

How to enforce foreign judgments and arbitration awards in the BVI

This guide covers frequently asked questions on the enforcement of foreign judgements and arbitration awards in the British Virgin Islands.

Can foreign judgments and arbitration awards be enforced in the BVI?

Foreign judgments and arbitration awards can and are regularly enforced in the BVI.

The enforceability and registration of foreign judgments in the BVI is governed by the Reciprocal Enforcement of Judgments Act (Cap 65) (the **Reciprocal Enforcement Act**) and the common law. Only monetary judgments from specified jurisdictions can be enforced under the Reciprocal Enforcement Act; common law enforcement must be used in respect of judgments from any other jurisdictions.

The Arbitration Act 2013 (the **Arbitration Act**) governs the enforcement of arbitral awards in the BVI. It does not differentiate between domestic and foreign awards, but it does between 'Convention awards' under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and 'non-Convention awards'.

What are the conditions for enforcing a foreign monetary judgment?

Reciprocal Enforcement Act

For a foreign monetary judgment to be recognised, the claimant must present a judgment from a foreign court of competent jurisdiction that is for a specified sum of money and final and conclusive on the merits. The court will not investigate the loss underpinning the judgment nor whether the obligation to pay remains outstanding.

The BVI court must also be satisfied that the original court had jurisdiction over the judgment debtor, and the judgment debtor was duly served. Other factors that will bar registration include if:

- the judgment was obtained by fraud
- the judgment debtor can demonstrate it has a pending appeal or intends to appeal the judgment
- it would be against public policy, including enforcement of public laws, such as taxes, penalties or fines, of another state

A monetary judgment from a jurisdiction covered by the Reciprocal Enforcement Act can be registered in the BVI for enforcement as if it were a BVI judgment. An application for registration of a foreign judgment under the Act is made according to Part 74 of the Eastern Caribbean Civil Procedure Rules (Revised Edition) 2023 (the **EC CPR**). The application may be made without notice and must be supported by affidavit evidence, including the necessary statements regarding the judgment (such as the amount of interest that has become due), along with a certified copy of the foreign judgment and a certified translation into English, if necessary.

A judgment is registrable within 12 months of the date of the judgment (or such longer period as may be allowed by the court) if in all the circumstances of the case the court thinks it is just and convenient to enforce the judgment in the BVI.

Common law debt claim

Judgments from jurisdictions not subject to the Reciprocal Enforcement Act cannot be registered. Instead, the BVI court will generally allow the judgment creditor to make a common law claim for the judgment sum as a cause of action for debt in itself so that no retrial of the issues is necessary.

The original judgment must not be impeachable, and must also be:

- for a debt or definite sum of money (not being a sum payable in respect of taxes, penalties or fines)
- final and conclusive (at common law a judgment is still final and conclusive even if it is subject to appeal or an appeal is actually pending)
- from a foreign court which had jurisdiction to give the judgment

Further, a debt claim on a foreign judgment must be brought within 12 years of the judgment becoming enforceable and arrears of interest on a judgment debt cannot be recovered after six years from the date on which the interest was due.

A common law claim is commenced under EC CPR Part 8 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. Once the claim has been served, the judgment debtor will have 14 or 35 days to acknowledge service and 28 or 56 days to file a defence, dependent on whether they are in or outside of the jurisdiction, respectively. Following service, the judgment creditor will generally be able to file an application either for default judgment – if no acknowledgement of service or defence is filed – or for summary judgment, on the basis of the doctrine of obligation by action or estoppel. An affidavit supporting the summary judgment application claim will need to set out the steps taken to secure the judgment in the foreign jurisdiction and the judgment debtor's involvement in those proceedings.

The fact that, save for the limited circumstances identified above, the BVI Court will not look again at the merits of the foreign judgment means that even when enforcement needs to take place by bringing a common law debt claim, it is generally not a lengthy process.

Once a judgment is registered or granted on a common law debt claim, it can be enforced like any other BVI judgment.

Can foreign non-monetary judgments be enforced in the BVI?

There is no statutory mechanism for the direct enforcement of non-monetary judgments in the BVI. Nevertheless, if the judgment creditor has a foreign judgment based on a cause of action recognised under BVI law, and can establish that the BVI court has jurisdiction over the judgment debtor (ie, whether the court has jurisdiction to serve the defendant out of the jurisdiction), then that cause of action may be brought in the BVI afresh. The judgment creditor uses the foreign judgment and the principles of estoppel to prevent either the cause of action or the issue(s) from being re-litigated.

The BVI claim must seek to determine an identical issue or question to that determined in the original foreign proceedings and be given in proceedings between identical parties.

Although indirect enforcement is not as straightforward and cost-effective as direct enforcement, it can nevertheless save substantial time and costs for the claimant since not all of the issues will have to be re-tried.

How are foreign arbitral awards enforced in the BVI?

Recognition and enforcement of arbitral awards are governed by Part X of the Arbitration Act. Under the Arbitration Act, a Convention award can be enforced either by instituting an action in court or applying to seek leave of the court; a non-Convention award can only be enforced by seeking leave of the court. Once leave has been granted, the award has the same effect as a judgment or order of the BVI court and can be enforced using the remedies under EC CPR Part 45 (outlined below).

Applications for recognition and enforcement of a foreign arbitral award is made under EC CPR 43.12, by way of a fixed date claim form supported by affidavit evidence. The evidence must:

- exhibit the original or certified copy of the award, and, if relevant, a certified English translation
- where applicable, exhibit the original or certified copy of the arbitration agreement
- specify the date and place of the arbitration proceedings
- specify the amount of the interest, if any, which under the law of the country of the award has become due under the award up to the time of the application
- state to the best of the information or belief of the deponent that the claimant is entitled to enforce the award, at the time of the application the award has not been satisfied, and the amount of the award which remains unsatisfied.

If leave to enforce is granted, the order must be served on the judgment debtor, who can apply to appeal set aside the decision. If the party against whom enforcement is sought is a foreign defendant, the claim must be served out of the jurisdiction under EC CPR 7.3(5).

Convention awards

Pursuant to section 86 of the Arbitration Act, enforcement of Convention awards may only be refused if the person against whom enforcement is sought proves one of the following Convention defences:

- a party to the agreement was, under the law applicable to them, under some incapacity
- the arbitration agreement was invalid under the applicable, 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 proceedings, or was otherwise unable to present their case
- subject to the award containing severable decisions, 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 tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place
- the award has not yet become 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 which is not capable of settlement by arbitration under the laws of the British Virgin Islands or if enforcement would be contrary to public policy

Non-Convention awards

Under section 83 of the Arbitration Act, the grounds for refusal of enforcement of a non-Convention award are the same as for Convention awards with an additional ground of any other reason the court considers just.

How are judgments generally enforced in the BVI?

Once a foreign judgment or arbitration award has been domesticated and has become a BVI judgment, EC CPR Part 45 provides for the following methods of enforcement:

- a charging order under EC CPR Part 48
- garnishee order under EC CPR Part 50
- judgment summons under EC CPR Part 52
- an order for the seizure and sale of goods under EC CPR Part 46
- an order for the appointment of a receiver under EC CPR Part 51

Generally, when judgment creditors seek to enforce foreign judgments or arbitration awards in the BVI, they have reason to believe that the judgment debtor owns assets in the BVI, usually in the form of shares in a BVI company. Therefore, the most common method of enforcement used when seeking to enforce a foreign judgment is to seek a charging order over the shares in the relevant BVI company owned by the judgment debtor.

This is done by joining the company to the proceedings and seeking a provisional charging order, which can then be converted into a final one. There is no requirement to serve the application for an interim charging order on the judgment debtor, and the order granting the relief is simply served once it has been made. The judgment debtor will, however, then have the opportunity to object to the provisional charging order being made final. Once a final charging order has been granted, a judgment debtor will usually apply for the appointment of a receiver and an order for sale. The receiver will typically vote themselves or a nominee on to the company's board of directors, to then sell underlying assets.

Is it also possible to appoint liquidators to enforce a foreign judgment or arbitral award?

Instead of seeking to enforce the claim against the assets of a judgment debtor directly, a judgment creditor can seek to appoint a liquidator over the debtor to wind-up the debtor on the basis of the unpaid judgment or award, and apply the proceeds of liquidation to the satisfaction of the debtor's debts, including the relevant judgment or award. Generally, a statutory demand will be served on the company first, but this is not strictly required under BVI law.

What if there is a risk of dissipation once enforcement proceedings are commenced?

It is common for judgment creditors who may have discovered that the judgment debtor has assets in the BVI to fear that once the enforcement proceedings are brought, the debtor will dissipate assets. For this reason, a freezing order may be sought and granted at the same time as the claim is issued. This means that the order granting the freezing injunction can be served simultaneously with the order registering the judgment or award.

If the matter needs to proceed by common law enforcement, then the injunction can also be sought and obtained at the time of filing so that when the claim is served, it is served with the freezing injunction. To obtain a freezing order, however, it is necessary to have tangible evidence (not simply a suspicion) of a risk of dissipation.

Conclusion

We hope this guide helps you understand how to enforce foreign judgments and arbitration awards in the BVI. If you have any further questions, please contact Claire Goldstein or Christopher Pease.

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