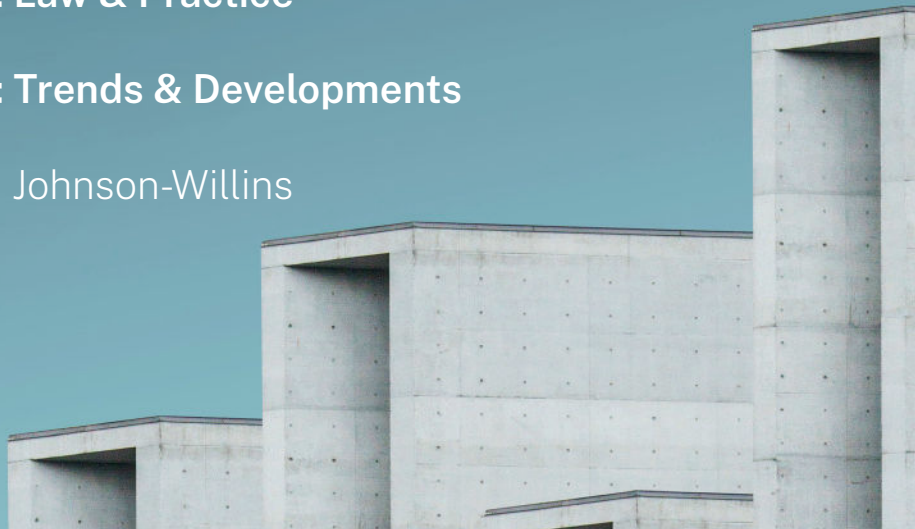

CHAMBERS GLOBAL PRACTICE GUIDES

Enforcement of Judgments 2023

Definitive global law guides offering
comparative analysis from top-ranked lawyers

**British Virgin Islands: Law & Practice
and
British Virgin Islands: Trends & Developments**

Paul Dennis, KC, Asha Johnson-Willins
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O'Neal Webster



BRITISH VIRGIN ISLANDS

Law and Practice

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1. Identifying Assets in the Jurisdiction

1.1 Options to Identify Another Party's Asset Position

The only publicly available information to identify the asset position of another party in the BVI is the register of land titles. A party may carry out a search at the Land Registry to ascertain whether another party owns real estate, and may pay a small fee and obtain certified copies of the relevant extract from the land register.

However, BVI real property is rarely a feature of international cases. In such cases, the question tends to be whether a person has assets in the form of shares in BVI companies, or what assets are held by companies incorporated within the jurisdiction. Recent changes to the BVI Business Companies Act 2004 require companies to file annual returns in the form prescribed by the BVI Business Companies (Financial Return) Order 2023, which would ordinarily include a basic balance sheet.

Otherwise, the asset position of another party may be identified by means of the following:

- pre- or post-judgment freezing orders;
- a witness summons requiring a witness to produce documents to the court;
- an order for specific disclosure;
- an order for oral examination of a judgment debtor; or
- service of a financial position notice on a judgment debtor, requiring them to complete a statement setting out their financial position.

In some cases, Norwich Pharmacal (disclosure) relief will be available, but the nature of this juris-

diction means that it would seldom extend to disclosure of the assets of a party.

2. Domestic Judgments

2.1 Types of Domestic Judgments

There are, in substance, two forms of domestic judgments:

- interim orders or judgments prior to a trial; and
- final orders.

At the pre-trial stage, such judgments may include:

- interim payments;
- interim orders for costs and orders for security for costs;
- interim remedies, such as injunctive relief or orders appointing receivers;
- judgment in default of defence; or
- upon an admission, summary judgment, which could include the grant of declaratory or injunctive relief.

At trial, judgments may include:

- final judgments, which could include orders for payment of money, declaratory and injunctive relief, or specific performance; and
- post-trial relief in aid of execution.

2.2 Enforcement of Domestic Judgments

The general rule is that a judgment creditor may make an application to the court for an enforcement order once a domestic judgment becomes enforceable. The options available for domestic money judgment enforcement include the following:

- charging orders, including orders for the sale of the charged assets;
- garnishee orders (also known as third-party debt orders);
- judgment summonses;
- orders for the seizure and sale of goods;
- orders for the sale of land;
- the appointment of receivers;
- insolvency proceedings;
- bankruptcy proceedings where the judgment debtor is a natural person;
- domestic non-money judgments (may be enforced by contempt or sequestration proceedings); and
- a money judgment registered as a charge against land owned by the judgment debtor.

An application to enforce a domestic judgment in any of the ways set out above must be supported by evidence on affidavit. The affidavit should generally include the following:

- brief details of the judgment;
- a copy of the relevant judgment or order;
- details of the claim that led to the judgment; and
- the facts and legal basis of the claim.

If the judgment was a sum in a foreign currency, the judgment creditor is required to file a certificate confirming the exchange rate at the close of business on the previous business day.

2.3 Costs and Time Taken to Enforce Domestic Judgments

The cost and timeframe for enforcing domestic judgments varies according to the enforcement method and the division of the court in which the application is filed.

Timeframe

Applications for the appointment of liquidators are typically resolved within six to eight weeks of the application being presented, particularly if the application is not opposed. In addition to the costs of bringing the application, it would also be necessary to provide a line of initial funding to the proposed liquidator, who would need to be a BVI-licensed insolvency practitioner, whose fees thereafter would be paid out of the company's assets in priority to all other claims.

Typically, applications for charging orders and garnishee orders would initially be heard *ex parte*, followed by a later *inter partes* hearing, at which time any initial relief granted at the first hearing would be made final.

The first hearing would typically take place within two to three weeks of filing, and the *inter partes* hearing would take place within two to three months of filing. Applications for oral examinations and judgment summonses would typically take a little longer, and would ordinarily be resolved within three to six months.

Fees

Court filing fees are modest, ranging from USD150 to USD200 in the High Court and from USD900 to USD1,200 in the Commercial Division.

Professional fees vary widely depending on the firm, the complexity of the case and the seniority of the legal practitioner(s) involved. Typically, legal practitioners in the BVI will bill on a time-spent basis in increments of six minutes. The hourly rates, increments and fee structure are generally between USD450 and USD950 per hour, and are usually set out in the relevant letter of engagement.

2.4 Post-judgment Procedures for Determining Defendants' Assets

A judgment creditor may obtain information about the judgment debtor's assets by filing a request for an order of an oral examination of the judgment debtor. The oral examination order must be served personally on the judgment debtor at least seven days before the date fixed for the examination.

The oral examination may take place before the High Court Registrar, a judge or a master.

In addition to or in place of an order for an oral examination, a judgment creditor may also serve a financial position notice requiring the judgment debtor to complete a statement detailing their financial position. The financial statement must be served on the judgment creditor within 14 days of service of the financial position notice.

2.5 Challenging Enforcement of Domestic Judgments

The means by which a defendant may challenge enforcement depend on the circumstances and the nature of the enforcement process.

A defendant might do any of the following:

- dispute service of the proceedings;
- apply to set aside any default judgment as of right, if the conditions for obtaining the judgment were not satisfied or on a discretionary basis where the defendant has a good arguable defence and a satisfactory explanation for failing to respond to the claim;
- apply to set aside any order made *ex parte* – eg, on the basis that there was a breach of the duty of full and frank disclosure;
- avoid enforcement of a money judgment by making offers to pay by instalments;

- apply for a stay of enforcement at any stage; or
- exercise the right of appeal against a judgment, generally.

2.6 Unenforceable Domestic Judgments

There are no types of domestic judgment that cannot be enforced in the BVI.

2.7 Register of Domestic Judgments

The BVI has no central register for domestic judgments. However, for sealed or family proceedings, a copy of any judgment or order may be obtained by an interested party upon payment of a prescribed fee to the High Court Registry.

Domestic judgments are also published on the Eastern Caribbean Supreme Court's website.

3. Foreign Judgments

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

A foreign judgment has no direct operation in the British Virgin Islands and cannot be immediately enforced by execution.

Foreign money judgments are generally enforced pursuant to the Reciprocal Enforcement of Judgments Act 1922, or at common law. Under certain circumstances, a foreign judgment may provide a basis to commence insolvency proceedings. Certain types of non-money judgments are capable of being enforced by way of an estoppel action. Finally, arbitration awards may be enforced pursuant to the Reciprocal Enforcement of Judgments Act and the Arbitration Act 2013.

For completion, it should also be mentioned that the Foreign Judgments (Reciprocal Enforcement) Act 1964 makes provision for the enforcement of foreign judgments in certain circumstances. However, that Act is seldom invoked as there is a general view that it did not properly designate territories as required under the Act, and therefore has no effect. This view has not yet been tested by the court.

The Reciprocal Enforcement of Judgments Act 1922

Section 2 of the Reciprocal Enforcement of Judgments Act 1922 defines judgments as “any judgment or order given or made in any civil proceedings, whether before or after the passing of this act, 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”.

The foreign judgment is therefore required to be a money judgment/award and applies to both court-issued judgments and arbitral awards. However, enforcement under the Act is limited to judgments emanating from certain specified countries: England and Wales, New South Wales (Australia), Nigeria, Northern Ireland, Scotland, Bahamas, Barbados, Belize, Bermuda, Grenada, Guyana, Jamaica, St Lucia, St Vincent, and Trinidad and Tobago.

Common Law

A foreign money judgment that has not been issued by one of the specified jurisdictions under the Reciprocal Enforcement of Judgments Act 1922 may be enforced at common law as a simple contract debt. It is also possible to adopt this common law method of enforcement for judgments that fall under the Reciprocal

Enforcement of Judgments Act, but it would not ordinarily be advisable to do so since that would have additional cost implications.

3.2 Variations in Approach to Enforcement of Foreign Judgments

In the BVI, foreign money judgments are enforceable by statute and common law. They may also be enforced by way of insolvency proceedings.

Foreign non-money judgments are not directly enforceable. However, they may form the basis of an estoppel action to resist an action or prevent re-litigation or set-off, if the non-money judgment is based on a cause of action recognised by BVI law.

3.3 Categories of Foreign Judgments Not Enforced

The following foreign judgments are not enforceable in the BVI:

- judgments in respect of taxes, fines or penalties;
- judgments based on criminal or administrative proceedings;
- judgments that are not final and conclusive;
- judgments issued by a court without competent jurisdiction;
- judgments for unspecified damages – eg, the judgment must be for a fixed sum, or it must be capable of being arithmetically determined;
- judgments that are older than 12 years (or six years in the case of interest); and
- judgments that are contrary to public policy.

3.4 Process of Enforcing Foreign Judgments

Registration of a Foreign Judgment

To register a foreign money judgment in the BVI, an application must be made within 12 months

of the date of the judgment. The court may extend this period upon the application of the judgment creditor. The applicant is required to show that it is just and convenient to register the foreign judgment.

The application may be made without notice; however, it must be supported by affidavit evidence that includes a verified, certified or otherwise duly authenticated copy of the judgment. If the judgment is not in the English language, the applicant must provide a certified or authenticated English translation of it.

The affidavit is also required to show details of the interest due, if any, and details about the judgment debtor. The applicant must certify that the judgment creditor is entitled to enforce the judgment and that the judgment, or a part of it, remains unsatisfied.

A court may order the judgment creditor to give security for costs of the application and of any proceedings that may be brought to set aside the registration.

Notice of the registration of the judgment must be served; in the case of a judgment debtor outside the jurisdiction, the notice may be served in accordance with the relevant rules of court (Part 7 of the Civil Procedure Rules) without the leave of the court.

Once the time for setting aside the registration has passed, the judgment creditor is entitled to commence enforcement proceedings, which are available with respect to domestic judgments.

Claims at Common Law

A foreign judgment that cannot be registered under the Reciprocal Enforcement of Judgments Act 1922 can be enforced by way of a claim. The

cause of action is one of a simple contract debt, based on the foreign judgment, and the claim is commenced like any other claim originating in the BVI.

If the judgment debtor resides in the BVI, the claim must be served in accordance with the applicable rules of court. If the judgment debtor resides outside the BVI, the claim must be served in accordance with the rules applicable to service outside the jurisdiction.

Following service, if the judgment debtor acknowledges the claim, the judgment creditor may apply for summary judgment as there are no viable defences in law. If the judgment debtor fails to acknowledge service, then the judgment creditor may apply for judgment in default of acknowledgement. Once judgment is granted in either scenario, it becomes enforceable as a judgment of the BVI court.

Insolvency Proceedings

If the judgment debtor is a BVI company, a judgment creditor may institute insolvency proceedings in one of two ways.

First, the judgment creditor may serve a statutory demand for the debt, provided that the unsatisfied portion of the foreign judgment exceeds USD2,000. The judgment debtor has 21 days to repay the debt or, if it is disputed, 14 days to apply to set aside the statutory demand. If neither occurs, the BVI company is deemed insolvent, and the judgment creditor may apply for the appointment of a liquidator.

Alternatively, a judgment creditor may commence insolvency proceedings against the BVI company directly, without first issuing a statutory demand on the basis that it is insolvent and unable to pay its debts as they fall due.

3.5 Costs and Time Taken to Enforce Foreign Judgments

Costs

The primary costs associated with the enforcement of foreign judgments relate to court and professional fees.

The division of court where the matter is filed determines the court fees. Matters that exceed USD500,000 in value are required to be filed in the Commercial Court; matters with a value below this threshold are filed in the Civil Division of the High Court.

The Commercial Court fees are significantly higher than those of the Civil Court:

- Claim Form – USD1,500 in the Commercial Court, and USD50 in the Civil Court;
- Statement of Case – USD300 in the Commercial Court, and USD50 in the Civil Court;
- Notice of Application – USD300 in the Commercial Court, and USD40 in the Civil Court;
- Affidavit – USD100 in the Commercial Court, and USD20 in the Civil Court;
- Certificates – USD25 in the Commercial Court, and USD15 in the Civil Court; and
- Orders – USD25 in the Commercial Court, and USD25 in the Civil Court.

Professional Fees

Professional fees vary widely according to the firm, the complexity of the case and the seniority of the legal practitioner(s) involved. Typically, legal practitioners in the BVI will bill on a time-spent basis in increments of six minutes. The hourly rates, increments and fee structure are generally between USD450 and USD950 per hour, and are usually set out in the relevant letter of engagement.

Registration of a foreign judgment is considered the most economical option for the enforcement of a foreign money judgment. Enforcement by way of a common law claim will be more expensive but would still be more economical than insolvency proceedings.

Timeframe

In an uncomplicated case falling under the Reciprocal Enforcement of Judgments Act, the quickest method of enforcing a foreign judgment is through an application to register the judgment in the Commercial Court, where a matter of this nature can ordinarily be expected to be completed in about six weeks. The timeframe may vary if service is required on a party that is outside the jurisdiction.

Enforcement claims at common law will take longer – months rather than weeks – but whatever the method of enforcement employed, the timeframe will be affected by factors such as whether the judgment debtor resides outside the jurisdiction, whether the proceedings are contested, and the general state of the court's calendar.

3.6 Challenging Enforcement of Foreign Judgments

In the BVI, a judgment debtor has several options to challenge the enforcement of a foreign judgment. These options include but are not necessarily limited to challenges on the following grounds:

- the judgment was not final and/or conclusive;
- the judgment is impeachable – eg, the judgment was obtained through fraud or breach of natural justice, or is contrary to public policy;
- the judgment was not for a specified or arithmetically determinable sum of money;

- the judgment was for money in respect of taxes, fines or penalties;
- the original court acted without jurisdiction, such as where the judgment debtor did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; and
- the recognition and enforcement claim are statute barred.

4. Arbitral Awards

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

The Arbitration Act 2013 governs the enforcement of foreign arbitration awards in the BVI.

The BVI acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 25 May 2014.

The Reciprocal Enforcement of Judgments Act 1922 also refers to arbitral awards within the definition of judgment, and applies to the countries named in **3.1 Legal Issues Concerning Enforcement of Foreign Judgments**.

Arbitration Act

The Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration, providing a framework for the enforcement of both domestic and foreign arbitral awards. It sets out provisions for enforcing awards from a New York Convention contracting state (Convention Awards) and those from a non-contracting state.

The Arbitration Act gives the court general discretion to refuse the enforcement of awards from non-contracting states if it considers it just to

do so, but there is no similar discretion to refuse Convention Awards.

Other Methods of Enforcing Arbitral Awards

Arbitral awards for a specified sum of money may be enforced at common law or by the commencement of insolvency proceedings.

4.2 Variations in Approach to Enforcement of Arbitral Awards

Both Convention Awards and arbitral awards from non-contracting states may only be enforced by statute and insolvency. Convention Awards may also be enforced at common law.

4.3 Categories of Arbitral Awards Not Enforced

Arbitral awards will not be enforced in the following circumstances.

- Arbitral awards that are not final and conclusive may not be enforced. If the award is subject to further review or appeal within the arbitral process, then it will not be enforced.
- If the BVI court is not satisfied that the arbitration agreement was valid, then it is likely to refuse to enforce the award.
- Where the arbitral tribunal exceeded the scope of its jurisdiction, enforcement of the award is likely to be refused.
- In the event of failure to comply with the formal requirements under the rules, such as proper authentication or certification, the BVI courts may refuse enforcement until such requirements are satisfied.
- Where the award is based on a dispute that is regarded as non-arbitrable under BVI law, enforcement of the award may be refused. Matters involving public law or criminal offences are generally regarded as non-arbitrable.

- A BVI court has the discretion to refuse enforcement of an arbitral award if it is contrary to the public policy of the BVI. This exception is interpreted narrowly and generally involves extreme circumstances, such as awards obtained through fraud, corruption or a violation of fundamental principles of justice.

4.4 Process of Enforcing Arbitral Awards Applications for Enforcement

A party that wishes to enforce an arbitral award must apply for leave to enforce the award. The application must be supported by an affidavit that includes a duly authenticated or certified copy of the original award and the original or certified copy of the arbitration agreement.

If the award or agreement is in a language other than English, a certified translation of the award or agreement must be provided.

If the court determines that the award is valid, then the award may be registered. If the application was made *ex parte*, then the award debtor is required to be served.

Based on the location of the award debtor, different rules may apply for any application to set aside the registration of the award.

Upon being served with the order, the award debtor has the right to set aside the order if they prove that one of the grounds listed in Section 83 (non-convention) or Section 86 (convention) of the Arbitration Act applies.

A Claim at Common Law

A party may only commence a claim at common law to enforce Convention Awards; this method of enforcement is not available in respect of awards from non-contracting states. The claim

will be structured as discussed in 3.4 **Process of Enforcing Foreign Judgments**. The cause of action is one of a simple contract debt; however, the claimant is required to specifically plead and prove the arbitration agreement, the valid appointment of the arbitrator, the award, and that the award is unsatisfied.

Liquidation

A similar approach as discussed in 3.4 **Process of Enforcing Foreign Judgments** may be taken with arbitral awards.

4.5 Costs and Time Taken to Enforce Arbitral Awards

The costs and professional fees outlined under 3.5 **Costs and Time Taken to Enforce Foreign Judgments** would also apply to the enforcement of arbitral awards.

An application to enforce an arbitral award is unlikely to be completed in less than eight weeks in the Commercial Court, and is likely to take longer in the Civil Division of the High Court. Enforcement of a Convention Award by way of a common law claim will usually take longer.

4.6 Challenging Enforcement of Arbitral Awards

The grounds for challenging Convention Awards will be construed narrowly considering the New York Convention's object and purpose of facilitating the recognition and enforcement of foreign arbitral awards. However, possible grounds of challenge might include the following:

- a party to the arbitration agreement was under some incapacity, under the law applicable to that party;
- the arbitration agreement was not valid under the law to which the parties subjected it or, if there was no indication of the law to which

the arbitration agreement was subjected, under the law of the country where the award was made;

- the affected party was not given proper notice of the appointment of the arbitrator or the proceedings, or was otherwise unable to present their 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 that are beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or procedure was not in accordance with the agreement of the parties or, where there is no agreement, with the law of the country where the arbitration took place;
- the award is not yet binding on the parties or has been set aside by a competent authority of the country in which, or under the law of which, it was made; and
- 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.

Where an application for setting aside or suspending an arbitral award has been made to a competent authority in a foreign state, the BVI court before which the enforcement proceeding is brought may adjourn the enforcement proceedings and may order security for costs, upon the application of the party seeking to enforce the award.

Trends and Developments

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Enforcement of Judgments in the British Virgin Islands: Recent Trends and Developments

The British Virgin Islands (BVI) has long been recognised as a leading offshore financial centre owing to its favourable legal framework, tax advantages and relative political stability. As an international business hub, the BVI has seen an increase in cross-border transactions, which necessitates a robust and effective system for enforcing foreign judgments.

The legal framework for enforcing foreign judgments in the BVI primarily relies on the Reciprocal Enforcement of Judgments Act and common law principles. The Act establishes a mechanism for the enforcement of judgments from certain specified jurisdictions, and the common law principles provide a foundation for enforcing judgments from jurisdictions that do not have reciprocal enforcement arrangements with the BVI.

By its accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 25 May 2014, the BVI also provides an effective regime for the enforcement of foreign arbitral awards.

The success of the New York Convention is well known. More than 160 states have signed it and it has been described as “the single most important pillar on which the edifice of international arbitration rests” (*Enka Insaat ve Sanayi AS v OOO “Insurance Company Chubb”* [2020] UKSC 38; [2020] 1 WLR 4117, para 126). The BVI’s commitment to the regime is clear, with its state-of-the-art International Arbitration Centre, revamped Arbitration Act 2013 and the complementary provisions of its Civil Procedures Rules ensuring that foreign arbitral awards have a clear and uncomplicated path to enforcement.

Foreign judgments and the new CPR

One of the most significant developments for foreign judgment enforcement in the BVI will be the implementation of the new Eastern Caribbean Supreme Court Civil Procedure Rules 2023 (CPR 2023), which come into force on 31 July 2023.

A judgment creditor who wishes to enforce a foreign judgment from a non-reciprocating jurisdiction must sue at common law. If the judgment debtor resides outside the jurisdiction, the existing Civil Procedure Rules require the judgment creditor to apply for permission to have the claim served outside the jurisdiction. Such applications are routinely made *ex parte*; however, this adds an additional layer of procedure, with increased costs, complexity and delay in enforcement.

The new CPR 2023 dispense with the requirement for litigants to seek permission to serve outside the jurisdiction, provided that service is effected by a method that complies with specified requirements and that there is a certificate of service with the required declarations. This development intends to bring the enforcement of foreign judgments at common law more in line with applications to register foreign judgments under the less cumbersome enforcement regime of the Reciprocal Enforcement of Judgments Act and is sure to be celebrated by judgment creditors as a necessary and welcome change.

The new CPR 2023 also provide greater clarity regarding how claims for enforcement are to be pleaded once the new rules come into force, thereby removing some of the uncertainties that persisted under the old rules. The new rules also encourage the continued use of the electronic filing regime and remote hearings, through retention of the Practice Directions. The resulting ben-

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efit to foreign parties involved in BVI proceedings will be immediately apparent.

Freezing injunctions and the “Black Swan” jurisdiction – developments

The court's ability to order a freezing injunction is a powerful tool to manage cases and avoid its decisions being rendered futile or nugatory. Before the so-called “Black Swan” jurisdiction was developed in the case of *Black Swan Investment ISA v Harvest View Limited* (BVIHCV (Com) 2009/399), freezing injunctions were only available to assist domestic proceedings.

The Black Swan jurisdiction allows BVI courts to grant a standalone freezing injunction to assist foreign proceedings where the respondent was within the in personam jurisdiction of the BVI court. That position stood for a decade before the Eastern Caribbean Court of Appeal overruled *Black Swan*, applying the decision in *The Siskina* ([1979] AC 210). In *Broad Idea International Ltd v Convoy Collateral Ltd* (BVIHCMAPP2019/0026), the Court of Appeal held that *Black Swan* was wrongly decided and encouraged the BVI legislature to correct the resulting gap in the law.

In the wake of that decision, Section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act 2020 was swiftly passed, codifying the Black Swan jurisdiction. Accordingly, a BVI court may now grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.

The section was successfully tested in March 2021, in *Claimant X v A TVI Company* (BVIHC (COM) 2021/0037), in which the BVI court accepted the two-stage approach found in the authority of *Refco Inc and another v Eastern Trading Co and others* ([2003] EWCA Civ 752) to grant a proprietary injunction against a BVI

company engaged in foreign proceedings in England and Wales.

In October 2021, the Privy Council delivered its decision in *Convoy Collateral Ltd v Broad Idea International Ltd* ([2022] UKPC21), confirming that where the High Court of the BVI has personal jurisdiction over a party, it has the power to grant a freezing injunction against that party to assist enforcement through the court's process of a prospective (or existing) foreign judgment. In assessing several authorities, Lord Leggatt opined that the key question is whether the assets are or would be available to satisfy a judgment through some process of enforcement.

The common law Black Swan jurisdiction has therefore unequivocally been restored.

Enforcement of foreign judgments – updates

In *Sergey Tartuta v JSC VTB Bank* (BVIHCMAPP 2021/0002), the appellant appealed the judge's order to separate the trial for recognition and enforcement. In ruling against the appellant, the Court of Appeal held that a judge has wide case management powers and rejected the argument that, as a matter of law, in a claim for recognition of a foreign judgment it is necessary to investigate whether the loss represented by the judgment has in fact occurred and whether the obligation to pay the amount of the foreign judgment remains outstanding. The Court affirmed that, for recognition, all the claimant needs to do is present a judgment from a foreign court of competent jurisdiction that is final and conclusive on the merits.

Another important point that emerged from this case is that a judge will be given wide latitude in determining whether the assistance of expert evidence is necessary where claims of irregularity

ties and breaches of natural justice are advanced by a defendant in the context of enforcement proceedings. The court held that a BVI judge was within his power to refuse to entertain expert evidence on procedural irregularities in the foreign proceedings, as such irregularities could be assessed by reference to the BVI's standards of natural justice.

The BVI courts continue to rely on the Dicey Rule as a guide in assessing common law claims for enforcement of foreign judgments. In *Nokian Shina LLC v Andrei Valerevich Smyshliaev and anor* (BVIHCM2020/0113 decided 30 September 2022), the court reiterated that, to be enforceable, foreign judgments must be for a definite sum of money, must be final and conclusive, and must not be limited in their enforceability by public policy or other considerations. In this case, the claimant had applied to enforce two Russian judgments, one of which was not for a definite sum while the other, though for a definite sum of money, was unclear on the question of whether the defendant should pay the sum in question to the claimant. Both applications were, accordingly, refused.

Enforcement of foreign judgments in probate proceedings

Foreign judgments are now being recognised in relation to movable property located in the BVI in probate proceedings. In March 2022, the Court of Appeal held in *Sheikha Amena Ahmed H.A. Al-Thani et al v Sheika Aisha Mohammed Ali Abdullah Al Thani et al* (BVIHCVAP2021/0001) that the appellants were estopped by the foreign judgment from contending that the foreign will was not valid and enforceable in the BVI.

The deceased died in London. After his death, it was discovered that a will was issued by the Registry in Qatar, where the deceased was dom-

iciled. The appellants commenced proceedings in Qatar, challenging the validity and enforceability of the will on the ground that it had been revoked by the deceased's subsequent conduct and was therefore invalid and unenforceable. The appellants made an *ex parte* application in the BVI for a grant of letters of administration. Their application did not disclose the existence of the will or that there were proceedings in Qatar challenging its validity. The BVI court granted letters of administration on the basis that the deceased died intestate. After the grant of letters of administration in the BVI, the Qatari lower court rendered judgment in favour of the appellants, holding that the will was not valid and enforceable. However, this decision was overturned by the Qatari Court of Appeal, which held that the will had not been revoked and remained valid and enforceable.

Armed with the decision of the highest appellate court in Qatar that the will was valid, the respondents commenced proceedings in the BVI seeking revocation of the grant of letters of administration. The appellants contended that the issue in the Qatari proceedings concerned the validity and enforceability of a will in Qatar, but that the court in the BVI proceedings must determine the validity and enforceability of the will in accordance with BVI law. In revoking the grant of letters of administration, the BVI court held that the judgment of the Qatari court was valid and enforceable, and that it was conclusive as to the validity and enforceability of the will in the BVI. Accordingly, the appellants were estopped by the judgment of the Qatari Court of Appeal from contending that the will was not valid or enforceable in the BVI for the disposal of the deceased's movable BVI property.

Thus, where a foreign domiciled person dies owning BVI assets, BVI law will determine the

succession and administration of immovable property located in the BVI, and the law of the foreign domicile will determine the succession and administration of movable property located in the territory.

Enforcement of Convention Awards – updates

The BVI Commercial Court recently confirmed that Convention Awards may form the basis of an application to appoint a liquidator. In *Daselina Investments Ltd v Kirkland Intertrade Corp* (BVI-HCM2019/0149 decided December 2019), Jack J, in granting an application to appoint liquidators based on a Convention Award, rejected the argument that recognition under the New York Convention was the only means by which the court could take cognisance of the debt created by the arbitration award. The court also held that the liquidation application should be dismissed if there is an arguable defence pursuant to the New York Convention or the Arbitration Act.

The BVI generally adopts a pro-enforcement approach to arbitral awards. The standard of proof required to show that an award should not be enforced based on public policy is accordingly very high. However, the standard was met in the case of *AB Ltd and ors v GH Ltd* (BVI-HCM2021/0192 decided 27 January 2023), in which the compound interest on the underlying contract was accepted to be illegal according to Thai law. The court held that it was entitled to refuse enforcement of an award where the contract was illegal, and exercised its discretion to set aside the enforcement order based on comity. The court also cast doubt on the argument that the BVI's public policy trumps the provisions of foreign arbitration law.

Although not emanating from the BVI, the recent Privy Council case of *Gol Linhas Aereas S.A. (formerly VRG Linhas Aereas S.A.) v MatlinPatterson Global Opportunities Partners (Cayman) II LP and others* ([2022] UKPC 21) may have an impact on the BVI courts' interpretation of the New York Convention and the Arbitration Act. The decision in that case from the Cayman Islands addresses the appropriate approach to be adopted by the court when considering a challenge to a Convention Award on the basis that the defendant was unable to present his case owing to a breach of natural justice. The facts before the court established that the Brazilian tribunal had found the award debtor liable because of a legal provision that had not been advanced by the award creditor and on which the award debtor had not been invited to comment or make submissions.

The Board opined that, whilst it was prudent for arbitral tribunals to give parties an opportunity to comment or make submissions before applying any provision of law, the failure to do so in this case did not amount to a serious denial of procedural fairness, to justify a refusal of the award. It noted that the extent to which parties are informed of a tribunal's decision to rely on a particular legal basis varies by jurisdiction, and that an important consideration would be the legal culture where the award was made. The Board indicated that a court should be cautious about finding that a fundamental and generally accepted requirement of procedural fairness had been infringed.

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