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LITIGATION UPDATE

ENFORCEMENT OF FOREIGN JUDGMENTS IN AUSTRALIA

In an increasingly globalised business environment, it is not uncommon for a company or individual to enter into transactions or hold assets in several jurisdictions around the world. If such a company or individual were to become a judgment debtor pursuant to a judgment issued in Jurisdiction X, the judgment creditor could seek to enforce that judgment in Jurisdiction Y if the judgment debtor holds assets in Jurisdiction Y and the laws in that jurisdiction provide for the recognition and enforcement of foreign judgments.

STATUTORY ENFORCEMENT

In Australia, a foreign judgment can be enforced by registering the judgment under Part 2 of the *Foreign Judgments Act 1991* (Cth) (the Act). The key points under the Act are:

- The Act operates in an administrative fashion and, subject to evidentiary requirements being satisfied, allows the judgment creditor to register the foreign judgment without the need to commence fresh proceedings in Australia.
- The judgment creditor is usually able to apply to enforce a foreign judgment on an *ex parte* basis or by naming the judgment debtor as a defendant in its application (without the need effect service of the application).
- The judgment debtor may make an application to set aside the registration of the foreign judgment under section 7 of the Act for reasons that include the judgment debtor having been denied natural justice; there having been fraud on the part of the judgment creditor; or the foreign judgment having been satisfied.
- The Act is based upon reciprocity of enforcement and to be enforceable, the foreign judgment must be issued by a country or court set out in the *Foreign Judgments Regulations 1992* (Cth) (the Regulations). For example, the United States of America (USA) is not listed in the Regulations, meaning a judgment from an American court is not enforceable under the Act.

- The foreign judgment sought to be enforced under the Act must be a "money judgment" (defined under section 1 of the Act as foreign judgments under which money is payable) of the superior courts and some inferior courts of certain foreign countries. Certain "non-money judgments" issued by New Zealand courts may also be enforced under the Act.
- The foreign judgment sought to be enforced under the Act must be final and conclusive. That does not preclude an interlocutory judgment from being enforced under the Act, to the extent that it involves a "money judgment", but requires that the judgment puts an end to the dispute.
- Upon registration under the Act, the foreign judgment will have the same force and effect as a judgment issued by the Court it is registered in (either the Federal Court of Australia or the Supreme Court of a State or Territory). This allows the foreign judgment to be relied upon in other enforcement proceedings such as bankruptcy proceedings against individuals, and winding up applications against corporations.
- The foreign judgment must have been issued six years prior to the application to enforce it under the Act.

Enforcement of a foreign judgment under the Act is illustrated by the recent decision by Justice Adamson in *Raffaele Viscardi SRL v Quality Centre Food Serviced Pty Ltd* [2013] NSWSC 1104. In that case, the Court made the order sought by the plaintiff, being an order pursuant to section 6 of the Act (and in accordance with the relevant court rules being Part 53 of the *Uniform Civil Procedure Rules 2005* (UCPR)) that a foreign judgment obtained against the defendant in Tribunale Di Nocera Inferiore, Italy, be registered as a judgment of the Supreme Court of New South Wales (NSW). Justice Adamson allowed the defendant a period of 14 days from service of the judgment, within which it could make any application to set aside registration of the foreign judgment.

Notwithstanding the administrative fashion in which the Act was applied, the Court allowed enforcement of the judgment despite there being a discrepancy between the name of the plaintiff and the name of the judgment creditor on the face of the foreign judgment (Raffaele Viscardi SRL cf.

Viscardi Raffaele SRL) and the name of the defendant and the judgment debtor (Quality Centre Food Services Pty Ltd cf. Quality Centre Food Service). Otherwise, the foreign judgment satisfied the requirements under Act (e.g. money amount owing, interest payable, authenticated copy of judgment translated and certified by a notary). These requirements can usually be set out in an affidavit.

COMMON LAW ENFORCEMENT

If a foreign judgment does not fall within the scope of the Act, it is necessary to consider whether other instruments provide a mechanism for enforcement. For example, Australia is party to the bilateral treaty for the *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994* with the United Kingdom, which provides for another way of enforcing a foreign judgment. If a bilateral instrument does not apply, a judgment creditor might apply to the Court to enforce a foreign judgment (e.g. a judgment from the USA) under common law. In order to do, the foreign must satisfy certain requirements:

- The foreign judgment must have exercised jurisdiction recognised by the Court i.e. that the foreign court had jurisdiction. This usually requires the judgment debtor to have been present in the foreign jurisdiction when served with the originating process for the foreign proceedings, the judgment debtor to have been domiciled or ordinarily a resident in the foreign jurisdiction or for the judgment debtor to have submitted to the jurisdiction to the foreign court.
- The foreign judgment must be final and conclusive. In other words, the foreign judgment must end not only the proceedings between the parties, but also the dispute which led to the proceedings. If a foreign judgment is a form of default judgment, this could lead to some difficulty (A.S. Bell *et al*, "Nyg's Conflict of Laws" (8th ed.), at [40.32]). The foreign judgment could be final even if it is the subject of an actual or potential appeal however it is not final if it can be varied by the same court which issued it.
- The foreign judgment must be for a fixed sum of money or an amount that may be readily calculable in full.

- The parties must be the same and in the same interest as the original foreign judgment. However, a party can be an assignee of judgment creditor for enforcement purposes.
- Under common law the enforcement of the foreign judgment must not be out of time. For example, if it is sought to be enforced in NSW, the judgment must have been issued within the last twelve years in accordance with section 17 of the *Limitation Act 1969* (NSW). Enforcement of a foreign judgment in NSW under the common law is available for a longer period than under the Act.
- The foreign judgment can only be enforced to the extent it is unsatisfied.

The judgment debtor has a number of defences available under common law, including the defence that the foreign judgment was obtained by fraud, that the foreign court acting contrary to natural justice or that the foreign judgment is estopped by an earlier inconsistent local judgment.

CONCLUSION

The Act and the principles established under common law have established an effective legal framework for the enforcement of foreign judgments within Australia. The legal framework protects judgment creditors dealing with judgment debtors that hold Australian assets and also any companies or individuals that enter into international transactions (and may end up in international disputes) with parties that holds assets in Australia.

For Australian companies doing business abroad, it is important to recognise the risk that a foreign dispute and foreign judgment present to local assets.

MORE INFORMATION

For any enquiries relating to the enforcement of a foreign judgment or the setting aside of a registered foreign judgment, please speak to one of the following contacts:



Scott McDonald
Partner
T +61 2 9286 8331
scott.mcdonald@dlapiper.com



Kirk Simmons
Senior Associate
T +61 2 9286 8111
kirk.simmons@dlapiper.com

Or contact your nearest DLA Piper office:

BRISBANE

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 38, 201 Elizabeth Street
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

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