

Enforcing foreign judgments and arbitral awards in Guernsey

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Foreign Judgments

There are two routes to enforcement of foreign judgments in Guernsey: (i) pursuant to statute, by reliance on the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 (as amended) ("**Reciprocal Enforcement Law**"); and (ii) pursuant to the common law.

Enforcement by way of statute

The Reciprocal Enforcement Law provides for the recognition and enforcement of a foreign judgment by way of registration. The scope of the Reciprocal Enforcement Law is limited to jurisdictions which offer reciprocal treatment to judgments of the Guernsey courts.

There are a limited number (and somewhat surprising group) of reciprocating countries. These countries include: England and Wales, the Isle of Man, Israel, Jersey, the Netherlands, Curacao and St. Maarten (previously known as the Netherlands Antilles), Northern Ireland, Italy, Scotland, and Surinam.

Whilst these countries are reciprocating countries, it does not mean that **all** judgments from those countries will be able to be registered. There are a number of conditions which must be met in order to be able to rely on the Reciprocal Enforcement Law.

What judgments can be registered?

A judgment of a reciprocating country can only be registered pursuant to the Reciprocal Enforcement Law if it satisfies a number of conditions:

- The first of these is that it is a judgment of a "superior court" of the reciprocating country. The definition of a "superior court" is set out in secondary legislation. So, in the case of England and Wales, for example, judgments of the Supreme Court, Court of Appeal and High Court can all be registered. However, judgments of the County Court cannot and therefore must be enforced by way of the common law.
- The judgment must be for a debt or a definite sum of money, other than a sum payable in respect of taxes or similar charges, or a fine or other penalty.
- The judgment must be final and conclusive. A judgment will be final and conclusive notwithstanding the fact an appeal is pending or that the time period for making an appeal is still open.
- The judgment must not be more than six years old.

- The court of the reciprocating country must have had jurisdiction to grant the judgment. Whether a foreign court has jurisdiction is determined by reference to Guernsey laws rather than the laws of the reciprocating country.

For actions *in personam*, the Reciprocal Enforcement Law deems the foreign court to have had jurisdiction, where the judgment debtor was the **defendant**, if he, (1) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings or agreed to submit; (2) counterclaimed in the proceedings; (3) was resident in the jurisdiction of the foreign court at the time of the proceedings (or in the case of a company had its principal place of business there); or (4) had an office or place of business there and the action was in respect of a transaction effected through that office. Where the judgment debtor was the **plaintiff** the foreign court will be deemed to have had jurisdiction.

For actions relating to immovable property, or in an action *in rem* relating to movable property, the test is whether the property in question was at the time of the proceedings situate in the same jurisdiction as the court.

What judgments cannot be registered?

In addition to satisfying the conditions above, there are a number of foreign judgments that are not capable of being registered under the Reciprocal Enforcement Law. These include,

- Judgments which have been wholly satisfied.
- Judgments which are not capable of being enforced by execution in the court of the reciprocating country.
- *In personam* judgments which relate to matrimonial matters, the administration of a deceased person's estate, insolvency and winding up of companies, and lunacy or guardianship of infants.

What is the process for registration?

In order to register a judgment under the Reciprocal Enforcement Law, a judgment creditor must apply to the Royal Court of Guernsey seeking permission for the judgment to be registered. An application for registration may be made on an *ex parte* basis.

The application must also be accompanied by a supporting affidavit. This must include a certified copy of the foreign judgment and a statement that the judgment creditor is (a) entitled to enforce the foreign judgment, and (b) that the foreign judgment has not been satisfied.

The Royal Court of Guernsey is able to impose conditions on the registration of a foreign judgment, including requiring that notice of the registration of the judgment is given to the judgment debtor and making provision for security for costs.

Following registration, a certified copy of the foreign judgment and certificate will be provided to the judgment creditor. The judgment debtor then has a period of fourteen days (unless this has been extended by the Royal Court) to apply to have the registration set aside.

What is the effect of registration?

Once registered, the foreign judgment is enforceable in Guernsey in the same way as a Guernsey judgment (see below for methods of enforcement).

Enforcement by way of common law

In the case of foreign judgments which cannot be registered under the Reciprocal Enforcement Law, the only route open to enforce them is by way of the common law.

Enforcement by way of the common law requires the judgment creditor to sue on the foreign judgment in the same manner as they would a civil debt.

What judgments can be recognised/enforced?

Similar conditions apply to judgments enforced pursuant to the common law as apply to registration under the Reciprocal Enforcement Law.

The judgment must be final and conclusive, be for a debt or definite sum of money (but not payable in respect of taxes of a fine or penalty) and granted by a court which had jurisdiction (in this case usual conflicts of law principles apply).

It is not, however, necessary for the judgment to be a judgment of a superior court.

What judgments cannot be recognised/enforced?

If the judgment can be recognised under the Reciprocal Enforcement Law, it is not possible to enforce it pursuant to the common law route.

In addition, a foreign judgment is not capable of enforcement under the common law if it was obtained by way of fraud, or if it is contrary to public policy or principles of natural justice.

What is the process for recognition/enforcement?

In order for a judgment creditor to enforce a foreign judgment pursuant to the common law it must sue on the judgment as if it were a civil debt, which will require the commencement of fresh proceedings in Guernsey.

In order to commence proceedings in Guernsey it is necessary to prepare a 'summons' and a 'cause' (similar to a claim form and particulars of claim in England and Wales, or a complaint in the United States) setting out the details of the foreign judgment and confirming that it has not been satisfied.

Where the judgment debtor is resident outside of Guernsey (but enforcement is sought in Guernsey because assets are situated here) it will be necessary to make an application to the Royal Court for permission to serve the summons outside of the jurisdiction. Such applications are made ex parte.

Once service has been effected on the judgment debtor, the summons will specify a 'return date' for the judgment debtor to appear before the Royal Court. On the return date, the judgment creditor will usually apply for summary judgment and unless the judgment debtor is able to establish one of the reasons for not recognising the foreign judgment – e.g. that the foreign court did not have jurisdiction – the Royal Court should usually grant summary judgment. If the judgment debtor fails to appear on the

return date, it is possible to apply for judgment in default of appearance, provided it can be shown the summons and cause were effectively served.

What is the effect of recognition/enforcement?

If the Royal Court grants a judgment in the debt proceedings the judgment creditor will have a Guernsey judgment which it can enforce in the usual way (see below for methods of enforcement).

Foreign Arbitral Awards

In a similar way to the enforcement of foreign judgments, there are two principal ways of enforcing foreign arbitral awards: pursuant to the Arbitration (Guernsey) Law, 2016 (as amended) ("**2016 Arbitration Law**"); and the Arbitration (Guernsey) Law, 1982 (as amended) ("**1982 Arbitration Law**").

Enforcement under the 2016 Arbitration Law

This is the main method of enforcement of foreign arbitral awards in Guernsey.

The 2016 Arbitration Law provides for the recognition and enforcement of awards, which have been made in pursuance of a written arbitration agreement, and in a territory of a state which is a party to the New York Convention on the recognition and enforcement of foreign arbitral awards.

What arbitral awards can be recognized/enforced?

As stated above, the 2016 Arbitration Law applies to awards, which have been made in pursuance of a written arbitration agreement, and in a territory of a state which is a party to the New York Convention. If the award does not satisfy these requirements it may nevertheless be possible to enforce it under the 1982 Arbitration Law.

What arbitral awards cannot be enforced?

Recognition and enforcement of an award can be refused if the person against whom it is invoked proves that,

- The arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication of it, under the law of the country where the award was made.
- A party to the arbitration agreement was (under the applicable law) under some incapacity.
- That person was not given proper notice of the appointment of the arbitrator or of the arbitration 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 (although those decisions that are within

the scope are enforceable).

- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which 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.
- The award is in respect of a matter that is not capable of settlement by arbitration, or if it would be contrary to public policy to recognize or enforce the award.

What is the process for recognition/enforcement?

An arbitral award which complies with the requirements set out in the 2016 Arbitration Law is automatically recognised as binding on the parties to the award and is capable of being relied upon by way of defence, set-off or otherwise in any civil legal proceedings in Guernsey.

In order to enforce an arbitral award under the 2016 Arbitration Law, it is necessary to apply for the permission of the Royal Court (similarly as with foreign judgments under the Reciprocal Enforcement Law (see above)).

In order to obtain permission, the applicant must provide the Royal Court with a duly authenticated original award or a duly certified copy of it, and the original arbitration agreement or a duly certified copy. If the award or agreement is in a foreign language, the applicant must also provide a translation of the document which must be certified by an official or sworn translator or by a diplomatic or consular agent.

What is the effect of recognition/enforcement?

As stated above, if an award satisfies the requirements set out in the 2016 Arbitration Law, it is treated as binding on the parties—subject to the award—and may be relied upon in any Guernsey civil proceedings.

If the Royal Court grants leave to enforce the award, it may be enforced in the same way as a Guernsey judgment (see below for methods of enforcement).

Enforcement by the 1982 Arbitration Law

Whilst most of the 1982 Arbitration Law has been repealed by the 2016 Arbitration Law, the 1982 Arbitration Law continues to provide for the enforcement of awards in arbitral proceedings that are subject to the Geneva Convention and the Protocol on Arbitration Clauses of 24 September 1923 (which are also not New York Convention awards).

What arbitral awards can be enforced?

In addition to the requirement that the award is made in arbitral proceedings subject to the Geneva Convention and the Protocol, an arbitral award will only be enforceable under the 1982 Arbitration Law if it complies with the following conditions set out in

Section 33(1):

- It must have been made under an arbitration agreement that was valid under the law by which it was governed.
- It must have been made by the tribunal provided for in the agreement or constituted in the way agreed to by the parties.
- It must have been made in conformity with the law governing the arbitration procedure.
- It must have become final in the country in which it was made. An award will not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.
- It must have been in respect of a matter which may lawfully be referred to arbitration in Guernsey.
- Finally, it must not be contrary to the public policy of Guernsey.

What arbitral awards cannot be enforced?

It is not possible to enforce an arbitral award under the 1982 Arbitration Law where the Royal Court is satisfied that,

- The award has been annulled in the country in which it was made;
- The party against whom enforcement is sought was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- The award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.

What is the procedure for recognition/enforcement?

It is also necessary to seek the permission of the Royal Court to enforce a foreign award under the 1982 Arbitration Law. The process is almost identical to that under the 2016 Arbitration Law, save for the applicant must also provide evidence that the award has become final and may be required to provide evidence that the conditions set out in Section 33(1) of the 1982 Arbitration Law.

Any foreign award which would be enforceable under the 1982 Arbitration Law is treated as binding on the persons subject to the award and may be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in Guernsey.

What is the effect of recognition/enforcement?

As stated above, if an award satisfies the requirements set out in the 1982 Arbitration Law, it is treated as binding on the parties, subject to the award, and may be relied upon in any Guernsey legal proceedings.

If the Royal Court grants leave to enforce the award, it may be enforced in the same way as a Guernsey judgment (see below for methods of enforcement).

Methods of Enforcement in Guernsey

There are two main methods of enforcement in Guernsey, depending upon whether the property against which enforcement is sought is personalty (movable property such as cash, shares, art, choses in action etc.) or realty (immovable Guernsey property).

Enforcement against personalty is via Her Majesty's Sheriff (and possibly *désastre* proceedings, if the judgment creditor is insolvent) and enforcement against realty is via *saisie* proceedings.

Her Majesty's Sheriff

The main method of enforcement is by way of Her Majesty's Sheriff ("HM Sheriff"), an officer of the Royal Court. HM Sheriff has wide powers to investigate the existence of assets, to arrest and (if necessary) sell personalty situated in Guernsey and then apply those proceeds to satisfy a judgment. The costs of instructing HM Sheriff are very reasonable.

In practice, HM Sheriff will be provided with a copy of the judgment and will take steps to investigate what personalty the debtor has in Guernsey (for example, by writing to all high street banks). Any personalty identified is then "arrested" (in the case of a bank account the funds will usually be transferred to HM Sheriff to hold).

Following the arrest, the creditor (known as the arresting creditor) needs to summons the judgment debtor to the Royal Court to see the court confirm the arrest and grant permission to sell the arrested items, the proceeds of which would be applied to satisfy the judgment.

Désastre

If the personalty arrested by the HM Sheriff is inadequate to satisfy the judgment, the arresting creditor will (subject to at least one other debt being owed to another creditor) be able to initiate a Guernsey customary law procedure called "*désastre*." Equally, if HM Sheriff arrests assets which are sufficient to satisfy a judgment creditor's debt but is aware that other debts are due to other creditors, and insufficient assets are available to satisfy all debts, then it will be necessary to begin *désastre* proceedings.

The core process of *désastre* begins with a hearing involving the arresting creditor, debtor and any other creditors before a Jurat (a lay-magistrate) who will act as Commissioner and who will be responsible for marshalling the claims against the debtor. At this first hearing, HM Sheriff will confirm that the proceeds realized by the arrest are insufficient to satisfy the debts of which she is aware. The Commissioner will then declare the debtor to be "*en etat de désastre*" (literally translated as, in a state of (financial) disaster!)

The Commissioner will then convene a meeting of creditors to examine the claims against the debtor. At the meeting, attending creditors are invited to make their claims against the debtor and establish an entitlement to any priorities over other creditors. At the conclusion of the meeting the Commissioner will prepare a report declaring dividends for each creditor, taking account of the various amounts and priorities of each creditor's proven claims.

The priority of claims in *désastre* is organized in the following manner: first, the cost of the *désastre* itself (including HM Sheriff's fees and the arresting creditor's costs); second, the claims of creditors holding a security interest under the Security Interests (Guernsey) Law, 1993; third, preferred debts (for example, debts owed to a landlord in relation to rent, unpaid wages and unpaid taxes); and finally, unsecured creditors.

Notably, *désastre* does not extinguish creditors' claims against the debtor to the extent that those claims remain unpaid (unlike bankruptcy proceedings in England and Wales). Therefore, there is nothing to stop a creditor claiming in subsequent *désastre*

proceedings, should further personal property be discovered, or initiating a *saisie* proceeding in respect of the debtor's real estate (set out below), for any unpaid amounts.

Saisie

Where a judgment debtor has real property situated in Guernsey it will be necessary to follow another customary law procedure known as "*saisie*."

Saisie consists of a three-stage process which results in the seizure and forfeiture of the real property owned by the judgment debtor.

The first stage is to obtain a **preliminary vesting order** ("PVO"), which gives certain rights to the creditor; these include the right to evict the people living in the property, or collect rent from tenants.

The second stage is to obtain an **interim vesting order** ("IVO") which takes the debtor's property away from him and transfers it to the arresting creditor to hold on trust for all potential claimants against that property.

Once the IVO is obtained, the arresting creditor must make a call for any other claims against the debtor's property which is done by way of publication of a notice in the local Gazette Officielle for two successive weeks. Following a period of 28 days, a Commissioner is appointed to assess the claims and a date set for the final stage of the process—the **final vesting order** ("FVO"). This hearing is typically dramatic, as each creditor must decide in turn, starting with those having the lowest priority, if they wish to take the real property (on the condition that they repay **all** higher priority creditors in **full**, immediately) or renounce their claim against the debtor. If substantial equity is available in the property and the creditor is well-resourced then it may be worth taking the property (strictly speaking there is not a requirement to return surplus equity to the judgment debtor!)

A significant quirk of *saisie* proceedings is, once they are initiated by a judgment creditor, they are deemed to give up their right to enforce their debt against any of the debtor's other assets. As a result, a judgment creditor should take care to satisfy themselves that the debtor's real estate is sufficient to discharge the debt. As a result of this and the protracted and complicated procedure, *saisie* is typically regarded as a last resort.

Corporate Insolvency

The scope of Guernsey's corporate insolvency law is beyond the scope of this article, but it should be noted that Guernsey has a well-established system of corporate insolvency law, including liquidation and administration. The recognition and assistance of foreign liquidators, receivers and trustees in bankruptcy is frequently ordered by the Royal Court.

Enforcement Against Trusts

Issues in relation to enforcement against assets held in trust established by a judgment debtor and/or that a judgment debtor is a beneficiary of can be particularly complex. Most Guernsey trusts are discretionary trusts and beneficiaries do not have any beneficial interest in the assets of the trust against which a judgment or arbitral award can be enforced; legally speaking they are a 'mere object of a power.'

The notion that a beneficiary of a trust has no beneficial interest against which a judgment or arbitral award can be enforced is often alien to lawyers from civil law jurisdictions and even to lawyers from common law jurisdictions who are not especially familiar with trust law.

In order to 'enforce' against the assets of a trust, it is therefore necessary to think laterally and explore other potential routes, which may include seeking to,

- appoint an equitable receiver over any powers reserved to the judgment debtor (such as a power to remove the trustee, add beneficiaries and/or remove beneficiaries), as occurred in the Cayman case of *TMSF v. Merrill Lynch Bank and Trust Company (Cayman Limited) and Others* (2009);
- set aside the judgment debtor's dispositions into trust on the grounds that they constituted fraudulent transfer on creditors, whether utilising statutory provisions such as s.423 of the UK's Insolvency Act 1986 or a customary law Pauline action;
- establish that the trust is a "sham" and the judgment debtor remains the beneficial owner of its assets;
- establish that, whilst not a sham, the trust is "illusory" because an excessive retention of control by the judgment debtor never successfully alienated the relevant assets, as was decided in the recent English case of *Mezhprom v. Pugachev* [2017] EWHC 2426 (Ch).

These avenues are complex and the prospects of their application and success will be highly fact specific. However, if a judgment debt is substantial and significant assets are located within a Guernsey trust, they should be explored carefully.

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