

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

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### JUDGMENTS: PROCEDURE FOR ENFORCEMENT

#### Overview

#### 1. 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 can 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.

A judgment creditor with an unpaid money judgment against a BVI company can seek to enforce that 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 the 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 domestic BVI judgment.

Judgments from jurisdictions not subject to the Reciprocal Enforcement Act cannot be registered. 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 debtor 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 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 can apply for summary judgment. Once judgment is entered, the judgment can be enforced like any domestic BVI judgment.

If the judgment debtor is a BVI company and has not paid the foreign judgment debt when due, the judgment creditor may apply to appoint a liquidator over the foreign judgment debtor to wind up on the basis of cash flow insolvency. In such circumstances, separate recognition/registration of the foreign judgment is not necessary, and there is no strict requirement to issue a formal statutory demand for payment before applying to appoint a liquidator, provided there is sufficient evidence of the existence of the foreign judgment debt and non-payment by the judgment debtor. However, recent case law suggests that the court may expect a judgment creditor to issue a statutory demand before making a liquidation application. This is unless there are good reasons for not doing so (and although these decisions tend to relate to the enforcement of arbitral awards, they will apply by analogy to the enforcement of judgments). The BVI court must also be satisfied that the common law requirements for enforcement of the foreign judgment debt are satisfied (*see below*).

It is not a strict requirement to appoint counsel to enforce judgments in the BVI, but since applications must be made in the BVI court, it is advisable to do so. The applications above are made to the High Court, Commercial Division (assuming that the judgment relates to a commercial dispute). Fees payable include:

- A fee for issuing a fixed date claim form of USD300.
- Application fees of up to USD500.
- An affidavit filing fee of USD100 (plus USD25 for an exhibit).

Applications to register foreign judgments under the Reciprocal Enforcement Act can take three to four months depending on court availability. Enforcement proceedings under the common law can take longer because the proceedings must be served (sometimes outside the jurisdiction) and summary judgment must be sought and ordered.

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## Foreign judgments: formal/simplified proceedings

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

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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, although the proceedings will usually be determined on a summary basis (see *Question 5*).

### 3. 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?

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

#### Form of application

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

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#### Domestic

When commencing enforcement proceedings, the judgment creditor must include a copy of the relevant domestic judgment. CPR 43.7 provides that 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 where the foreign judgment is in a language other than English.

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.

### 5. 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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#### Domestic

An application to enforce a domestic judgment in any of the ways set out in the CPR Part 45 (see *Question 18*) requires an affidavit in support. That affidavit should generally cover:

- 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 for registration of a foreign judgment 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 claim to enforce a foreign judgment not subject to the Reciprocal Enforcement Act must be supported by evidence dealing with substantially the same issues as are required in support of an application for registration of a judgment.

## CHALLENGING ENFORCEMENT

### Service

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

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#### 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 enforcement action, 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

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

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#### Domestic

Under CPR 60.3, the filing of an appeal against a domestic judgment does not automatically stay the enforcement of the judgment under appeal. Consequently, a judgment creditor can continue to apply to enforce a domestic judgment that is under appeal unless the judgment debtor has successfully applied for a stay of execution pending the determination of the appeal.

#### Foreign

Under both the Reciprocal Enforcement of Judgments Act 1922 and common law, 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. 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,

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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 it may stay or adjourn the enforcement proceedings pending the outcome of the appeal, if appropriate.

### Foreign judgments: jurisdiction

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

- Due service on the defendant.
- Whether the defendant was subject to the *in personam* jurisdiction of the foreign court.
- Appearances/submission to the jurisdiction by the defendant.

See *Question 10* and *Question 13*.

#### 9. 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

A foreign judgment will not be registered under the Reciprocal Enforcement of Judgments Act 1922/CPR 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 a cause of action that, for reasons of public policy in the BVI 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 enforce the foreign judgment at common law.

### 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

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#### 10. 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 will not review the underlying substance of the judgment. However, it will refuse to enforce certain foreign judgments (for example, on public policy grounds (see *Question 11*)) and so to the extent necessary to ascertain the nature of the underlying judgment, the BVI court may need to review the underlying judgment and/or proceedings.

### Foreign judgments: public policy

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

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The BVI courts will refuse to enforce judgments considered to be contrary to public policy. Public policy considerations are not just limited to procedural deficiencies such as due service.

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

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The BVI court will not (subject to certain specific international treaties, which are beyond the scope of this article) enforce the public laws of another state. Consequently, a foreign judgment that enforces a foreign tax law or penal award such as a fine, will not be enforced. Whilst a recent decision of the Commercial Court (*Gregson v Meribelle Investments Ltd BVIHC (COM) 2020/0013, 16 March 2020*) has suggested that "modern public policy" may be in favour of the enforcement of foreign tax debt, the general expectation is that such judgments would not usually be enforced.

Previously there was a widely held view that foreign judgments derived from gambling would not be enforceable in the BVI, as gambling was, until recently, unlawful in the BVI. However, the BVI legislature passed the Gambling (Gaming & Betting) Control Act in August 2020, legalising betting and gaming in the Territory, and so foreign gambling-related judgments are, we believe, now less likely to be unenforceable on public policy grounds.

A foreign judgment contrary to the "firewall" provisions of the BVI Trustee Act 1961 (relating to issues of "heirship"), will not be enforced. An award by a foreign court of punitive damages is likely to be unenforceable. The BVI court will not register/enforce a foreign judgment obtained by fraud or in breach of principles of natural justice.

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

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#### 13. What other conditions must be satisfied for recognition and enforcement of judgments?

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### 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.

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## Foreign

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

## JUDGMENTS: METHODS OF ENFORCEMENT

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

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CPR Part 45 sets 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*

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

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CPR Part 17 provides for a range of interim remedies that the court can order at any stage of proceedings (including pre-action or post-judgment), 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 in BVI companies where a party asserts an interest in those shares.

Under section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap 80), the court can grant an injunction or appoint an interim receiver if it is just and convenient to do so. An interim receiver can be appointed to preserve assets pending the enforcement of a foreign or domestic judgment, but the BVI Commercial Court has emphasised that such an appointment should only be temporary and should not delay the taking of active enforcement measures (*VTB Bank (Public Joint Stock Company) v Micros Group Ltd and another (BVIHC(COM) 2018/006723 January 2020*). Further, a creditor (which would include a judgment creditor) could in certain exceptional circumstances (where assets are in immediate jeopardy) apply to court to appoint a provisional liquidator over a company under the Insolvency Act 2003.

All of these measures can assist with preserving assets that may be subject to enforcement.

A judgment creditor can also apply for an order for oral examination of a judgment debtor to ascertain the judgment debtor's assets and assist with deciding the best method of enforcement (*CPR Part 44*). However, it is well established that such orders do not have extra-territorial effect in the light of the English decision in *Masri v Consolidated Contractors International (UK) Ltd and others (No 4) [2009] UKHL 43*, and as such their use

in enforcement proceedings, where officers of BVI companies tend to reside outside the BVI, has historically been limited. That may change with the introduction of economic substance requirements, which may result in more BVI companies appointing BVI-resident directors.

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

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

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#### 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 awarded by a foreign court.

## Currency

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

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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*

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

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#### 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.

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.

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## International conventions/agreements

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

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

#### Definitions

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

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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

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

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#### 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 *Question 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

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

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#### 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 and a non-New York Convention award.

**Convention Awards.** A New York Convention award can be enforced in the BVI by applying for the leave of the court to enforce the award (the streamlined enforcement procedure) or by commencing an action suing on the award. The procedure for commencing an action on the award is substantially similar to the procedure for enforcing a foreign judgment at common law.

An application for leave to enforce 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. The application is made to the High Court. Fees can include court fees of:

- An application fee of up to USD500.
- A filing fee of USD100 for an affidavit (plus USD25 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.

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 procedure as for New York Convention Awards. The key difference is that the BVI court has slightly broader discretion to refuse leave (see *Question 33*).

#### Foreign awards

See above, *Domestic awards*.

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

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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*).

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## Form of application

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

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See *Question 26*.

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

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See *Question 26*.

The affidavit in support of the application must exhibit the duly authenticated (or a duly certified copy) of the original award and original arbitration agreement, and if the award or agreement is in a language other than English, a translation of the award or agreement, certified by an official or sworn translator or by a diplomatic or consular agent.

## CHALLENGING ENFORCEMENT

### Service

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

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#### 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

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

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#### 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

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

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#### Domestic

It is necessary to include an original or certified copy of the arbitral award and arbitration agreement, along with a translation (if necessary) (*see Question 25 and Question 26*). Similarly, the judgment debtor must have been given proper notice of the appointment of the arbitrator or of the arbitral proceedings. 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*.

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

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#### 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. Further, the BVI court takes a pragmatic and pro-enforcement approach to enforcement. For example, it has been held that a convention award should be enforced in circumstances where a certified copy of the award had not been produced but where all other requirements had been satisfied.

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.

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## Foreign

See above, *Domestic*.

## Public policy

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

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#### 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. The BVI court would take the same approach to these issues as if it were considering the enforcement of a foreign court judgment.

See *Question 14*.

#### Foreign

See above, *Domestic*.

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

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See *Question 34* and *Question 14*. There are no reported decisions on this from the BVI courts. It is likely that English authority would be persuasive (though not binding), such that a narrow / pro enforcement approach to the public policy exception would be taken.

## ACTUAL ENFORCEMENT

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

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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.

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

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#### 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 CPR Part 48, the respondent will have the right to challenge that application in the usual way.

#### Foreign

See above, *Domestic*.

## ARBITRAL AWARDS: INTERIM REMEDIES AND INTEREST

### *Interim remedies*

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

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#### Domestic

Section 43 of the Arbitration Act allows the court to grant a broad range of 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 to the BVI court in relation to foreign arbitral proceedings to preserve assets against which any award may be enforced (see *Question 4*).

A party wishing to enforce an unsatisfied arbitral award for a specified sum of money against a BVI company can apply to the court as a creditor, relying on the award and the respondent's failure to pay as evidence of its insolvency, for the appointment of a liquidator over the company. However, the BVI court has recently suggested that in most cases the correct approach in relation to arbitral awards is to issue a statutory demand (following the procedure in the BVI Insolvency Act 2003) before issuing a liquidation application (*Rangecroft Limited v Lenox International Holdings Ltd BVIHC (Com) 37 of 2020*). As such, the practice of issuing a liquidation application without first issuing a statutory demand should only be followed if there are good reasons not to issue a statutory demand.

#### Foreign

See above, *Domestic*.

#### Interest

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

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#### 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

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

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When applying to enforce an arbitral award given in a currency other than the US dollar (which is the currency used in the BVI), a party must file a certificate stating the exchange rate at the close of business the business day before the application is filed.

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## JUDGMENTS AND ARBITRAL AWARDS: PROPOSALS FOR REFORM

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

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#### Judgments

In March 2020, the BVI legislature passed the Charging Orders Act, which put the court's jurisdiction to grant charging orders in respect of a wide range of classes of property (including shares and other securities) on a statutory footing.

#### Arbitral awards

The Arbitration Act came into force on 1 October 2014 and represents a modern and reformed legislative framework for arbitration in the BVI. In November 2016 the BVI International Arbitration Centre was opened to provide bespoke, modern arbitration facilities in the BVI.

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**Professional associations/memberships.** BVI Bar Association, the Recovery and Insolvency Specialists Association (RISA), the Chancery Bar Association, the Financial Services Law Association, the London Common Law & Commercial Bar Association, the Professional Negligence Bar Association and the Honourable Society of the Inner Temple.

**Professional qualifications.** Solicitor, England and Wales (2006); Solicitor advocate, England and Wales (2010), Solicitor Advocate, BVI (2013)

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