



## Legal Insights

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# Enforcement of Foreign Judgments and Arbitration Awards in the British Virgin Islands

November 2024

### Introduction

The British Virgin Islands (“**BVI**”) is a very user-friendly jurisdiction for enforcing foreign judgments and arbitral awards.

The Reciprocal Enforcement of Judgments Act 1922 (“**1922 Act**”) and the common law governs the enforcement and registration of foreign judgments in the BVI.

The Arbitration Act 2013 (as revised) (“**Arbitration Act**”) governs the enforcement of arbitration awards in the BVI. The Arbitration Act does not distinguish between domestic and foreign awards but does in relation to awards (“**Convention Awards**”) under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“**New York Convention**”) and non-New York Convention awards (“**non-Convention Awards**”).

The New York Convention was extended to the BVI by the United Kingdom Government in 2014.

### Foreign Monetary Judgments

The jurisdiction where the judgment was obtained will determine which procedure (i.e. the 1922 Act or the common law) is used to enforce the foreign monetary judgment.

#### 1922 Act

Monetary judgments from the following jurisdictions are covered under the 1922 Act:

- 1) England and Wales;
- 2) Scotland;
- 3) Northern Ireland;
- 4) New South Wales;
- 5) the Bahamas;
- 6) Barbados;
- 7) Bermuda;
- 8) Belize;

- 9) Guyana;
- 10) Grenada;
- 11) Jamaica;
- 12) Nigeria;
- 13) St Lucia;
- 14) St Vincent; and
- 15) Trinidad and Tobago.

The 1922 Act provides a simplified registration process for judgments originating from one of the above-listed jurisdictions. In order for a foreign monetary judgment to be recognised, the judgment from the foreign court must be for a specified sum of money and be final and conclusive on the merits. The BVI court must be satisfied that the foreign court had jurisdiction over the judgment debtor, and that they were duly served. Registration would be prevented if, among other things, the judgment was obtained by fraud or registration of the judgment would be against public policy.

A monetary judgment from a jurisdiction which is covered by the 1922 Act can be registered in the BVI for enforcement as if it were a BVI judgment (the judgment will have the same force and effect as if it was a BVI judgment from the date of its registration). An application for registration of a foreign judgment under the 1922 Act may be made without notice but must be supported by affidavit evidence, together with a certified copy of the foreign judgment and a certified English translation (if necessary).

It should be noted that a judgment is registrable within 12 months of the date of the judgment if (in all the circumstances of the case) the court thinks it is just and convenient to enforce the judgment in the BVI. The 12-month period can be for such longer period as may be allowed by the BVI court.

#### Common law debt claim

A judgment that is not from a jurisdiction that is subject to the 1922 Act cannot be registered. Notwithstanding this, a judgment creditor can normally commence a common law claim in the BVI court for the judgment sum as a cause of action for debt in itself so that there is no retrial of the issues. Such a debt claim on the foreign judgment must be commenced within 12 years of the judgment becoming enforceable. Any arrears of interest on the foreign judgment debt cannot be recovered after six (6) years from the date on which the interest was due.

The foreign judgment must not be impeachable. It must also, among other things, be for a debt or definite sum of money as well as be final and conclusive.

A common law claim is commenced via a Claim Form and Statement of Claim. An affidavit must also be included (exhibiting a certified copy of the foreign judgment and, if relevant, a certified English translation).

After the claim is served, the judgment creditor will generally be able to apply for either:

- 1) default judgment (if no acknowledgement of service or defence is filed); or
- 2) summary judgment (on the grounds of the doctrine of obligation by action or estoppel).

The BVI court will not look again at the merits of the foreign judgment. A common law debt claim is not generally a lengthy or complicated process. If judgment is granted on the judgment creditor's common law debt claim, it is enforceable like any other BVI judgment.

#### **Foreign Non-Monetary Judgments**

In the BVI, there is only the indirect enforcement of non-monetary judgments. Where a judgment creditor has a foreign judgment which is based on a cause of action that is recognised under BVI law and can establish that the courts in the BVI have jurisdiction over the judgment debtor, then the cause of action can be brought in the BVI by the judgment creditor. The cause of action or the issue(s) are not re-litigated

because of the foreign judgment and the principles of estoppel. It should be noted that the BVI claim must seek to determine an identical issue or question to that which was determined in the foreign proceedings and given in proceedings between identical parties.

## **Arbitral Awards**

The recognition and enforcement of arbitral awards are governed by the Arbitration Act.

### Convention Award

A Convention Award is enforceable in the BVI either:

- 1) by instituting an action in court; or
- 2) applying to seek leave of the court.

### Non-Convention Award

A non-Convention Award can only be enforced by seeking leave of the court.

### Leave to enforce arbitral award

The requirements and procedure which are applicable to both a Convention Award and a non-Convention Award are the same.

An application for the recognition and enforcement of a foreign arbitral award is made by way of a Fixed Date Claim Form supported by affidavit evidence. The evidence must, among other things:

- exhibit the original or a certified copy of the award (and, if relevant, a certified English translation); and
- exhibit the original or certified copy of the arbitration agreement (where applicable).

The Fixed Date Claim Form must be served on the award debtor. In the event that the award debtor is located outside the jurisdiction, the award creditor must serve out of the jurisdiction.

If leave is granted, the award has the same effect as a BVI court judgment or order and can be enforced using the remedies provided for under the Eastern Caribbean Supreme Court Civil Procedure Rules which apply in the BVI. The order must be served on the award debtor. The award debtor has the right to apply to set aside the decision.

### Refusal to enforce a Convention Award

The enforcement of a Convention Award may only be refused if the person against whom enforcement is sought proves one of the Convention defences. The defences include:

- the arbitration agreement was invalid under the applicable law, or if there was no indication of the applicable law, under the law of the country where the award was made;
- the party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present their case; and
- 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 party against whom enforcement action is taken against has the burden of proof to demonstrate that one of the applicable circumstances applies.

### [Refusal to enforce a non-Convention Award](#)

The grounds for refusal of enforcement of a non-Convention Award are the same as for a Convention Award. However, there is the additional ground where the court has a wider discretion to refuse enforcement on its own volition if it considers it just to do so.

### **Enforcement of Foreign Judgments and Arbitration Awards in the BVI**

Once the foreign judgment or arbitration award become a BVI judgment, it can be enforced by:

- a charging order;
- garnishee order;
- judgment summons;
- an order for the seizure and sale of goods; and
- an order for the appointment of a receiver.

From a practical standpoint, the enforcement of any foreign judgment or arbitration award in the BVI is only effective if the judgment debtor has assets in the BVI against which the foreign judgment or arbitration award can be enforced. This will usually be in the form of shares in a BVI company. The most common way to enforce is to seek a charging order over the shares in the relevant BVI company owned by the judgment debtor. Procedurally, this is done by joining the BVI company to the proceedings and applying for a provisional charging order (“PCO”). The PCO can then be made final. The application for the PCO does not need to be served on the judgment debtor but the order (once granted) needs to be served. It should be noted that the judgment debtor can oppose the PCO being made final. If in the event that the PCO is made final, the judgment creditor can apply for the appointment of a receiver and an order for sale.

### **Appointment of a liquidator**

Notwithstanding the above, the judgment creditor can instead apply to appoint a liquidator over the judgment debtor (where the latter is a BVI company) to wind up the judgment debtor on the basis that the foreign judgment or arbitration award is unpaid. The liquidator can then apply the proceeds of the liquidation to the satisfaction of the judgment debtor's debts, including the relevant foreign judgment or arbitration award. It is normal to serve a statutory demand on the judgment debtor company first in such a situation (although this is not strictly required under the laws of the BVI).

***This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice on the matters covered above, please contact your usual Loeb Smith attorney or any of the following:***

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## About Loeb Smith Attorneys

Loeb Smith is a leading offshore corporate law firm, with offices in the British Virgin Islands, the Cayman Islands, and Hong Kong, whose Attorneys have an outstanding record of advising on the Cayman Islands' law aspects and BVI law aspects of international corporate, investment, and finance transactions. Our team delivers high quality Partner-led professional legal services at competitive rates and has an excellent track record of advising investment fund managers, in-house counsels, financial institutions, onshore counsels, banks, companies, and private clients to find successful outcomes and solutions to their day-to-day issues and complex, strategic matters

