

# Enforcement of assigned judgment debt refused by British Virgin Islands Court

UPDATE

Update prepared by Shane Donovan (British Virgin Islands)

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A foreign judgment will only be enforced in the British Virgin Islands if it is for a definite sum of money. In *Nokian Shina LLC v Smyshliaev & Anor*,<sup>1</sup> the High Court considered the enforceability of two separate judgments in circumstances where the claimant sought to enforce an earlier monetary judgment as assignee of the judgment creditor pursuant to the terms of a second judgment.

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## Background

The Claimant is a Russian company that is principally engaged in automotive parts trading. The Defendants were formerly husband and wife, both of whom had since been declared bankrupt in the Russian Federation.

The Claimant had entered into a sale and purchase agreement with Russhina Tyumen LLC (**Russhina**), pursuant to which Russhina agreed to purchase the Claimant's products. The Claimant had also entered into a surety agreement with Track LLC, pursuant to which Track guaranteed the obligations of Russhina to the Claimant. The First Defendant was the sole shareholder of Russhina, and believed to be the beneficial owner of Track.

In March 2016, Track was held by a Russian Court to be insolvent and bankruptcy proceedings were initiated against it before that court.

On 28 March 2019, the Russian Court held that certain individuals, including the Defendants, bear subsidiary liability and are jointly and severally liable for all creditor claims against Track (which amount to RUB 3,228,393,383.31) (the **March 2019 Judgment**).

By judgment dated 13 June 2019, the Russian Court assigned to the Claimant Track's right to claim against the Defendants for subsidiary liability (the **June 2019 Judgement**), although it did not in terms order the Defendants to pay any specific sums to the Claimant.

The Claimant subsequently sought recognition and enforcement of the June 2019 Judgment in the BVI with a view to enforcing the judgment against shares in a BVI company that were believed to be beneficially owned by the First Defendant.

## Overview of Recognition and Enforcement of Foreign Judgments in the BVI

As set out in our [guide](#), there are two procedures for obtaining recognition and enforcement of a foreign money judgment in the BVI, depending upon where the foreign judgment was obtained:

1. A simplified statutory process of registration is provided for under the Reciprocal Enforcement of Judgments Act 1922 in respect of judgments given in the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in Scotland, and the courts of the Bahamas, Barbados, Belize, Trinidad and Tobago, Guyana, St Lucia, Grenada, Jamaica, and New South Wales (Australia); or

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<sup>1</sup> Claim No. BVIHCM 2020/0113, 30 September 2022.

2. For judgments from all other jurisdictions, it is necessary for the judgment creditor to bring a common law claim for enforcement of the judgment.

A common law claim for enforcement can often be brought to a swift conclusion by obtaining summary judgment. This is on the basis that the defendant has no real prospect of successfully defending the claim, given that the foreign judgment is generally determinative of the merits of the claim.

Generally speaking, a foreign judgment may be enforced in the BVI at common law by a claim for the amount due under the judgment if:

- (a) the foreign court had jurisdiction over the parties;
- (b) the judgment is for a debt or a fixed sum of money; and
- (c) the judgment is final and conclusive.

The jurisdiction requirement is generally satisfied if the person against whom the judgment was given:

1. was, at the time the foreign proceedings were commenced, present in the foreign country;
2. was a claimant or counter-claimant in the foreign proceedings;
3. submitted to the jurisdiction of the foreign court by voluntarily appearing in the foreign proceedings;  
or
4. had, prior to the commencement of the foreign proceedings, agreed to submit to the jurisdiction of the foreign court, in respect of the subject matter of the proceedings. Most commonly, this occurs when a contract sued upon includes a jurisdiction clause.

Even if the above requirements are satisfied, the Court may nevertheless refuse to enforce the foreign judgment if it is satisfied that:

- (a) the foreign judgment has been obtained by fraud of the party in whose favour it is given, or of the court pronouncing it;
- (b) enforcement of the foreign judgment would be contrary to public policy; or
- (c) there was a denial of natural justice in the proceedings in which the foreign judgment was obtained.

The common law principles are also embodied in the Reciprocal Enforcement of Judgments Act.

### **The Judgment**

The BVI Court held that the June 2019 Judgment was not a judgment for a definite sum of money, and as such, it was not independently enforceable. Whilst the March 2019 judgment was a judgment for a definite monetary sum, that judgment was entered in favour of Track, not the Claimant. The two judgments were two separate judgments, although made in the same legal proceedings. The effect of the June 2019 Judgment was simply to assign the judgment debt from Track to the Claimant. It did not actually order the Defendants to pay any sum to the Claimant.

Although this finding was fatal to the Claimant's claim for enforcement of the June 2019 Judgment, the Court indicated that it otherwise accepted that the two judgments satisfied the requirements for enforceability.

In addition, the Court said (by way of *obiter*) that it was not persuaded by a public policy argument raised by the Second Defendant to the effect that BVI Courts should not enforce a Russian judgment for subsidiary liability, to the extent that such a judgment gives rise to an *in personam* right of recovery outside the Defendants' collective insolvency proceedings in the Russian Federation. The Second Defendant had argued that permitting enforcement would allow the Claimant to gain an advantage over other creditors. The Court said:

*'The Russian concept of subsidiary liability appears to be somewhat akin to piercing the corporate veil under English/BVI law, and, like the latter, is a practical solution to mischief that can otherwise all too easily be perpetrated by wrongdoers who seek to hide behind legal structures. Moreover, as we see, for example, from the various methods used for unwinding Ponzi schemes, whilst no method is capable of making all creditors whole, or indeed able to eliminate net losers, our legal system does not shrink from allowing one or more of such methods to be used, even though a pari-passu apportionment cannot be achieved. The watchword is that some recovery, however imperfect, is better than no recovery.'*

## Conclusion

Whilst the decision may at first glance seem harsh, it does emphasise the importance of seeking early advice as part of any effective cross-border enforcement strategy. It is likely that the June 2019 Judgment would have been enforced in the BVI had it expressly ordered the Defendants to pay a specific sum to the Claimant.

The BVI nevertheless remains a creditor friendly jurisdiction, and as the *obiter* comments made by the Court in relation to the public policy defence show, the Court will assist creditors where possible, even if the outcome may be imperfect.

## Contacts

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