

Cayman 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 may be enforced in the Cayman Islands either in accordance with the Foreign Judgments Reciprocal Enforcement Act (as amended and revised from time to time) (the **Foreign Judgments Act**) or under English common law principles. Registration of foreign judgments under the Foreign Judgments Act and proceedings for enforcement by common law must be brought within six years from the date of the judgment or if there have been appeals against the judgment, from the date of the last judgment delivered in those proceedings (section 4(1) of the Foreign Judgments Act). The Hague Judgments Convention 2019 and the Hague Choice of Courts Convention 2005 are not ratified by the Cayman Islands and there is no indication when or if that may happen.

A foreign judgment which seeks to affect the validity of a trust or disposition of property held by a Cayman Islands law governed trust shall not be recognized, enforced or give rise to any estoppel insofar as it is inconsistent with the Trusts Act (2021 Revision).

Enforcement under the Foreign Judgments Act

The Foreign Judgments Act provides for the recognition and enforcement of a judgment of a foreign court of competent jurisdiction to which the Foreign Judgments Act has been extended. To date, the Foreign Judgments Act has only been extended to certain Superior Courts of Australia and its external territories under the Foreign Judgments Reciprocal Enforcement (Australia and its External Territories Order) 1993.

Under the Foreign Judgments Act, a foreign judgment may be enforceable in the Cayman Islands if it is “*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*” (See “Definitions and Interpretation” section of the Foreign Judgments Act).

Foreign *in personam* non-money judgments are not enforceable under the Foreign Judgments Act.

For a foreign judgment or order to be registered and enforced under the Foreign Judgments Act, section 4 requires that the foreign judgment must be:

- a) Final and conclusive (notwithstanding that an appeal is pending, or it is subject to an appeal in the courts of the foreign jurisdiction);
- b) For a debt or definite sum of money (not in respect of taxes, fines, or other penalties);
- c) Handed down after the Foreign Judgments Act came into force on 22 October 1996;
- d) Delivered by one of the jurisdictions to which the Foreign Judgments Act applies (as mentioned above, the Foreign Judgments Act currently only applies to Australia); and
- e) At the date of the application to the Cayman court, the foreign judgment must not already have been satisfied or enforced and must still be capable of enforcement in the country where the foreign judgment was made.

Enforcing a foreign judgment under common law

At common law, an application can be made to the Cayman court to domesticate a foreign judgment which can then be enforced locally. In such cases, the court will treat the foreign judgment as creating a debt due or liability owed to the judgment creditor by the judgment debtor and that debt would form the basis of the Cayman judgment. In some cases, foreign *in personam* non-monetary judgments may also be enforced in this way.

Certain conditions must first be satisfied for the common law route to be available. A foreign money judgment must be:

- a) final and conclusive on the merits;
- b) made by a court of competent jurisdiction;
- c) for a definite sum of money; and
- d) not contrary to public policy.

A foreign non-money judgment is enforceable at common law if:

- a) it is final and conclusive on the merits;
- b) it is not contrary to public policy; and
- c) the principles of comity require enforcement (*Bandone v Sol Properties Incorporated* 2008 CILR 301).

Some types of foreign judgments that are enforceable under common law include injunctions, default judgments and *ex parte* judgments.

Other considerations regarding enforcement of foreign judgments in the Cayman Islands

Foreign judgments which offend public policy or principles natural justice, and foreign judgments in respect of taxes, fines, or other penalties will not be enforced either under the Foreign Judgments Act or under common law principles (*Kisha Dean Trezevant v Stanley H. Trezevant III* (FSD 314 of 2021, Doyle J) (Unreported, 10 November 2021)).

Enforcement of foreign arbitral awards

Foreign arbitral awards can be recognized and enforced in the Cayman Islands under the Arbitration Act, 2012 (the **Arbitration Act**) and under the Foreign Arbitral Awards Enforcement Act (1997 Revision) (the **FAAEA**). The FAAEA implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (otherwise known as the **New York Convention**), which deals with New York Convention Awards.

Section 72(5) of the Arbitration Act states that an arbitral award, irrespective of the country in which it was made, shall be treated as binding and, upon application, shall be enforced subject to sections 6 and 7 of the FAAEA. In practice, sections 6 and 7 of the FAAEA and Order 73, rule 31 of the Grand Court Rules (the **GCR**) set out the procedural and legal framework for seeking enforcement of the foreign New York Convention and non-convention arbitral awards. Under Order 73, rule 31 of the GCR, applications shall be made by way of an *ex parte* Originating Summons but the court can direct that the application be served on the responding party.

An arbitral award creditor seeking leave from the Cayman court to enforce a foreign award is required to file a duly authenticated or certified copy of the arbitral award; an original or certified copy of the arbitration agreement; and a certified translation of the same where the documents are in a foreign language.

An order granting leave to enforce an arbitral award must be served on the arbitral award debtor, who then has 14 days (or such period as the Court may fix) to apply to set aside the order. New York Convention awards and non-convention awards are both subject to the same limitations imposed in section 7 of the FAAEA, which sets out the circumstances in which enforcement of these awards may be refused.

The refusal grounds set out in section 7 of the FAAEA include:

- a) invalidity of the arbitration agreement under its governing law;
- b) incapacity of a party;
- c) a party to the agreement was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise unable to present its case;

	<ul style="list-style-type: none"> d) the foreign arbitral award deals with a difference not contemplated by, or not falling within the terms of, the submission to the arbitration, or the arbitral award contains decisions on matters beyond the scope of the submission to the arbitration; e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the laws of the country where the arbitration took place; and f) whether the award is binding on the parties. <p>The court may also refuse to enforce an award if the award was not capable of settlement by arbitration or if it would be contrary to public policy to enforce the award.</p>
2.	<p>What other considerations may apply to enforcement of a foreign judgment against a state in your jurisdiction, e.g. notice provisions?</p>
	<p>The United Kingdom’s (UK) State Immunity Act 1978 (the SIA) was extended to the Cayman Islands by The State Immunity (Overseas Territories) Order 1979 (the State Immunity Order). The State Immunity Order stipulates that references in the SIA to the UK shall be construed as references to the Cayman Islands. The SIA therefore governs the immunities and rights of a foreign State within the Cayman Islands. These immunities and the exceptions thereto are elaborated on in section 3.</p> <p>A State, including its sovereign or other head of State in their public capacity, the government of that State, and any department of that government, enjoys certain statutory immunities.</p> <p>Certain provisions of the SIA are incorporated into the GCR which govern procedural matters regarding a State including the service of proceedings, judgments in default and writs of execution.</p> <p>Service of proceedings</p> <p>GCR Order 11 deals with the service of process out of the Cayman Islands, including service of writs in relation to the enforcement of foreign judgments. Service on a State must be effected through diplomatic channels in accordance with section. 14 of the SIA (GCR O. 11, r. 7(1)). In practice, this requires an applicant to deliver to the Clerk of the Cayman court a request for service on the Secretary of State in the UK (the Foreign, Commonwealth and Development Office as described in section 12(5) of the UK SIA) (the Secretary of State), a copy of the writ and a translation in the official language of the State. These documents are transmitted by the Clerk of Court to the Governor of the Cayman Islands and onwards to the Security of State with a request to serve the writ on the State (the Ministry of Foreign Affairs of that State).</p>

	<p>Service is deemed to have been effected when the pleadings are received at the Ministry of Foreign Affairs of the State (section 12(1) of the SIA).</p> <p>Under section 12(2) of the SIA, the time period for acknowledging service/entering an appearance begins to run two months after the writ or document is received (except in circumstances where the manner of effecting service was agreed with the State in accordance with section 12(6) of the SIA).</p> <p>Judgment in default</p> <p>A judgment in default of appearance cannot be made against a State until the service and response time requirement is complied with, unless it was otherwise agreed with the State in question that service be effected in another manner (section 12(4) of the SIA).</p> <p>An application for leave to enter judgment against a State shall be supported by an affidavit stating the grounds of the application, verifying the facts relied on which exempt the State from immunity (see Section 3 below), and verifying that the State was served and the time for acknowledging service/entering an appearance has lapsed in accordance with section 12 of the SIA. This application can be made <i>ex parte</i> but the Court may require that the matter proceed <i>inter partes</i> and direct that a summons be issued and served on the State. An applicant must follow the same service requirements as noted above.</p> <p>A judgment in default (including the affidavit in support of the application for leave to enter judgment) against a State must also be transmitted through the requisite diplomatic channels and applications to set aside the default judgment must be made within two months after a copy of the judgment is received at the Ministry of Foreign Affairs of that State (section 12(5) of the SIA. See also GCR O. 42, r. 3A). The judgment in default will not become effective until two months after service (GCR O. 42, r. 3A).</p> <p>Writ of execution</p> <p>Together with the ordinary requirements set out in GCR O. 46, r.6 for the issue of a writ of execution, an applicant must produce evidence that the State was served in accordance with GCR O. 42, r. 3A.</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>In the Cayman Islands, the law of sovereign immunity is governed mainly by the SIA. The Cayman court lacks jurisdiction over a State except where an exemption applies. Exemptions are discussed below. Under section 1(2) of the SIA, the Cayman court will give effect to sovereign immunity even in circumstances where the State does not appear in the proceedings.</p>

Although 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. Whilst it is unclear when this convention will take effect, it is not expected that this pending development will signal a wholesale change in the approach to the law on sovereign immunity in the Cayman Islands, as set out below. But readers should be mindful that this area of law may be subject to change.

Section 1 of SIA provides a State with general immunity from both jurisdiction and enforcement, unless one of the limited exceptions to a State's general immunity applies. A proceeding to enforce a foreign judgment against a State in the Cayman Islands requires the Cayman court to consider a State's immunity from jurisdiction because the Cayman court will effectively be asked to adjudicate on the domestication of a foreign judgment.

Immunity from jurisdiction (adjudication)

There are several exemptions to immunity from jurisdiction in the Cayman Islands which are outlined in sections 2 to 11 of the SIA. This section will focus on the most common exemptions in respect of the recognition of foreign judgments and arbitral awards:

- a) When a State has submitted to the jurisdiction of the courts of the Cayman Islands (section 2 of the SIA);
- b) When proceedings relate to a commercial transaction entered into by the State (section 3(a) of the SIA);
- c) When an obligation of the State arises because a contract falls to be performed wholly or partly in the Cayman Islands (section 3(b) of the SIA); and
- d) Where a State has agreed in writing to submit a dispute to arbitration (section 9 of the SIA).

Submission to jurisdiction

Under section 2(2) of the SIA, a State can submit to jurisdiction after the dispute giving rise to the proceedings has arisen (or after proceedings have been commenced) or by prior written consent.

Consenting to jurisdiction or waiving immunity by written agreement must be clear, and such a waiver does not waive a State's general immunity from enforcement.

If a State initiates or takes a step within a proceeding, the State will be deemed to have submitted to the jurisdiction of the Cayman court (s. 2(3) of the SIA). Under section 2(4) of the SIA, a State is not deemed to have submitted to the jurisdiction of the Cayman court when a State intervenes in enforcement proceedings to claim immunity or assert an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

A State's submission to the jurisdiction cannot be revoked.

Commercial transaction

A State is not immune from a lawsuit relating to a commercial transaction entered into by the State, including any commercial activity conducted outside the Cayman Islands (s. 3(1)(a) of the SIA).

The recognition and enforcement of a foreign judgment against a State is not considered a proceeding relating to a commercial transaction, notwithstanding that the underlying dispute giving rise to the judgment was based on a commercial transaction (*NML Capital Ltd v Argentina* [2011] UKSC 31). Thus, this ground provides a State with a strong immunity defense.

Contract performed wholly or partly in the Cayman Islands

This exception to immunity is distinguishable from the "commercial transaction" exception as it applies to any obligation (not just a commercial one) (s. 3(1)(b) of the SIA). Under section 3(2) of the SIA, this exception does not apply if:

- a) the contract is not a commercial transaction;
- b) the contract was made in the territory of the State concerned; and
- c) the obligation in question is governed by administrative law.

Arbitration

A State is not immune from arbitration or from proceedings in the Cayman court related to the arbitration where the State has agreed in writing to submit to arbitration (s. 9 of the SIA). This means that a State is not immune from the recognition and enforcement of a foreign arbitral award in the Cayman Islands as the enforcement proceedings relate to the arbitration.

Immunity from enforcement (execution)

Once an exception to the principle of state immunity from the adjudication is established, it is important to next consider whether a State has any property in the Cayman Islands that can be enforced against and whether there are any exceptions to the principle of state immunity against enforcement.

Section 13(2) of the SIA sets out a State's immunity from injunction and enforcement:

- a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
- b) the property of a State shall not be subject to any process to enforce a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

	<p>The SIA codifies two narrow exceptions to the immunity against this enforcement principle which are specified as follows:</p> <ul style="list-style-type: none"> a) a State can give written consent (for example, by agreement or treaty) to the giving of any relief or the issue of any process; and b) judgments or arbitral awards may be enforced against property that is either in use or intended for use for commercial purposes. <p>A written waiver of immunity in relation to executing against State property will permit a judgment or arbitral award creditor to obtain injunctive relief (including freezing injunctions) and enforcement against State property, except that the waiver will not apply to diplomatic premises (Dicey, Morris & Collins on the Conflict of Laws 16th Ed. at 14-002 (Dicey) at [9-020]).</p>
<p>4.</p>	<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 or acts of aggression as defined by the Rome Statute¹ in the Cayman Islands.</p> <p>Section 5 of the SIA provides that a State is not immune in relation to proceedings in respect of death or personal injury, or damage to or loss of property caused by an act or omission in the Cayman Islands. Recent English case authority, which is persuasive but not binding in the Cayman Islands, suggests that section 5 applies as an exemption to sovereign immunity if the State’s acts or omissions arise by exercise of its sovereign authority (<i>acta jure imperii</i>) and acts of a private law nature (<i>acta jure gestionis</i>) which includes commercial activities.</p> <p>It is reasonable to conclude that improper actions of a defendant State (e.g. wars of aggression) could fall within the exemption under section 5 of the SIA. That said, section 16(5) of the SIA says that section 5 and other sections under Part I of the SIA do not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the Cayman Islands.</p> <p>Burden</p> <p>The English High Court recently confirmed in <i>Ghanem Al-Masarir v Kingdom of Saudi Arabia Arabia</i> [2022] EWHC 2199 (QB) that the burden of proving an exception to the general immunity provided by section 1 of SIA lies on the claimant and not the</p>

¹ The Rome Statute of the International Criminal Court (“Rome Statute”) defines “crime of aggression” as the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations

	<p>defendant, and that the Court must be satisfied on the balance of probabilities that an exception applies.</p>
<p>5.</p>	<p>What due process standards and exceptions may apply in proceedings for enforcement of judgment against a state?</p>
	<p>Except for a few minor procedural requirements in the SIA and GCR (as described above), Cayman Islands law does not create different requirements for the enforcement of judgments against a State or other defendants.</p> <p>No matter who the foreign judgment is against, the party seeking enforcement in the Cayman Islands will be required to domesticate their foreign judgment in the first instance. The Cayman court has the power to exercise jurisdiction relating to enforcement, including any judgment, order, decree or direction of any court (including any foreign court) which is or has become enforceable in whole or in part (Judicature Act (2021 Revision), section 31).</p> <p>There are no provisions within the Foreign Judgments Act which differentiate between a foreign judgment against a State or other entity. This mechanism enables the foreign judgment to be registered in the Cayman Islands, following which it will be treated as if it were a domestic judgment, allowing it to be enforced in the usual way.</p> <p>Order 71 of the GCR outlines the rules in relation to the Foreign Judgments Act regarding applications leading to registration of the foreign judgment. An <i>ex parte</i> originating summons, together with a supporting affidavit which contains certain key information and exhibits is filed with the Cayman court which may or may not be directed to be served on the defendant. In an <i>ex parte</i> proceeding, the applicant has a duty of providing full and frank disclosure. The Cayman court will consider the application and whether the criteria detailed within the legislation has been complied with. If compliant, the foreign judgment can be registered and notice of the same must be served on the defendant, who upon receipt will have a period within which they must apply to set aside the registration. Failure to make an application to set aside the registration will result in the registered foreign judgment being domesticated, opening the pathway for enforcement measures to be initiated.</p> <p>Under the common law recognition route, new proceedings must be commenced in the Cayman Islands, within which a judgment would be sought, using the foreign judgment as the basis of the action in order to obtain a judgment in the same terms contained within the foreign judgment. A judgment is often achieved by way of a summary judgment. A judgment will be granted only if the criteria outlined above in section 1 have been satisfied. If it is shown that any of the criteria have not been satisfied, the Cayman court will not grant a judgment, which in turn will mean that the foreign judgment may not be enforced in the Cayman Islands barring any appeal.</p>

A foreign State must be served in accordance with the service procedures outlined above in section 2 and below in section 5b.

Grounds to set aside enforcement proceedings

Under the Foreign Judgments Act, a State may be able to set aside judgment enforcement proceedings, if the State satisfies the Cayman court that the:

- a) foreign judgment is not a judgment to which the Foreign Judgments Act applies or was registered in contravention of the provisions of the Foreign Judgments Act.
- b) court of the country which issued the original foreign judgment (the **Originating Court**) had no jurisdiction in the circumstances of the case. The Foreign Judgments Act provides that where a person, under the rules of public international law, was entitled to immunity from the jurisdiction of the Originating Court, the Originating Court is not deemed to have had jurisdiction and therefore in that case the registered judgment must or may be set aside (s. 6(3)).
- c) judgment debtor, being a defendant in the Originating Court proceedings, did not (notwithstanding that process may have been duly served on them in accordance with the law of the country of the Originating Court) receive notice of those proceedings in sufficient time to enable it to defend the proceedings and did not appear;
- d) foreign judgment was obtained by fraud;
- e) enforcement of the foreign judgment would be contrary to public policy of the Cayman Islands; or
- f) rights under the foreign judgment are not vested in the person who makes an application for registration.

At common law, a defendant State can oppose proceedings which seek to enforce a foreign judgment in the Cayman Islands on the basis that:

- a) the Originating Court granting the judgment was not competent;
- b) the foreign judgment was obtained by fraud;
- c) enforcement of the foreign judgment would be contrary to Cayman Islands law; and
- d) the foreign judgment was obtained in a manner which infringes the principles of natural justice, which includes circumstances whereby the State was not given any or adequate notice of the proceedings in the Originating Order or did not participate in those proceedings.

The general requirements for the refusal of a foreign arbitral award are set out above in section 1.

Whilst the Cayman court must recognize every foreign judgment which it intends to enforce (whether that be against a State or other entity), a court “... *need not enforce*

	<p><i>every foreign judgment which it recognizes” (Dicey) and Clarke v Fennoscandia Ltd [2007] UKHL 56, 2008 S.C. (HL) 122, per Lord Rogers at 21).</i></p> <p>There are a number of enforcement options available once a foreign judgment or arbitral award become enforceable as a matter of Cayman Islands law. Some of the enforcement mechanisms include the following:</p> <ul style="list-style-type: none"> a) the appointment of a receiver by equitable execution (Order 51 of the GCR), where receivers are appointed to realize specific assets; b) obtaining a charging order (Order 50 of the GCR) to secure the debt owed over land or other financial securities. Once obtained, the property charged could be sold to repay the indebtedness. This is a multi-stage process with the first stage being an <i>ex parte</i> application for an order to show cause, followed by an <i>inter partes</i> show cause hearing for a charging order absolute; c) obtaining a garnishee order (also known as third-party debt orders) when monies are owed to a State by third parties. The process to obtain a garnishee order is similar to that of a charging order (Order 49 of the GCR); and (d) obtaining a writ of sequestration where assets of the debtor are seized to satisfy the indebtedness. This mechanism is used less often in the Cayman Islands and is made under Order 46 of the GCR.
<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 defendant State seeking to challenge enforcement could argue, where appropriate, that they were not on notice of the proceedings at all or they were not provided with adequate notice to prepare their defense in the Originating Court proceedings.</p> <p>When challenging whether service took place at all or correctly, the State will have the burden to establish why the criteria in those foreign proceedings were not met.</p> <p>As for the domestication of a foreign judgment or arbitral award in respect of a State, an applicant award or judgment creditor must comply with the service requirements mentioned above.</p>
<p>b.</p>	<p><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>
	<p>Based on the recent UK Supreme Court decision in <i>General Dynamics United Kingdom Ltd v Libya</i> [2021] UKSC 22 (<i>General Dynamics</i>), which is not binding but is highly persuasive in the Cayman Islands, there does not appear to be an exception to the conventional forms of service against a State under the SIA.</p>

	<p>In <i>General Dynamics</i>, the UK Supreme Court held that the service requirements under section 12 of the SIA must be strictly observed and could not be dispensed with. Unfortunately, this means that when service on a State cannot be effected (for example, if there are no diplomatic channels), an applicant cannot proceed with their recognition and enforcement application. Notwithstanding the UK Supreme Court’s ruling in <i>General Dynamics</i>, in Dicey at 9-024, the authors suggest that there are conflicting rulings as to whether a State can evade service, for example, by refusing to accept service, and the authors suggest that the better view is that a State cannot evade service in such a manner.</p> <p>While there is no Cayman Islands case law specifically on point, the Cayman court has repeatedly held that “[t]he purpose of service of proceedings is to bring the proceedings to the notice of the defendant. It is not about playing technical games...” (See <i>In the Matter of Bridge Global Absolute Return Fund SPC</i> (FSD 51 of 2022 (IKJ)) (Unreported, 10 May 2022) referring to <i>Bush v. Baines</i> 2016 CILR (2) 274).</p>
<p>c.</p>	<p><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>
	<p>As a general rule in relation to foreign judgments by Originating Courts, the Cayman court will generally not go behind any foreign judgment properly made (<i>Lakatamia Shipping Co Ltd v Nobu Su</i> (FSD 142 of 2014, Mangatal J)) (Unreported, 27 June 2017). There are no formal requirements in relation to the Cayman court assessing whether the right to representation has been met in the original foreign proceedings against a State. The criteria mentioned in sections 1 to 5 above will likely be referred to, with consideration given to public policy and natural justice grounds.</p>
<p>d.</p>	<p><i>What exceptions may apply where the defendant state cannot find legal representation, or chooses not to be represented?</i></p>
	<p>There are no specified exceptions in relation to this aspect. Where a defendant State chooses not to be represented it is less likely to offend the principles of natural justice. Where a State cannot find legal representation, it may be appropriate to determine why that is the case to determine whether the principles of natural justice have been offended, so much so that the defendant’s rights have been breached because of the defendant being unable to adequately present their case. In any event, the Cayman court will give effect, under section 1(2) of the SIA, to the immunity conferred on the State even if the State does not appear in the proceedings.</p>

6.	<p>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>
	<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 to enforce a judgment or arbitral award or, in an action <i>in rem</i>, for its arrest, detention or sale.</p> <p>The SIA provides two main exceptions to this rule:</p> <ul style="list-style-type: none"> a) If the State provides written consent to enforce (s. 13(3)); and b) If the property being enforced against was used, or intended to be used, for commercial purposes (s. 13(4)). <p>Written consent to enforce must be clear. A waiver of jurisdiction or submission to the jurisdiction of a foreign court will not constitute consent to execution.</p> <p>Furthermore, the “commercial purposes” exception will not apply to property belonging to a State’s central bank or other monetary authority (s. 14(4) of the SIA). The UK Supreme Court has confirmed that the origin of the property against which execution is being sought is irrelevant to determine whether to apply the “commercial purposes” exception. The relevant consideration is whether the property is subject to current, or would be subject to future, commercial activity (<i>SerVaas Incorporated v Rafidain Bank and others</i> [2012] UKSC 40 [SerVass]). “Commercial purposes” is defined as meaning the purposes of such transactions or activities which are set out in section 3(3) of the SIA. This section defines commercial transactions as:</p> <ul style="list-style-type: none"> a) any contract for the supply of goods or 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>State owned property will only fall within this exception if it is intended to be used exclusively for commercial purposes (not a mixed use) and the Court will assess how the property is used to determine whether the exception applies (see <i>Alcom v Republic of Colombia</i> [1984] AC 580 and <i>SerVass</i>).</p> <p>Section 10 of SIA also provides that state immunity will not apply to an action <i>in rem</i> against a ship belonging to a State or an action <i>in personam</i> for enforcing a claim in connection with a ship belonging to a State, if at the time the cause of action arose, the ship was in use or intended for use for commercial purposes.</p>

Under sections 14(2) and (3) of the SIA, the property of a “separate entity” (which is distinct from the executive organs of the government of the State), other than a State’s central bank, would be subject to execution, unless the below provisions of the SIA apply. Where the provisions below apply, the “separate entity” would be immune from the jurisdiction of the Cayman court:

- a) the proceedings relate to anything done by the separate entity in the exercise of sovereign authority; and
- b) the circumstances are such that a State would have been so immune.