



o'neill partners
commercial lawyers

Legal Alert

February 2011

Overseas Judgments and the Australian Jurisdiction – Enforcement & Recovery of Debts Part II

Key Summary

Businesses worldwide are looking for international opportunities to develop and expand their operations. Contracts between companies across borders are often the norm particularly as access to, and acceptance of, online commercial opportunities increase.

Many businesses have customers / clients located in jurisdictions other than their own. Despite their best efforts to minimise such risks, it is almost inevitable that disputes will arise, promises will be broken and agreements will be abandoned. This article looks at how foreign judgments may be enforced against Australian assets.

Which Jurisdiction?

Contracts commonly include a clause by which the controlling law of the agreement is selected and identifying the jurisdiction within which disputes or claims are to be brought.

In the event a state or territory within Australia is the contractual jurisdiction of choice, then irrespective of the actual location of either party, proceedings may be commenced and prosecuted in that state or territory in accordance with the relevant Court Rules.

In the event the contract identifies a non-Australian jurisdiction for resolution of disputes or claims, then subject to certain limited exceptions Australian Courts will not allow a party to the contract to circumvent a contractual jurisdictional clause and, by preventing proceedings from being commenced or continued in Australia, will require the dispute or claim to be dealt with in the nominated non-Australian jurisdiction.

Non-Australian Judgment – Enforcement and Recovery

Pursuant to the Foreign Judgments Act (Cth) 1991 (Act), holders of a "money judgment" given in the Superior Courts of a range of prescribed countries are entitled to register and enforce that judgment in any state or territory in Australia. A money judgment is an order given in civil proceedings pursuant to which money is payable.

The range of countries for which the Act allows the registration of judgments is extensive, and include New Zealand, Canada, France, Germany, Japan, Singapore, Hong Kong, the United Kingdom and Switzerland. We invite you to contact us for a

current complete listing.

The process of registering a foreign judgment is governed by the applicable Court Rules, which vary according to the Australian state or territory in which enforcement of the judgment is sought. The granting of an order for registration of a foreign judgment does not require an attendance before the Court by the party seeking to enforce the judgment, and may be done by a Registrar of the Supreme Court in Chambers. There is no requirement to notify the debtor of this process.

The Act sets out a number of matters of which the Registrar must be satisfied before a Court order for registration of a foreign judgment may be granted. These include:

- confirmation the foreign judgment has been made by a "Superior Court", as defined in the Act. This requires the supply of a certified copy of the judgment which, if the judgment was not rendered in English, includes the supply of a certified translation of the judgment into English;
- the basis for the determination that the jurisdiction in which the foreign judgment is sought to be registered (e.g. New South Wales) is appropriate. This will require evidence of the debtor's place of business, the debtor's residential address, or the location of any assets owned by the debtor in the jurisdiction;

Overseas Judgments and the Australian Jurisdiction – Enforcement & Recovery of Debts Part II - February 2011

- confirmation that the foreign judgment remains unsatisfied and enforceable (e.g. that it has not been set aside);
 - identification of the amount the debtor owes the creditor under the judgment, including identification of any part-payments that may have been made by the debtor; and
 - calculation of any interest claimed in respect of the foreign judgment debt and the basis for that calculation, e.g. by reference to contractual terms.
- bankruptcy notice / sequestration order – these orders are applicable only in the case of personal debtors. Such orders require payment within 21 days of service of the notice, failing which the creditor is entitled to seek an order from the Court for the appointment of a trustee in bankruptcy to the debtor; and
 - statutory demand / winding up application – these orders are applicable only in the case of corporate debtors. Such orders require payment within 21 days of service of the demand, failing which the creditor is entitled to seek an order from the Court for the appointment of a liquidator to the debtor.

If satisfied of those matters, the Court will then issue a Notice of Registration. The Notice of Registration must then be served on the debtor. The Notice of Registration will specify a notice period, determined on a case-by-case basis, within which the debtor is allowed to take steps in order to seek to set aside the judgment if it is entitled to do so, for example by establishing the foreign judgment had been improperly obtained. A creditor must wait until the expiry of that notice period before undertaking any steps to enforce its registered judgment.

Enforcement Options

If full payment of the judgment debt has not been forthcoming from the debtor by the end of the notice period, there are a variety of enforcement options available to a creditor to recover the amount due under the registered judgment, including:

examination summons – these orders may be sought in respect of either personal or corporate debtors. Such an order may require the debtor to provide to the Court for inspection documents regarding its financial circumstances or for the debtor to appear before the Court in order to answer questions regarding matters relevant to the payment of the judgment debt. Strictly speaking, these orders are fact-finding tools rather than enforcement tools, but may be powerful aids to achieving successful enforcement;

- writ of execution – these are orders for a Court-enforced sale of land or other assets of the debtor in order to satisfy the judgment debt;
- used in the case of personal debtors as they may entitle the creditor to enforce its judgment by way of wage or salary deductions directly from a debtor's employer to ensure payment of the debt. Such orders may also be sought against those persons who owe the debtor monies, such that those monies are paid directly to the foreign judgment creditor in satisfaction of the judgment debt, thereby bypassing those monies passing first through the hands of the judgment debtor – when used in conjunction with an examination summons, this can dramatically improve recoverability against a corporate debtor;

Given the different characteristics of the various enforcement options, the creditor's enforcement choice of action will depend upon the individual circumstances of the debtor.

Conclusion

In light of the steps involved when seeking to enforce a foreign judgment in Australia, companies doing business with parties in Australia should consider, from the outset of entering into the business relationship, whether it may be preferable, quicker and more cost effective to specify in their agreement that disputes or claims are to be resolved in Australia, rather than offshore and subsequently sought to be enforced in Australia.

This article was prepared by Colin Brown, a partner in our insolvency and reconstruction team. We invite you to contact Colin or Michael O'Neill, should you have any questions or require any further information about the matters discussed in this article.

The contents of this article are intended to provide only a general summary on matters of interest and are not comprehensive, nor does this article constitute legal advice. You should seek legal or other professional advice before acting or relying on any of the contents of this article.

© O'Neill Partners – Commercial Lawyers, 2011

Contacts



Michael O'Neill
Snr Partner & Chairman
michaelo@oplegal.com.au
(02) 8046 4905



Colin Brown
Partner
colinb@oplegal.com.au
(02) 8046 4902