



THE EFFECTIVENESS OF THE AWARD: Recognition and Enforcement of Foreign Judgments and Arbitral Awards

**International Arbitration, Litigation and Transport Law
Commissions**

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National Report of Jersey, Channel Islands

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1 Recognition and enforcement of foreign civil judgments

1.1 Which legislation (international treaties, regulations, national laws) governs the recognition and enforcement of foreign civil judgments in your country?

Foreign judgments cannot be directly enforced in Jersey unless the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the "**Reciprocal Enforcement Law**") applies. 'Judgment' means 'a judgment or order given or made by a Court in any civil proceedings or by a Court in criminal proceedings for payment of a sum of money in respect of compensation or damages to an injured party'.¹

Certain judgments (though this does not include those for sums payable to tax or revenue authorities or those in respect of fines or other penalties) given in the superior courts of other jurisdictions can be registered under the Reciprocal Enforcement Law and (if not challenged and set aside within a specified time) and using the procedure provided for under the Reciprocal Enforcement Law given effect as if they were Jersey judgments and enforced accordingly.

1.2 Which is the competent court/authority for deciding on the enforcement of foreign judgments?

The Royal Court is the principle civil court in Jersey. It is divided into four divisions: Family, Probate, Heritage (property) and Samedi (dealing with all other matters and including large commercial disputes). The Samedi division would be the appropriate forum for such an application. The Royal Court is equivalent to the High Court in England and Wales. However, when it sits in civil cases (most usually as the Inferior Number) it comprises a judge of law (whether the Bailiff, Deputy Bailiff or a Commissioner - a person suitably qualified to sit as an ad hoc judge) and two Jurats (permanent, lay members of the Court who are the judges of fact and arbiters of damages).

Hearings are normally conducted in public, unless otherwise ordered by the court. Previously, the court was often ready to accede to requests for private hearings although this has changed recently and now far more cases are being heard in public or are made the subject of anonymised, public judgments.

¹ Article 2(1) of the Reciprocal Enforcement Law.

1.3 What are the formal requirements (to be complied with by the judgment creditor) for the enforcement of foreign judgments?

As mentioned above, the Reciprocal Enforcement Law legislates the framework for registration and enforcement in Jersey of judgments given in the superior courts of countries that give reciprocal treatment to judgments given in Jersey. The judgment in question must be a judgment of a superior court of a foreign jurisdiction specified in orders made pursuant to the Reciprocal Enforcement Law. The courts detailed in such orders are as follows:

1. England and Wales – the Supreme Court of the United Kingdom, the House of Lords, the Court of Appeal and the High Court of Justice;
2. Scotland – the Supreme Court of the United Kingdom, Court of Session and the Sheriff Court;
3. Northern Ireland – the Supreme Court of the United Kingdom and the Court of Judicature of Northern Ireland;
4. Isle of Man – Her Majesty’s High Court of Justice;
5. Guernsey – the Royal Court of Guernsey and the Court of Appeal of Guernsey.

Subject to the below, the starting position is that only judgments of the aforementioned courts can be directly enforced in Jersey. For instance, when giving judgment in *Re Hardwick*², the Royal Court declared that an English County Court judgment could not be registered in Jersey under the Reciprocal Enforcement Law as it was not a judgment of a superior court.

However, the subsequent judgment of the Royal Court in *Brunei Investment Agency and Bandone v Fidelis and others*³ extended the court's inherent jurisdiction to enforce foreign judgments in Jersey. This decision was of importance for its consideration of the enforceability of foreign non monetary judgments, though the decision does not apply to matrimonial cases, the administration of the estates of deceased persons, bankruptcy, winding up of companies, mental health or guardianship.

² [1995] JLR 245

³ [2008] JRC 152

In this case, orders were sought by the Brunei Investments Agency ("BIA") for the transfer of shares in two Jersey companies, beneficially owned by Prince Jeffri, to Bandone. In 2006, the High Court of Brunei Darussalam had ordered Prince Jeffri to effect this transfer of shares in accordance with his obligations under a settlement agreement relating to earlier legal proceedings brought in the High Court of Brunei Darussalam by the BIA and the government of Brunei Darussalam (the "Brunei Judgment"). The order for the transfer of the shares was sought in reliance upon the principles of comity recognised by the Royal Court on previous occasions⁴. The Reciprocal Enforcement Law does not apply to judgments issued in Brunei, and so it was necessary for the court to consider its inherent jurisdiction to enforce foreign judgments.

The court referred to the opinion expressed (albeit obiter dictum) by the Privy Council in the case of *Pattni v Ali and another*⁵ to the effect that courts should be prepared to give appropriate relief to enforce contractual rights to movables or intangible property situate within its jurisdiction in circumstances where such rights have been determined by a foreign court issuing an in personam judgment as against persons who have submitted to the foreign court's jurisdiction. The court considered that this opinion carried significant weight and also noted that the Cayman Islands court in *Miller v Gianne and Redwood Hotel Investment Corporation*⁶ had held that the ability to enforce foreign judgments and orders made in personam was no longer limited to judgments for debt or a definite sum of money.

It was therefore decided that as the court in Brunei had jurisdiction to make the Brunei Judgment and as that judgment was final and conclusive; the terms of the Brunei Judgment and of the orders sought from the Royal Court were clear and specific. The Royal Court was not being required in this instance to provide more judicial assistance than it would to its own litigants; and there were no grounds upon which it should refuse to exercise its discretion.

To be registered under the Reciprocal Enforcement Law, the judgment must:

1. be final and conclusive as between the parties;

⁴ *Lane v Lane* 1985-86 JLR 48 and *Compass Trustees Limited v McBarnett* 2002 JLR 321

⁵ [2006] UKPC 51, [2007] 2 AC 85: case concerned an application to enforce in the Isle of Man an order of the Kenyan High Court for the transfer of shares in an Isle of Man company.

⁶ (2007) CILR 18

2. provide for the payment of a sum of money (but not in respect of taxes or similar charges, or a fine or other penalty) or a sum not wholly satisfied; and
3. able to be enforced by execution.

A judgment can be "final and conclusive" even if an appeal in the foreign court is pending or possible, although any such appeal will be relevant to an application to set aside registration. This was confirmed in *Re Bell*⁷. If an appeal is still pending the Royal Court may opt to set aside the registration or adjourn the matter pending, resolution of the appeal⁸; however, even if there is an appeal pending and there is a breach of an undertaking given to the Court, the judgment can still be final and conclusive⁹.

If a foreign judgment falls within the Reciprocal Enforcement Law, the judgment creditor must use the registration procedure. No other proceedings for the recovery of the sum payable, for example by action at common law, are permitted in Jersey.

1.4 Can you briefly set out the various steps of the proceedings for the enforcement of a foreign judgment? Please provide information on how the judgment debtor is to be notified about the request for enforcement.

An application must be made to the Royal Court on an ex parte basis within six years of the date of the judgment itself or, the last judgment in the appeal proceedings. The application must be supported by an affidavit¹⁰:

1. exhibiting a certified copy of the judgment and authenticated by the seal of the original court (together with a translation into English, if appropriate);
2. stating, to the best of the knowledge, information and belief of the deponent:
 - a. that the applicant is entitled to enforce the judgment;
 - b. that the judgment has not been satisfied or has not been wholly satisfied, and what amounts remain outstanding;

⁷ 1995 JLR 23

⁸ *ED&F Man Sugar Ltd v. Haryanto Ltd* 1990 JLR 169

⁹ *Abdel Rahman v. Chase Bank (CI) Trust Company Ltd* 1990 JLR 59

¹⁰ Rules 3, 4 and 6 of the Judgments (Reciprocal Enforcement) (Jersey) Rules 1961 (the "1961 Rules")

- c. that at the date of application, the judgment can be enforced by execution in the country of the foreign court;
 - d. that, if the judgment were registered, the registration would not be, or be liable to be, set aside under Jersey law (see below);
3. specifying the amount of the interest (if any) which under the law of the country of the original court has become due under the judgment up to the time of registration;
4. indicating the full name, title, trade or business and the usual last known place of abode or of business both of the judgment creditor and of the judgment debtor;
5. headed "*In the matter of the Judgments (Reciprocal Enforcement) (Jersey) Law, 1960 and in the matter of a judgment of the . . . obtained in the . . . and dated ...*".

A foreign judgment will not be registered if, at the date of the application, it has been wholly satisfied, or could not be enforced by execution in the foreign country itself. However, the Royal Court has the power to register the outstanding balance due under a partially satisfied foreign judgment, and to register a foreign judgment insofar as it provides for the payment of a money sum whilst ignoring any non-registrable elements (such as an order for specific performance). Any sum payable in a foreign currency is converted to pounds sterling at the prevailing rate. The registered judgment will also include any interest due under the law of the foreign country up to the time of registration, together with the reasonable costs of the registration process in Jersey.

Once the judgment is registered, a written notice of the registration must be served on the judgment debtor¹¹, this will usually stipulate a period (usually 14 or 28 days, subject to any extensions) within which a debtor may apply to have the registration set aside. A registered judgment cannot be enforced until either that time period has expired or any application to set aside the registration has been dealt with. Following this, the judgment can be enforced in the same way as a judgment given in Jersey.

Service on the judgment debtor, if in Jersey, is by personal service, if outside Jersey, is in accordance with any rules for service abroad which may prescribe a special form of summons accompanied by an affidavit of service to be sworn by a process server in that country.

¹¹ Rule 9 of the 1961 Rules

In relation to foreign judgments to which the Reciprocal Enforcement Law does not apply, the judgment creditor must sue in Jersey on the foreign judgment.

1.5 On which grounds can recognition and enforcement be refused? Can a foreign civil judgment be denied enforcement on the ground that it conflicts with another decision? Which arguments for refusal of enforcement are the most frequently encountered and likely to be successful?

In order to set aside a judgment, the judgment debtor must apply (within the relevant time period specified above) to the Royal Court by way of summons which must be supported by affidavit evidence. The Royal Court must be satisfied that:

1. the requirements set out above at 1.4 are not satisfied or if the procedure for registration has not been complied with; or
2. the judgment debtor did not receive notice of the proceedings in the foreign court in sufficient time to enable him to defend them and did not appear before it (even if duly served in accordance with the law of the foreign court); or
3. the judgment was obtained by fraud; or
4. the enforcement of the judgment would be contrary to public policy in Jersey; or
5. the applicant did not have rights under the judgment; or
6. the foreign court had no jurisdiction.

In the case of a judgment in any action in personam (not involving matrimonial matters, administration of estates of deceased persons, bankruptcy or winding-up of a company) the foreign court will be deemed to have jurisdiction if:

1. the judgment debtor voluntarily appeared in the proceedings other than for the release of property seized or threatened with seizure or of contesting the jurisdiction of the original court;
2. the judgment debtor was the plaintiff or a counterclaimant;
3. if the judgment debtor had, before commencement of the original proceedings, agreed to submit to the jurisdiction of that court or the courts of the country;

4. the judgment debtor was at the time the proceedings were begun resident in, or being a company had its principal place of business in, the original country;
5. the judgment debtor had an office or place of business in the country of the proceedings relating to a transaction effected through or at that office or place of business.

In the case of a judgment of which the subject matter was immovable property or an action in rem of which the subject matter was movable property, the foreign court will only be deemed to have jurisdiction if the property in question was at the time of proceedings situate in the country of the foreign court.

The foreign court will not be deemed to have jurisdiction if:

1. the subject matter of the proceedings was immovable property outside the country of the foreign court; or
2. the bringing of proceedings in the foreign court was contrary to an agreement under which the parties agreed to settle any dispute outside the country of the original court (except as mentioned above); or
3. if the judgment debtor was entitled to immunity under Public International Law and did not submit to the jurisdiction of that court.

1.6 Can and will the court/authority deciding on recognition and enforcement of the judgment review the merits of the matter?

As mentioned above, not all judgments can be registered. The registration procedure set out in Part 2 of the Reciprocal Enforcement Law applies only to judgments or orders given or made in civil proceedings, or in criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party. It does not apply to judgments given on appeal from an inferior court nor, for example, to an English County Court judgment given in proceedings later transferred to the High Court for enforcement. Therefore, in considering whether an award is registrable (ie if it is to be recognized and capable of enforcement), the Royal Court will consider whether:

1. the requirements set out above at 1.4 are not satisfied or if the procedure for registration has not been complied with; or

2. the judgment debtor did not receive notice of the proceedings in the foreign court in sufficient time to enable him to defend them and did not appear before it (even if duly served in accordance with the law of the foreign court); or
3. the judgment was obtained by fraud; or
4. the enforcement of the judgment would be contrary to public policy in Jersey; or
5. the applicant did not have rights under the judgment; or
6. the foreign court had no jurisdiction.

Non-money judgments traditionally fall outside the scope of the Reciprocal Enforcement Law and, historically, have also not been enforceable at common law. However, in the judgment in *Brunei Investment Agency*, in the interests of comity and to reflect modern-day commercial practices, the common law was expressly amended so that the Royal Court now has a discretion to enforce non-monetary judgments, albeit this discretion should be exercised "cautiously". It is not yet clear how this cautious extension of the common law will be applied in practice. It would therefore appear that the Royal Court is prepared to exercise its discretion and review the merits on a case by case basis.

A separate regime applies to the registration and enforcement of maintenance orders pursuant to the Maintenance Orders (Facilities for Enforcement) (Jersey) Law 2000. Divorces and legal separations may be recognised under the Recognition of Divorces and Legal Separations (Jersey) Law 1973.

1.7 In order to be able to resist enforcement, must the judgment debtor have challenged the judgment in the country where it was rendered? Will the courts of your country enforce a judgment that has been annulled in the country where it was rendered?

No - see above answer at 1.5.

1.8 If only a part of the foreign judgment does not fulfill the requirements for recognition and enforcement, will enforcement be entirely refused, or can the judgment be partially enforced?

The registrable part can be registered and enforced in accordance with the Reciprocal Enforcement Law, which will exclude the non-registrable part of the judgment. It will not therefore be entirely refused, and can be partially enforced.

1.9 What is the approximate total duration of the proceedings necessary for the enforcement (including possible appeals)?

See answer at 1.4 above.

A registered judgment cannot be enforced until either the time period stipulated in the notice has expired or any application to set aside the registration has been disposed of. Following this, the judgment can be enforced in the same way as a judgment given in Jersey.

The time for enforcement, if approved, would be approximately two months and, if opposed, perhaps six months. The timeframe is also largely dependent on the Royal Court's diary. Further time may be needed where there are subsequent problems in executing the judgment against particular assets. Executing a judgment against Jersey immovable property may involve an even longer process.

In relation to judgments falling outside the scope of the Reciprocal Enforcement Law, the time period is largely dependent on the court diary, however an estimate would be 3 months.

1.10 In case of an appeal against the foreign civil judgment of which a party seeks the enforcement, will the appeal affect the decision to grant the enforcement?

Where the judgment debtor satisfies the Royal Court that an appeal of the foreign judgment is pending or possible, the Royal Court may adjourn the application to set aside for a reasonable period to allow any such appeal to be pursued or disposed of.

1.11 Which remedies (including at the international level) are available to the party seeking enforcement of a foreign judgment if the domestic courts unjustifiably delay or refuse the enforcement of a foreign civil judgment?

Separate proceedings may be commenced in aid of foreign proceedings even if the Jersey proceedings are only for an injunction¹². Such an injunction may be available where there is a real risk of dissipation of assets situate in Jersey¹³.

1.12 Is it possible to obtain interim measures pending a decision on the enforcement of a foreign civil judgment? If positive:

1.12.1 What types of interim measures are available to the creditor?

Interim relief such as a freezing order (Mareva injunction) could in appropriate circumstances be obtained to support an application under the Reciprocal Enforcement Law. Where this occurs, the plaintiff may need to give security for costs. The amount would depend on the means of the applicant, the likely chance of success, and the nature of the dispute and likely amount of the costs.

An alternative course is for the applicant to obtain a caveat, (if the judgment debtor was Jersey situate immovable property) which is a restriction on the sale of any Jersey situs immovable property. A caveat has the result of rendering the sale void as a matter of law. This is only available if the judgment debtor is the owner of the property, and is in effect a form of injunction to prevent the liquidation of the immovable property asset and dissipation of the proceeds of sale. A caveat is an interim measure and is possible even where the debtor disputes the claim, although the nature of the claim and debtor's dispute of it are material factors which will affect the discretion of the court whether to allow the lodging of a caveat.

1.12.2 What would be the applicable procedural rules? Would any "out of court" measures be available? (For example, rights of detention.)

¹² *Solvalub Ltd v Match Investments Ltd* 1996 JLR 361 (CA)

¹³ *Johnson Matthey Bankers Ltd v Arya Holdings Ltd and National Westminster Bank plc* 1985-86 JLR 208

The procedural rules governing the conduct of enforcement of the debt and interim measures referred to above would be contained within the Royal Court Rules 2004 ("**RCR**").

There are no specific "out of court" options available prior to registration of the judgment, however the applicant may apply for an *ordre provisoire* (a provisional court order protecting the position of the creditor) pending a decision in respect of registration/ enforcement of the debt. *Ordres provisoires* are applied for *ex parte* containing an order (which is signed by the Bailiff), and can include orders to:

1. distrain or seize the debtor's movable property (an *arrêt*)
2. distrain money belonging to the debtor, currently in the hands of a third party, which the third party may owe to the debtor (an *arrêt entre mains*);
or
3. arresting and imprisoning the debtor (a *saisie*).

There may be clear cases where a debtor owes a creditor a fixed, liquidated sum which is undisputed, and have sufficient assets by which the debt may be satisfied, but which he refuses to apply in repayment. In such circumstances, an arrest (or *arrêt*) is a remedy whereby the debtor's movable property may be seized and held safe from disposal, pending a decision on registration.

An *ordre provisoire* by way of *arrêt* (or *arrêt provisoire*) allows an applicant to seize movable property belonging to a defendant who owes him a liquidated sum of money. An *arrêt provisoire* can be made to authorise the seizure of belongings, of a person who is not "*fondée en heritage*" (i.e. is not the owner of land within Jersey) and who is without sufficient assets in Jersey. The relevant moveable property would be seized by the Viscount (the Court's enforcement officer) and grants the applicant a proprietary, security interest in the property arrested from the time of the arrest¹⁴.

¹⁴ *F G Hemisphere Associates LLC v DRC & ors* [2010] JRC 195; *F G Hemisphere Associates LLC v DRC & ors* [2011] JCA 141

An affidavit is not required in support of an application for an *ordre provisoire*, though it is important to note that the duty of full and frank disclosure applies to the application for an *ordre provisoire*. It would therefore always be preferable to lodge an affidavit in support of the application in order to address the nature of the application in a full and frank manner.

Once the foreign judgment is registered, there is an automatic right to distrain over the movables of the judgment debtor unless the court specifically directs otherwise, and if against an individual, a power of arrest against wages. Further orders may also be sought to enforce the registered judgment, usually to arrest bank accounts and possibly pursuing procedures to realize immovable property in Jersey by a *dégrévement* or a *désastre* (local insolvency procedures). Imprisonment for debt is, theoretically, still available if the defendant does not own immovable property in Jersey and there appears insufficient property to seize. The maximum period of such imprisonment is one year, but if the debtor is of good faith, the debtor can apply for an early release. This remedy is now rare and has been questioned as to its appropriateness¹⁵.

1.12.3 What would be the likely outlay of costs? Would the judgment creditor be required to provide a cross undertaking or other security?

Yes - see above at 1.12.1. It is likely that the applicant would need to provide security for costs.

When considering whether the applicant would be required to give security for costs, the Court would consider whether:

4. the applicant resides overseas, potentially causing difficulties enforcing a costs order against him (although residence is no longer the determining criteria); and
5. it is faced with a corporate applicant, wherever it is resident making it more inclined to order security against it.

¹⁵ *Benest v. Le Maistre* 1998 JLR 213 (CA) and *Gray v. Nadin* 1994 JLR 54

In deciding whether to make an order for security, and the amount of the same, the Court must balance the risks of restricting the applicant's access to justice by ordering him to provide security beyond his means; against injustice to the defendant should he defeat the application but have no recourse against the applicant for the costs incurred.

- 1.12.4 Would this be an *ex parte* application or is notice to the judgment debtor always required? What options would be available to the defendant to challenge such measures?

An injunction may be obtained on an application inter partes or, in certain circumstances, ex parte. All applicants for an injunction have a duty of full and frank disclosure to the Court particularly in instances where disclosure the application is made ex parte.

Failure to comply with the duty of full and frank disclosure may be sufficient of itself to discharge the injunction even where there are good grounds for that injunction. If such an application is brought ex parte, and after he has been served with an injunction, the respondent can apply to lift the injunction, arguing that it has no foundation, either in respect of the underlying claim, or the grounds on which the injunction itself was granted. Further, the respondent may challenge the injunction on the grounds that the application itself was defective, for instance by reason of some failure by the applicant to make full disclosure.

- 1.12.5 What would the consequences be if the request is dismissed?

See above at 1.12.2, the applicant has many alternative courses to enforce the registered judgment once it has been registered.

1.13 What would be the likely costs of the proceedings? Do the costs depend on the amount awarded in the foreign judgment?

Stamp duty (nominal amount) is payable to commence proceedings at various procedural stages. Legal fees are ordinarily payable on a time basis and will depend on such factors as the complexity of the application (for example if the application is to be contested and the facts are complicated), the sum involved, the urgency and the time spent.

Contingency fee agreements and conditional fee agreements are not permitted, although third-party litigation funding agreements may be permitted if the terms are appropriate¹⁶.

The reasonable costs of, and incidental to, the registration can be recovered as part of the registered judgment. Other legal costs may be ordered to be paid by one party to the other at the discretion of the Royal Court. The recoverable costs are either on a standard basis or on an indemnity basis.

1.14 Would your answers to the foregoing questions change in the event of a request pertaining to the enforcement of an interlocutory judgment by a foreign court? If so, which would be the relevant differences in your answers?

In order for a judgment to be recognized and registered in Jersey, so that it may be enforced, it must fulfill the requirements stipulated at 1.3 above (one of which being that it is final and conclusive between the parties). It would appear that the enforcement of a foreign interlocutory judgment would not be possible. However, as further explained at 1.6, non-monetary judgments were traditionally not enforceable until the decision in *Brunei Investment Agency*, which amended the common law in order that the Royal Court have the discretion to enforce non-monetary judgments. The extent of this discretion has not yet been tested.

The Royal Court has ‘inherent jurisdiction’, its powers are not limited to those which are conferred on it expressly by the express provisions of the RCR, Royal Court (Jersey) Law 1948 or any other statute. The Royal Court is able, for example, to grant injunctions pursuant to Article 49 Bankruptcy (Désastre) (Jersey) Law 1990 (the "**Désastre Law**") in its discretion and make orders it thinks fit to assist the courts of other countries or territories in circumstances where such a court issues a letter of request in relation to the insolvency of any person.

The mere presence of assets is sufficient for jurisdiction to grant injunctions so mirroring of foreign interlocutory orders may be possible.

¹⁶ *Re Valetta Trust* [2011] JRC 227

Additionally and more generally, the Service of Process and Taking of Evidence (Jersey) Law 1960 (as amended) stipulates conditions regarding assistance provided to foreign courts. The letter of request issued by the court in question is ordinarily provided to the Attorney General with the sealed, original order of the requesting court who will then arrange for service to be effected and a certificate of service returned to the requesting party. The Attorney General is also able to assist overseas authorities in a number of ways including, obtaining documentary and oral evidence for use in civil asset recovery investigations and proceedings, and freezing and confiscating assets subject to external civil asset recovery proceedings.

In conclusion, the enforcement of a foreign interlocutory judgment does not appear possible. An application to attempt to enforce such a judgment would be a novel application and untested, particularly noting the Court's concern in *Brunei Investment Agency* regarding the need for "cautious" exercise of its discretion.

1.15 Could you provide examples of “borderline” cases in which a foreign judgment was – perhaps surprisingly – enforced or, on the contrary, enforcement was refused? [For instance: Is a judgment awarding a claim of punitive damages enforceable?] Could you provide examples where enforcement was refused for being contrary to public policy?

See above for the decision of *Brunei Investment Agency and Bandone v Fidelis and others*¹⁷.

The English decision of *Adams and others v Cape Industries plc* and another¹⁸ is also frequently cited. In this case, the defendants owned South African companies which mined asbestos and a United States company through which the asbestos was marketed in the United States. A total of 205 parties brought actions in the United States against the defendants and others claiming damages for injury caused by exposure to asbestos dust from an asbestos insulation factory to which the defendants had supplied raw asbestos, and were awarded damages in Texas. These damages were in the form of a global amount, resulting in approximately \$75,000 for each plaintiff. The defendants took no part in the proceedings in the Texas court because they had no assets in the United States, and judgment was given against them in default.

¹⁷ [2008] JRC 152

¹⁸ [1991] 1 All ER 929

The plaintiffs then brought proceedings against the defendants in England to enforce the Texas judgment pursuant to the common law rule that a judgment in personam of a foreign court of competent jurisdiction could be sued on in England as creating a debt between the parties. The judge at first instance held that the presence in Illinois of the defendants' subsidiary and the independent Illinois corporation through which they marketed asbestos could not be treated for jurisdiction purposes as the presence of the defendants themselves in Illinois at the time the proceedings were commenced but, if the defendants had been present in Illinois, that would have provided sufficient basis for the Texas court to exercise jurisdiction. The judge further held that the judgment in the Texas court had not been procured by fraud but it would be contrary to natural justice and public policy to enforce the judgment because the procedure adopted therein offended against English principles of justice because no assessment of the defendants' liability to each individual plaintiff was made (a global amount was ordered). The plaintiffs appealed against the judge's findings that the defendants had no presence in Illinois through their subsidiary and marketing activities and that it would be contrary to natural justice and public policy to enforce the judgment.

The appeal was dismissed. It was also noted that the defence of breach of procedural natural justice preventing a judgment of a foreign court being enforced in England was not restricted to the requirements of due notice and opportunity to put forward a case. It also depended on whether the proceedings in the foreign court offended the English court's views of substantial justice. The defendants had no knowledge and were not given notice of the unusual method of assessment of damages which had been proposed by the plaintiffs and accordingly they had no knowledge of any basis for seeking relief from the court in Texas in respect of the defect in the proceedings. As a matter of principle the onus lies on the plaintiff seeking to enforce the judgment of a foreign court to prove the competence of that court to assume jurisdiction over him.

2 RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

2.1 Which legislation (international treaties, regulations, national laws) governs the recognition and enforcement of foreign arbitral awards in your country? [For most countries, this will mainly be the New York Convention 1958, so there is no need to describe its provisions except as they specifically apply in your jurisdiction.]

The Arbitration (Jersey) Law 1998 provides (in Parts 3 and 4) that certain foreign arbitration awards (for example those made in a country which is a party to the Geneva or New York Conventions) may be enforced in Jersey either by action or, with the leave of the Royal Court obtained on an application made ex parte, in the same manner as a Jersey judgment. Jersey has declared through the UK that it will apply the New York Convention only to recognition and enforcement of awards made in the territory of another contracting state.

The Arbitration (International Investment Disputes) (Jersey) Order 1979 permits the registration and enforcement of an award under the Convention on the Settlement of International Disputes (opened for signature in Washington on 18 March 1965).

2.2 Which decisions qualify as “foreign arbitral awards”? Can rulings rendered by arbitral tribunals such as orders for interim relief and preliminary awards be enforced? If so, under which legislation and under which conditions?

Awards under the Protocol on Arbitration Clauses 1923, the New York Convention and the Geneva Convention are capable of enforcement.

Foreign awards are defined as those to which the Protocol on Arbitration Clauses applies, an award made in a dispute in which one person is subject to the jurisdiction of the Geneva Convention on the Execution of Foreign Arbitral Awards and an award made in a territory where the Geneva Convention applies.

2.3 Which is the competent court/authority for deciding on the enforcement of a foreign arbitral award?

The Royal Court can assist in every stage of the arbitration process and can:

1. stay legal proceedings started in a matter that falls within the scope of an arbitration agreement;
2. extend any time limits for starting arbitration proceedings and for making an award;
3. determine any question of law arising during an arbitration referred to it by an arbitrator; and
4. enforce an arbitral award in the same way as a judgment .

The Royal Court can make an order for the arbitrator or umpire to have the power to continue with the reference in default of appearance or of any other act by one of the parties in like manner as the court might continue with proceedings in the court where a party fails to comply with an order of the court or a requirement of rules of court.

2.4 What are the formal requirements (to be complied with by the award creditor) for the enforcement of a foreign arbitral award?

In order for a foreign award to be enforceable, the applicant must demonstrate that the award:

1. was made pursuant to an agreement for arbitration that was valid under the law by which it is governed;
2. was made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
3. was made in conformity with the law governing the arbitration procedure;
4. became final in the country in which it was made;
5. is in respect of a matter that may lawfully be referred to arbitration under the law of Jersey; and
6. the enforcement thereof must not be contrary to the public policy or the law of Jersey.

A party seeking to enforce a New York Convention award must produce the original or a duly certified copy of the award, the original or a duly certified copy of the arbitration agreement and certified translation if either the award or agreement is in a foreign language. The party seeking to enforce a Geneva Convention award must produce, in addition to the aforementioned documents, evidence proving that the award has become final and such other evidence as required to prove it is enforceable.

2.5 On which grounds can recognition and enforcement be refused? Which grounds for refusal of enforcement are the most frequently encountered and likely to be successful?

A Geneva Convention award shall not be enforceable if the court is satisfied that:

1. the award has been annulled in the country in which it was made;
2. the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to allow it to present its case, was under some legal incapacity or was not properly represented;
or
3. the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.

If the award does not deal with all the questions referred, the court has the discretion to postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

A New York Convention Award may be refused where a party to the arbitration agreement was under some incapacity or the agreement was not valid under the law of country where it was made.

2.6 Can the court/authority deciding on recognition and enforcement of the award review its merits?

The Royal Court is able to participate and assist as set out in 2.3 above.

2.7 In order to be able to resist enforcement, must the award debtor have challenged the award in the country where it was rendered? Will the courts of your country enforce a judgment that has been annulled in the country where it was rendered?

No - see above

2.8 Could you provide examples of “borderline” cases in which a foreign award was – perhaps surprisingly – enforced or, on the contrary, enforcement was refused? [For instance: Is an award of punitive damages enforceable?] Could you provide examples where enforcement was refused for being contrary to public policy?

Please see answer at 3.4 below concerning the decision of FG Hemisphere.

2.9 Do “institutional” awards (i.e. those rendered in the context of institutional arbitration proceedings) enjoy better enforceability than awards rendered in ad hoc arbitrations?

No see above at 2.4 - the award must comply with the requirements listed. If so, it becomes enforceable.

2.10 If only a part of the award does not fulfill the requirements for recognition and enforcement, will enforcement be entirely refused, or can the award be partially enforced?

See above at 2.4 - the award must comply with the requirements listed. If so, it becomes enforceable.

2.11 Can you briefly set out the various steps of the proceedings for the enforcement of a foreign award?

A domestic award can, by leave of the Royal Court on an ex parte application, be enforced in the same way as a court order or judgment to the same effect. Where

leave is granted, the order will specify the manner of enforcement and it can then be subject to enforcement proceedings like any other court order.

A foreign award under the New York Convention or Geneva Convention and Protocol on Arbitration Clauses is enforceable in the same way or by action. An action must be commenced by an Order of Justice. If the debtor party cannot be served in Jersey then leave to serve him outside the jurisdiction must be obtained from the Master of the Royal Court. An application is made ex parte stating the ground on which leave is sought – if the award is to be enforced against assets in Jersey, that itself should be a sufficient ground.

Once served, the debtor party would be required to attend the Royal Court and indicate whether or not it would defend the action. If the party indicates it will, then it will have 21 days in which to file an answer. If not, then judgment in default could be entered at that stage.

If the action is to be defended, the debtor party would normally apply for summary judgment (ie, judgment without a full trial as the merits of the original claim would not be examined).

2.12 What is the approximate total duration of the proceedings (including possible appeals)?

See above answer at 2.11.

2.13 Do the appeal proceedings stay the execution of the decision ordering the enforcement of the foreign award?

One of the requirements for an award to be enforceable is that it be a final decision. As mentioned above, the Royal Court has extensive powers concerning arbitration and arbitral awards, and may therefore stay legal proceedings pending a final outcome or decision. However, for a foreign arbitration award to become enforceable in Jersey, it must (as mentioned above) be "final in the country in which it was made".

2.14 Is it possible to obtain interim measures pending a decision on the enforcement of a foreign award? If positive:

The Royal Court can grant Mareva-type relief in support of an arbitration or award, whether the arbitration is a domestic Jersey or overseas arbitration¹⁹. The procedure is the same as outlined in section 1 above.

2.14.1 What types of interim measures are available to the creditor?

The same as outlined in section 1 above.

2.14.2 What would be the applicable procedural rules? Would any “out of court” measures be available? (For example, rights of detention.)

The same as outlined in section 1 above.

2.14.3 What would be the likely outlay of costs? Would the judgment creditor be required to provide a cross undertaking or other security?

The same as outlined in section 1 above.

2.14.4 Would this be an *ex parte* application or is notice to the judgment debtor always required? What options would be available to the defendant to challenge such measures?

The same as outlined in section 1 above.

The duty of full and frank disclosure is an important factor to bear in mind when making any such application, as demonstrated In *Goldtron Ltd v Most Investments Ltd*²⁰. The plaintiff had agreed to sell shares to the defendant for a price in US dollars. The contract was subject to Russian Law and arbitration. The defendant

¹⁹ *Goldtron Ltd v Most Investments Ltd* 2002 JLR 424

²⁰ 2002 JLR 424

did not pay the full contract price as the Russian government devalued the Rouble, on the strength of which the defendant contended there should be a price adjustment and referred the matter to arbitration in accordance with the contract. The arbitration panel awarded in favour of the plaintiff, though one member of the panel dissented citing procedural irregularities and on the basis of which the defendant appealed the award in the Russian courts.

The plaintiff applied ex parte for post-award Mareva relief. Its application contained the complete award in Russian which referred to a dissenting opinion, and a translation into English which referred only to a 'separate' award. The Royal Court held that it was insufficient to discharge the duty of full and frank disclosure by providing the required information to the Court buried in the information supplied in support of the application and preventing the Court from considering relevant matters, the injunction was therefore discharged.

The Court did re-impose Mareva injunctions in this case, as the defendant had agreed to pay the contractual price. This was a post-award Mareva application in circumstances where there was a complete absence of evidence about the financial position of the defendant. There was therefore a real risk of the defendant dissipating its assets which justified the re-imposition of the Mareva injunctions, notwithstanding the non-disclosures.

2.14.5 What would the consequences be if the request is dismissed?

The same as outlined in section 1 above.

2.15 What would be the likely costs of the enforcement proceedings? Do the costs depend on the amount of the award?

An arbitral award may be enforced in the same manner as a judgment, by leave of the court, which may also give its judgment in terms of the award. Further enforcement proceedings follow the same procedures as set out in section 1 above, with a similar range of procedural options including: contempt applications; procedures similar to garnishee applications; and insolvency procedures.

2.16 Which remedies (including at the international level) are available to the award creditor if the domestic courts unjustifiably delay or refuse the enforcement of a foreign award?

The same as outlined in section 1 above.

2.17 Is there a need for reform of the system of award enforcement in your country or at the international level (e.g. of the New York Convention)? Which aspects, in your opinion, need be reformed?

The system of award enforcement in Jersey is largely modeled on the UK system, and our legislation is based largely on the old English Arbitration Acts 1950 to 1982 (which have since been repealed). As the changes in England were largely to promote England as a centre for international arbitration; the amendments were not also adopted in Jersey as it was not thought to be necessary.

3 STATE IMMUNITY ISSUES

3.1 Which legislation governs the immunity of execution of states and state-owned entities in your country?

The primary legislation is the State Immunity (Jersey) Order 1985 (the "**Order**"), which largely adopts the State Immunity Act 1978 and modifies and extends it to Jersey.

Generally, there is no law limiting the liability of the States of Jersey or any organ of the States of Jersey (including Ministers, departments, bodies, officers and employees) or any local parochial authority. Accordingly, a judgment capable of being reciprocally enforced under the Reciprocal Enforcement Law could be so enforced against any such body. Certain exceptions to this apply by statute. For example, the Jersey Financial Services Commission, its officers and employees are immune from liability unless bad faith can be proved. Similar immunity applies to the Viscount (Chief Executive Officer of the Royal Court) when administering a *désastre* under the *Désastre Law* or when managing the proceeds of crime under the *Drug Trafficking Offences (Jersey) Law 1988* and the *Proceeds of Crime (Jersey) Law 1999*.

3.2 Do foreign states and state-owned enterprises enjoy immunity of execution in respect of civil judgments or arbitral awards rendered against them? What is the extent of such immunity?

A state is not immune in relation to proceedings wherein it has submitted to the jurisdiction of the Jersey courts (and can do so by prior written agreement or after the dispute giving rise to the proceedings has arisen). A state is deemed to have submitted to the jurisdiction if it has instituted the proceedings in question or has intervened or taken any step in the proceedings (though this does not include any steps taken to claim immunity or asserting an interest in property in circumstances where the state would be entitled to claim immunity if the proceedings had been initiated against it).

A state is not immune from proceedings concerning (amongst others):

1. a commercial transaction it enters into;

2. an obligation owed by it arising under a contract which falls to be wholly or partly performed in Jersey;
3. a contract of employment between the state and an individual made in Jersey or where the work is to be performed partly or wholly in Jersey
4. death or personal injury;
5. damage to or loss of tangible property caused by an act or omission in Jersey; and
6. any interest in or possession or use of (or an obligation arising from the same) immovable property in Jersey; or interest arising in immovable or movable property as a result of succession, gift or bona vacantia.

3.3 When does an entity qualify as “state-owned” (or “state-controlled”)? What are the criteria for a state-owned or state-controlled entity to benefit from immunity of enforcement?

Any immunity conveyed under the Order does not extend to a separate entity "which is distinct from the executive organs of the government of the State and capable of suing or being sued". A separate entity in this case would only be immune if the proceedings relate to anything done by it in the exercise of sovereign authority and the State would have also been immune.

Please see 3.4 below which is also of assistance.

3.4 Can a civil judgment or an arbitral award rendered against a state entity be enforced against the assets of an entity owned or controlled by such state (and vice-versa)?

In 2012, the Privy Council gave judgment in a case which addressed this very issue. It overturned a Jersey Court of Appeal decision on the grounds that the extent of state control of the company in question was not sufficient to make the company an organ of the state, and concluded that the assets of state-owned companies should be considered to be assets of the state only in very limited and specific circumstances²¹.

²¹ *La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC* [2012] UKPC 27

The original claim was brought by FG Hemisphere against La Générale des Carrières et des Mines (“Gécamines”), a mining company owned by the Democratic Republic of Congo (“DRC”). The Privy Council held that Gécamines was distinct from the DRC, and therefore, FG Hemisphere was unable to enforce the DRC debts against the company's assets.

FG Hemisphere purchased the assignment of two arbitration awards against the DRC, bringing proceedings in a number of different jurisdictions, including Jersey, where it sought to enforce against Gécamines’ shareholding in a Jersey joint venture company and certain income streams due from that company to Gécamines under contract. The Royal Court upheld FG Hemisphere’s claim including a claim for injunctive relief, on the basis that Gécamines was at all material times an organ of and so to be equated with the DRC. The Jersey Court of Appeal upheld this judgment (by a majority) in 2011. Gécamines then appealed to the Privy Council.

The Royal Court had determined Gécamines was an organ of the DRC by a common law test derived from the English Court of Appeal’s decision in *Trendtex Trading Corp v Central Bank of Nigeria*²². The Privy Council however considered that significant developments since that judgment also needed to be taken into account. In particular, the UK State Immunity Act 1978 (the “Act”) (which had been applied to Jersey by virtue of the State Immunity (Jersey) Order 1985), provided for an express distinction between, on the one hand, the State, and, on the other, a separate entity (that being “any entity ... distinct from the executive organs of the government of the State and capable of suing and being sued”).

An entity’s control and functions were also relevant, and notably “where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other’s liabilities”. In order that a state-owned entity be assimilated with a State, the affairs of the entity and the State would have to be “so closely intertwined and confused” that the entity could not properly be regarded as distinct from the State.

²² [1977] 1 QB 529

The Privy Council concluded that Gécamines was not a “mere cypher” for the DRC, rather it was a separate entity, having substantial assets, borrowings and other liabilities. It was clearly distinct from the executive organs of the DRC.