

#### 22. What is the applicable domestic legislative framework for enforcement of arbitral awards?

##### Domestic

The Cayman Islands enacted the Arbitration Law (2012 Revision) (Arbitration Law) to govern the enforcement of all arbitration proceedings where the seat of the arbitration is in the Cayman Islands, irrespective of where the parties are based.

The Arbitration Law is largely based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law). The Arbitration Law provides a regime for enforcement of domestic awards, interim measures and for challenges to the arbitration agreements in the Cayman Islands courts.

##### Foreign

The Foreign Arbitral Awards Enforcement Law (1997 Revision) (the Foreign Awards Enforcement Law) gives domestic effect to the New York Convention and provides a mechanism for enforcement of New York Convention awards in the Cayman Islands.

Foreign, non-New York Convention awards are also enforceable under the Arbitration Law. Section 72(5) of the Arbitration Law provides that any arbitral awards from any foreign state (irrespective of whether or not they are New York Convention awards) are enforceable in the Cayman Islands under the enforcement provisions of section 6 and 7 of the Foreign Awards Enforcement Law.

### International conventions/agreements

#### 23. What international conventions and agreements on enforcement of arbitral awards is your jurisdiction a party to?

The government of the United Kingdom extended the operation of the New York Convention to the Cayman Islands, which took effect on 24 February 1981 by way of a notification to the Secretary General of the United Nations. The Foreign Arbitral Awards Enforcement Law (1997 Revision) gives effect to the New York Convention in the Cayman Islands.

### Definitions

#### 24. What is the definition of an arbitral award in your jurisdiction for the purpose of enforcement proceedings?

The Arbitration Law defines an "award" as a decision of the arbitral tribunal on the substance of the dispute. A decision includes any interim, interlocutory or partial award. It is analogous to a judgment in a court of law.

Section 62 of the Arbitration Law outlines the requirements about form and content of all arbitral awards. The arbitral award must be in writing and signed by the tribunal. Unless the parties have agreed that no reasons are to be stated in the award, or that the award is made for the purposes of recording a settlement reached between the parties, the award must state the reasons on which it is based.

The Foreign Arbitral Awards Enforcement Law (1997 Revision) defines "Convention award" as an award made under an arbitration agreement in any state (other than the Cayman Islands) that is party to the New York Convention.

## ENFORCEABLE/EXCLUDED TYPES OF ARBITRAL AWARD

#### 25. What types of arbitral awards are enforceable, and what types are excluded?

##### Domestic

**Enforceable.** Any award made by an arbitral tribunal with the correct jurisdiction can be enforced with leave from the court, including:

- Money awards.
- Awards containing injunctions ordering or prohibiting the doing of acts.

- Decisions in preliminary/provisional proceedings.
- Decisions or awards by arbitral tribunals granting provisional measures and declaratory awards.

**Excluded.** Provided the arbitral tribunal had jurisdiction to make the award, no awards will be excluded from enforcement once leave from the court is obtained.

### Foreign

**Enforceable.** In principle, any award made under an arbitration agreement in a state that is a party to the New York Convention is enforceable under the Foreign Arbitral Awards Enforcement Law (1997 Revision) (Foreign Award Enforcement Law). This includes:

- Money awards.
- Awards containing injunctions ordering or prohibiting the doing of acts.
- Decisions in preliminary/provisional proceedings.
- Decisions or awards by arbitral tribunals granting provisional measures and declaratory awards.

**Excluded.** There are no arbitral awards specifically excluded from enforcement under the Foreign Award Enforcement Law.

## ENFORCEMENT PROCEEDINGS

### Procedure

#### 26. What is the procedure for making an application to enforce an arbitral award?

##### Domestic awards

An award made with leave from the court can be enforced in the same way as a judgment or order of the court (section 72(1), Arbitration Law).

All applications made to the Grand Court arising out of arbitrations must be made in the Financial Services Division. Order 73 of the Grand Court Rules requires that the parties must apply for leave to enforce an award by *ex parte* originating summons and must file supporting affidavit evidence exhibiting both the arbitration agreement and the original award (or certificated copies). In addition, the affidavit must state the usual or last known place of residence or business of each of the parties, and must confirm that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

The resulting order must be served on the party against whom the award is sought to be enforced, and that party is then given the opportunity to apply to set aside recognition of the award, or to apply to the court to challenge enforcement.

The fee for start proceedings to enforce an arbitration award in the Grand Court of the Cayman Islands is CI\$5,000.

There is a limitation period of six years to enforce proceedings (section 9, *Limitation Law (1996 Revision)*). The length of enforcement proceedings depends on the complexity of the award

### Foreign awards

The procedure to enforce foreign awards is the same as for enforcement of domestic awards. In the case of both New York Convention and non-New York Convention awards, any enforcement procedure is carried out under sections 6 and 7 of Foreign Arbitral Awards Enforcement Law (1997 Revision). The only additional requirement is that where the award is in a foreign language, a translation of it, certified by an official or sworn translator or by a diplomatic or consular agent, is required. It is not necessary to convert the value of foreign awards into local currency.

#### 27. Can parties seek to enforce only part of the award?

Section 72(1) of the Arbitration Law allows awards to be enforced with permission from the court in the same way as a judgment or order of the court. Even though the legislation does not specifically provide for the enforcement of part of an award, there is no reason in principle why a Cayman Islands court will not allow this.

Awards sought to be enforced can be separated to allow enforcement only of those parts of the award properly submitted to arbitration (section 7(4), *Foreign Arbitral Awards Enforcement Law (1997 Revision)*).

### Form of application

#### 28. What documents and information must be provided with an application to enforce an award?

##### Domestic

See *Question 26*.

##### Foreign

See *Question 26*

#### 29. What information must be included in the application?

Neither the Grand Court Rules (in the case of a domestic award) nor the Foreign Arbitral Awards Enforcement Law (1997 Revision) (Foreign Awards Enforcement Law) (in the case of a foreign award) require specific information about the award to be included in the *ex parte* originating summons. However, the requirement to give full and frank disclosure to the court in cases of *ex parte* proceedings demands that information about details of the claim, the facts and legal grounds and whether the judgment is still open to challenge will, except in unusual cases, be necessary.

Section 6 of the Foreign Awards Enforcement Law requires that the party seeking to enforce a New York Convention award must produce as evidence:

- A duly authenticated original or duly certified copy of the award.
- The original arbitration agreement or a duly certified copy of it.
- A translation if necessary.

## ONLINE RESOURCES

**Grand Court Rules, 1995 (Revised)**

W [https://laws-in-force.judicial.ky/dtSearchView.aspx?fileView=http://laws-in-force.judicial.ky/pdf/Current/G/Grand Court Rules 1995 \(Revised\).pdf](https://laws-in-force.judicial.ky/dtSearchView.aspx?fileView=http://laws-in-force.judicial.ky/pdf/Current/G/Grand%20Court%20Rules%201995%20(Revised).pdf)

**Description.** The Cayman Islands' Procedure Rules. The online version may not be up to date with recent amendments, practice directions and judicial orders on procedure.

**The Arbitration Law (2012 Revision)**

W [https://laws-in-force.judicial.ky/dtSearchView.aspx?fileView=http://laws-in-force.judicial.ky/pdf/Current/A/Arbitration Law, 2012.pdf](https://laws-in-force.judicial.ky/dtSearchView.aspx?fileView=http://laws-in-force.judicial.ky/pdf/Current/A/Arbitration%20Law,%202012.pdf)

**Description.** The Cayman Islands Arbitration Act.

**Foreign Arbitral Awards Enforcement Law (1997 Revision)**

W [https://laws-in-force.judicial.ky/dtSearchView.aspx?fileView=http://laws-in-force.judicial.ky/pdf/Current/F/Foreign Arbitral Awards Enforcement Law \(1997 Revision\).pdf](https://laws-in-force.judicial.ky/dtSearchView.aspx?fileView=http://laws-in-force.judicial.ky/pdf/Current/F/Foreign%20Arbitral%20Awards%20Enforcement%20Law%20(1997%20Revision).pdf)

**Description.** The Cayman Islands Arbitral Awards Enforcement Law.

## CHALLENGING ENFORCEMENT

*Service***30. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?****Domestic**

Any issues about service of the proceedings will have been addressed as part of the underlying domestic proceedings.

Leave to enforce both a domestic and a foreign award will not be given in circumstances where the arbitral tribunal lacked jurisdiction to make the award (section 72(1) (3), Arbitration Law). In addition, it is likely that the Cayman Islands can set aside and refuse to enforce a domestic award on the same grounds applicable to New York Convention awards (see below).

The Grand Court will not usually consider again any issue about service *ex officio*, but will consider this as a defence if raised as a ground to refuse enforcement.

**Foreign**

Enforcement can be refused for foreign awards if any of the following grounds are met (section 7(2), Foreign Arbitral Awards Enforcement Law (1997 Revision)):

- A party to the arbitration agreement was under some incapacity.
- The arbitration agreement was not valid under the law governing it.
- Proper notice of the appointment of the arbitration or the arbitration proceedings was not given or a party was otherwise unable to present a case.

*Pending challenge proceedings***31. What is the effect of pending challenge proceedings to the award?****Domestic**

There are no express provisions in the Grand Court Rules allowing a domestic award to be set aside or suspended pending an application to challenge proceedings. However, in practice it is likely that the Cayman Islands court will take into account the same considerations that are set out in the Foreign Arbitral Awards Enforcement Law (1997 Revision) (Foreign Awards Enforcement Law) (see below, Foreign).

**Foreign**

Where an application has been made to set aside or suspend an award in the country in which it was made, the Cayman court can adjourn the Cayman Islands proceedings and/or order the person against whom the award is made to provide security (section 7(5), Foreign Awards Enforcement Law). In *Terk Technologies Corporation v Dockery 2000 CILR N-1*, it was held that where an award is not yet suspended or set aside by the foreign court, an application for a stay must be made under the court's inherent jurisdiction or under Order 47(1) of the Grand Court Rules which give the court a wide discretion.

*Review/opposition***32. Can the enforcing court review an award if all formalities were complied with and if the award meets all requirements?****Domestic**

The Cayman Islands court is not required to review an award if all formalities were complied with and if the award meets all the requirements.

**Foreign**

The court will not review an award *ex officio* and will only review an award on certain grounds, limited to the grounds outlined in section 7(5) of the Foreign Arbitral Awards Enforcement Law (1997 Revision) (see Question 31).

**33. What are the grounds for refusing enforcement?****Domestic**

Leave to enforce a domestic award will not be given in circumstances where the arbitral tribunal lacked jurisdiction to make the award (section 72(1)(3), Arbitration Law). In addition, it is likely that the Cayman Islands can set aside and refuse to enforce a domestic award on the same grounds applicable to New York Convention awards (see below, Foreign).

**Foreign**

The Cayman Islands court can refuse to enforce a New York Convention award if any of the following grounds are proved by the person resisting enforcement (section 7, Foreign Arbitral Awards Enforcement Law (1997 Revision)):

- A party to the arbitration agreement was under some incapacity.
- The arbitration agreement was not valid under the law of the agreement or the law of the forum.

- Proper notice of the appointment of the arbitrator or of the proceedings was not provided or a party was otherwise unable to present a case.
- The award deals with a dispute not contemplated by or outside the terms or scope of the submission to arbitration.
- The tribunal was not properly or validly composed.
- The award is not yet binding, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- The award is in respect of a matter not capable of settlement by arbitration.
- It would be contrary to public policy to enforce the award.

Where the award is not a New York Convention award, it is covered by the Arbitration Law.

### Public policy

#### 34. Which country's public policy applies? Does the court approach the issue differently depending on whether the award is a domestic or foreign award?

##### Domestic

It is anticipated that the court will apply Cayman Islands public policy when considering local enforcement questions. However there is currently no case law on this issue.

##### Foreign

See above, *Domestic*.

It is not anticipated that the issue will be treated differently depending on whether the award to be enforced is domestic or foreign.

#### 35. In what circumstances and against which awards has the principle of public policy generally been applied?

There has been no case law in the Cayman Islands on this issue. In the absence of local precedent, the Cayman Islands courts will be guided by decisions of the English and Commonwealth courts in relation to the question of which circumstances would be sufficient to refuse enforcement on grounds of public policy.

Arbitral awards obtained by fraud or illegality have been refused enforcement by English courts and it is likely that the Cayman court will adopt a similar position.

### ACTUAL ENFORCEMENT

#### 36. What is the execution procedure when a declaration of enforceability is granted?

An award can be enforced in the same way as a local judgment of the court, once a declaration of enforceability is granted.

Methods of enforcement include:

- Seizure of assets.
- Garnishee orders.
- Charging orders over land or other assets.
- The appointment of a receiver.
- Insolvency proceedings (on the basis that the company in question is unable to pay its debts as they fall due).

#### 37. Can defendants oppose the execution procedure, and if so, on what grounds/defences?

##### Domestic

The target of any enforcement process can seek to oppose the execution procedure on the same grounds that apply to judgments. The available defences are the same as for enforcement of a domestic judgment. See *Question 17*.

##### Foreign

See above, *Domestic*.

### ARBITRAL AWARDS: INTERIM REMEDIES AND INTEREST

#### Interim remedies

#### 38. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?

##### Domestic

The court has jurisdiction to grant interim freezing orders, regardless of whether or not the seat of the arbitration is in the jurisdiction.

##### Foreign

See above, *Domestic*.

##### Interest

#### 39. Is the creditor entitled to interest? If so, on what basis is it calculated?

##### Domestic

The tribunal can award interest calculated as agreed by the parties or in the absence of agreement, in the manner determined by the arbitral tribunal. Interest can be awarded on the whole or on any part of an amount that the tribunal orders to be paid in respect of any period up to the date of the award. Unless the tribunal otherwise directs, the award carries interest from the date of the award at the same rate as a judgment debt.

Under Order 73, rule 32 of the Grand Court Rules, where an applicant seeks to enforce an award of interest, a supporting affidavit must be filed stating:

- Whether simple or compound interest was awarded.
- The date from which the interest was awarded.
- The rate of interest.

## ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS

A calculation showing the total amount claimed up to the date of the affidavit and whether any sum will become due afterwards on a daily basis.

**Foreign**

See above, *Domestic*.

**Currency****40. Is it required to convert the value of foreign awards into the local currency?**

It is not necessary to convert the value of foreign awards into local currency.

**JUDGMENTS AND ARBITRAL AWARDS: PROPOSALS FOR REFORM****41. Are any changes to the law currently under consideration or being proposed?****Judgments**

The Foreign Judgments Reciprocal Enforcement (Amendment) Bill 2014, which is currently undergoing consultation, seeks to expand the list of countries whose judgments can be enforced in the Cayman Islands by way of a streamlined registration process without the need to follow the common law enforcement procedure. However it remains to be seen whether the proposed bill will gain the necessary support from the local profession.

**Arbitral awards**

There are no changes to the law currently under consideration or being proposed.

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# Enforcement of judgments and arbitral awards in Guernsey: overview

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## JUDGMENTS: LEGAL FRAMEWORK

### Domestic framework

#### 1. What is the applicable domestic legislative framework for enforcement of judgments?

##### Domestic

In Guernsey there are various ways to enforce a domestic judgment. An *arrêt* (or arrest) is a form of execution derived from customary law. The types of *arrêt* include:

- *Arrêt conservatoire*, used to freeze assets pending the determination of a claim;
- *Arrêt execution*, used to arrest the assets of a judgment debtor pending sale, towards satisfaction of a judgment debt;
- *Registration* (with leave) against the judgment debtor (or its interest in any realty);
- *Arrêt de gages* (wages), used to arrest wages (a Guernsey form of an attachment of earnings order);
- *Arrêt de personnes*, used to arrest a person to increase the chances of a debt being paid. This is theoretically still available but has not been used in many years;
- *Licitation* is a customary law enforcement procedure against jointly owned property; and
- *Saisie* proceedings for the seizure (and ultimate realisation of) the judgment debtor's Guernsey realty.

The *arrêt conservatoire* has to an extent been eclipsed by the adoption of the Guernsey equivalent of English Mareva and Anton Pillar orders, but can still be used where the creditor wishes to arrest a particular tangible thing, for example, a yacht or car. The key difference is that an arrest works *in rem* (against the thing) whereas the injunctive relief works *in personam*. Thus it is not necessary for the court to have jurisdiction over the person against whom proceedings are being raised for the court to be able to grant an *arrêt des biens* (the *arrêt conservatoire* or *arrêt execution*).

##### Foreign

The following methods are available to enforce a foreign judgment in Guernsey:

- The Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (Reciprocal Enforcement Law) (if applicable).

- The foreign judgment can be sued on as a debt (and early summary judgment obtained even if defended).
- If the Reciprocal Enforcement Law does not apply, common law prevails. This operates on the principle of comity among courts of different jurisdictions.

### International conventions/agreements

#### 2. What international conventions and agreements on enforcement of judgments is your jurisdiction a party to?

The Bailiwick of Guernsey is not a party to the HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

### Definitions

#### 3. What is the definition of judgment in your jurisdiction for the purpose of enforcement proceedings?

##### Domestic

There is no statutory definition of what constitutes a "judgment" in domestic law for enforcement purposes. However, an act of court recording the decision made by one of the judges in one of the following divisions of the courts in the Bailiwick will apply:

- Magistrate's court in Guernsey.
- Court of Alderney.
- Court of the Sénéchal in Sark.
- Royal Court of Guernsey (which has various divisions including the ordinary court, matrimonial court and interlocutory court).
- Guernsey Court of Appeal.

##### Foreign

"Judgment" is defined in the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 as "a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party".

**Enforceable/excluded types of judgment****4. What types of judgment in commercial matters are enforceable, and what types are excluded?****Domestic**

**Enforceable.** In principle a judgment made by a Bailiwick Court for a definite sum of money will be enforceable using the means set out in *Question 1*.

**Excluded.** The following judgments are excluded:

- Where the judgment is impeachable for whatever reason or is subject to appeal and where a stay of execution pending appeal has been granted.
- Where the action is barred by the passage of time (more than six years for judgments by consent or following a hearing (*Acte d'americi*) or more than three years for judgments by default (*Acte de vers arrêt*)).

**Foreign**

**Enforceable.** Under the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (Reciprocal Enforcement Law), the following conditions apply:

- For a judgment of a foreign court to be registrable, it must be for a definite sum of money.
- A judgment debt for taxes or other similar charges or a fine or other penalty will not be enforceable if made after the Reciprocal Enforcement Law came into effect.
- The foreign judgment can be *in personam* or *in rem*, but will usually be *in personam*.
- Under the common law, Guernsey courts will recognise and enforce foreign judgments *in personam* and *in rem*. Accordingly, subject to certain qualifications (for example, judgments obtained by fraud, judgments contrary to public policy and proceedings contrary to natural justice) a judgment *in personam* from a foreign court with jurisdiction to give that judgment is capable of both recognition and enforcement.
- The judgment must be for a debt or definite sum of money, other than a sum payable in respect of taxes or penalties.
- An order for the payment of costs is not enforceable until the costs have been taxed.
- A sum is sufficiently certain if it can be ascertained by simple arithmetical process.
- The judgment must be final and conclusive (this can be the case even though an appeal is pending).
- A judgment *in rem* is also capable of recognition and enforcement at common law. A judgment *in rem* pronounced by a court of a competent jurisdiction is conclusive and binding in Guernsey, not only between parties and privies, as in the case of a judgment *in personam*, but against the world.
- With regard to specific performance, there is only case law in Jersey, not Guernsey. While the Guernsey courts are not bound by the decisions of the Jersey courts, they find them persuasive. Accordingly, the Guernsey courts can follow the Jersey position which provides that the Jersey courts have discretion

(to be exercised cautiously) to enforce a foreign *in personam* non-monetary judgment given by the courts of a competent jurisdiction without considering the merits.

- Given the width of orders that can be recognised, the common law enforcement route must be capable of covering declarations from foreign courts and other orders relating to the status of things, for example, matters concerning trusts.

The Reciprocal Enforcement Law will apply if:

- The judgment that is sought to be enforced was obtained in a reciprocating country.
- It is a judgment to which the Reciprocal Enforcement Law applies.
- The judgment was made in a superior court of the reciprocating country with jurisdiction.

The judgment must be final and conclusive and for a sum of money. Reciprocating jurisdictions include:

- England and Wales.
- Scotland.
- Northern Ireland.
- Isle of Man.
- Israel.
- Italy.
- Jersey.
- Netherlands.
- Netherlands Antilles.
- Surinam.

Where the Reciprocal Enforcement Law does not apply, the common law applies and can permit recognition and enforcement of a foreign judgment. However, the following conditions apply:

- The foreign court that granted the judgment must have had jurisdiction. Guernsey courts will apply conflict of laws rules when determining this.
- Under the common law, a foreign judgment is regarded as a debt (with liability arising from the implied promise to pay the amount of the foreign judgment). Therefore, a claimant will sue the defendant on the debt and apply for summary judgment.

**Excluded.** A judgment will be excluded where it:

- Is impeachable for whatever reason or is subject to appeal and where a stay of execution pending appeal has been granted.
- Is barred by the passage of time (more than six years for judgments by consent or following a hearing (*Acte d'americi*) or more than three years for judgments by default (*Acte de vers arrêt*)).
- Does not comply with the requirements to be enforceable.
- Relates to taxes or other similar charges, fines or other penalties.
- Is contrary to public policy or in relation to proceedings in breach of the principles of natural justice.



## JUDGMENTS: PROCEDURE FOR ENFORCEMENT

### Overview

#### 5. What is the general outline of enforcement proceedings?

##### Domestic

*In personam* claims can be satisfied by seeking to execute the judgment against the moveable or immoveable property of the debtor or by starting insolvency proceedings.

Nearly all of the applications listed in *Question 1* to enforce a domestic judgment will involve an application to the Royal Court.

When executing a judgment against the debtor's personalty, the judgment must be sent to the sheriff asking for the arrest and sale of the personalty to satisfy the outstanding debtor or wage arrest orders to be put in place.

Wage arrests in relation to domestic proceedings or petty debts can also be sought by application to the magistrate's court.

##### Foreign

The process begins with the judgment creditor applying to the Royal Court on an *ex parte* basis seeking leave for the judgment to be registered with the Royal Court.

Once recognised under either the common law or the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957, a foreign judgment is enforceable in the same way as any domestic judgments under Guernsey law.

#### Foreign judgments: formal/simplified proceedings

#### 6. Is the enforcement of a foreign judgment subject to formal proceedings or simplified procedures?

Enforcement of a foreign judgment will be subject to a simplified process if a reciprocating country is involved because the court will not wish to re-open and examine the merits of the judgment.

#### 7. Must applicants institute a new action on the foreign judgment in the form of main proceedings instead of making an application for enforcement based on the judgment?

An application must be made based on the judgment itself.

#### Form of application

#### 8. What documents and information must be provided with an application for enforcement?

##### Domestic

For an *arrêt conservatoire* (see *Question 1*), Practice Direction 3 of 1992 in relation to information that must be included in an injunction applies equally to applications for an arrest. This requires that the following information must be provided:

- Address for service (within the Bailiwick).

- Security for costs and damages and/or undertakings as to costs and damages.
- Undertakings about service of the arrest documentation (and copies if required) and time limits for it.
- Undertakings about time within which to commence action.
- (In urgent cases) undertakings about the time within which to furnish an original affidavit sworn by the claimant or by some other senior agent or director of the claimant with knowledge of the facts.
- A sufficient timeframe for the defendant or affected parties to apply for a variation or lifting of arrest before information is released.
- Details about the party on whom the order is to be served.

As a matter of practice, the applicant for an arrest must also specify:

- The amount and nature of the debt.
- That the creditor has requested payment but the debt remains unsatisfied.
- That the debtor has goods in the jurisdiction capable of arrest.
- That there is a likelihood that the assets will be removed if not arrested.
- That the removal will prejudice the applicant's claim.

Further directions are given in Practice Direction 2 of 1993 and include:

- All applications for an *arrêt conservatoire* must be made through HM Greffier with a sworn affidavit, the draft order and any documents in support.
- At the hearing, the advocate must present the original affidavit and any supporting exhibits.

For an *arrêt execution*, a judgment automatically grants the judgment creditor authority to proceed to enforcement against the personalty of the judgment debtor. Once the judgment creditor receives a certified copy of the judgment, it can deliver it to the sheriff who will then arrest the personalty of the debtor to the value required to be satisfied by the judgment.

For an *arrêt des gages*, the court or sheriff requires the following information:

- Identity of the debtor's employer.
- Debtor's place of work.
- Debtor's rate of earnings including overtime.
- Debtor's expenditure.
- Debtor's other assets and debts.

For an *arrêt des personnes*, the order will only be granted on a debt of GB£10 or more and the creditor must swear an affidavit containing:

- The debtor's name and address.
- The amount and nature of the debt.
- The facts leading the creditor to fear that the debtor is about to leave Guernsey.
- The facts demonstrating that the creditor has tried to obtain payment of the debt without success.
- The reason why the debtor's absence from Guernsey will prejudice the action.

## ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS

### Foreign

If the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (Reciprocal Enforcement Law) applies, a supporting affidavit is required. The affidavit must:

- Exhibit a certified copy of the judgment and state to the best of the deponent's information and belief that the creditor is entitled to enforce the judgment and the judgment has not been satisfied.
- State that the judgment is enforceable by execution in the original jurisdiction and that, if registered, the judgment will not be liable to be set aside under the provisions of section 6 of the Reciprocal Enforcement Law.
- Specify the amount of interest payable and clarify any parts of the judgment that are not enforceable. If the judgment is expressed as payable in a foreign currency, the Guernsey equivalent must be specified on the basis of the exchange rate prevailing at the date of the judgment.

Under the common law, a foreign judgment is regarded as a debt (so the liability arises on the implied promise to pay the amount of the foreign judgment). Therefore, it is necessary to sue the defendant and then apply for summary judgment.

Enforcement then follows as set out above for a domestic judgment where the presence of the debtor or its assets within the jurisdiction allows.

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### 9. What information must be included in the application regarding the judgment, the claim as awarded in the judgment, the facts and legal grounds of the case, and that the judgment is no longer appealable?

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See *Question 8*.

## CHALLENGING ENFORCEMENT

### Service

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### 10. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?

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#### Domestic

A judgment will not be granted in domestic proceedings unless the court is satisfied that the proceedings have been adequately served in accordance with the rules of court.

#### Foreign

Under section 6(1)(m) of the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957, the registration of a foreign judgment must be set aside by the Royal Court if the defendant did not (notwithstanding that process was duly served in accordance with the law of the country of the original court) receive notice of the original proceedings in sufficient time to enable it to defend the proceedings and it did not appear.

However, under both the Reciprocal Enforcement Law and the common law, there is no requirement that the defendant was technically and formally served with notice of the original action in the foreign jurisdiction. Actual notice is sufficient.

Lack of formal notice of the foreign proceedings is not a ground on which objection can be taken in Guernsey to a foreign judgment if the defendant voluntarily appeared in the proceedings. In any event, if the law of the foreign country with regard to notice is complied with, any notice is sufficient if it is in accordance with the law of the foreign country.

If the defendant agreed to submit to the jurisdiction of the foreign court, it is deemed to have agreed to submit to the foreign court's rules of procedure and is bound by its judgment even though the defendant may not have had notice of the proceedings.

### Final/provisional judgments

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### 11. Must a judgment be final and have conclusive effect, and what is the effect of pending appeal proceedings?

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#### Domestic

A judgment must be final and conclusive. An otherwise final judgment is not invalidated because it is subject to an appeal to a higher court, or because an appeal is actually pending, unless a stay of execution has been granted.

#### Foreign

The foreign judgment must be final and conclusive, so it is *res judicata* in the country where it has been pronounced. It must be final in the particular court in which it is pronounced.

### Foreign judgments: jurisdiction

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### 12. Is the enforcing court entitled to consider the grounds on which the court assumed jurisdiction (and if so, on what jurisdictional grounds can enforcement be refused)?

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It is essential to the recognition or enforcement of a foreign judgment *in personam* that the foreign court must have had jurisdiction according to Guernsey rules on the conflict of laws. The enforcing court will consider the following:

- A foreign court has jurisdiction to pronounce a judgment if, at the date of the commencement of the proceedings, the defendant was resident or present in the country of the foreign court.
- Where the defendant is a corporation, the foreign court has jurisdiction over it if, at the date of the commencement of the proceedings, the corporation was to some extent carrying on business in the country of the court at a definite and reasonably permanent place.
- A foreign court has jurisdiction to pronounce a judgment *in personam* capable of recognition and enforcement in Guernsey if the defendant submitted or agreed to submit to the jurisdiction of the foreign court.
- It is uncertain whether the courts of a foreign country have jurisdiction over a national of that country merely by reason of nationality or domicile.
- The mere fact that a foreign court has assumed jurisdiction in circumstances in which a Guernsey court would have assumed jurisdiction is insufficient to give the foreign court jurisdiction for the purpose of recognition or enforcement of a foreign judgment *in personam*.

- The possession by the defendant of property, whether movable or immovable, in the country of the foreign court is an insufficient basis of jurisdiction.
- The mere fact that the defendant was present in the foreign country at the time when the cause of action arose is also insufficient to give the foreign court jurisdiction.

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### 13. If the court assumed jurisdiction on the basis of an exorbitant ground of jurisdiction, can the enforcing court review the judgment on that ground?

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#### Exorbitant ground of jurisdiction

See Question 12.

#### Voluntary acknowledgement

Provided that the foreign court has jurisdiction to pronounce a judgment *in personam* according to the Guernsey conflict of laws rules, it is immaterial to the recognition or enforcement of the foreign judgment that the court lacked competence under the law of its own country.

If the defendant appeared and pleaded to the merits, the appearance is regarded as having been voluntary, even if the defendant contested the court's jurisdiction. On the other hand, an appearance merely to contest the jurisdiction of the foreign court is not a voluntary appearance.

An appearance to release or protect a defendant's property after it has been seized by a foreign court is not a voluntary appearance. An appearance before it has been seized (in order to protect it from seizure) is a voluntary appearance.

#### Foreign judgments: review of judgment

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### 14. Can the enforcing court review the judgment as to its substance if all formalities have been complied with and if the judgment meets all requirements?

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The enforcing court can only review the judgment in the following cases:

- Judgments obtained by fraud.
- Judgments contrary to public policy.
- Proceedings contrary to natural justice.

#### Foreign judgments: public policy

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### 15. Can enforcement of a judgment be refused on grounds of public policy? Does public policy include matters of substantive law?

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Under section 6(1)(a)(v) of the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957, the registration of a judgment can be set aside and under the common law a foreign judgment can be impeached, if the enforcement of the judgment is contrary to public policy in Guernsey.

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### 16. In what circumstances and against which types of judgments has the principle of public policy generally been applied?

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The principle of public policy has been applied:

- In relation to the level of interest applied to the judgment.
- Where the enforcement of a foreign revenue claim has been sought.

#### Domestic and foreign: other conditions for recognition and enforcement

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### 17. What other conditions exist to enforce and recognise a judgment/refuse recognition and enforcement?

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#### Domestic

See Questions 7 to 15.

#### Foreign

Once a foreign judgment is reciprocated or successfully sued on, it becomes enforceable as though it were an originating Guernsey judgment.

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## JUDGMENTS: METHODS OF ENFORCEMENT

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### 18. What is the enforcement procedure after a declaration of enforceability is granted?

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See Questions 1 and 17.

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## JUDGMENTS: INTERIM REMEDIES AND INTEREST

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#### Interim remedies

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### 19. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?

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#### Domestic

Interim relief such as a freezing order (Mareva injunction) can, in appropriate circumstances, be obtained to support an application. Where this occurs, the claimant may need to give security for costs. The amount will depend on the:

- Means of the applicant.
- Likely chance of success.
- Nature of the dispute.
- Likely amount of the costs.

#### Foreign

See above, *Domestic*.

#### Interest

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### 20. Is the judgment creditor entitled to interest? If so, on what basis is it calculated?

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#### Domestic

The Bailiwick courts are empowered by statute to award simple interest on the sum of debt or damages, for any rate and for any period it thinks fit (*section 1, Judgments (Interest) (Bailiwick of Guernsey) Law 1985*).

#### Foreign

Under section 4(2)(c) of the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957, the sum for which a judgment is registered will carry interest. Once registered, it is treated as a Guernsey judgment and the interest is 8% simple.

## Currency

### 21. Must the value of a foreign judgment be converted into the local currency?

In relation to *in personam* claims at common law, the Guernsey courts do not generally convert the damage award into local currency. Judgments can be awarded and enforced in any currency.

## ARBITRAL AWARDS: LEGAL FRAMEWORK

### Domestic framework

### 22. What is the applicable domestic legislative framework for enforcement of arbitral awards?

#### Domestic

Section 61 of the Arbitration (Guernsey) Law 2016, (Arbitration Law) provides that an arbitral award can, with leave of the court, be enforced in the same way as a judgment or order of the court to the same effect. This law applies to arbitration agreements entered into after 12 December 2016. Otherwise the Arbitration (Guernsey) Law 1982 (old Arbitration Law) will continue to apply.

Section 26 of the old Arbitration Law is identically worded as far as enforcement of domestic arbitral awards is concerned.

#### Foreign

Part II of the old Arbitration Law (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards.

### International conventions/agreements

### 23. What international conventions and agreements on enforcement of arbitral awards is your jurisdiction a party to?

A foreign arbitration award is enforceable under the Arbitration (Guernsey) Law, 1982. The Guernsey legislature has given statutory effect to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

### Definitions

### 24. What is the definition of an arbitral award in your jurisdiction for the purpose of enforcement proceedings?

Section 61 of the Arbitration (Guernsey) Law 2016 refers to "an award made by the tribunal pursuant to an arbitration agreement".

Section 31, Part II of the Arbitration (Guernsey) Law 1982 relates to the enforcement of foreign awards. It sets out the awards to which it applies, which includes any award made after the 28 July 1924 to which the Protocol on Arbitration Clauses, 24 September 1922 applies (that is, where one of the parties is a signatory to the Convention on the Execution of Foreign Arbitral Awards signed at Geneva, in a jurisdiction where that convention applies).

## ENFORCEABLE/EXCLUDED TYPES OF ARBITRAL AWARD

### 25. What types of arbitral awards are enforceable, and what types are excluded?

#### Domestic

**Enforceable.** Any award made by a tribunal under an arbitration agreement.

**Excluded.** Leave to enforce an award will not be given where:

- The award is now prescribed.
- The tribunal lacked substantive jurisdiction to make the award.

#### Foreign

**Enforceable.** For a foreign award to be enforceable, it must have:

- Been made under an arbitration agreement that was valid under its governing law.
- Been made by the tribunal provided for in the agreement or constituted in the way agreed on by the parties.
- Been made in conformity with the law governing the arbitration procedure.
- Become final in the country in which it was made.
- Been about a matter that can lawfully be dealt with by arbitration under the law.
- Not been contrary to public policy or the law (in relation to its enforcement).

**Excluded.** A foreign award will not be enforceable if the court is satisfied that the:

- Award has been annulled in the country in which it was made.
- Party against whom enforcement is sought was not given notice of the arbitration proceedings in sufficient time to enable it to present a case, or was under some legal incapacity and was not properly represented.
- Award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.

Recognition or enforcement of a New York Convention award can be refused if the person against whom it is invoked proves that (*section 88, Arbitration (Guernsey) Law 2016*):

- A party to the arbitration agreement was (under the applicable law) under some incapacity.
- The arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication of it, under the law of the country where the award was made.
- That a person was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present a case.
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (although those decisions that are within the scope are enforceable).

- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement, with the law of the country in which the arbitration took place.
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- The award is in respect of a matter that is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

## ENFORCEMENT PROCEEDINGS

### Procedure

#### 26. What is the procedure for making an application to enforce an arbitral award?

##### Domestic awards

Once leave has been granted the application will proceed as if the arbitral award were a judgment (see *Question 5*).

##### Foreign awards

Unlike applications to enforce judgments, under Guernsey law an application for leave to enforce a foreign arbitration award must be made on notice to the other party. This differs from the position in England and in Jersey, where these applications are made ex parte.

When making the application for leave to enforce the award, it must state in general terms the grounds for the application and the applicant must produce the following documents to the court:

- The original award, or a copy of the award authenticated in the way required by the law of the country where the award was rendered.
- Evidence proving that the award is final and evidence and that the conditions outlined in *Question 25* are satisfied.
- The original arbitration agreement, or a properly authenticated copy.
- Where applicable, an English translation of the award and agreement properly certified as correct by an official or sworn translator, or by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in accordance with Guernsey law.

#### 27. Can parties seek to enforce only part of the award?

This is possible if part of the award complies with the conditions required in *Question 25*.

### Form of application

#### 28. What documents and information must be provided with an application to enforce an award?

See *Questions 8* and *26*.

#### 29. What information must be included in the application?

##### Domestic

See *Question 28*.

##### Foreign

See *Question 28*.

## CHALLENGING ENFORCEMENT

### Service

#### 30. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?

##### Domestic

See *Question 10*.

##### Foreign

See *Question 10*

### Pending challenge proceedings

#### 31. What is the effect of pending challenge proceedings to the award?

##### Domestic

See *Question 11*.

##### Foreign

See *Question 11*.

### Review/opposition

#### 32. Can the enforcing court review an award if all formalities were complied with and if the award meets all requirements?

Provided that all the relevant formalities and conditions have been complied with, the enforcing court is unlikely to review the substance of the award.

#### 33. What are the grounds for refusing enforcement?

See *Question 25*.

### Public policy

#### 34. Which country's public policy applies? Does the court approach the issue differently depending on whether the award is a domestic or foreign award?

A Guernsey court will be concerned with whether an award is contrary to public policy in Guernsey, whether that award is domestic or foreign.

## ONLINE RESOURCES

### Guernsey Legal Resources

W [www.guernseylegalresources.gg](http://www.guernseylegalresources.gg)

**Description.** This website is a joint initiative of the Royal Court of Guernsey and the Law Officers of the Crown providing access to the Bailiwick of Guernsey's most frequently used legal material. This includes laws, ordinances, statutory instruments, practice directions, unreported judgments, Guernsey law reports, Guernsey law journals and a link to the Jersey and Guernsey Law Review.

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### 35. In what circumstances and against which awards has the principle of public policy generally been applied?

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See *Question 10*.

## ACTUAL ENFORCEMENT

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### 36. What is the execution procedure when a declaration of enforceability is granted?

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See *Questions 1 and 17*.

### 37. Can defendants oppose the execution procedure, and if so, on what grounds/defences?

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#### Domestic

A party can challenge an award based on lack of substantive jurisdiction, serious irregularity or by appeal on a point of law.

#### Foreign

See above, *Domestic*.

## ARBITRAL AWARDS: INTERIM REMEDIES AND INTEREST

### *Interim remedies*

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### 38. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?

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See *Question 19*.

### *Interest*

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### 39. Is the creditor entitled to interest? If so, on what basis is it calculated?

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#### Domestic

Section 18 of the Arbitration (Guernsey) Law 1982 states that unless the award directs otherwise, it will carry interest from the date of the award and at the same rate as a judgment debt.

Section 43 of the Arbitration (Guernsey) Law 2016 is more complex. It allows the parties to agree on the powers of the tribunal with regard to interest. In the absence of agreement, the tribunal can award simple or compound interest from any dates, at any rates and with any rests that it considers meets the justice of the case either on the award itself or where there has been payment on the outstanding amount.

#### Foreign

Section 18 of the Arbitration (Guernsey) Law 1982 and section 43 of the Arbitration (Guernsey) Law 2016 (*see above, Domestic*) apply to foreign awards in the same way as for domestic awards.

#### Currency

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### 40. Is it required to convert the value of foreign awards into the local currency?

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See *Question 21*.

## JUDGMENTS AND ARBITRAL AWARDS: PROPOSALS FOR REFORM

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### 41. Are any changes to the law currently under consideration or being proposed?

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#### Judgments

A committee on the Royal Court Civil Rules 2007 meets periodically to discuss possible reforms to Guernsey civil litigation procedure but there have been no changes in recent years. The Royal Court issues practice directions periodically.

#### Arbitral awards

These have recently been reformed with the introduction of the by virtue of the Arbitration (Guernsey) Law 2016. It is therefore unlikely that more reform will be proposed in the near future.

## Contributor Profiles



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#### Recent transactions

- Advising on a ground-breaking Blockchain product for fund administration.
- Defending three sets of claims against a Guernsey law trust.

**Professional associations/memberships.** Chairman, Guernsey Association of Compliance Officers; Chairman, Guernsey Bar Association; Member, States of Guernsey Legislation Review Panel.

#### Publications

- Guernsey editor for the Butterworths International Guide to Money Laundering Law and Practice – second edition.
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- Defending enforcement proceedings in relation to an external confiscation order.
- Mis-selling claim against large investment manager for breach of contract and negligence.

#### Publications

- Author – Law in Sport A Recap Of *The Wada Independent Commission's Mandate For Reporting On Iaaf And Araf*.
- Author – Law in Sport An Analysis Of Recent Disciplinary Cases From European Professional Club Rugby.

# Enforcement of judgments and arbitral awards in Jersey: overview

Marcus Pallot and Richard Holden  
Carey Olsen

[global.practicallaw.com/W-007-5822](https://global.practicallaw.com/W-007-5822)

## JUDGMENTS: LEGAL FRAMEWORK

### Domestic framework

#### 1. What is the applicable domestic legislative framework for enforcement of judgments?

##### Domestic

The enforcement of judgments regime in Jersey is derived from customary law and practice and is not codified in any particular statute or rules.

The Jersey Royal Court Rules 2004 (RCR) contain limited rules (*Rule 11/3 and Rule 11/4*) relating to:

- The satisfaction of judgments by distraint of a defendant's moveable assets (broadly, anything other than real property).
- The sale of movables upon which distraint has been made.

The RCR do not codify a more general regime on the enforcement of judgments.

##### Foreign

Judgments given by a "superior court" in a country listed in the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the Reciprocal Enforcement Law) are registrable under the regime set out in that law and its related rules. After registration, it can be enforced in the same way as a local judgment. At present the signatory countries to which the Reciprocal Enforcement Law applies are limited to England and Wales, Scotland, Northern Ireland, Isle of Man and Guernsey.

Judgments from any other courts (including inferior courts in countries designated under the Reciprocal Enforcement Law and the courts of any other country) are enforceable by issuing a fresh action under the principles of Jersey private international law (referred to as "common law enforcement").

The common law enforcement procedure is not available for judgments that are registrable under the Reciprocal Enforcement Law.

The legal principles applied by the Royal Court are broadly similar in the case of both registration and common law enforcement, although the latter offers greater flexibility.

### International conventions/agreements

#### 2. What international conventions and agreements on enforcement of judgments is your jurisdiction a party to?

Jersey is not a member of the EU or the EEA and is not a party to the Brussels or Lugano conventions on jurisdiction and enforcement.

### Definitions

#### 3. What is the definition of judgment in your jurisdiction for the purpose of enforcement proceedings?

##### Domestic

Any judgment or order of a Jersey court is enforceable in Jersey unless it has been set aside on appeal or a stay of execution has been granted.

##### Foreign

**Registration.** Under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (Reciprocal Enforcement Law), "judgment" is defined as "a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party". The judgment must be from a superior court of a country designated under the law and:

- Be final and conclusive as between the parties to it.
- Provide for payment of a sum of money (that is not payable in respect of taxes or other similar charges or in respect of a fine or other penalty).

**Common law enforcement.** The court will apply a substantially similar test to that set out in the Reciprocal Enforcement Law. The court has been prepared to enforce non-monetary judgments under the common law enforcement process and as such the common law enforcement regime is potentially more flexible than the registration procedure.

Further information about the types of foreign judgment that may or may not be enforced by the Jersey court are set out in *Question 4*.



## Enforceable/excluded types of judgment

### 4. What types of judgment in commercial matters are enforceable, and what types are excluded?

#### Domestic

Any judgment or order of a Jersey court is enforceable.

#### Foreign

**Enforceable.** The following judgments are enforceable:

- **Monetary judgments.** A foreign money judgment for a fixed sum will be enforceable, subject to the requirements for finality.
- **Non-monetary judgments.** Non-monetary judgments are enforceable at the court's discretion. The court can recognise (as opposed to enforce) a number of categories of foreign non-monetary judgments. For example, the court has an inherent jurisdiction to recognise the appointment of receivers appointed by a foreign court in order to police a worldwide freezing order.
- **Insolvency judgments.** The position in Jersey in relation to the enforcement of foreign insolvency judgments is not currently clear following two conflicting rulings in the UK, neither of which is binding in Jersey. It is thought that the Jersey court will apply ordinary rules of private international law to the enforcement of foreign insolvency judgments.
- **Trusts/matrimonial judgments.** Article 9 of the Trusts (Jersey) Law 1991, which sets out Jersey's trust firewall provisions, has the effect of restricting the circumstances in which foreign court decisions about Jersey trusts will be enforceable in Jersey. The basic position (following various amendments to Article 9) is that a foreign order to vary a Jersey trust (directing a trustee to take some action authorised by the terms of the trust) may be enforceable or given effect to, but an order to alter a Jersey trust (directing a trustee to take some action not authorised by the terms of the trust) will not.

**Excluded.** Judgments to enforce a foreign penal or revenue law are not enforceable in Jersey.

## JUDGMENTS: PROCEDURE FOR ENFORCEMENT

### Overview

### 5. What is the general outline of enforcement proceedings?

#### Domestic

**Monetary judgments.** A monetary judgment is immediately enforceable by distraint against the judgment debtor's assets. Although no further court order is required before enforcement by distraint against a debtor's assets can begin, in practice it is common to apply for an order or directions, particularly where additional remedies are sought or where third parties are affected (see *Question 17*).

While it is possible to seek an order that the judgment debtor's immovable property be subject to a judicial hypothec (*hypothèque judiciaire*) (see *Question 18*), certain time limits must have elapsed before any action can be taken to enforce against this property.

**Non-monetary judgments.** A non-monetary judgment (such as a mandatory injunction or order for specific performance) will typically specify a time within which the defendant must comply with the relevant order. If the defendant fails to comply, enforcement of the order will usually take the form of an action for committal. If the defendant is found to be in contempt of court following a committal trial, the defendant can be ordered to pay a fine or serve a term of imprisonment. The court can make "unless" orders and other forms of procedural sanction providing that certain consequences will follow if the defendant fails to comply with the order.

#### Foreign

A foreign judgment is not enforceable in Jersey unless and until either:

- It has been registered and the time for challenging the registration has passed.
- An order has been made giving effect to the foreign judgment following a common law enforcement action.

Once the foreign judgment has been registered in Jersey (or an order has been made enforcing it), the judgment will be enforceable from that point on in the same way as a domestic judgment.

### Foreign judgments: formal/simplified proceedings

### 6. Is the enforcement of a foreign judgment subject to formal proceedings or simplified procedures?

If a foreign judgment is registrable under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, the judgment creditor must follow the registration procedure under that law. It must apply to the Royal Court for registration but does not require a new action. Once the judgment has been registered, a notice must be served on the judgment debtor, who will have an opportunity to apply to set aside the registration before it can be enforced.

For any other foreign judgment, the judgment creditor must begin a fresh action in the Royal Court, relying on the unsatisfied foreign judgment as a cause of action. The matter will usually be determined summarily without a full trial. The judgment debtor can oppose the application for summary judgment and/or defend the claim, but there are only limited grounds on which enforcement will be refused and a full factual enquiry is rarely necessary.

The grounds for refusing to enforce a judgment are substantially similar to the grounds on which registration can be set aside (see *Question 10*). If the court is satisfied that the judgment must be enforced, it will be entered in favour of the judgment creditor and be enforceable in Jersey as a domestic judgment.

### 7. Must applicants institute a new action on the foreign judgment in the form of main proceedings instead of making an application for enforcement based on the judgment?

See *Question 6*.

### Form of application

#### 8. What documents and information must be provided with an application for enforcement?

##### Domestic

No separate application needs to be made to enforce a domestic judgment (subject to the requirement to apply for certain enforcement procedures and remedies) (see *Question 5*).

##### Foreign

**Registration procedure.** An application for registration under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (Reciprocal Enforcement Law) is made without notice to the judgment debtor.

The application is made to the Judicial Greffier (a judicial officer of the Royal Court) and the following documents are required:

- Covering letter.
- Affidavit sworn by a representative of the judgment creditor, exhibiting a certified copy of the judgment to be registered and stating to the best of the information and belief of the deponent:
  - that the applicant is entitled to enforce the judgment;
  - either that at the date of the application the judgment has not been satisfied, or if the judgment has been satisfied in part, what the amount is in respect of which it remains unsatisfied;
  - that at the date of the application the judgment can be enforced by execution in the country of the original court; and
  - that if the judgment were registered, the registration would not be, or be liable to be, set aside under Article 6 of the Reciprocal Enforcement Law.

The affidavit must also specify the amount of interest, if any, that under the law of the country of the original court has become due under the judgment up to the time of registration, and set out any other evidence required.

Two copies of a draft order for registration in the prescribed form.

Unless the Judicial Greffier is doubtful that the order for registration should be made or believes that there are questions relating to the application that should be referred to the Royal Court for determination, the foreign judgment will be registered without a hearing.

After registration, the judgment creditor must serve a notice of registration on the judgment debtor, providing a short time (14 or 28 days) within which an application to set aside the registration can be made. The judgment cannot be enforced until that period expires. The registration notice can be served out of the jurisdiction without the leave of the court. The person serving it must endorse a duplicate of the notice of registration with the date on which service was effected within three days of service (or within another time specified by the court in special circumstances), otherwise the judgment cannot be enforced without leave. The judgment creditor must also produce an affidavit of service.

**Common law enforcement procedure.** A common law enforcement action is commenced by an Order of Justice. This is a form of originating process containing a formal pleading setting out the legal and factual basis for a claim. In an action to enforce a foreign judgment, the Order of Justice does not need the full details of the original claim (but an outline summary is usually provided). The fact that a final and conclusive judgment has been entered against the judgment debtor and not satisfied will in itself form the basis of the cause of action in the form of a simple debt claim. The Order of Justice must annex a certified copy of the judgment to be enforced (or this can be exhibited to the affidavit in support of a summary judgment application).

The Order of Justice is endorsed by the court and then served on the defendant (judgment debtor). The Service of Process Rules 2004 provide that a claim brought to enforce a judgment can be served out of the jurisdiction with leave from the court.

A judgment creditor will typically file an application for summary judgment under Royal Court Rule 7/1 with the Order of Justice on the basis that the judgment debtor has no defence to the claim. This requires a summons and supporting affidavit to be filed and served on the defendant. To the extent that the defendant objects on the basis that the judgment should not be enforced, the summary judgment application will be opposed on the basis of those objections.

#### 9. What information must be included in the application regarding the judgment, the claim as awarded in the judgment, the facts and legal grounds of the case, and that the judgment is no longer appealable?

##### Domestic

Not applicable.

##### Foreign

**Registration.** The affidavit must exhibit a certified copy of the judgment to be registered and state to the best of the information and belief of the deponent:

- That the applicant is entitled to enforce the judgment.
- Either that at the date of the application the judgment has not been satisfied, or if the judgment has been satisfied in part, what the amount is in respect of which it remains unsatisfied.
- That at the date of the application the judgment can be enforced by execution in the country of the original court.
- That if the judgment were registered, the registration would not be, or be liable to be, set aside under Article 6 of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (Reciprocal Enforcement Law).

The affidavit must also specify the amount of the interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of registration, and setting out such other evidence required.

There is no requirement to include the full facts and legal arguments of the underlying case.

**Common law enforcement.** An applicant for common law enforcement is expected to include basic information relating to the foreign judgment in the Order of Justice to establish a cause of action based on the unsatisfied judgment.

The affidavit in support of an application for summary judgment must contain substantially the same information as required for registration under the Reciprocal Enforcement Law.

## CHALLENGING ENFORCEMENT

### Service

#### 10. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?

##### Domestic

Not applicable.

##### Foreign

On an application for registration or an application for common law enforcement, the court will not necessarily conduct a detailed inquiry about whether the foreign proceedings were properly served. In both cases it is an implied pre-requisite that the foreign court had jurisdiction.

A judgment debtor can apply to set aside registration or enforcement of a foreign judgment on the grounds that:

- The courts of the country of the original court had no jurisdiction in the circumstances of the case.
- The judgment debtor (being the defendant in the proceedings in the original court) did not (notwithstanding that process was duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable it to defend the proceedings and did not appear.

The affidavit in support of an application for registration must state the deponent's belief that there are no grounds on which the registration can be set aside, and the judgment creditor must highlight any potential issues about this in its application. The Judicial Greffier can refer any question in relation to an application for registration to the Bailiff (the senior judge and president of the Royal Court), so that the Royal Court can give directions on it. If there are any obvious doubts about whether the foreign court had jurisdiction, these will be determined before granting the order for registration. Alternatively, the judgment debtor can raise jurisdictional grounds in support of an application to set aside the registration of the judgment.

In a common law enforcement action (made on notice to the judgment debtor), the judgment debtor will be expected to raise jurisdictional arguments in opposition to the application for summary judgment (and/or by way of a substantive answer to the Order of Justice) and these are then determined by the court.

The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (Reciprocal Enforcement Law) provides that the courts of the country of the original court will, subject to certain exceptions, be deemed to have had jurisdiction only:

- In the case of a judgment given in an action *in personam*:
  - if the judgment debtor (being a defendant in the original court) submitted to the jurisdiction of that court by voluntarily appearing in the proceedings other than for the purpose of protecting or obtaining the release of property seized, or threatened with seizure in the proceedings, or of contesting the jurisdiction of that court;
  - if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court;
  - if the judgment debtor (being a defendant in the original court) had before the start of the proceedings agreed in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court;
  - if the judgment debtor (being a defendant in the original court) was at the time when the proceedings were instituted, resident in, or being a body corporate had its principal place of business in, the country of that court; or
  - if the judgment debtor (being a defendant in the original court) had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.
- In the case of a judgment given in an action where the subject matter was immovable property (or an action *in rem* where the subject matter was movable property), where the property in question was at the time of the proceedings in the original court situated in the country of that court.
- In the case of a judgment given in an action other than any action mentioned in the first two bullet points above, if the jurisdiction of the original court is recognised by the law of Jersey.

The exceptions to the above are as follows:

- If the subject matter of the proceedings was immovable property outside the country of the original court.
- Except in certain circumstances, if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled other than by proceedings in the courts of the country of that court.
- If the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts in the country of the original court and did not submit to the jurisdiction of that court.

The Reciprocal Enforcement Law provides that "action *in personam*" will not include:

- Any matrimonial cause or any proceedings in connection with any matrimonial matter.
- Matters relating to the administration of the estates of deceased persons.

## ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS

- Bankruptcy.
- Winding up of companies.
- Lunacy.
- Guardianship of infants.

The same (or substantially similar) principles about jurisdiction will apply to an action to enforce a foreign judgment at common law. These broadly correspond with English private international law rules on jurisdiction.

### Final/provisional judgments

#### 11. Must a judgment be final and have conclusive effect, and what is the effect of pending appeal proceedings?

##### Domestic

A domestic judgment will not be enforceable if it is not final and conclusive.

A pending appeal does not render a domestic judgment unenforceable unless a stay of execution is granted.

##### Foreign

A foreign judgment will not be registrable or enforceable at common law unless it is final and conclusive.

A pending appeal does not render a foreign judgment unenforceable. However, a pending appeal can be a discretionary factor taken into consideration by the court in the context of an application to set aside registration, or when considering whether to enforce a judgment at common law. It can, in appropriate circumstances, result in an adjournment of the enforcement proceedings pending determination of the appeal.

### Foreign judgments: jurisdiction

#### 12. Is the enforcing court entitled to consider the grounds on which the court assumed jurisdiction (and if so, on what jurisdictional grounds can enforcement be refused)?

See *Question 10*.

#### 13. If the court assumed jurisdiction on the basis of an exorbitant ground of jurisdiction, can the enforcing court review the judgment on that ground?

##### Exorbitant ground of jurisdiction

The court will apply principles of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 and/or Jersey private international law when determining whether the foreign court had jurisdiction. If it is established that the foreign court's jurisdiction was based on an exorbitant ground not recognised under Jersey law, the court will refuse to register or enforce the judgment.

##### Voluntary acknowledgement

A voluntary submission by the defendant to the jurisdiction of the foreign court (other than for the limited purpose of contesting jurisdiction) will be considered sufficient to establish that the foreign court had jurisdiction as a matter of Jersey law.

### Foreign judgments: review of judgment

#### 14. Can the enforcing court review the judgment as to its substance if all formalities have been complied with and if the judgment meets all requirements?

The court will not review the substance of the underlying judgment unless the substance of the judgment is relevant to the court's determination of any issues about the enforceability or registrability of the judgment. For example, if the judgment debtor alleges that the judgment was obtained by fraud, or that its enforcement will be in breach of public policy, the court may need to review the judgment to determine those issues. Typically, however, the court will not assess the merits of the foreign court's decision when deciding whether a foreign judgment should be enforced.

### Foreign judgments: public policy

#### 15. Can enforcement of a judgment be refused on grounds of public policy? Does public policy include matters of substantive law?

A foreign judgment will not be enforced if enforcement is contrary to public policy in Jersey. This can relate to the manner in which the foreign judgment was obtained (procedural issues) or to matters of substantive law.

#### 16. In what circumstances and against which types of judgments has the principle of public policy generally been applied?

The Royal Court has so far never refused to register or enforce a foreign judgment on public policy grounds.

In *Dalemont Limited v Senatorov and others* [2013] JRC 207, the Royal Court held (*obiter*), that the public policy ground for refusing recognition should operate only in exceptional circumstances.

In *Haryanto v Man* (Unreported, 5 July 1991) the Jersey Court of Appeal considered whether registration of an English judgment should be refused on public policy grounds. The English judgment (which gave effect to an arbitral award) had been obtained on the basis of a breach of a settlement agreement between the parties relating to an earlier dispute over various contracts. The judgment debtor objected to the registration of the English judgment on the basis of a finding by a court in Indonesia that the underlying contracts to which the settled proceedings related were void and unenforceable. Unsurprisingly, the Jersey Court of Appeal considered that the enforceability of the underlying contracts was irrelevant, given that the subsequent settlement agreement was valid and binding and that the judgment debtor had previously abandoned arguments about the enforceability and validity of the contracts in earlier proceedings.

## ONLINE RESOURCES

### Jersey Legal Information Board

W [www.jerseylaw.je](http://www.jerseylaw.je)

**Description.** This contains revised versions of all Jersey laws and provides access to judgments of the Royal Court, Court of Appeal and Privy Council, as well as the Royal Court Rules 2004 and practice directions.

### Domestic and foreign: other conditions for recognition and enforcement

#### 17. What other conditions exist to enforce and recognise a judgment/ refuse recognition and enforcement?

##### Domestic

There are no other conditions to enforce and recognise a judgment/ refuse recognition and enforcement.

##### Foreign

The following conditions apply:

- **Time limits.** The registration procedure must be commenced within six years of the date of the foreign judgment or, if applicable, the date of judgment in any relevant appeal. For common law enforcement, no strict time limits apply but the judgment must remain enforceable as a matter of the law of the relevant foreign jurisdiction. Where no time limit applies as a matter of relevant foreign law, a ten-year time limit is generally assumed to apply, but this will ultimately be a question for the court to decide in an appropriate case.
- **Fraud.** No judgment can be registered or enforced in Jersey if it was obtained by fraud.
- **Double recovery.** A foreign judgment will not be enforced if it can be shown that the judgment has already been satisfied in another jurisdiction.
- **Conflicting judgments.** If there are two or more conflicting foreign judgments, the court will consider that the earliest of the judgments creates *res judicata* between the parties, such that the subsequent judgment(s) will not be registrable/enforceable.
- **Multiple damages.** The Trading Interests Act 1980 (Jersey) Order 1983 provides that no foreign judgment awarding a party multiple damages can be registered or enforced in Jersey. A judgment for multiple damages is defined as any judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.

## JUDGMENTS: METHODS OF ENFORCEMENT

### 18. What is the enforcement procedure after a declaration of enforceability is granted?

The principal methods by which a judgment can be enforced are as follows:

- Distraint (by *arrêt*) against a defendant's moveable assets via the Viscount (a government officer whose responsibilities include various functions relating to the enforcement of judgments), who can effect a sale of the assets and apply the proceeds in satisfaction of the judgment.
- Enforcement of a judicial hypothec.
- *Arrêt entre mains*: a procedure with some similarities to a garnishee/third party debt order in England (and also some similarities to a charging order), giving the judgment creditor rights in respect of the judgment debtor's moveable property currently in the hands of a third party.
- Although not strictly a method of enforcement, a judgment creditor can also be entitled to apply for the commencement of a collective bankruptcy proceeding against a judgment debtor known as *désastre*.
- Non-monetary judgments are enforceable by the court through committal proceedings and/or procedural and other sanctions, including unless orders.

While it is technically possible to have an impecunious judgment debtor imprisoned in certain circumstances under a "*saisie*", the procedure has fallen out of use and is generally not considered appropriate.

#### Distraint

As soon as the foreign judgment is deemed to be enforceable, the judgment creditor can begin arresting (distraining) the judgment debtor's assets. Although the Royal Court Rules (RCR) refer to "*distrain*" the customary term for the procedure is an "*arrêt*". The Viscount (at the written request and direction of the judgment creditor) will take possession of the judgment debtor's assets and can sell them in satisfaction of the judgment debt, subject to certain notification requirements set out in RCR 11/4.

There is an automatic right to distraint against wages up to GB£80 a week, but for a figure in excess of that amount a separate application will be required.

#### Judicial hypothec

If a defendant owns property in Jersey, a Jersey court judgment can specify that the immovable property must be registered in the *Registre Public*. This creates a judicial hypothec, enabling the judgment debtor to enforce the judgment against that property using procedures known as "*dégrévement*" (for immoveable property) and "*réalisation*" (for moveable property).

If the judgment remains unsatisfied after a month, the judgment creditor can apply to the Royal Court for an "*Acte Vicomte chargé d'écrire*". The Viscount will then notify the judgment creditor that the property will be deemed to have been renounced if the judgment remains unsatisfied for a further two months (in the case of Royal Court judgments). After a further application to the court by the judgment creditor, the *dégrévement* and/or *réalisation* procedures can be initiated to realise the property in satisfaction of the judgment.

The judgment creditor can apply for an order arresting assets that belong (or that may belong) to the judgment debtor in the hands of third parties. The process is derived from customary law but is similar in many respects to the English garnishee or third party debt order procedure, and can also have characteristics of a charging order.

The judgment creditor can apply *ex parte* to the Royal Court (usually by Order of Justice supported by affidavit) for an order arresting the assets on an interim basis. The *ex parte* order creates an interim charge over the assets that can be finalised or discharged when the matter comes back to the court *inter partes*. The court has discretion whether to grant the order in the circumstances of the case.

Once granted, the order arrests or attaches the debt owed to the judgment debtor, charging it or diverting it to the judgment creditor. The effect is to direct the third party to pay the judgment creditor and also to give the judgment creditor proprietary rights in respect of the asset or debt. The third party in whose hands the assets are arrested will be obliged to make payment, or pass the assets directly to the judgment creditor.

### Bankruptcy

The procedure for applying for a declaration *en désastre* in respect of a judgment debtor is set out in the Bankruptcy (Désastre) (Jersey) Law 1990 and the related Rules. In broad terms the test is whether the debtor can pay its debts as they fall due, and failure to satisfy a judgment debt can constitute evidence of insolvency. In the case of a foreign judgment debt for a specific sum it is not usually a requirement to bring separate enforcement or registration proceedings in respect of that judgment.

If a declaration *en désastre* is made by the court, the Viscount will take responsibility for collecting in the judgment debtor's assets and distributing them to all creditors on the basis of a statutory waterfall. In most cases a judgment debtor will have an unsecured, non-preferential claim in the *désastre* and will rank *pari passu* with other unsecured creditors and will be subordinated to secured and preferential creditors.

There is currently no mechanism as a matter of Jersey law for a judgment creditor to seek to appoint an independent liquidator or trustee in bankruptcy in respect of a judgment debtor.

## JUDGMENTS: INTERIM REMEDIES AND INTEREST

### Interim remedies

#### 19. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?

##### Domestic

The Royal Court has an inherent jurisdiction to grant interim relief in support of the enforcement of a judgment, and regularly does. Interim relief includes freezing injunctions to prevent the dissipation of assets (the *arrêt* procedure (see *Question 18*) may also be available as an alternative). A judgment creditor can also seek a *caveat* in respect of Jersey immoveable property, which restricts the judgment debtor's ability to dispose of property.

There are currently no codified provisions in Jersey to examine a judgment debtor. However, the court will, in appropriate cases, grant disclosure orders to assist in the identification of assets against which enforcement can be made, and to assist in the policing of freezing injunctions. Disclosure orders have been made against third parties, although the juridical basis for these orders remains unclear. Notwithstanding the lack of a codified examination procedure, it is conceivable that the court will, in an appropriate case, order the cross-examination of a judgment debtor to police either a freezing order or a free-standing disclosure order.

Each of the above interim remedies must be sought by application to the court, which in most cases has discretion whether to order the relief sought in the circumstances of the case. Judicial precedent will apply.

##### Foreign

The court will exercise its inherent jurisdiction in relation to domestic judgments when enforcing foreign judgments. The principles were restated in *ENRC NV v Zamin Ferrous Limited* [2015] JRC 217, where the court demonstrated its willingness to grant freezing orders and make disclosure orders in aid of a judgment creditor's worldwide enforcement efforts.

##### Interest

#### 20. Is the judgment creditor entitled to interest? If so, on what basis is it calculated?

##### Domestic

Simple interest can be ordered to be paid on any judgment for the payment of a debt or damages from the date the cause of action arose up to the date of judgment. This amount must be included in the judgment amount.

Every judgment must carry post judgment interest at a rate determined by the court, to accrue up to the date of satisfaction.

Interest will not run on debts that are already accruing it (for example, contractual interest on a loan).

##### Foreign

**Registration.** Pre-judgment interest awarded by the foreign court must be included and payable in the registered judgment.

The court can determine the rate of post-registration interest (up to 4%) that will accrue from the date of registration of the judgment.

**Common law enforcement.** Any pre-judgment interest awarded by a foreign court will ordinarily be included in the Jersey court's judgment giving effect to the foreign judgment, provided that the rate of interest is not excessive or punitive. The court will award post judgment interest in the same way as for a domestic judgment.

## Currency

### 21. Must the value of a foreign judgment be converted into the local currency?

**Registration.** The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 requires judgments for payment of a sum in a foreign currency to be converted to sterling at the rate of exchange prevailing at the date of the judgment of the original court.

**Common law enforcement.** There is no strict requirement for conversion into sterling, although where enforcement is executed against assets valued or denominated in sterling the judgment amount must be converted so that the court can be sure that the judgment creditor does not recover more than the judgment debt.

## ARBITRAL AWARDS: LEGAL FRAMEWORK

### Domestic framework

### 22. What is the applicable domestic legislative framework for enforcement of arbitral awards?

#### Domestic

Arbitration is rarely used as a method of commercial dispute resolution in Jersey. However, domestic arbitral awards are enforceable in Jersey with leave of the court under the provisions of the Arbitration (Jersey) Law 1998 (Arbitration Law).

#### Foreign

In addition to the domestic procedure above, the Arbitration Law provides that a foreign arbitral award handed down in a country that is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) is enforceable as if it were a domestic arbitral award.

Further, other foreign awards from certain non-New York Convention states may also be enforceable under the Arbitration Law if the state in question is a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (Geneva 1927 Convention) in the same way as a domestic award or "by action".

Separately, arbitral awards are to be treated as binding between the parties and can be relied on by parties as a defence, set-off or otherwise in any legal proceedings in Jersey, subject to the rules on enforceability.

The Arbitration Law does not apply to awards from the International Centre for the Settlement of Investment Disputes (ICSID). These awards are enforceable under the Arbitration (International Investment Disputes) (Jersey) Order 1979. This chapter focuses on private commercial arbitration awards.

### International conventions/agreements

### 23. What international conventions and agreements on enforcement of arbitral awards is your jurisdiction a party to?

Jersey has been a deemed signatory of the New York Convention since 2002.

## Definitions

### 24. What is the definition of an arbitral award in your jurisdiction for the purpose of enforcement proceedings?

The Arbitration Law sets out enforcement regimes in relation to:

- Arbitral awards generally and (principally) domestic awards.
- New York Convention awards.
- Other foreign awards (that fall outside the New York Convention but within the Geneva 1927 Convention).

## ENFORCEABLE/EXCLUDED TYPES OF ARBITRAL AWARD

### 25. What types of arbitral awards are enforceable, and what types are excluded?

#### Domestic

**Enforceable.** Any domestic award is enforceable under the Arbitration Law.

**Excluded.** The Arbitration Law does not set out any specific grounds for refusing to enforce a domestic arbitral award. However, there are limited grounds on which an appeal against a domestic award can be brought including:

- Misconduct by the arbitrator.
- Where an arbitration or an award was improperly procured.

A court can choose to exercise its discretion not to enforce an award where an appeal is pending, and it is unlikely to grant leave to enforce it if there are extant proceedings to set the award aside.

#### Foreign

**Enforceable.** Any valid New York Convention award or Geneva 1927 Convention award is *prima facie* enforceable under the Arbitration Law and there are no restrictions about the types of award that are or are not enforceable.

However, a foreign award must meet well-established basic criteria of enforceability including:

- Capacity of the parties.
- Validity of the arbitration agreement.
- Notice.
- Arbitrability of the dispute and scope of the arbitration agreement.
- Proper constitution and conduct of the tribunal.
- Finality of the award.
- Public policy.

**Excluded.** In the case of New York Convention Awards, there is no explicit obligation on the party seeking to enforce it to establish that there are no grounds to set the award aside. The Arbitration Law

## ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS

provides that the court can refuse to enforce an award where the person against whom enforcement is sought proves that one or more of the basic criteria above has not been satisfied.

In the case of a Geneva 1927 Convention award, the person seeking enforcement is under a positive obligation to prove that the award satisfies the basic criteria for enforceability.

### ENFORCEMENT PROCEEDINGS

#### Procedure

#### 26. What is the procedure for making an application to enforce an arbitral award?

##### Domestic awards

There are no specific rules specifying the procedure for enforcing an arbitral award, but the Arbitration Law specifies that applications for leave to enforce can be made without notice and must specify the proposed manner of enforcement of the award in Jersey.

The most common method of application is a "representation" (a form of originating process, similar to a petition) accompanied by an affidavit. Unless there are any likely difficulties with enforcement, or an onerous method of enforcement such as an *arrêt entre mains* is sought, the application will generally be granted at a short procedural hearing or on the papers.

An application to enforce an arbitral award must be made within ten years of the date the award was made and published to the parties.

##### Foreign awards

The procedure is the same as for a domestic award, although the time limit for bringing an enforcement action will be determined by reference to the rules of the foreign arbitration and/or the relevant law in that jurisdiction.

#### 27. Can parties seek to enforce only part of the award?

There is nothing to prevent a party from enforcing only part of an award.

#### Form of application

#### 28. What documents and information must be provided with an application to enforce an award?

##### Domestic

The Arbitration Law is silent about the documentary requirements for enforcement of a domestic award but at a minimum the award itself and a copy of the underlying arbitration agreement must be produced to the court.

##### Foreign

A party seeking to enforce a New York Convention award must produce:

- The authenticated original award or a certified copy of it.
- The original arbitration agreement or a certified copy of it.
- Where the award or agreement is in a foreign language, a certified translation of it.

In practice, those documents will be exhibited to an affidavit in support of the application.

Any awards falling outside the New York Convention must in addition submit:

- Evidence proving that the award is final.
- Evidence proving that the award is a foreign award and that the conditions for enforceability (see Questions 24 and 32) are satisfied.

#### 29. What information must be included in the application?

##### Domestic

Generally the arbitral award will speak for itself and no further information will be required.

##### Foreign

In the case of a New York Convention award the burden of proof as to enforceability lies primarily with the party against whom enforcement is sought. The enforcing party is not obliged to prove that the award meets the basic criteria for enforceability. In practice, however, it is advisable to confirm that no grounds to refuse enforcement exist.

For other awards, the enforcing party must prove that the basic criteria for enforceability are met, so the evidential burden is higher.

### CHALLENGING ENFORCEMENT

#### Service

#### 30. Does the enforcing court review service of the proceedings? What conditions regarding service of the proceedings must be satisfied?

##### Domestic

There are no specific provisions in the Arbitration Law about setting aside awards on service grounds and this will be a matter for determination by the arbitral tribunal itself during the course of the arbitration. However, in the unlikely event that a party can establish that it did not receive proper notice of an arbitration and an award was made, this may constitute a ground to set aside the award on the basis that it was "improperly procured".

##### Foreign

The court can (and almost certainly will) refuse to enforce a New York Convention award if the party against whom enforcement is sought proves that:

- It was not given proper notice of the appointment of the arbitrator or the arbitration proceedings.
- It was otherwise unable to present a case.

A Geneva 1927 Convention award will not be enforceable if the court is satisfied that the party against whom enforcement is sought was not given notice of the arbitration proceedings in sufficient time to enable the party to present its case, or was under some legal incapacity and was not properly represented.



## Pending challenge proceedings

### 31. What is the effect of pending challenge proceedings to the award?

#### Domestic

There is no specific provision about the effect of pending challenges on the enforcement of a domestic arbitration award. However, where a challenge to an award is pending, the court is expected to exercise its discretion not to enforce, or to adjourn or stay the enforcement application until the challenge is determined.

#### Foreign

Where an application to set aside or suspend a New York Convention Award has been made to a competent authority, the court can adjourn the enforcement proceedings and, on application from the party seeking to enforce the award, order the other party to provide security.

For Geneva 1927 Convention awards, they are not deemed final if any proceedings contesting the validity of the award are pending in the country in which it was made.

## Review/opposition

### 32. Can the enforcing court review an award if all formalities were complied with and if the award meets all requirements?

#### Domestic

The court can only review an award if an appeal is made on a point of law. An appeal requires leave of the court or the consent of the parties. The parties can agree to exclude appeal rights in the arbitration agreement.

#### Foreign

The court cannot review a foreign award other than to ensure that the basic criteria for validity and enforceability are met.

### 33. What are the grounds for refusing enforcement?

#### Domestic

There are no specific grounds for refusing to enforce a domestic award. The court might refuse to enforce an award if there is evidence that it was improperly procured, or there is a pending appeal or other procedure to set the award aside.

#### Foreign

**New York Convention awards.** The court can set aside enforcement where the party against whom enforcement is sought proves that:

- A party to the arbitration agreement was (under the law applicable to the party) under some incapacity.
- The arbitration agreement was not valid under the law to which the parties subjected it or, failing that, under the law of the country where the award was made.
- The person was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present a case.

- The award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. (An award that contains decisions on matters not submitted to arbitration can be enforced to the extent that it contains decisions on matters submitted to arbitration that can be separated from those on matters not so submitted).
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing agreement, with the law of the country where the arbitration took place.
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

Enforcement of an award can also be refused if it is in respect of a matter not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

**Geneva 1927 Convention awards.** The grounds for opposing enforcement are substantially the same as for New York Convention awards but there is a provision for the person against whom enforcement is sought to prove some other reason why the award should not be enforced.

## Public policy

### 34. Which country's public policy applies? Does the court approach the issue differently depending on whether the award is a domestic or foreign award?

#### Domestic

These issues are unlikely to arise in the context of the enforcement of a Jersey award, but the court would probably apply principles of Jersey public policy.

#### Foreign

The court will consider issues of Jersey public policy. The principles are the same as those for the enforcement of foreign judgments (see *Question 15*).

### 35. In what circumstances and against which awards has the principle of public policy generally been applied?

See *Question 15*.

## ACTUAL ENFORCEMENT

### 36. What is the execution procedure when a declaration of enforceability is granted?

The enforcement methods available are exactly the same as for foreign judgments. However, a key difference in approach is that the order granting leave to enforce must specify the manner of enforcement.

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### 37. Can defendants oppose the execution procedure, and if so, on what grounds/defences?

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#### Domestic

There are various circumstances in which a defendant can seek to oppose an execution procedure. This will vary depending on the circumstances of enforcement and the method of enforcement being pursued (this applies also to foreign judgments and foreign arbitral awards).

The following are examples of arguments raised in opposition to enforcement/execution in Jersey:

- The possibility that parallel enforcement proceedings in Jersey and another jurisdiction may result in double recovery, and/or that enforcement steps being taken in the other jurisdiction may be improper or fraudulent.
- That the principle of sovereign immunity extended to the entity against which enforcement was sought.
- That the entity against which enforcement was sought was not responsible for the liabilities of the judgment debtor.
- That the *situs* of the assets (for example, debts) against which enforcement was sought was not in Jersey.

#### Foreign

See above, *Domestic*.

## ARBITRAL AWARDS: INTERIM REMEDIES AND INTEREST

### *Interim remedies*

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### 38. Is it possible to apply for interim measures from the enforcing court pending the enforcement proceedings?

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#### Domestic

Interim remedies are available and are the same as those available for enforcement of judgments (*see Question 19*).

#### Foreign

All interim remedies are available in respect of the enforcement of a foreign award.

### *Interest*

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### 39. Is the creditor entitled to interest? If so, on what basis is it calculated?

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#### Domestic

Sums directed to be paid in an award are subject to simple interest at a rate specified by the arbitrator, unless the award directs otherwise.

#### Foreign

Any award of interest in a foreign award will be enforceable in Jersey, provided that the award satisfies the public policy requirement. It is possible that excessive or punitive rates of interest granted in a foreign award may not be enforced.

### *Currency*

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### 40. Is it required to convert the value of foreign awards into the local currency?

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There is no strict requirement to convert awards in a foreign currency into sterling. However, if enforcement is to be made against money or assets held in Jersey and valued in sterling, the court will expect the amount of the award to be converted into sterling to ensure that the enforcing party does not recover more than it is entitled to.

## JUDGMENTS AND ARBITRAL AWARDS: PROPOSALS FOR REFORM

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### 41. Are any changes to the law currently under consideration or being proposed?

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#### Judgments

There are possible reforms under debate to the Royal Court Rules to include provisions for the examination of judgment debtors, but to date there are no concrete proposals.

Amendments to the Companies (Jersey) Law 1991 are likely to be introduced to enable creditors to apply for the appointment of a liquidator for a debtor company, but the expected timing for the introduction of the amendments is currently not clear.

#### Arbitral awards

There are no current or potential reforms under consideration.

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- Advised on the incorporation, acquisition and operation of a vehicle to acquire a multinational property structure underlying a formerly listed property fund to enable all of the underlying entities to have all remaining assets wound up and dissolved.
- Regularly acts for regulated entities involved in actual or threatened proceedings with the Jersey Financial Services Commission.
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- Acting on Jersey's first substantive judgment on dishonestly assisting breach of trust.
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