

ENFORCEMENT OF FOREIGN JUDGMENTS IN BERMUDA AT COMMON LAW

In general, there are two ways in Bermuda to enforce a final money judgment¹ obtained in an overseas Court (a “foreign judgment”) against a person² in Bermuda. The method employed will depend upon the jurisdiction in which the foreign judgment was obtained and possibly the Court within that jurisdiction. This article addresses only enforcement of judgments obtained in countries which are not included in Bermuda’s *Judgments (Reciprocal Enforcement) Act 1958*, in other words, judgments which are enforceable at common law

The position at common law is, generally speaking, that a person wishing to enforce a foreign money judgment in Bermuda cannot do so by direct execution of that judgment; he must sue on the foreign judgment, as if it were a debt. The enforcement of foreign judgments at common law is based on the principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action in debt to enforce the judgment may be maintained.³ That is not to say that there must be a trial in Bermuda which repeats the proceedings which have already taken place elsewhere. The judgment creditor in Bermuda can seek final judgment in Bermuda by way of Bermuda’s summary judgment procedure, a faster procedure than the normal trial process. The plaintiff (as the foreign judgment creditor is in Bermuda) simply sues on the foreign judgment and seeks judgment in Bermuda by the summary judgment procedure, asserting that there is no real defence to the action in Bermuda.

The foreign judgment is very strong evidence that the debt recognised by that foreign judgment is truly owed by the defendant to the plaintiff and the defendant will have to displace that strong evidence to defeat such an application. Indeed, the Supreme Court of Bermuda is frequently asked to enforce foreign judgments, and it is a rare occasion and on good and substantial grounds that the Supreme Court of Bermuda refuses to do so.

The only grounds for resisting the enforcement of such a judgment at common law are generally said to be:

- (1) lack of jurisdiction in the foreign court;
- (2) that the judgment was obtained by fraud;

¹ *E.g.*, a judgment for damages or in debt or for costs.

² Which includes a company, partnership, association or other like body.

³ *Williams v. Jones* (1845) 13 M & W 628, 633; *Goddard v. Gray* (1870) LR 6 QB 139,147; *Adams v. Cape Industries plc* [1990] Ch 433, 513; *Owens Bank Ltd v. Bracco* [1992] 2 AC 443; *Rubin v. Eurofinance SA & Ors* [2012] UKSC 46.

- (3) that enforcement of the foreign judgment would be contrary to public policy;
- (4) that the proceedings in which the judgment was obtained were contrary to natural justice, as those principles are understood in Bermuda; and
- (5) inconsistency with a prior judgment in Bermuda.

In order to establish that the foreign court had jurisdiction over the defendant, the plaintiff must show that either:

- (1) the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country or
- (2) the plaintiff in Bermuda was an active party in the foreign proceedings and obtained a money judgment against the other party, whether as a claimant or as a defendant to a counterclaim, in the proceedings in the foreign court; or
- (3) the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
- (4) the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.⁴

Once jurisdiction has been established in this way, the burden will be on the defendant in Bermuda to impeach the foreign judgment on one of the other above-mentioned grounds.

It is to be noted that the Supreme Court of Bermuda will not conduct a re-hearing of the trial (if any) which led to the foreign judgment nor will the Supreme Court of Bermuda look behind it in any way. To the contrary, a foreign judgment which is final and conclusive on the merits and not impeachable under any of the four heads set out above is conclusive as to any matter adjudicated upon, and cannot be impeached for any error either of fact or law.

Against this background one must consider the nature of the foreign judgment sought to be enforced in Bermuda.

In order to successfully enforce the foreign Court's money judgment, the foreign judgment sum must not be a sum payable in respect of taxes or in respect of a fine or other penalty.

⁴ *Dicey, Morris and Collins, Conflict of Laws*, (2012), Rule 43.

In addition, that portion of any judgment under the United States RICO law⁵ which provides for damages beyond the purely compensatory (e.g. punitive damages) will not be enforceable in Bermuda⁶ to the extent that the judgment exceeds the actual loss. The securities and insolvency laws in various jurisdictions must also be looked at carefully, as they may impose strict liability on directors or companies or creditors which offend our notions of natural justice. Similarly, procedural law must be investigated. If the procedural law under which judgment was given effectively prevented the defendant from defending, then that will almost certainly offend our principles of natural justice.

By way of example, where a plaintiff obtained a foreign judgment in default because the defendant was unable (as opposed to unwilling) to post security for costs in the foreign court, the Supreme Court of Bermuda refused to enforce that foreign judgment, notwithstanding that it was final and conclusive. The reason for that is that the defendant was shut out of defending by reason of lack of funds,, even though it was accepted that the Defence filed had merit.

In summary, whilst the Supreme Court of Bermuda generally stands willing to assist a party in enforcing a foreign judgement, depending upon the underlying circumstances, it may not be safe to assume that Bermuda will assist in enforcement without question.

This article addresses general principles only and is not intended to be a comprehensive exposition of the subject. Specific legal advice should be obtained in respect of any particular foreign judgment to be enforced in Bermuda.

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⁵ *Racketeer Influenced and Corrupt Organizations Act 1970.*

⁶ *E.g. by reason of the Protection of Trading Interests Act 1981.*