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Legal Alert

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Australian Judgments and Overseas Debtors – Enforcement & Recovery of Debts

Key Summary

When seeking to enforce an Australian judgment in a foreign jurisdiction, the foreign jurisdiction's laws on the enforceability of foreign judgments will govern the viability of the process.

This article provides a general background regarding the enforcement of Australian judgments in foreign jurisdictions, and the issues that typically arise.

Introduction

Dealings by Australian businesses with international clients, suppliers and developers are increasing at a rapid rate. One result of that trend is the need to take into consideration the enforcement of claims brought against overseas-based companies or individuals.

Regardless of where one's business is based, the enforcement of claims brought against overseas-based parties can be difficult, lengthy, expensive and ultimately deeply unsatisfying. Consideration of such issues, and of the steps that may be taken to improve the prospects of a successful recovery process, is highly recommended as a proactive measure to be taken when setting up dealings with international parties.

Reciprocal Enforcement Arrangements

Australia is a party to reciprocal enforcement arrangements with many countries in respect of the enforcement of judgments obtained in Australian Courts. The Foreign Judgments Regulations (Cth) 1992, identifies those countries with which Australia has reciprocal enforcement arrangements, including New Zealand, Germany, Japan and France. A notable exception is the United States, which situation persists despite the introduction of the Australia-United States Free Trade Agreement.

The terms of reciprocal enforcement arrangements differ from country to country. Reference must be had to the legislation of the relevant country in order to identify which Australian Courts (and, therefore, the judgments of those Courts) are recognised in that country, and to identify the applicable enforcement process.

A major benefit of there being an applicable reciprocal enforcement arrangement is the enforcing court will be unlikely to require that the merits of the Australian Court's decision be re-visited.

Typically, when seeking to enforce an Australian judgment in a foreign jurisdiction with which Australia has a reciprocal enforcement arrangement, the judgment must:

- be final and conclusive – it is worth noting that in some foreign jurisdictions, even if an appeal of the Australian judgment is pending, the judgment may be viewed as 'final and conclusive' for purposes of seeking enforcement in those foreign jurisdictions. Special rules may apply to default judgments;
- concern a matter regarding which the Australian Court held the jurisdiction to hear;
- not conflict with local public policy in the jurisdiction in which enforcement of the judgment is sought – i.e. the terms of the Australian judgment, or the claim(s) determined by that judgment concern matters must not offend the public policy of the jurisdiction in which enforcement of the judgment is sought. For example, judgments awarding exemplary damages are not recognised in some countries, and statutory interest attaching to Australian judgments may not be enforceable in countries that follow Sharia Law, which is often the case in Middle Eastern countries such as the United Arab Emirates;

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- be a money judgment – i.e. the judgment cannot be an equitable order for an injunction or for specific performance;
- be made in respect of proceedings for which proper notice had been given – i.e. notice had been properly served on the overseas-based debtor pursuant to the procedural rules of the Australian Court that issued the judgment; and
- be given by a Court that is recognised as a court of sufficient standing by the foreign jurisdiction – i.e. whilst judgments given by the superior courts (e.g. the Supreme and Federal Courts) are generally recognised, reciprocal enforcement arrangements do not always provide that all Australian Courts will be recognised.

Access to the enforcement processes in a foreign jurisdiction is entirely dependant upon the laws of that country. Generally, a verified copy of the original Australian judgment, together with a translation of the judgment into the official language of the foreign country, should be provided to the applicable judicial body, together with:

- an affidavit setting out the particulars of the debt that is the subject of the Australian judgment and identifying the location of the overseas debtor; and
- written submissions confirming that the Australian judgment meets the substantive requirements of the relevant reciprocal enforcement agreement.

Non-Reciprocal Enforcement Arrangement Jurisdictions

In foreign jurisdictions for which reciprocal enforcement arrangements are not in effect, generally the judicial authorities will not recognise Australian judgments as being the final determination on the merits of the claims raised in the Australian proceedings. It is highly likely the merits of the Australian judgment will be re-examined by the judicial authorities of the foreign jurisdiction, potentially requiring a complete re-prosecution of the original claim.

In addition to any factual defences the overseas debtor might raise against the claim, the debtor may also be entitled to raise defences such as lack of jurisdiction, fraud, public policy considerations that are local to the foreign jurisdiction in which proceedings have been commenced, and denial of natural justice.

International Arbitration – an Alternative

For cross-border commercial dealings, private arbitral proceedings are a commonly accepted alternative to the prosecution of claims through the court systems. A prerequisite to taking a matter in dispute to arbitration is the parties' agreement to accept arbitration.

Generally, the parties will make such an agreement when they enter into the contract that governs their commercial dealings. Contracts that contain provisions to resolve disputes by arbitration typically set out the terms by which the rules governing the arbitration are selected, the body of law governing both the contract and the arbitral proceedings, the arbitral venue, the language in which the proceedings will be conducted, and perhaps most importantly, the parties' agreement that arbitral awards will be binding on the parties and may be enforced in any courts that have jurisdiction over the party against which enforcement is sought. That the parties did not agree at the time of contracting to accept arbitration does not preclude their later agreeing to do so, but this may lessen the likelihood of the parties agreeing to accept arbitration when a dispute arises. Acceptance of arbitration as an alternative to pursuing claims through the courts is also becoming more common in purely domestic commercial dealings.

The election to resolve matters in dispute through arbitration proceedings often yields a number of benefits to the parties such as; the dispute may be heard by an industry specialist, the proceedings are frequently implemented much more quickly and then heard in less time, the avenues of appeal are limited, and the cost of arbitration often works out to be a fraction of the cost of proceedings conducted through the courts.

The Convention on the Recognition and Enforcement of Foreign Arbitral Award (**New York Convention**) and the UNCITRAL Model Law on International Commercial Arbitration (**UNCITRAL Model Law**), obligates courts from participating countries to recognise and enforce private arbitral awards made in a country that is a party to the New York Convention. At the time of writing, more than 140 countries are parties to the New York Convention. By contrast, there are only some 30 countries that have reciprocal enforcement arrangements with Australia.

The New York Convention identifies a range of grounds upon which a party against whom an arbitral award has been made, may seek to persuade a foreign court not to enforce the award. These include; the party was subject to some incapacity, recognition and enforcement of the award is contrary to the public policy of the country in which enforcement is sought, or the award dealt with matters that fell outside the matters submitted for arbitration.

Given the wide acceptance of the New York Convention and its relatively straight-forward operation, providing for resolution of disputes by arbitration in international commercial dealings is certainly worth considering, particularly where the counterparty is domiciled in a country, such as the United States, that does not have a reciprocal enforcement agreement with Australia.

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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 as at the date of publication 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.

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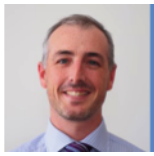

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