

# Collas Crill explains ... Enforcing foreign arbitral awards in Jersey

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This guide looks at how you can enforce foreign arbitral awards in Jersey.

Words in **bold** are defined at the end of this guide.

We refer to the person or entity seeking to enforce the arbitral award as the **creditor** and the person being enforced against as the **debtor**.

## Arbitral awards

The recognition and enforcement of international arbitral awards in Jersey is set out in the **Arbitration Law**, which is based on the UK **Arbitration Acts** 1950-1982. Parts 3 and 4 of the Arbitration Law provide for the enforcement of arbitral awards made pursuant to:

- the Protocol on Arbitration Clauses, 24 September 1923 (the **Protocol**)
- the Geneva Convention on Foreign Arbitral Awards, 26 September 1927 (the **Geneva Convention**), and
- the New York Convention, 10 June 1958 (the **New York Convention**)

Under the Arbitration Law, arbitral awards are classified in two ways:

'**Convention awards**' are awards which were made under an arbitration agreement in a state that is party to the New York Convention. The New York Convention has over 170 contracting states (see the full list on their website), so the majority of arbitral awards will be convention awards.

'**Foreign awards**' are awards to which either the Protocol or Geneva Convention applies. They fall outside the scope of the New York Convention, but meet certain other criteria relating to the parties, the arbitration agreement or where the award was made.

## Enforcement of foreign arbitral awards

Both convention awards and foreign awards are enforceable in one of two ways:

- through a statutory summary procedure, in the same way as a domestic arbitral award is enforced (by leave of the **Court** without notice to the **debtor**), which is in the same manner as a judgment or order of the **Court** to the same effect; or
- by raising a new action in **Court** by way of an **Order of Justice**, effectively in a similar manner as if the award were a debt.

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Arbitral awards can also be relied upon in defending claims, can be the subject of counter claim or can be **set off** against debts owed by the **creditor** to the **debtor**.

## What's the difference?

### Convention awards

The presumption is that convention awards will be enforced in Jersey. To rebut that presumption, the onus is on the **debtor** to establish one of the limited prescribed grounds for refusal, namely that:

- a. a party to the arbitration agreement was under a legal incapacity;
- b. the arbitration agreement was not valid under the law which governed it or the law where the award was made;
- c. the **debtor** was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;
- d. the award deals with a matter not contemplated by the arbitration or was not submitted to arbitration, or contains decisions on matters beyond the scope of the arbitration;
- e. either the composition of the arbitral body or the arbitral procedure was not in accordance with the arbitration agreement or the law of the country where the arbitration took place;
- f. the award is not yet 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;
- g. the award is in respect of a matter not capable of settlement by arbitration or it would be contrary to public policy to enforce it.

In respect of (d), the **Arbitration Law** provides that an award may still be enforced to the extent that it contains decisions on matters which were submitted to arbitration, if those matters can be separated from those not so submitted.

In respect of (f), where an application has been made to set aside or suspend the award, the **Court** may, if it thinks fit, adjourn the proceedings and may, on the application of the **creditor**, order the **debtor** to give security.

It may also be possible for the **debtor** to challenge the standing of the person seeking to enforce the award, but the **debtor** must show that it has a good arguable case, i.e. one that is more than barely capable of serious argument, but need not have more than a 50% chance of success.

### Foreign awards

In contrast, with **foreign awards**, the burden is on the **creditor** to establish that the award meets the following criteria:

- a. the award must have been made under a valid arbitration agreement;
- b. the arbitral body must be one specified in the arbitration agreement, or constituted in the manner agreed by the parties

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- c. the award must conform with the law governing the arbitration agreement
- d. the award has become final;
- e. the matter is of a type that could lawfully be referred to arbitration under the law of Jersey;
- f. enforcement is not contrary to public policy, natural justice, or the law of Jersey;

If the **creditor** satisfies the above criteria, the burden then shifts to the **debtor** to establish that the award should not be enforced.

A foreign award shall not be enforceable where the **Court** is satisfied that:

- the award has been annulled in the country in which it was made;
- the **debtor** was not given notice of the arbitration proceedings in sufficient time to present their case, or was under some legal incapacity and was not properly represented; or
- the award does not deal with all questions referred or contains decisions on matters beyond the scope of the arbitration agreement.

### What's the procedure to enforce?

Both types of award are enforceable in Jersey either by way of a separate action or by way of the statutory summary procedure, i.e. in the same way as an award from an arbitrator in domestic arbitration proceedings. The latter procedure is easier and quicker than raising fresh proceedings.

### Summary procedure

This involves the **creditor** making an application to **Court** by way of a representation (akin to a petition in England and Wales) supported by an affidavit.

The representation must be made within the time limit provided for by the governing law of, or the rules applicable to, the arbitral award.

The representation needs to set out the material facts relied on and the relief sought. It must also specify what assets are to be enforced against and what enforcement remedies are sought so that the **Court** can make an appropriate order if leave to enforce is granted.

The supporting affidavit must, in each case, exhibit the arbitral award (either the original or a certified copy). Translations will be required of foreign language documents.

For **convention awards**, the affidavit must also exhibit the arbitration agreement.

For **foreign awards**, the **creditor** will also have to provide such evidence as is necessary to establish that the award meets the criteria, as set out at (a) to (d) above, namely that:

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- the award was made under a valid arbitration agreement;
- the arbitral body was one specified in the arbitration agreement, or was constituted in the manner agreed by the parties
- the procedure followed conformed with the arbitration agreement or governing law; and
- the award has become final.

The representation may be made without giving notice to the **debtor**. If the **creditor** chooses this approach then the **debtor** will be convened to a subsequent hearing, at which they can then challenge the enforcement.

## Enforcement and execution

If the **debtor** contests the validity of the award or seeks to have it set aside, the **Court** has discretion to either give leave to enforce the award, refuse to enforce the award, or adjourn the proceedings for parties to try and resolve the matter.

If the **Court** grants the **creditor** leave to enforce the award, the award can be enforced like a domestic judgment or order of the **Court** to the same effect. The order granting leave must specify which assets are to be enforced against and how it is to be enforced.

Enforcement will be available against any assets which are located within Jersey (which will have been detailed in the representation), whether moveable or immovable.

Various enforcement methods are available, depending on the nature of the **debtor** and the assets they own, including:

- for moveable property, an arrêt for creating a proprietary security interest over the property in favour of the creditor; (or an arrêt entre mains for moveable property in the hands of a third party); and
- an arrêt provisoire, where relief is obtained on an interim basis, suspending the security interest until the arrêt is confirmed.
- for immovable property, a judicial hypothec giving the **creditor** a right of security over the property, which will give rise to a right to proceed with a dégrèvement procedure (similar to foreclosure) if the debt is not discharged;
- freezing injunctions to restrain the **debtor** from dissipating their assets;
- disclosure orders requiring the **debtor** or others to give details of the **debtor's** assets.

## Terms used

**Arbitration Law** means the Arbitration (Jersey) Law 1998.

**Convention award** means an award made under an arbitration agreement in a state that is a party to the New York Convention.

**Court** means the Royal Court of Jersey

**Creditor** means the person or entity seeking to enforce the arbitral award.

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**Debtor** means the person against whom the arbitral award is being enforced.

**Foreign award** means an arbitral award made:

- under an agreement which falls within the Protocol;
- between individuals who are subject to the jurisdiction of states which are party to the Geneva Convention; or
- within a Geneva Convention state.

**Geneva Convention** means the Convention on the Execution of Foreign Arbitral Awards signed in Geneva on 26 September 1927.

**New York Convention** means the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the United Nations Conference of 10 June 1958.

**Order of Justice** means the originating court process used in Court to commence an action.

**Protocol** means the Protocol on Arbitration Clauses of the League of Nations of 24 September 1923.

**Set off** means the ability to reduce a debt owed by party A to party B by subtracting a second debt owed in the other direction: from party B to party A.

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