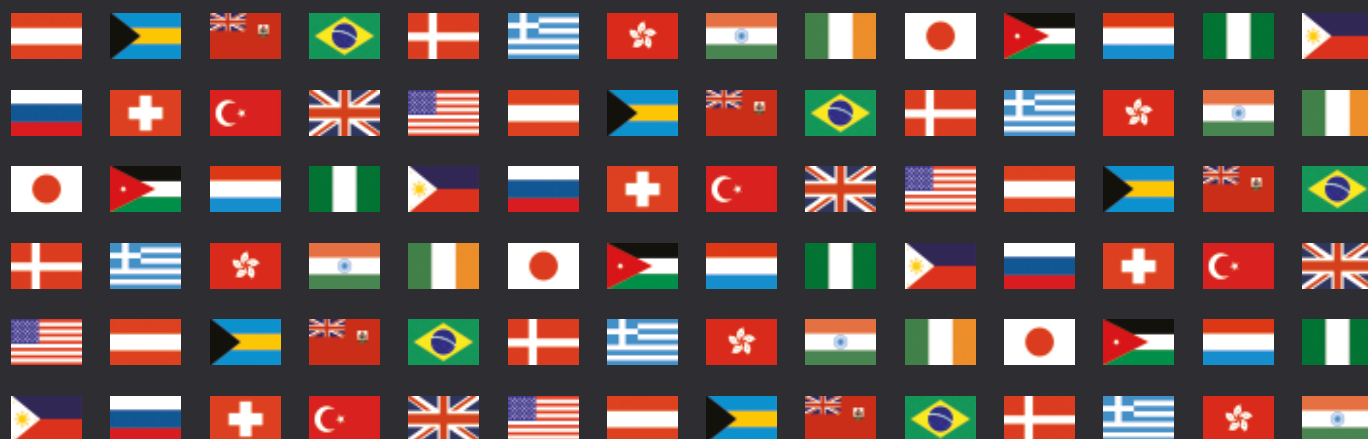


Enforcement of Foreign Judgments 2021

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Enforcement of Foreign Judgments 2021

Contributing editors

Oliver Browne and Tom Watret
Latham & Watkins

Lexology Getting The Deal Through is delighted to publish the tenth edition of *Enforcement of Foreign Judgments*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Bahamas, Denmark and Greece.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Oliver Browne and Tom Watret of Latham & Watkins, for their continued assistance with this volume.



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August 2020

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LEGISLATION

Treaties

- 1 | Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties, and what, if any, amendments or reservations has your country made to such treaties?

There are no international conventions and bilateral treaties applicable in the Commonwealth of The Bahamas in respect to the recognition and enforcement of judgments.

Intra-state variations

- 2 | Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Yes, the law on the enforcement of foreign judgments uniformly applies throughout the Commonwealth of The Bahamas.

Sources of law

- 3 | What are the sources of law regarding the enforcement of foreign judgments?

In The Bahamas, there are two primary mechanisms pursuant to which a foreign judgment may be enforced.

First, foreign judgments may be recognised and enforced pursuant to the Reciprocal Enforcement of Judgments Act 1924 (the Act). While the Act permits the recognition of judgments obtained in foreign jurisdictions, it is applicable only in relation to judgments obtained in a few expressly designated jurisdictions, including:

- Australia;
- Barbados;
- Belize;
- Bermuda;
- British Guiana (Guyana);
- British Honduras (Belize);
- Jamaica;
- Leeward Islands;
- St Lucia;
- Trinidad; and
- the United Kingdom.

Otherwise, where a judgment is obtained from a jurisdiction to which the Act does not apply, it is necessary to utilise the foreign judgment to form the basis of a fresh action within The Bahamas. In this regard, the foreign judgment is not recognised per se; but rather, it can be sued upon as a cause of action and judgment may be obtained if the suit is successful. Further, having regard to the fact that the underlying issues

would have been proven in the foreign jurisdiction, the Bahamian court will not typically allow the issues to be relitigated and it is usual that an action in The Bahamas based upon a foreign judgment would be determined upon an entirely summary basis.

Hague Convention requirements

- 4 | To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

The Bahamas is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgements.

BRINGING A CLAIM FOR ENFORCEMENT

Limitation periods

- 5 | What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Where recognition is sought pursuant to the Reciprocal Enforcement of Judgments Act 1924 (the Act), an application for recognition is required to be brought within 12 months of the date that the foreign judgment was obtained; however, the Act does provide the court with the discretion to extend this period.

In relation to judgments from jurisdictions in relation to which the Act does not apply, the limitation period would be six years.

Types of enforceable order

- 6 | Which remedies ordered by a foreign court are enforceable in your jurisdiction?

While there are no remedies that are expressly excluded under the Act, it is arguable that only monetary judgments (including arbitral awards) are capable of being recognised or registered. However, the definition of 'judgment', as set out under Section 2 of the Act, on its face, contemplates a wider scope and provides:

Any judgment or order given or made by a court in any civil proceedings whether before or after the passing of this Act 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 in that place.

This definition is rather broad and the position in this regard is not entirely settled. A default judgment that has not been challenged and is therefore final and conclusive can be registered under the Act. On the other hand, it may be difficult to register a judgment in relation to:

- injunctions, as there is a requirement for there to be a cause of action within The Bahamas in order to obtain an injunction; or
- punitive damages as the same are generally considered to be contrary to public policy (although exemplary damages are occasionally awarded).

The same considerations would be applicable in relation to fresh actions commenced in relation to judgments from jurisdictions in relation to which the Act does not apply.

Competent courts

- 7 | **Must cases seeking enforcement of foreign judgments be brought in a particular court?**

Cases seeking enforcement of foreign judgments must be commenced in the Supreme Court of the Commonwealth of The Bahamas.

Separation of recognition and enforcement

- 8 | **To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?**

Under the Act, it is necessary for a judgment to be registered prior to it being capable of enforcement.

With respect to jurisdictions to which the Act does not apply, prior to any steps being taken with respect to enforcement there must first be a successful action within The Bahamas based on the foreign judgment with a Bahamian judgment being therefrom obtained. Upon obtaining the Bahamian judgment, it is that judgment that is enforced (as opposed to the foreign judgment directly).

OPPOSITION

Defences

- 9 | **Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?**

Merits-based defences are not permissible under the Reciprocal Enforcement of Judgments Act 1924 (the Act) and the only defences that are available pursuant to section 3(2) of the Act are:

- the original court acted without jurisdiction;
- the judgment debtor, being a person not ordinarily resident or carrying on business in the relevant jurisdiction, did not voluntarily submit to the jurisdiction of the foreign court;
- the judgment debtor was not duly served with notice of the foreign proceedings;
- the judgment was obtained by fraud;
- the judgment is not final or conclusive (usually due to a pending appeal);
- the judgment should not be registered as it is of a kind that could not have been obtained in the Bahamas due to public policy reasons.

In the context of a fresh action commenced in relation to a country to which the Act does not apply, while there is no statutory codification of defences, at common law, similar non-merits-based defences are available to a defendant as set out under section 3(2) of the Act.

Injunctive relief

- 10 | **May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?**

Where a defendant is able to satisfy the court that the judgment is subject to appeal or that there is some other basis on which it is improper for the matter to proceed, the defendant can apply for a stay of the Bahamian proceedings.

REQUIREMENTS FOR RECOGNITION

Basic requirements for recognition

- 11 | **What are the basic mandatory requirements for recognition of a foreign judgment?**

Subject to the exceptions in section 3(2) of the Reciprocal Enforcement of Judgments Act 1924 (the Act), the court will generally recognise a foreign judgment obtained in an applicable jurisdiction.

With respect to fresh actions, unless there is some relevant public policy consideration applicable to the jurisdiction in which the judgment was obtained, the Supreme Court of the Commonwealth of The Bahamas will not have regard to or apply any threshold requirements.

Other factors

- 12 | **May other non-mandatory factors for recognition of a foreign judgment be considered and, if so, what factors?**

With respect to recognition under the Act, the Act is based upon reciprocal enforcement.

With respect to enforcement based upon fresh actions in relation to countries not covered under the Act, reciprocity is not a mandatory factor. However, one of the basic underlying principles pursuant to which the Supreme Court of the Commonwealth of The Bahamas foregoes a consideration of the underlying facts and evidence is one of comity.

Procedural equivalence

- 13 | **Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction and, if so, how is that requirement evaluated?**

Not per se; however, if there is a particular relevant issue related to the country in question, this may give rise to a public policy basis for not recognising a judgment or not permitting a suit on a judgment, as the case may be.

JURISDICTION OF THE FOREIGN COURT

Personal jurisdiction

- 14 | **Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant and, if so, how is that requirement met?**

Yes, the Bahamian courts will consider if the foreign court had personal jurisdiction over the defendant having regard to all the circumstances of the case and will determine if it is just and convenient that the judgment should be enforced in the Commonwealth of The Bahamas.

Subject-matter jurisdiction

- 15 | Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy and, if so, how is that requirement met?

Yes, the Bahamian courts will consider if the foreign court had subject-matter jurisdiction over the defendant having regard to all the circumstances of the case and will determine if it is just and convenient that the judgment should be enforced in the Commonwealth of The Bahamas.

Service

- 16 | Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Foreign judgments will not be registered under the Act if the judgment debtor was not duly served and did not appear in the original foreign proceedings. Where a judgment debtor is not served with the process in the foreign court, the courts in The Bahamas will refuse to recognise and enforce the judgment. As to what constitutes requisite and proper service, this will be a question to be determined having regard to all of the circumstances of the case.

In relation to judgments from jurisdictions in relation to which the Act does not apply, a fresh action on the debt will not be successful where there has been a breach of the rules of natural justice. This would arise where the judgment debtor did not have proper notice of the original proceedings or was not afforded an opportunity to be heard.

Fairness of foreign jurisdiction

- 17 | Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

This is unlikely, unless it can be established that there are some public policy considerations that are relevant.

EXAMINATION OF THE FOREIGN JUDGMENT**Vitiating by fraud**

- 18 | Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Yes, the Bahamian courts will consider if the judgment was obtained by fraud and, if so, the judgment will not be enforced in the Commonwealth of The Bahamas.

Public policy

- 19 | Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Where the judgment is contrary to public policy or otherwise would be contrary to the local laws, the foreign judgment will not be enforced by the courts in the Commonwealth of The Bahamas.

Conflicting decisions

- 20 | What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

This would likely raise the issue as to whether the judgment in question was conclusive. In this regard, a judgment will not be recognised under the Act if it is not conclusive. With respect to a suit on a foreign judgment, the fact that a judgment is not conclusive would be a defence to such an action.

Enforcement against third parties

- 21 | Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

There is no mechanism or consideration under the Act for the recognition or enforcement of a judgment against any party other than the judgment debtor. However, in general, the court will pierce the corporate veil in appropriate circumstances. That being said, additional applications that fall beyond the scope of the Act may be required.

In relation to judgments from jurisdictions in relation to which the Act does not apply, the same principles would be applicable save that, as fresh action would need to be commenced in any event, applications in relation to third parties can be addressed within the fresh action.

Alternative dispute resolution

- 22 | What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

If there is an enforceable agreement between the parties to use alternative dispute resolution and this requirement was not followed, the Supreme Court may not permit the judgment to be enforced or for a plaintiff to be successful on a fresh action on public policy grounds.

Favourably treated jurisdictions

- 23 | Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

No, save to the extent that the Act provides a specific mechanism in relation to countries to which it applies.

Alteration of awards

- 24 | Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Save as it may relate to public policy considerations, such as punitive awards being unlikely to be capable of enforcement, the Bahamian courts would likely not alter or limit a damage award.

AWARDS AND SECURITY FOR APPEALS**Currency, interest, costs**

- 25 | In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

With respect to exchange rates, at the time that the application for recognition is made or at the time that a fresh action is filed, it is

typically necessary to convert foreign currencies into the Bahamian dollar equivalent.

If interest has been awarded by the foreign court, the interest will be recoverable based on the terms of the foreign judgment, subject to the discretion of the court.

Security

26 | Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

The Reciprocal Enforcement of Judgments Act 1924 (the Act) does not expressly provide for a mechanism of appeal in relation to the recognition of a judgment obtained under the Act.

In relation to fresh actions, these would fall to be considered in the same manner as any action brought in the Supreme Court of the Commonwealth of The Bahamas and a defendant would be at liberty to appeal any judgment obtained by a plaintiff based upon the foreign judgment.

ENFORCEMENT AND PITFALLS

Enforcement process

27 | Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once a foreign judgment is recognised, it becomes enforceable by the same means available for the enforcement of any Bahamian judgment.

Enforcement of judgments includes those provided in Order 45 Rule 1(1) of the Rules of the Supreme Court; that is, by means such as (but not limited to):

- writ of fieri facias;
- garnishee proceedings;
- charging order;
- appointment of a receiver; and
- writ of sequestration.

Pitfalls

28 | What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

The most common pitfall that may arise in bringing proceedings to enforce a foreign judgment, or to sue thereon as the case may be, is one of timing. It is essential to ensure that the foreign judgment is final and conclusive prior to taking steps to enforce it. Further, while the period of appeals in most jurisdictions is clearly defined, there are often mechanisms available to extend the period limited for appeal.

UPDATE AND TRENDS

Hot topics

29 | Are there any emerging trends or hot topics in foreign judgment enforcement in your jurisdiction?

There are currently no reforms planned for the framework on the recognition and enforcement of judgments.

Coronavirus

30 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In an effort to combat the spread of covid-19, the government of The Bahamas issued an Emergency Powers Proclamation and implemented the Emergency Powers (Covid-19) Regulations 2020 (the Regulations), effective 17 March 2020. These new regulations were passed to ensure the necessary legal powers were available if and when necessary for a quick response on the government's part.

In accordance with the issued Regulations, the Emergency Powers (Covid-19) Order 2020 (as amended), the Emergency Powers (Covid-19) (Special Provisions) Order 2020 (as amended) and the Emergency Powers (Covid-19) (Lockdown) Order 2020 (as amended) (collectively the Orders), the government imposed restrictions on movement, imposed curfews, waived certain laws and payment of fees, and imposed restrictions on business operations, among other things. See the link to the Office of the Prime Minister to receive up-to-the-minute information.

Further, the office of Chief Justice of The Bahamas issued covid-19 mitigation protocols, which suspended trials, and only emergency applications were heard. As of 14 May 2020, the courts commenced the process of reopening and rescheduling remote hearings so that they may proceed. See the link to the Judiciary of the Bahamas to receive up-to-the-minute information.

Below is a list of relevant developments and changes to the law and regulations contained in the various Orders (these amendments are subject to change once the emergency powers have been lifted).

Pursuant to the Emergency Powers (COVID 19) (Special Provisions) Order 2020, the following changes occurred (see <https://opm.gov.bs/category/press-room/emergency-orders-covid-19/page/7/>).

Suspension of certain obligations under enactment

The requirement to file a document with, pay a fee to or renew a licence, visa or permit issued by any government entity, statutory body or regulator has been suspended for the duration of the state of emergency plus 30 days.

The suspension of certain obligations under this heading does not apply to obligations that arise under:

- the Customs Management Act 2011;
- the Value Added Tax (VAT) Act 2014;
- the Real Property Tax Act;
- the National Insurance Act;
- the obligation to make a payment into court for child support and maintenance; or
- the obligation to pay any other civil payment into court.

Limitation Act 1995

Limitation of time under the Limitation Act 1995 is suspended from 17 March 2020 for the duration of the state of public emergency and extending 30 days thereafter.

Register of Beneficial Act 2018

The obligation for legal entities incorporated or registered before 20 December 2018 and registered agents to comply with the Register of Beneficial Ownership Act 2018 has been suspended for the duration of the state of emergency plus 60 days.

Companies Act 1992 and the International Business Companies Act 2000

Any requirement to pay a fee, make a payment instalment in an arrangement or file a declaration or document under the Companies Act 1992 has been suspended from 17 March 2020 until 14 days after the state of emergency ends.

A requirement under the International Business Companies Act 2000 to pay any fee or file any declaration or document was also suspended from 17 March 2020 for the duration of the state of public emergency and extending 14 days after the state of emergency ends.

Common seal of company

Any document purporting on its face to be a deed shall be deemed to be a deed despite no seal actually being affixed or impressed on the document.

Any document required by any company incorporated under the Companies Act 1992 or the International Business Companies Act 2000 to have its common seal affixed shall be deemed to have been met despite no such common seal being actually impressed or affixed on the document, so long as the intention to affix the seal is declared in the relevant document.

These requirements will apply from 17 March 2020 for the duration of the state of public emergency extending 14 days after the state of emergency.



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