



International litigation issues - a New Zealand perspective

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Ian Gault/Daisy Bell
Partner/Solicitor
Bell Gully
Auckland
New Zealand

Introduction

The development of the global economy has brought with it an increase in cross-border disputes and resulting international efforts to harmonise both substantive and procedural laws. While not all such disputes necessarily involve bringing substantive proceedings in a second jurisdiction, the procedural rules of that second jurisdiction will still be relevant to such matters as evidence gathering in support of foreign proceedings or service of foreign process. Overseas counsel dealing with litigation implicating defendants or witnesses resident in New Zealand may be surprised to learn that New Zealand is not yet a party to the leading international conventions in these areas. While there are other ways of achieving the steps which the conventions facilitate, these are found in a mixture of the common law and statute and therefore require the assistance of local counsel.

This article also addresses practical issues in obtaining interim relief in support of foreign process and the ways in which foreign judgments may be enforced in New Zealand.

Service of foreign process

The first enquiry in serving foreign process in New Zealand is to establish whether a convention exists which governs service. While New Zealand is not yet a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, it is a party to a number of somewhat dated bilateral conventions on service and the taking of evidence abroad with a number of mainly European States.

In lieu of an applicable bilateral service convention and subject to the requirements of the foreign court concerned, service of foreign process in New Zealand may be effected informally, through private channels. The usual rules of service as set out in the High Court rules apply to the service of foreign process in New Zealand. For example, a proceeding may not generally be served on Sunday, Christmas Day, New Year's Day or Good Friday. Another important point to be aware of is that service on New Zealand companies is governed exclusively by the provisions of the Companies Act 1993. Service under that Act is permitted by:

- Delivery to a person named as a director on the companies' register;
- Delivery to an employee at the head office or principal place of business;
- Leaving the document at the company's registered office or address for service;

- Serving in accordance with directions given by the New Zealand Court; or
- Serving in accordance with an agreement with the company.

Should it be necessary to use diplomatic channels, the High Court rules specify procedures which apply where a foreign court, not within the Commonwealth, wishes to have its process served in New Zealand and there is no convention between the two countries dealing with service. Such service must be related to a civil or commercial matter which may be pending before that foreign court or tribunal. The foreign court originates a letter of request which must be passed to the chief executive of the Department of Justice. If approved, the chief executive passes it on to the Registrar with two copies of the document to be served. If not in English, translations of the letter and documents are also required.

There is no specific Rule or procedure covering the service in New Zealand of documents originating from a Commonwealth country - from which it can be inferred that it is intended that Commonwealth countries will use informal channels.

The New Zealand Law Commission has recommended that New Zealand become a party to the Hague Convention on Service and this issue is under active consideration by the New Zealand Government.

Obtaining evidence in New Zealand for overseas proceedings

New Zealand has not yet acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Provisions governing the gathering of evidence for use in foreign proceedings are currently scattered throughout a number of domestic statutes. Overseas counsel who wish to have a person in New Zealand examined for the purpose of a foreign proceeding will need to determine whether that witness is willing to give evidence. The co-operation of the witness will influence the steps which counsel will have to take in order to obtain the evidence.

Willing Witness

There are currently no restrictions in New Zealand preventing a person who is willing to give evidence in foreign proceedings from doing so. Provided that the witness is co-operative, foreign counsel are not required to seek any official permission or involvement from New Zealand authorities. Nevertheless, counsel will need to be aware of the requirements of the court or tribunal where the evidence is to be used, and convey these to their agents in New Zealand. These requirements will ultimately determine how the evidence is to be collected.

There are no restrictions on oaths being administered in New Zealand for use in foreign civil proceedings. However, if false evidence is given there will be no right of recourse in New Zealand. Counsel may overcome this problem by requiring the witness to declare the truth of their evidence in accordance with the Oaths and Declarations Act 1957.

Unwilling Witness

In New Zealand the High Court has a statutory power to order the examination of the witness on oath before any person for the purpose of civil (and criminal) proceedings which are pending before an overseas court or tribunals 48A, Evidence Act 1908. The jurisdiction conferred on the High Court includes the ability to compel the attendance of any person named in the order.

Foreign counsel wishing to compel an unwilling witness to give evidence, must apply (via New Zealand agents) to the High Court for orders. The application must be supported by evidence that the overseas court is "desirous" of obtaining a witness's evidence. The two principal methods of meeting this evidential requirement are to present the High Court with a letter of request issued by the overseas court or a certificate signed by an "overseas representative" which certifies these facts. "Overseas representative" is defined in the Evidence Act to include a range of personnel likely to be found in an overseas embassy. On a practical level, the application should seek

detailed directions as to the time, place and manner of the examination. In particular, consideration should be given as to the manner of the examination, for example, whether overseas counsel wish to cross-examine and whether video or telephone evidence is required.

A witness who is compelled to give evidence for use in a foreign proceedings is afforded the same right to refuse to answer any question, on the grounds that it is self-incriminating or privileged, or for any other recognised reason as if the proceeding was occurring in the New Zealand High Court. Witnesses are entitled to recover for travelling expenses and loss of time.

The Court may not make an order giving effect to a request to take evidence for an overseas proceeding if the Attorney-General certifies in writing that the request infringes New Zealand's jurisdiction or is otherwise prejudicial to its sovereignty, or trading, commercial, or economic interests.

Finally, the statutory scheme embodied in s 48A is broad enough to encompass pre-trial deposition procedures such as those operative in the United States. The procedure to be followed will be the same as the process for seeking an order for examination of an unwilling witness at the trial stage.

Production of Documents

There is no law in New Zealand which empowers the Court to order discovery in New Zealand in aid of a foreign proceeding. If counsel wish to obtain documents from an unwilling witness the request under the Act must be construed in accordance with the general principles applying to a *subpoena duces tecum*, not discovery. Any such request should be narrow and the documents particularised carefully as the Court must be satisfied that they can be produced under a subpoena. The same principles apply where counsel seeks documents from an unwilling witness pre-trial.

Separately, there is a self-contained trans-Tasman regime with procedures relating to the production of documents by subpoena.

The Attorney-General also has power to prohibit the production of documents sought by a foreign authority (or acts likely to lead to such production).

Interim relief in support of foreign proceedings

The ability of a New Zealand Court to grant interim relief in support of foreign proceedings is generally thought to be restricted to cases where substantive proceedings have been filed or are about to be filed in New Zealand. This common law requirement can be problematic where it is inappropriate or impossible to commence duplicate substantive proceedings in New Zealand, for example, where the New Zealand court has no jurisdiction. One example of a case in which it may not be possible to obtain interim relief is where a Mareva injunction is sought in support of foreign proceedings having no connection with New Zealand in relation to a defendant who is not present in New Zealand and who is not asserting a proprietary interest in the relevant assets. In this situation it is unlikely that a New Zealand Court would have jurisdiction to entertain the proceedings under the current law relating to service out of New Zealand (jurisdiction in an action *in personam* depending solely on valid service on the defendant).

Having obtained interim relief in support of the New Zealand proceedings, the plaintiff can then refrain from pursuing the New Zealand proceedings while seeking to obtain judgment in the other jurisdiction. In the absence of a stay however the plaintiff is open to the risk that it might find itself committed to trial within the jurisdiction in circumstances where that might not be strategically desirable.

Notably, where a New Zealand court is able to exercise jurisdiction, it is now well established that it is possible to obtain an interim order such as a Mareva injunction even though the order may relate to assets outside New Zealand, i.e., in a third jurisdiction.

Enforcement of Foreign Judgments in New Zealand

A judgment of an overseas court is not immediately enforceable in New Zealand. Those wishing to enforce a foreign judgment in New Zealand can seek to do so by bringing an action based on the judgment (the common law approach) or, where applicable, have the judgment enforced under the Reciprocal Enforcement of Judgments Act 1934 (the **Act**). Judgments to which the Act applies cannot be enforced at common law, so it is important to ascertain which procedure is appropriate from the outset.

Common Law enforcement of foreign judgments

Foreign judgments are enforced at common law by bringing an action on the judgment. If successful the creditor will then have a New Zealand judgment which can be enforced following the normal procedures against the debtor and his or her property in New Zealand. Unhelpfully, foreign judgments that are not money judgments, for example, injunctions, cannot be enforced in New Zealand. The applicable limitation period for an action on a foreign judgment is 12 years. Interest accruing more than six years before an action on the judgment is commenced cannot be recovered.

At common law, a foreign judgment can be enforced in New Zealand law if:

- it is a money judgment, and is not for a sum in respect of taxes or penalty;
- the judgment is final and conclusive (this does not prevent the judgment being enforced even though it is subject to rights of appeal, including where an appeal has been filed);
- the foreign court had jurisdiction to give the judgment against the judgment debtor under the common law as to jurisdiction in this context.

The principal difficulty arising out of these requirements is that the grounds of jurisdiction recognised at common law are limited. For example, jurisdiction does not vest at common law where the proceedings are served out of the country in which judgment is given unless the defendant submits to the jurisdiction (either by appearing to defend the proceedings or by agreement).

The defences open to a defendant to enforcement proceedings are strictly limited at common law. A foreign judgment will not be enforced in New Zealand if it was procured by fraud, where the proceedings resulting in judgment were contrary to natural justice or where enforcement is contrary to New Zealand public policy.

An action to enforce a foreign judgment is an ordinary High Court proceeding, begun in the usual way by filing a statement of claim. The statement of claim must plead the essential elements required to enforce a foreign judgment, namely;

- the judgment was given in a foreign court in favour of the plaintiff, against the defendant;
- the judgment is for a definite sum;
- that the foreign court had jurisdiction over the defendant;
- the judgment is final and conclusive; and
- the judgment has not been satisfied or satisfied in full.

There may be efficiencies in electing to seek summary judgment in an action on a foreign judgment as evidence can more readily be dealt with by way of affidavit under the summary judgment procedure. Two affidavits will normally be necessary – the first by or on behalf of the plaintiff setting out how the judgment was obtained, annexing the judgment, and setting out what (if any) payments have been made. The second will typically be an affidavit from the lawyer who acted for the plaintiff in the foreign court, setting out his or her qualifications to give

evidence on the law, confirming that the judgment is a valid and binding and is conclusive, and setting out the basis on which interest is payable on the judgment under foreign law.

Enforcement of foreign judgments under statute

The Act streamlines the enforcement process by providing for the registration of foreign money judgments, removing the need to sue on the judgment at common law. Notably, “judgment” is defined in the Act to include certain arbitral awards. The judgment must be registered within six years after the date of judgment.

Part 1 of the Act provides for the registration of:

- money judgments given in superior courts of listed foreign countries (being the United Kingdom and other principally Commonwealth countries to which the Act has been extended by Order in Council); and
- money judgments given in inferior courts of foreign countries specified in an Order in Council (being various Australian courts).

Part 1 also provides for the registration of non-money judgments, which would significantly improve the law so far as interim relief is concerned, but this limb has not come into operation as no relevant Order in Council has yet been made.

The procedure for making an application to register a foreign judgment under the Act is governed by Part XII of the High Court Rules. An originating application must be made to the High Court with affidavits confirming that the requirements for registration are met. If the prescribed matters are established, the Court will register the foreign judgment. A judgment that has been registered will not be enforceable until notice of registration has been served on the judgment debtor, and either the time for applying to set aside has elapsed without application being made, or any application has been disposed of. The grounds on which an application to set aside can be made are set out in the Act. The statutory grounds are similar but more expansive than the common law grounds. Importantly, the High Court has the power to set aside registration where an appeal in the foreign jurisdiction is pending and has a reasonable chance of success.

Section 56 of the Judicature Act 1908 establishes an alternative (but largely unused) statutory procedure for the enforcement of Commonwealth money judgments to which the 1934 Act does not apply.

Conclusion

Overseas counsel addressing the classic international litigation issues involving New Zealand are faced with an unsatisfactory archipelago of substantive and procedural law that requires the involvement of local counsel in order to navigate successfully. It is anticipated that New Zealand's accession to the relevant Hague Conventions will be a significant step towards integrating New Zealand into the global economy.

However, it is clear that domestic reforms in relation to matters such as interim relief and the enforcement of both interim orders and final judgments are essential in order to facilitate the resolution of cross-border disputes by reducing uncertainty and cost.