Chapter 27

NEW ZEALAND

1. Under general law

As a Commonwealth state, New Zealand law was based on English legislation and common law. From this position, New Zealand law has progressively evolved with the New Zealand Courts now referring to decisions of the English, American and Canadian Courts.

The Reciprocal Enforcement of Judgments Acts 1934 is not considered a means of enforcement in cases of insolvency as judgments in such cases do not constitute an "action in personam". Non-insolvency judgments of certain foreign countries will be enforced after they are registered under the Reciprocal Enforcement of Judgments Act 1934 or the Judicature Act 1980 Section 56.

New Zealand bases its law on the English common law the doctrine of comity has been embraced in New Zealand. The underlying principle of comity is that "one should do unto others as they would do unto you".

However, the New Zealand Courts will not enforce a foreign judgment based upon comity alone. The foreign judgment creditor must sue on the foreign judgment in the New Zealand High Court. It cannot be directly enforced. If the action succeeds, the High Court will rule that the judgment can be enforced as a local judgment against the debtor and the property in New Zealand.
Where an enforcement action of a foreign judgement in personam has been filed, the New Zealand Court must be satisfied that jurisdiction of a foreign Court granting the judgment is recognised by New Zealand law. The judgment should be final and conclusive and for a debt or definitive sum of money.

If the foreign judgment in question is a judgement in rem, the New Zealand Court will treat the judgment as final and conclusive and binding between parties.

2. Assisting legislation

New Zealand law has distinct mechanisms to deal with cross-border insolvency issues in cases of individual bankruptcy and cases involving overseas companies which have assets in New Zealand.

Individual Bankruptcy

The Insolvency Act 1967 Section 135 enjoins the High Court of New Zealand to assist foreign Courts having jurisdiction in bankruptcy. The section provides that:

- The High Court shall, in all matters of bankruptcy, act in aid of and be auxiliary to any Court of any Commonwealth country other than New Zealand, being a Court having jurisdiction in bankruptcy, and an order of that Court requesting aid shall be sufficient to enable the High Court to exercise in regard to the matters specified in the order such powers as the High Court might exercise in respect of the matter if it had arisen within its own jurisdiction.

- The Court may, if it thinks fit, exercise the powers specified in sub-section (1) of this section at the request of the Court in any country that is not a Commonwealth country.

Whilst it could be considered that the use of the word "shall" in Section 135 would make it mandatory for the High Court in New Zealand to exercise its powers and assist the Court of any other Commonwealth country, the High Court has taken the view that the word "shall" was directory rather than mandatory in nature. However, the High Court has discretion whether or not to grant aid sought at the request of the Court of any state which is not a Commonwealth country.

The procedure for requesting assistance is the provision of a letter of request from the applicable foreign Court requesting aid. This letter of request should provide or have attached the findings of any related matters and details of the administration of the estate in any other jurisdictions.

Liquidation of Assets of Overseas Companies

The Companies Act 1993 has no direct equivalent to the Insolvency Act 1967 Section 135. An application must be made to the High Court under the Companies Act 1993 Section 342 for the liquidation of the assets of an overseas company in accordance with the provisions applicable to domestic companies.

An application may be made whether or not the overseas company is registered in New Zealand or has been dissolved in its own jurisdiction (Section 342). The Registrar of Companies has standing to bring an application under this section (McPherson
Limited v Industrial Banking Corporation Limited (1997) 8 NZ CLC 261,420). As the liquidation of an overseas company is in the same format as that of a domestic company, the same grounds for the appointment of a liquidator by the Court apply and it would be permissible to rely upon the serving of a statutory demand in accordance with the Companies Act 1993 Section 289.

3. Insolvency practice

As a general principle, foreign liquidators have the right to administer the New Zealand assets of a company with the assistance of New Zealand Courts. This implies that with appropriate undertakings by foreign liquidators to protect New Zealand creditors, it may not be necessary to appoint a liquidator in New Zealand. Notwithstanding this, the New Zealand Courts have taken the approach in that it is desirable for any New Zealand liquidation of assets to be concurrent with and ancillary to the overseas liquidation with any positive benefits given by New Zealand law to creditors being retained by New Zealand creditors. (Gavigan v Australasian Memory Pty Limited (in Liquidation))

The ruling also considered the nature and extent of duties of a liquidator of a New Zealand company and the requirements that the person be subject to the control of New Zealand Courts. Whilst there is no statutory reason why a foreign liquidator cannot be appointed as the New Zealand liquidator (they are not prohibited under the qualifications of the Companies Act 1993 Section 280), it is probable that the New Zealand Courts will refuse such appointment.

4. Proposed reform

The New Zealand Government has recently decided that cross-border insolvency issues will be addressed through the adoption of the United Nations Commission on International Trade Laws Model Law on Cross-Border Insolvency. A new legislative framework is being developed that is anticipated to be incorporated into legislation within a calendar year.

5. Examples

Re Grose (High Court, Christchurch, B 404/92, 21 September 1992)

In this case, concurrent bankruptcies were proceeding in Australia and New Zealand. The applicant, the Australian Administrator and the Federal Court, sought the aid of the High Court in New Zealand under the Insolvency Act 1967, Section 135. Making the order for aid, the New Zealand Court required the claims in the New Zealand bankruptcy to be met by the property realised in New Zealand before the balance, if any, was made available to Australian creditors.
Re Beadle, HC Auckland, B No 116/80, 20 August 1980
(Judgment: 1 September 1980)

The action arose by way of a letter of request to the High Court in Auckland from the Supreme Court of Queensland, the latter of which court exercises federal jurisdiction in bankruptcy. The letter of request represented to the Supreme Court that the New Zealand property of the insolvent be made available to the Official Receiver in Queensland, to be dealt with by him in accordance with the Australian bankruptcy laws.

Barker J granted the letter of request stating:

"Counsel for the Official Assignee submitted that although the word “shall” is used in section 135, the power of the court is discretionary since there is, for example a reluctance of the Courts of one state to enforce the revenue laws of another state...I think Counsel is correct; in the present case, there is no matter shown which would deter this Court from giving effect to the comity and reciprocity which should exist between courts of comparable status exercising similar jurisdiction in Commonwealth countries”

Gordon Pacific Developments v Conlon (1993, 3 New Zealand Law Reports 765)

The plaintiff sought to enforce a judgment of the District Court of Queensland, Australia, in New Zealand under the Judicature Act 1908. Since Australia is a Commonwealth country, Henry J ruled that the Reciprocal Enforcement of Judgments Act 1934 was applicable. Enforcement was refused on the ground that, since the judgment was a judgment in personam the jurisdictional requirements set out in section 6 of the Act were not satisfied. Therefore the jurisdiction of the Queensland Court could not be recognised.

Gavigan v Australasian Memory Pty Limited (In Liquidation) (1997) 8 NZCLC 261,449

In this case, the Company was an Australian company registered in New Zealand as an overseas company. Immediately prior to the appointment of a liquidator in Australia, the New Zealand landlord re-entered the premises and made an application for the appointment of a liquidator to the Company’s New Zealand assets.

It was held that the underlying principle on which the Court should act was that the liquidators appointed to the company’s country of residence should be recognised as having the right to administer the assets of the company. Further, the Court should actively assist the liquidators in carrying out such duties. (Turners & Growers Exporters Ltd v The Ship “Cornelis Verolme”, [1997] 2 NZLR 110 followed).

Therefore, to facilitate a winding up and to work in harmony with the foreign liquidators, the New Zealand liquidation should be both concurrent and ancillary to the Australian liquidation with any positive benefits given by New Zealand law to creditors being retained by New Zealand creditors (New Zealand gives certain protection to various classes of creditors). It was noted that there might also be advantages to the liquidators in that they might gain certain benefits because of the application of the provisions of the Companies Act 1993 Part XVI which among other matters deals with voidable preferences and securities.
Notwithstanding this, it was held that the protection should not extend to endeavouring to preserve New Zealand assets for New Zealand creditors, as the normal pari passu rule relating to distribution to unsecured creditors should apply universally and not on a regional basis. Reference was made to in appropriate cases, the powers of the New Zealand liquidator being limited to collecting local assets, preparing a list of creditors, paying preferred creditors, remitting the balance of the funds to the foreign liquidators and such other powers as might be approved from time to time by the Court.

Turners & Growers Exporters Limited v The Ship “Cornelis Verolme” [1997] 2 NZLR 110

In this case, Williams J took the view that (assuming there was no positive New Zealand law to the contrary), the principles of comity required him to recognise:

- the liquidation of a foreign company in its place of incorporation; and
- the appointment of a foreign administrator

Unless the foreign proceedings were not final, were contrary to public policy, or in breach of natural justice. Accordingly, Williams J found that active assistance should be given to the liquidators appointed by a Belgian court.