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Enforcement of Judgments 2022

The Bahamas: Law & Practice
and
The Bahamas: Trends & Developments

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THE BAHAMAS

Law and Practice

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CONTENTS

1. Identifying Assets in the Jurisdiction	p.3	4. Arbitral Awards	p.7
1.1 Options to Identify Another Party's Asset Position	p.3	4.1 Legal Issues Concerning Enforcement of Arbitral Awards	p.7
2. Domestic Judgments	p.3	4.2 Variations in Approach to Enforcement of Arbitral Awards	p.8
2.1 Types of Domestic Judgments	p.3	4.3 Categories of Arbitral Awards Not Enforced	p.8
2.2 Enforcement of Domestic Judgments	p.3	4.4 Process of Enforcing Arbitral Awards	p.8
2.3 Costs and Time Taken to Enforce Domestic Judgments	p.4	4.5 Costs and Time Taken to Enforce Arbitral Awards	p.8
2.4 Post-judgment Procedures for Determining Defendants' Assets	p.4	4.6 Challenging Enforcement of Arbitral Awards	p.8
2.5 Challenging Enforcement of Domestic Judgments	p.4		
2.6 Unenforceable Domestic Judgments	p.5		
2.7 Register of Domestic Judgments	p.5		
3. Foreign Judgments	p.5		
3.1 Legal Issues Concerning Enforcement of Foreign Judgments	p.5		
3.2 Variations in Approach to Enforcement of Foreign Judgments	p.5		
3.3 Categories of Foreign Judgments Not Enforced	p.6		
3.4 Process of Enforcing Foreign Judgments	p.6		
3.5 Costs and Time Taken to Enforce Foreign Judgments	p.7		
3.6 Challenging Enforcement of Foreign Judgments	p.7		

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1. IDENTIFYING ASSETS IN THE JURISDICTION

1.1 Options to Identify Another Party's Asset Position

In The Bahamas, limited tools can be used to identify the asset position of another party pre-action or pre-judgment. For example, public searches can be undertaken in the Registry of Records to ascertain any ownership of real property. A similar search could be made in the Companies Registry to determine the shareholders of companies incorporated under the Companies Act of 1992; however, oftentimes, shares are held by nominee shareholders on behalf of the beneficial owners, thereby preventing the public from determining the true owner of such shares.

Once a judgment has been granted against a judgment debtor, an Order for Examination can be obtained, which would require the judgment debtor to disclose their assets. Additionally, insolvency or bankruptcy proceedings could be commenced, which would allow a liquidator, receiver or trustee in bankruptcy to take control of a judgment debtor's affairs to realise and distribute any available assets.

Once the assets of the judgment debtor are known to exist (or reasonably thought to exist), a party can seek a freezing injunction that would prevent the judgment debtor from using or disposing of the assets.

2. DOMESTIC JUDGMENTS

2.1 Types of Domestic Judgments

A number of domestic judgments can be granted in The Bahamas.

Once an action has commenced and the Defendant has failed to enter an appearance within fourteen (14) days, the Plaintiff can seek

a Judgment in Default of Appearance. This is the earliest possibility for a judgment to be entered against a party. Similarly, if the Defendant does not file a Defence within fourteen (14) days after service of the Statement of Claim, the Plaintiff can enter a Judgment in Default of Defence.

Throughout the length and breadth of a trial, there are often interlocutory applications, which must be decided before proceeding to trial. For example, there could be questions on discovery, witnesses or other preliminary points of contention. Once the trial has been heard, a final decision can be granted.

There may also be applications for summary judgment when a party considers that a claim or defence has no real prospects of success which, if successful, would prevent the matter from proceeding to trial. Additionally, applicants could seek declaratory relief, a remedy where parties seek a statement made by the court.

Mandatory and prohibitory injunctions are also available in our jurisdiction, and the legal principles for granting the same are outlined in the landmark case of *American Cyanamid v Ethicon* (1975) AC 396.

2.2 Enforcement of Domestic Judgments

Order 45(1) of the Bahamian Rules of the Supreme Court (RSC) outlines various means by which a judgment for the payment of money may be enforced, such as:

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

In enforcement proceedings, the judgment creditor is the prevailing party to whom a debt

is owed, and the judgment debtor is obligated to pay a debt in accordance with the judgment. Additionally, the judgment may be enforced by the sale of land pursuant to the court's jurisdiction under RSC Order 31(1) if the assets in The Bahamas include land and the court deems it necessary and expedient to order the sale of the land.

2.3 Costs and Time Taken to Enforce Domestic Judgments

As mentioned above, the following options are available to enforce a domestic judgment: a writ of fieri facias, garnishee proceedings, a charging order, the appointment of a receiver and/or a writ of sequestration.

If the judgment debtor has a bank account or is actively employed, a garnishee order is likely the fastest and most cost-efficient method to enforce a domestic judgment. A garnishee order allows a judgment creditor to either garnishee a judgment debtor's bank account or their wages to satisfy an outstanding debt.

If a charge or lien is placed over the judgment debtor's assets, the judgment creditor would have to wait until the assets have been sold to realise the funds. Similarly, if a receiver is appointed, there could be considerable time and cost associated with the receiver's work to identify and realise assets to satisfy the judgment debt.

2.4 Post-judgment Procedures for Determining Defendants' Assets

After a judgment has been granted, RSC Order 48 allows for an Order for Examination to be obtained. The Order for Examination requires the judgment debtor to attend court for an examination of their debts and assets. The judgment debtor is also required to produce books, bank statements and/or other documents in their possession or power relating to their debts or assets

at the time of the examination. The examination takes place before a Registrar of the Supreme Court.

Additionally, insolvency or bankruptcy proceedings could be commenced that would allow a liquidator, receiver or trustee in bankruptcy to take control of a judgment debtor's affairs and determine what assets are held by the judgment debtor and where they are located.

2.5 Challenging Enforcement of Domestic Judgments

If a party receives a judgment from the Supreme Court (the court of first instance in The Bahamas) with which the party does not agree, it may be challenged by appeal to the Court of Appeal. If the judgment is an interim judgment, leave to appeal must be obtained from the Supreme Court or the Court of Appeal before the appeal can be heard. If the judgment is a final judgment, an appeal is available as of right.

Frequently, the appellant would also apply to stay the enforcement of the judgment pending appeal pursuant to RSC Order 45, rule 11.

It is important to note, however, that there are instances where a party could apply to set aside an order or judgment before filing a formal appeal. For example, where a Judgment in Default of Appearance or a Judgment in Default of Defence was entered, the delinquent Defendant could apply to set aside the default judgment. In order to set aside such a judgment, the court must be satisfied that the Defendant has an arguable defence, which carries real conviction and has a realistic prospect of success. If such application is refused, the delinquent Defendant could then appeal.

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2.6 Unenforceable Domestic Judgments

Once a judgment has been handed down by a Bahamian court and has not been appealed or set aside, it is enforceable.

It is important to note, however, that there is a six-year limitation period for bringing an action to recover debts or to enforce a judgment. This means that no action to enforce a judgment or collect a debt may be brought after six years have passed from the date when the judgment became final, or the debt first fell due.

2.7 Register of Domestic Judgments

There is no central register of all judgments; however, judgments of cases held in open court are public documents, which can later be accessed via legal search engines.

Furthermore, the public can conduct a cause list search at the Supreme Court Registry and view the cause list book and court files to determine if there are any judgments against an individual or entity. A judgment can be marked settled by the judgment creditor in the event that the judgment debt has been settled.

3. FOREIGN JUDGMENTS

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

A judgment obtained outside of The Bahamas has no direct operation in The Bahamas and cannot be immediately enforced in the jurisdiction until it has first been recognised by the Supreme Court.

The Reciprocal Enforcement of Judgments Act, 1924 (the "REJA") applies only to judgments obtained in the UK and certain Commonwealth countries such as Australia, Barbados, Belize, Bermuda, British Guiana (Guyana), British Hon-

duras (Belize), Jamaica, Leeward Islands, St Lucia and Trinidad. An application to register a foreign judgment from the aforementioned list of countries can be made to the Supreme Court.

Where the judgment is obtained in a jurisdiction outside of The Bahamas and is not a jurisdiction enumerated in the REJA, common law requirements will regulate the proceedings for recognition of the judgment.

Under Bahamian common law principles (as specifically outlined in paragraph 48 of Cramin (as Personal Representative of the Estate of Jeffery D Cramin, deceased) v Bahama Divers (1976) Company Limited and another (2018) 1 BHS J No 161), the requirements to enforce a foreign judgment in The Bahamas are as follows:

- the foreign court must have been of competent jurisdiction;
- the rules of natural justice must have been complied with in the foreign proceedings;
- the foreign judgment must be final and conclusive;
- the judgment debt must be definite or ascertainable;
- the foreign judgment must not have been obtained by fraud; and
- enforcement of the foreign judgment must not be contrary to public policy in The Bahamas.

3.2 Variations in Approach to Enforcement of Foreign Judgments

The approach to enforcing a foreign judgment in The Bahamas depends on where the foreign judgment was obtained. If the foreign judgment emanated from a country listed in the REJA, the procedure for the registration of the judgment would follow the rules outlined therein. Alternatively, if the foreign judgment was obtained in the country where the REJA is not applicable, the above-mentioned common law principles will apply.

3.3 Categories of Foreign Judgments Not Enforced

The following categories will not be enforced:

- a foreign judgment for a sum payable in respect of taxes or like charges or fine or other penalties;
- an interim judgment; and
- a foreign judgment in rem determining the title to a foreign immovable (see *Thomas Roy Holbird Jr v Jerry Hamel and another* (2019) 1 BHS J No 117).

3.4 Process of Enforcing Foreign Judgments

The process for enforcing a foreign judgment in The Bahamas depends on whether the application is made pursuant to the common law or the REJA.

Process pursuant to the common law:

- The proceedings must be commenced by Writ of Summons or counterclaim, relying on the debt owed to the judgment creditor pursuant to the foreign judgment as to the cause of action. The matter is tried like any other civil action commenced by Writ or counterclaim (ie, service, exchange of pleadings, etc).
- The court will consider the claim and decide whether the debt is owed.
- If it is found that the debt is owed, a domestic judgment will be given in favour of the judgment creditor.

Process pursuant to the REJA:

- An Originating Summons to commence proceedings must be filed within 12 months from the date of the foreign judgment (provided that the court does not exercise its discretion to extend that time). This application seeks leave to have the judgment registered in The

Bahamas. This may be an ex-parte application.

- The Originating Summons must be supported by an affidavit of the facts, exhibiting the foreign judgment sought to be enforced or a certified copy thereof.
- The Originating Summons must be served on the judgment debtor (unless the court otherwise directs).
- Where the court makes an order granting leave for the judgment to be registered, the order is drawn up by the Registrar or Deputy Registrar and states the time within which the judgment debtor is entitled to apply to set aside the registration. If the application was by Summons, it must be served on the judgment debtor. If the application was ex parte, no service is necessary.
- Where the judgment debtor fails to set aside the registration, the judgment is registered, and notice of same must be served on the judgment debtor.
- The notice must state that the judgment debtor is entitled to apply to set aside the registration if the judgment debtor has grounds for so doing and stipulates a time frame within which the judgment debtor may apply by summons to have the registration set aside.
- After the expiration of the time limited by the order giving leave to register the judgment, the judgment creditor may seek to execute (enforce) the judgment.
- On application to enforce the judgment, the judgment creditor must produce an Affidavit of Service of the notice of registration and the warrant of execution.

Enforcement

Whether the foreign judgment is recognised pursuant to the REJA or under the common law, it is enforceable by the same means available for the enforcement of a Bahamian judgment [see **2.2 Enforcement of Domestic Judgments**]. This procedure would involve the filing and serving

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of a summons and supporting affidavit to apply for the most suitable enforcement method, the filing and serving of any requisite notices and a hearing for the court to determine whether or not the judgment can/should be enforced in that manner.

3.5 Costs and Time Taken to Enforce Foreign Judgments

The typical costs involved and the length of time it takes to enforce a foreign judgment depend on a number of factors, including but not limited to:

- counsel's fee rate;
- whether the enforcement is sought pursuant to the REJA or under common law principles;
- the complexity of the matter, whether or not the application is opposed;
- the mode of enforcement selected and the court's calendar.

It is, therefore, difficult, if not impossible, to estimate with any certainty the costs or length of time involved. In the most straightforward case where a party is seeking enforcement pursuant to the REJA, which is uncontested, the matter will be resolved in a shorter time frame and with less expense, than enforcement sought pursuant to common law principles, which is highly contested and/or where there is great difficulty in identifying assets within the jurisdiction or otherwise in establishing jurisdiction over the judgment debtor. Notably, the shortly to be promulgated new Civil Procedure Rules seek to implement procedures which will improve the overall cost and efficiency of litigation in The Bahamas.

3.6 Challenging Enforcement of Foreign Judgments

The grounds for challenging enforcement include the following:

- the foreign judgment is not final and conclusive;
- the foreign court acted without jurisdiction;
- the judgment debtor did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the foreign court;
- the judgment debtor was not duly served in the foreign court and did not appear;
- the judgment was obtained by fraud;
- there is an appeal pending, or the judgment debtor is entitled to or intends to appeal;
- the judgment is based on a cause of action which would not have been entertained by the Bahamian court for reasons of public policy or similar reasons;
- the judgment is not for a sum of money;
- the application by the judgment creditor was made out of time (12 months after the date of the foreign judgment);
- if the application is made under the REJA, the judgment is not from a superior court in one of the jurisdictions listed in **3.1 Legal Issues Concerning Enforcement of Foreign Judgments**; and
- it is not just and convenient for the judgment to be enforced in The Bahamas.

4. ARBITRAL AWARDS

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

The Bahamas is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and has given domestic effect to the New York Convention through the Arbitration (Foreign Arbitral Awards) Act, 2009 (the "2009 Act"). Pursuant to Sections 4 and 88 of the Arbitration Act, 2009, any arbitration award made pursuant to an arbitration agreement is enforceable in The Bahamas, with the leave of the court, in the same manner as a judgment or order [see **2.2 Enforcement of Domestic Judgments**].

Enforcement may only be refused under the terms provided in the 2009 Act as set out in **4.6 Challenging Enforcement of Arbitral Awards**.

4.2 Variations in Approach to Enforcement of Arbitral Awards

There is no difference in The Bahamas between the enforcement of a domestic and foreign arbitral award.

4.3 Categories of Arbitral Awards Not Enforced

There are no express categories of awards that will not be enforced. The approach is that all awards are binding, but the enforceability is determined by the application of the 2009 Act.

4.4 Process of Enforcing Arbitral Awards

The process for enforcing an arbitral award in The Bahamas involves filing and serving an Originating Summons, supported by an affidavit, which exhibits the authenticated award or a certified copy thereof, the original arbitration agreement or a certified copy thereof and translations if those documents are not in English. There will be an inter partes hearing of the matter (see *Therapy Beach Club Incorporated v RAV Bahamas Limited and another* (2018) 1 BHS J No 46).

4.5 Costs and Time Taken to Enforce Arbitral Awards

The typical costs involved and the length of time it takes to enforce an arbitral award depend on a number of factors, including but not limited to:

- counsel's fee rate;
- the complexity of the matter;
- whether or not the application is opposed;
- the mode of enforcement selected; and
- the court's calendar.

It is, therefore, difficult, if not impossible, to estimate with any certainty the costs or length of time involved. Where the enforcement of the arbitral award is uncontested and the procedural requirements of the 2009 Act are satisfied, the costs and length of time would be significantly less than where the enforcement is highly contested. Notably, the shortly to be promulgated new Civil Procedure Rules seek to implement procedures that will improve the overall cost and efficiency of litigation in The Bahamas.

4.6 Challenging Enforcement of Arbitral Awards

Sections 5 and 6 of the 2009 Act provide the following grounds for a challenge:

- A procedural challenge if the party seeking enforcement does not provide the authenticated award or a certified copy thereof, the original or a certified copy of the arbitration agreement and a translation of both documents where either is not in English.
- The person against whom enforcement is sought can prove that:
 - (a) a party to the arbitration agreement is under some incapacity under laws applicable to that party;
 - (b) the arbitration agreement was not valid under the relevant law;
 - (c) no proper notice was given for the appointment of the arbitrator, or of the proceedings or the person was otherwise unable to present the case;
 - (d) the award deals with issues not contemplated by or beyond the scope of the arbitration agreement;
 - (e) the tribunal composition or arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the state where the arbitration took place; or
 - (f) the award is not yet binding or has been set aside or suspended by a competent

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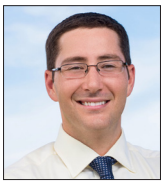
authority.

- The award is in respect of a matter that is not capable of settlement by arbitration or is contrary to public policy.
- The action to enforce the award was not commenced within 12 months from the date of the award.

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the Privy Council. The team is experienced and provides professional advice to corporate and individual clients in all aspects of litigation disputes. Key areas of expertise include insolvency and restructuring; commercial litigation; civil litigation; trust litigation; cross-border litigation; asset tracing and fraud; arbitration, conciliation and mediation; and quieting of titles. The firm is The Bahamas' member of Lex Mundi, a global association of over 160 independent law firms in 60-plus countries.

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Trends and Developments

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Enforcement of Foreign Judgments in The Bahamas

A foreign judgment is not automatically enforceable in The Bahamas. It must be registered pursuant to the Reciprocal Enforcement of Judgments Act of 1924 (the “Act”), or an action to enforce the foreign judgment must be commenced at common law.

The Act

Section 3(1) of the Act provides that a foreign judgment from a prescribed country, which relates to a sum of money, may be registered pursuant to the Act in the following circumstances:

“3. (1) Where a judgment has been obtained in a superior court outside The Bahamas the judgment creditor may apply to the Supreme Court, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in The Bahamas and subject to the provisions of this section, order the judgment to be registered accordingly.”

The prescribed countries to which the Act applies are Australia, Barbados, Belize, Bermuda, British Guiana (Guyana), British Honduras (Belize), Jamaica, Leeward Islands, St Lucia, Trinidad and the UK. In all other cases, an action for summary judgment must be commenced at common law to enforce the foreign judgment.

Recently in *The Public Institution for Social Security v Fahad Maziad Rajaan Al-Rajaan* 2020/

CLE/gen/00976, the Supreme Court of The Bahamas (which is the court of first instance; the “Supreme Court”) considered whether a worldwide injunction to freeze assets granted by the English High Court could be registered under the Act. The Defendant objected to the Plaintiff’s application to register the worldwide freezing order (the “WFO”) for the three following primary reasons:

- the WFO is not registrable under the Act because it is an interlocutory and not a final and conclusive judgment on the merits of the underlying dispute;
- the Supreme Court does not have jurisdiction to grant freestanding injunctive relief in aid of foreign proceedings; and
- there is no substantive cause of action against the Defendant in this jurisdiction.

Further, the Defendant contended that the WFO (before it was subsequently varied along with the Originating Summons filed in the Supreme Court) did not relate to the assets of the Defendant or entities possessed by the Defendant as the Defendant was not within the jurisdiction and any registration of the WFO lacked any intelligible means of enforcement in The Bahamas. Also, as one of the objectives of the Act is to achieve reciprocity with jurisdictions such as the UK, and the UK would not permit the recognition of a Bahamian interlocutory injunction, there would be no reciprocity in permitting the recognition of an injunctive order from the UK.

Section 3 of the Act provides for the registration of both final and interlocutory judgments and orders as Section 2 defines a judgment as “...

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any judgment or order given or made by a court in any civil proceedings...". The Supreme Court found this language to be clear and unambiguous.

The Defendant also contended that registering the WFO would be contrary to Section 21 of the Supreme Court Act (the "SCA"), which confers power on the Supreme Court to grant interlocutory or final injunctions, and the Plaintiff was in effect asking the Supreme Court to grant an interlocutory injunction in aid of foreign proceedings. The Supreme Court applied the Privy Council's decision in *Convoy Collateral Ltd v Broad Idea International Ltd and Cho Kwai Chee* [2021] UKPC 24 and held that the Plaintiff was not applying for an interlocutory freezing injunction. In any event, the Privy Council in *Convoy Collateral* made it clear that the longstanding principle that injunctions in aid of foreign proceedings require substantive causes of action is wrong. Further, there is no reason why Section 21(1) of the SCA cannot be used to grant interlocutory or final injunctions in aid of foreign proceedings.

The test to be applied in determining whether to register a foreign judgment or order under the Act is whether, in the circumstances of the case, "it is just and convenient" that the judgment or order be enforced in The Bahamas. This test is not the same as the grant of a freestanding freezing injunction. The Supreme Court stated that it was not granting a freestanding freezing injunction. The effect of registering an order under the Act, which happens to be a WFO, was not a matter of ongoing or primary concern for parliament as the bar for excluding the registration of judgments under the Act as stated in Section 3(2)(f) is not as high as the bar in other statutes, such as Section 6(3) of the Arbitration (Foreign Arbitral Awards) Act, 2009.

Further, the Supreme Court noted that reciprocity does not mean equality in all respects or substantial respects between the laws of the two countries. There is reciprocity between the UK and The Bahamas as declared by the Governor-General of The Bahamas.

The Supreme Court found the language of the Act to be clear and unambiguous and held that the orders sought by the Plaintiff met the criteria for enforcement under the Act. Accordingly, it was just and convenient for the Supreme Court to order the registration of the WFO in accordance with the Act.

The Common Law

Under the common law, a foreign judgment may generally be enforced by commencing a writ action against the judgment debtor. However, there is a well-established legal principle governing the non-enforcement of foreign judgments under the common law, known as "the exclusionary rule," described by the learned authors of Dicey, Morris and Collins on the Conflict of Laws as follows: "English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State."

The first two categories of the exclusionary rule (penal and revenue) have been the subject of extensive judicial consideration in numerous common law jurisdictions. However, there is a dearth of legal authorities, especially in The Bahamas, on the final category (other public law).

In *The Ontario Securities Commission v Wayne Lawrence Pushka and Bonnieblue Inc* 2015/CLE/gen/01979, the Supreme Court, for the first time in this jurisdiction, pronounced its acceptance of the modern statement of the exclusionary rule as expressed by the New South Wales Court of Appeal in *Evans v European Bank Ltd* [2004]

NSWCA 82. The headnote of Evans conveniently describes the exclusionary rule in the following terms:

“Domestic courts would not enforce the revenue or penal laws of a foreign state nor enforce the interests of a foreign government which arose from the exercise of powers peculiar to government. Whether or not the enforcement of a statute constituted a governmental interest of the relevant kind depended upon the scope, nature and purpose of the provisions being enforced and the substance, not the form of the proceedings or the identity of the applicant...”.

The UK Court of Appeal endorsed the approach taken in Evans as demonstrated in *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374, where the UK Court of Appeal held as follows:

“[125] On the authorities as they now stand the only category outside penal and revenue laws which is the subject of an actual decision, as opposed to dicta, is a claim which involves the exercise or assertion of a sovereign right. There is no decision which binds this court to find that there is a rule which prevents the enforcement of all foreign public laws. The test laid down by the High Court of Australia [in Evans] is not only consistent with the English authorities, including the Equatorial Guinea case in the Court of Appeal, but is a helpful and practical test.”

In light of the judicial dicta in Evans, the exclusionary rule may now be restated in this way: courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a foreign state’s penal or revenue laws or a governmental interest which arises from the exercise of certain powers peculiar to government.

The court decisions referred to above provide a useful tool in interpreting and applying the exclusionary rule in The Bahamas and enable clients and practitioners to have a greater degree of certainty when analysing whether a foreign judgment may be enforceable in this jurisdiction.

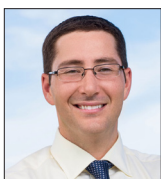
THE BAHAMAS TRENDS AND DEVELOPMENTS

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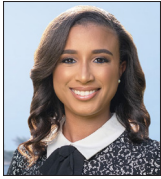


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