

INTERNATIONAL DEBTS

AND

COLLECTION

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CONTENTS

1. Introduction
2. The Trans-Tasman Proceedings Act 2010
 - 2.1 Registration and Enforcement of New Zealand Judgments
 - 2.2 Significance of Trans-Tasman Proceedings Act
3. The Foreign Judgments Act 1991 (Commonwealth)
4. Which Courts
5. Reciprocal Countries
6. Private International Law
7. Practical Implications

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1. Introduction

The general position with debts incurred in another country is that the creditor can sue in that other country, and ask the court to make a judgment against the debtor. If a foreign creditor does this, the next question is: can this foreign judgment be enforced in Australia? The brief answer is that it is neither easy nor cheap for a creditor to enforce a foreign judgment in Australia.

It is easy for a foreign creditor to arrange for a debt collector to telephone a debtor in Australia, and demand payment. However, taking legal steps to enforce a foreign debt is significantly more expensive and complicated. Much depends on the foreign country involved. There are three means by which foreign judgments can be enforced in Australia, other than in the case of foreign bankruptcies, which is a separate subject.

2. The Trans-Tasman Proceedings Act 2010

This Commonwealth Act is designed to streamline civil proceedings involving Australian and New Zealand persons and companies between the two countries. It came into force on 11 October 2013. Essentially, it means that Australian and New Zealand court proceedings and enforcement is subject to a simpler set of rules and procedures.

2.1 Registration and Enforcement of New Zealand Judgements

Part 7 of the Act makes provision for recognition and enforcement in Australia of judgments made by certain specified New Zealand courts and tribunals. A registrable New Zealand judgment is defined in section 66 of the Act as a final and conclusive judgment of a court in a civil proceedings, or a civil proceeding of some New Zealand tribunals. Monetary orders such as compensation or damages in a criminal proceeding are also included. Section 67 of the Act allows a person with the benefit of a judgment to apply for registration of it in a superior Australian court, or an inferior court with jurisdiction to deal with the amount of money involved. Section 74 provides that when a New Zealand judgment has been registered in this way, it has the same force and effect as an Australian judgment of that court, and can be enforced in the same way.

2.2 Significance of Trans-Tasman Proceedings Act

The system of judgement registration and enforcement is similar to the operation of the Service and Execution of Process Act 1992, (SEPA) the Commonwealth act which allows for service, registration and enforcement of court process (such as writs and summonses) and judgments between Australian states and territories. Experience with SEPA suggest that the Trans-Tasman system will operate mainly in regard to matters involving substantial sums of money. Though, in theory, smaller dollar amounts can be dealt with, in practice the legal costs involved in the double-jointed procedure means only matters involving quite substantial sums of money are likely to be pursued.

3. The Foreign Judgments Act 1991 (Commonwealth)

Australia is a party to a reciprocal scheme of enforcement of money judgments with a number of foreign countries. These countries are listed in the Foreign Judgments Regulations 1992 (Commonwealth). There are thirty-six countries and

regions which have reciprocal arrangements with Australia. They are listed at 5 below. Many of the countries were formerly part of the British Empire. There are some European countries – France, Germany, Poland and Switzerland – and some Asian countries – Hong Kong, Japan, Korea and Taiwan included. The United States and China are absent.

4. Which Courts

As well as a limited list of countries, there is also a limited list of courts within those countries. In most of the countries, only judgments of the superior courts are eligible. This means the equivalent of our Supreme and High Courts. Some lower courts, equivalent to our District Court, are specifically included. These include County Courts in the United Kingdom, some provincial courts in Canada, and intermediate courts in Switzerland and Poland.

The significance of this listing of courts is that a judgment of a court of summary jurisdiction, the equivalent of our Magistrates Court, is not included. This excludes smaller monetary claims, which are normally pursued in a court of summary jurisdiction.

5. Reciprocal Countries

New Zealand, Alberta in Canada, Bahamas, British Columbia in Canada, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong, Israel, Italy, Japan, Korea, Malawi, Manitoba Canada, Montserrat, Papua New Guinea, Poland, St. Helena, St. Kitts and Nevis, St. Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Switzerland, Taiwan, Tonga, Tuvalu, United Kingdom, Western Samoa.

6. Private International Law

Judgments from foreign countries which are not part of the foreign judgment scheme can, in theory at least, be enforced at common law if they meet certain tests. These are, briefly:

- * Only a judgment of a court that had jurisdiction over the debtor at the time the court proceedings were commenced can be enforced at common law. This ordinarily refers to a debtor who was present in, or a resident of, the foreign country concerned.
- * The foreign judgment must be final and conclusive. This means that the judgment must be one that settles the controversy between the parties. Strangely, the possibility that an appeal may be brought does **not** mean the judgment is not final or conclusive. The judgment may be viewed as final and conclusive despite the possibility of an appeal.
- * The same parties, quite precisely, must be involved in the foreign judgment and the proceedings here. For example, if one related to a partnership, and the other to one person who was a member of the partnership, there would not be identity of the parties.
- * Only judgments for a fixed sum of money can be enforced.

7. Practical Implications

The first thing to consider is the amount of the debt. The legal process for a creditor to pursue a debt in a foreign country is quite complicated, and the legal cost a creditor will incur is substantial. A relatively small debt, for example the equivalent of a few thousand dollars, cannot be economically pursued. Foreign

creditors with such a debt may bluff, and perhaps retain a debt collector to contact a debtor here, but legal action is unlikely.

In weighing up the options for a debtor with a foreign debt, it is appropriate to view demands made upon the debtor in the light of the difficulties faced by foreign creditors. The amount of the debt, and the court that made the judgment should be weighed up in considering the debtor's options. Bankruptcy in Australia will stop action against the debtor in Australia. However, it is a pity for a debtor to become bankrupt unnecessarily. A cautious wait and see approach may be best. If a creditor with a large foreign debt does clear all the jurisdictional hurdles and the debtor does find a local action for enforcement is under way, then bankruptcy can be considered as one option at that time.

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