

British Virgin Islands

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1. What are the basic criteria for the courts of your jurisdiction to allow enforcement of a foreign judgment?

Foreign judgments are enforceable in the British Virgin Islands (the “BVI”) either by way of common law based on the foreign judgment or, if registrable in the BVI, under the Reciprocal Enforcement of Judgments Act 1922 (the “REJ Act”). Arbitral awards are enforceable, although different approaches are required depending on whether the award is one made under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (a “Convention Award”) or not (a “Non-Convention Award”). There are no bilateral treaties to which the BVI are a party to in relation to reciprocity regarding the enforcement of foreign judgments.

The REJ Act

The REJ Act only applies to judgments from the High Court of England and Wales, Northern Ireland and the Court of Session in Scotland, and a selection of other jurisdictions including: The Bahamas, Barbados, Bermuda, Belize, Trinidad and Tobago, Guyana, St Lucia, St Vincent and The Grenadines, Jamaica, New South Wales (Australia), and The Federal Supreme Court of Nigeria and the High Courts of the Western, Northern and Eastern Regions and Lagos (Nigeria).

The term “judgment” is defined in section 2(1) of the REJ Act as, “*any judgment or order given or made by a Court in any civil proceedings... whereby any sum of money is made payable and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.*”

Only money judgments for a debt or a definite sum are enforceable under the REJ Act. Non-money judgments are not enforceable under the REJ Act and can only be enforced at common law (see below).

A judgment from a jurisdiction subject to the REJ Act can be registered in the BVI for enforcement as if it were a BVI judgment. The requirements for registration are as follows:

- The judgment must have been given by a court in civil proceedings, must be final and conclusive and must be for a fixed judgment sum.

- The judgment must be registered 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.
- The foreign court must have had jurisdiction.
- The judgment debtor must have been properly served and either appeared in the proceedings or submitted to the jurisdiction of the court or carried on business or been ordinarily resident within the jurisdiction of the foreign court.
- The foreign judgment must not have been obtained by fraud or in breach of natural justice, and must not have arisen from a cause of action which for reasons of BVI public policy could not have been entertained by the BVI court.
- It must be “just and convenient” that the foreign judgment be enforced in the BVI.

The procedure requires a judgment creditor to apply to the BVI court under CPR Part 74, with a supporting affidavit containing the necessary confirmations and statements about the judgment. This will include brief details of the judgment including any interest that has become due, 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 verified or certified copy of the foreign judgment must be exhibited with a certified or authenticated translation into English if necessary. The application can be made without notice and, in such cases, particular care and attention should be given to ensuring that full and frank disclosure is provided. An order giving leave to register a judgment must be drawn up by the judgment creditor. The order must state the period within which an application may be made to set aside the registration and contain a notification that execution on the judgment will not issue until after the expiration of that period.

Before a judgment can be registered a notice of registration of a judgment must be served on the judgment debtor by delivering it to the judgment debtor personally or in such other manner as the court may direct. The notice of registration must state full particulars of the judgment registered and the order for registration; the name and address of the judgment creditor or its legal practitioner on whom any summons issued by the judgment debtor may be served; the period within which any application to set aside the registration may be made; and the right of the judgment debtor to apply to have the registration set aside.

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, and if the registration is not set aside, it can be enforced like any domestic BVI judgment.

Enforcement at common law

Judgments from jurisdictions which are not subject to the REJ Act cannot be registered. In such cases, the judgment creditor must bring a claim in the BVI court 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, if the judgment creditor is resident in another jurisdiction, under CPR Part 7. The judgment debtor must reply or acknowledge service within 14 days if served within the jurisdiction or 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 can apply for summary judgment. Once judgment is entered, it can be enforced like any domestic BVI judgment.

Only money judgments are enforceable as a final and conclusive judgment at common law. Non-money judgments are not enforceable under the doctrine of obligation by action at common law. However, a non-money judgment based on a BVI-recognized cause of action may enable a fresh claim to be brought at common law and for it to be determined by summary judgment based on the principles of equitable estoppel.

Enforcement of arbitral awards

The enforcement of arbitration awards is governed by the Arbitration Act 2013 as amended by the Arbitration Act 2015 and the Arbitration Amendment Act 2020 (the “**Arbitration Act**”). The Arbitration Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration (1985) with some modifications.

Enforcement of Convention Awards

A Convention Award is enforced by a party applying for leave of the court pursuant to the statutory regime contained in Part X of the Arbitration Act and CPR 43 or by commencing an action on the award at common law. Once leave is granted, the award is enforceable in the same manner as a domestic BVI judgment.

The application for leave may be made without notice and in such case, the applicant needs to be cognizant of its duties of full and frank disclosure to the court. The supporting affidavit must exhibit verified or certified copies of the original award and the original arbitration agreement with a certified or authenticated translation into English if necessary. The affidavit also needs to confirm an address for service on the person against whom the applicant seeks to enforce the award and, if the award is for a payment of money, certify the amount remaining due to the applicant.

After leave has been granted, the order must be served on the award debtor. The award debtor has a right to apply to set aside the order if the application for leave is made without notice. Where the application for leave is made on notice, the award debtor will have an opportunity to oppose any order for enforcement being made on one or more of the following exhaustive grounds:

- a party to the arbitration agreement was under some incapacity under the law applicable to it;
- the arbitration agreement was not valid;
- the party was 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 submission to arbitration;
- the composition of the arbitral authority 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; or
- 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.

	<p>The court may also refuse enforcement of Convention Awards on its own volition if:</p> <ul style="list-style-type: none"> • the award is in respect of a matter that is not capable of settlement by arbitration under the laws of the BVI; or • it would be contrary to public policy to enforce the award. <p><u>Enforcement of Non-Convention Awards</u></p> <p>Non-Convention Awards can only be enforced by an application to enforce pursuant to the statutory regime under Part X of the Arbitration Act. The requirements and procedure applicable to Non-Convention Awards are the same as those for Convention Awards, however for the latter the court has broader discretion to refuse enforcement where it considers it just to do so.</p>
<p>2.</p>	<p>What other considerations may apply to enforcement of a foreign judgment against a state in your jurisdiction, e.g. notice provisions?</p>
	<p>Subject to the issues relating to state immunity discussed in question 3 and those matters addressed immediately below, the enforcement of a judgment against a State in the BVI does not require a judgment creditor to comply with any specific or additional rules over and above those required to enforce a foreign judgment against a non-state judgment debtor. The enforcement process is purely a court process and does not require the consent of a political body for the enforcement proceedings to be conducted.</p> <p>It is worth noting that a State, including its sovereign or other head of State in his/her public capacity, the government of that State, and any department of that government, enjoys certain procedural privileges which will be relevant considerations when enforcing a judgment against a State:</p> <p><u>Service of proceedings</u></p> <p>Service on a State is dealt with under s.12 of the SIA and CPR 7.14. Unless otherwise agreed with the State in question, service of any proceedings must be transmitted to the State via the Foreign, Commonwealth and Development Office to the Ministry of Affairs (the “Ministry”) of the State. In practice a request for service via this route along with the accompanying paperwork, must initially be delivered to the Commercial Case Manager at the High Court Registry to process. From there our experience is that it will be sent to the Governor’s office and then the minister for foreign affairs for onward transmission. Service is deemed to have been effected when the statements of case are received at the relevant foreign Ministry. In practice this can take many weeks or months which is not unique to the BVI process. However, this requirement does not apply to counterclaims made against a State or an action in rem.</p> <p><u>Judgment in default</u></p> <p>A judgment in default of appearance cannot be made against a State without proving that service has been effected in the correct way and that two month period for entering an appearance has passed.</p>

	<p><u>Failure to disclose documents / information</u></p> <p>No penalty by way of committal or fine can be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purpose of proceedings to which that State is a party.</p> <p><u>Immunity of State against certain types of relief</u></p> <p>An injunction or order for specific performance or the recovery of land or other property cannot be made against a State.</p>
<p>3.</p>	<p>What special considerations apply where the defendant/debtor in enforcement proceedings is a state, e.g. doctrine of sovereign immunity?</p>
	<p>It is worth noting at the outset that, whilst not currently in force, the United Nations Convention on Jurisdictional Immunities of States and their Property is intended to consolidate the international doctrine of state immunity. While it is unclear when this convention will take effect, it is not anticipated that this pending development signals a wholesale change in the law as regards sovereign immunity, as set out below. However, readers should be mindful that this area of law may be subject to change in the future.</p> <p>Where a State is a defendant in enforcement proceedings in the BVI, the case may give rise to a defence based on state immunity. The law of state immunity in the BVI is derived from the United Kingdom’s State Immunity Act 1978 (the “SIA”) which is extended to the BVI by the State Immunity (Overseas Territories) Order 1979 (SI 1979/458) (the “SIOTO”). By Schedule 2 of SIOTO the references to the United Kingdom in the SIA shall be construed as a reference to the BVI.</p> <p>The SIA provides that the BVI courts do not have jurisdiction over a State except in certain circumstances, which are discussed below. The exceptions relate to both immunity from adjudication and immunity to enforcement. It should also be noted that the BVI court is obliged to give effect to sovereign immunity even in circumstances where the State does not appear in the proceedings. This means that any judgment creditor seeking to enforce a foreign judgment or arbitral award against a State in the BVI will invariably need to raise arguments on both immunity from adjudication and immunity from enforcement on any without notice hearing as part of its duty of full and frank disclosure. Failure to do so may result in any order obtained ex parte being dismissed at the return hearing: see <i>Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan and others</i> (BVIHC(COM)2020/0196) (25 May 2021). While this is the only BVI matter dealing with registration and enforcement of ICSID Awards, it should be treated with caution as it has been consistently distinguished internationally – see <i>Sodexo v Hungary</i> (2021) NZHC 371 (at paragraph 28) and <i>Infrastructure Services v Kingdom of Spain</i> (2023) EWHC 1226 (Comm) (at paragraphs 120-121).</p> <p>Exceptions to immunity from adjudication</p> <p>The SIA establishes the general proposition that the BVI courts have no jurisdiction to adjudicate disputes against sovereign states unless one of the exceptions described in sections 2 to 11 applies. The immunities extend to the sovereign or other head of state of</p>

the relevant country in their public capacity, the government of that state, and any department of that government. This immunity extends both to the adjudication of legal disputes in which states are involved, and to interim and final enforcement actions against states and their property.

There are a number of notable exceptions to the general rule, and there is no State immunity where:

- (i) The State has submitted to the jurisdiction of the BVI courts. The right to claim immunity will be waived if the State participates in the BVI legal proceedings other than to claim immunity or to assert an interest in property to ground a claim of immunity for that property: section 2, SIA.
- (ii) The proceedings relate to a commercial transaction entered into by the State defined as including any contract for the supply of goods or services, any loan or other transaction for the provision of finance (including a guarantee): section 3(1)(a), SIA.
- (iii) The proceedings relate to a contractual obligation on the State that is to be performed wholly or partly in the BVI: section 3(1)(b), SIA.
- (iv) The State has agreed to submit the dispute to arbitration: section 9, SIA.
- (v) There is no immunity to proceedings relating to contracts of employment performed within the BVI, for personal injury or property damage within the BVI, proceedings relating to immovable property within the BVI, proceedings relating to intellectual property rights in the BVI, proceedings relating to rights as a member of a body corporate, partnership or unincorporated association arising under BVI law, issues relating to arbitration in the BVI, and certain *in rem* claims made in Admiralty proceedings in the BVI.

Exceptions to immunity from enforcement

In the context of immunity from enforcement, section 13(2) of the SIA sets out a general rule preventing a party from:

- (a) Obtaining an injunction, order for specific performance or order for the recovery of land or other property against the state; and
- (b) Enforcing any judgment or arbitration award against the property of a state.

There are two exceptions to the general rule about immunity from enforcement. First, a State can give written consent (for example, by agreement or by treaty) to the giving of any relief or the issue of any process. A State's consent can be limited to particular circumstances or apply generally. Secondly, in respect of the enforcement of judgments or arbitration awards only, such judgments or awards may be enforced against property that is "*for the time being in use or intended for use for commercial purposes*". For what constitutes such property, see question 6 below.

4.	<p>What exceptions may apply where the claim results from improper actions of the defendant state, e.g. wars of aggression?</p>
	<p>There are no recorded cases which consider exceptions to State immunity in the context of inappropriate acts, such as wars of aggression as defined in the Rome Statute of the International Criminal Court (the “Rome Statute”).</p> <p>It is conceivable that a “war of aggression” might touch upon the exception to adjudication immunity set out at section 5 of the SIA (as extended to the BVI by the SIOTO) which provides that a state is not immune as respects proceedings in respect of— (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the BVI.</p> <p>The English High Court recently confirmed in <i>Ghanem Al-Masarir v Kingdom of Saudi Arabia</i> [2022] 2199 (QB) at [153] that the burden of proving an exception to the general immunity provided by section 1 of the SIA rests with the judgment creditor and not the judgment debtor, and the court must be satisfied on the balance of probabilities that an exception applies.</p>
5.	<p>What due process standards and exceptions may apply in proceedings for enforcement of judgment against a State?</p>
	<p>In this regard, BVI law does not differentiate between a State debtor and any other judgment debtor. Thus, a State debtor may be able to rely upon any of the common arguments deployed by judgment debtors in BVI enforcement proceedings. Such arguments might include the following:</p> <p><u>Service</u></p> <p>A foreign judgment will not be registered under the Reciprocal Enforcement Act or be considered valid under common law enforcement action if the judgment debtor was not duly served with the process of the foreign court. The judgment creditor must produce evidence of due service in the affidavit supporting the application/claim to satisfy the BVI court.</p> <p><u>Jurisdiction of the foreign court</u></p> <p>A foreign judgment will not be registered and/or may be liable to be set aside if the judgment debtor was not subject to the personal jurisdiction of the foreign court and had not appeared in or submitted to the jurisdiction of the foreign court.</p> <p><u>Existence of pending appeal against foreign judgment</u></p> <p>The Reciprocal Enforcement Act permits a foreign judgment to be registered under CPR 74 without notice. Once registered a judgment debtor may apply to set it aside on the basis that the foreign judgment is the subject of a pending appeal. In such a case, it would be for the judgment debtor to satisfy the BVI court that it is just and convenient to set aside the registration pending the appeal in the foreign jurisdiction.</p>

	<p><u>Judgment subject to appeal</u></p> <p>At common law, a foreign judgment is final and conclusive even though it is subject to appeal and an appeal is pending in the foreign country where it was given. Further, enforcement at common law is an on-notice procedure, so the judgment debtor has the chance to raise the existence of an appeal at any summary judgment hearing and/or other hearing of the claim. While the existence of an appeal may not be a strict bar to enforcement, it may be a discretionary factor taken into consideration by the BVI court in the context of enforcement proceedings. For example, the BVI court may stay or adjourn the enforcement proceedings pending the outcome of the appeal, if appropriate.</p> <p><u>Judgment obtained by fraud</u></p> <p>In obtaining the foreign judgment there must have been no fraud on the part of the judgment creditor or on the part of the foreign court.</p> <p><u>Judgment contrary to public policy of the BVI</u></p> <p>It should not be contrary to BVI public policy for the foreign judgment to be recognized or enforced. A foreign judgment that enforces a foreign tax law or penal award such as fines or penalties will not be enforced in the BVI. The BVI court will also not enforce a judgment where it deems that the foreign court acted without jurisdiction.</p> <p><u>Judgment contrary to natural justice</u></p> <p>The proceedings pursuant to which the foreign judgment were obtained must not be contrary to the principles of natural justice.</p> <p>The initial burden of showing that the foreign judgment was obtained correctly falls on the judgment creditor. At the enforcement stage where a judgment debtor raises issues in its defense, the burden is on the judgment debtor.</p>
<p>a.</p>	<p><i>What standard will the court apply in the enforcement proceedings when assessing whether the service requirements have been met in the original proceedings against a state?</i></p>
	<p>As mentioned above, a judgment debtor might argue that it was not on notice of the original proceedings at all or they were not provided with adequate notice in order to prepare its defense of the original proceedings. Where such an issue is before the BVI court, it would expect service in the original proceedings to have been effected in accordance with the laws and rules of the jurisdiction in which the original proceedings took place.</p> <p>The BVI court’s approach will depend on whether the issue is raised (a) at the stage when a foreign judgment is being domesticated in the BVI, or (b) at the enforcement stage after the domestication process has been completed. As to the former, there are service requirements both under the REJ Act and under the common law to serve the domesticated judgment and the registration application on the judgment debtor. The</p>

	<p>judgment creditor will therefore need to satisfy the BVI court that the service requirements have been met.</p> <p>At the enforcement stage, where a judgment debtor seeks to challenge whether service of the original proceedings took place at all or correctly, it would have the burden to demonstrate why the criteria in the foreign proceedings were not met and for the judgment creditor to rebut any arguments made. If served through diplomatic channels, the creditor should be able to establish a chain of service via relevant affidavit evidence.</p>
b.	<i>What exceptions may apply where conventional forms of service against a state are impossible, e.g. due to absence of diplomatic relations?</i>
	<p>There are no specific exceptions that can be referred to in the BVI in relation to the service against a State in the original proceedings. The point will likely turn on the law and rules of the State of the original proceedings and may require expert evidence of such law and rules.</p>
c.	<i>What standard will the court apply in the enforcement proceedings when assessing whether the right to representation requirements have been met in the original proceedings against a state?</i>
	<p>As a general rule in relation to domestic judgments, the court will not go behind any domestic judgment properly made. Where the BVI court is required to assess whether or not the right to representation has been met in the original foreign proceedings against a State, there are no formal requirements. The criteria mentioned above (see questions 1 and 5) will likely be referred to. Chief among these are public policy and natural justice grounds. In this regard, the BVI courts will not normally recognize or enforce any foreign judgment where there has been a breach of the rules of natural justice. “Natural justice” is a term of art that denotes specific procedural rights in the English common law system similar to the American concepts of fair procedure and procedural due process. It requires that every party has the right to a fair hearing and the right to be heard by an impartial tribunal. Although the exact boundaries of this restriction are difficult to fix with precision, there is broad authority that this encompasses a right for each party to be represented, to fairly present their case and being afforded a proper opportunity to be heard.</p> <p>The BVI courts will not, as a matter of policy, display deference to the law or courts of one particular jurisdiction over another.</p>
d.	<i>What exceptions may apply where the defendant state cannot find legal representation, or chooses not to be represented?</i>
	<p>No exceptions will apply, although it is worth mentioning that section 1(2) of SIA states that the BVI Court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question. Accordingly, the judgment creditor will need to address the BVI Court both on the issue of enforcement immunity</p>

	as well as adjudicative immunity (in particular as to the existence of exceptional grounds as to why the general rules extending immunity should be displaced).
6.	What assets may be subject of enforcement if the claim is against a state and what are the requirements, e.g. enforcement against assets of state owned entities?
	<p>As mentioned above, section 13(2)(b) of the SIA provides that the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in any action in rem, for its arrest, detention or sale. The SIA provides two exceptions to this rule:</p> <p>First, a State can give written consent (for example, by agreement or treaty) to the giving of any relief or the issue of any process. The state’s consent can be limited to particular circumstances or be general.</p> <p>Secondly, in respect of the enforcement of judgments or arbitration awards only, such judgments or awards may be enforced against property that is for the time being “in use or intended for use for commercial purposes”. For the purposes of this exception, property is used for, or intended to be used for, “commercial purposes” when it is used for the purposes of commercial transactions. “Commercial transactions” are defined in section 3(3) of the SIA as meaning either of the following: (a) any contract for the supply of good and services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority.</p> <p>State owned property will only fall within this exception if it is used or intended to be used <i>exclusively</i> for commercial purposes. This means, for example, that enforcement action cannot be taken against a bank account that is used to make payments <i>both</i> in relation to commercial transactions and for more general purposes by a state’s diplomatic mission.</p> <p>The UK Supreme Court in <i>SerVaas Incorporated v Rafidain Bank and others</i> [2012] UKSC 40 confirmed that the origin of the property against which execution is sought is irrelevant for the purposes of determining whether or not the “commercial purposes” exception applies. The relevant consideration is whether the property in question is subject to current, or would be subject to future commercial activity. Although not binding on the BVI court, this decision is likely to be persuasive and followed.</p> <p>The UK Supreme Court also confirmed in <i>SerVaas Incorporated</i> that the burden is on the claimant seeking to enforce a final judgment or arbitral award to show that the State’s property is in use for commercial purposes.</p> <p>The UK Supreme Court in <i>La Générale des Carrières et des Mines (Appellant) v F.G. Hemisphere Associates LLC (Respondent)</i> [2012] UKPC 27 noted that where there is a separate legal entity created “it will in the Board’s view take quite extreme circumstances to displace this presumption.” Any creditor should consider that while recognition of a</p>

	Judgment or Award of a foreign Court or body may be readily available, enforcement may be a more difficult matter, but not an impossible preposition.
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