

Mainland Judgments (Reciprocal Enforcement) Bill

The Administration's Response to Issues Raised at the Bills Committee Meeting held on 22 June 2007

The Administration was requested to provide information on the use of "fraud" as a defence against the enforcement of foreign judgments. This paper discusses the principles applicable when fraud is alleged in resisting the enforcement of a foreign judgment and the relevant cases in Hong Kong.

2. At common law, the party against whom recognition or enforcement of a foreign judgment is sought may succeed in resisting recognition or enforcement by demonstrating that the foreign judgment was obtained by fraud. Where application for registration of a foreign judgment is made under the provisions of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), fraud also constitutes a ground whereby the court shall set aside the registration (section 6(1)(a)(iv)).

3. If fraud is invoked as a ground to resist the enforcement of a foreign judgment, it may either be fraud of the parties or fraud on the part of the court pronouncing the judgment¹. For the former kind of fraud, an example is where a plaintiff suing for the delivery of goods concealed from the court the fact that he already had them². An example of the latter is where a foreign court gives judgment in favour of the plaintiff because the judges have been bribed by a party who may not necessarily be the defendant³.

4. The defence of fraud may be invoked even if no newly discovered evidence is produced or the fraud might have been, and was, alleged in the foreign proceedings⁴.

5. In *WFM Motors Pty Limited v Malcom Maydwell*⁵, an application was made under Cap. 319 to set aside the registration of a foreign judgment on the allegation of fraud, the Court of Appeal of Hong Kong applied the following

¹ *Dicey & Morris on Conflicts of Laws*, 14th Edition (2006), p 622

² *Abouloff v Oppenheimer* (1882) 10 QBD 295

³ An example illustrated in *Dicey & Morris*, op.cit. p 626

⁴ *Dicey & Morris*, op. cit. p 622

⁵ [1996] 1 HKC 444

principles: -

- (a) the court is not retrying the case and the question is not whether the decision of the foreign court was correct;
- (b) where fraud is alleged, it is permissible in an appropriate case to examine the evidence to consider whether or not the evidence given at the trial was fraudulent;
- (c) this can be done even when the very points that are put forward have already been considered and dismissed by the foreign court; an allegation of fraud is always serious and the defendant must particularise the fraud with precision and then establish it to the appropriate standard;
- (d) as regards the above standard, it must be as high as that is necessary to prove fraud in any case and fraud must be demonstrated to a standard commensurate with the gravity of the allegations⁶.

In *WFM Motors Pty Limited*, the defendant resisted the enforcement of an Australian judgment by, *inter alia*, alleging fraud on the ground that the plaintiff had knowingly misled the Australian court that he was indebted to the plaintiff. The Court of Appeal held that the defendant failed to prove that there was a triable issue that the plaintiff had obtained the judgment by fraud and the decision was upheld by the Privy Council on appeal⁷.

6. The defence of fraud is, however, subject to the doctrine of estoppel and the principle against abuse of process. In *House of Spring Gardens Ltd. v Waite & Ors*⁸, the English Court of Appeal decided that the judgment debtor was estopped from further alleging the issue of fraud in subsequent enforcement proceedings in England given that a foreign court had already given its decision on the allegation of fraud in another action separate from the original one⁹.

⁶ *Ibid*, at p 449

⁷ [1997] 2 HKC 244

⁸ [1991] 1 QB 241

⁹ In this case, the High Court of Ireland awarded damages in favour of the plaintiffs in 1982. In 1985, the defendants commenced proceedings in Ireland against the plaintiffs, claiming that the plaintiffs obtained the judgment in 1982 by fraud. In 1987, the High Court of Ireland, after a 22-day hearing, dismissed the defendants' action and held that they had failed to prove that the 1982 judgment had been obtained by fraud. When the plaintiffs sought to enforce the 1982 judgment in England, the defendants again claimed that the judgment was obtained by fraud. The English Court of Appeal held that the defendants were estopped from alleging fraud again in the

7. Following the doctrine of estoppel, a domestic court may refuse to entertain the allegation of fraud by reason of abuse of process if the issue of fraud has been raised and adequately disposed of in the foreign court¹⁰. In *Wang Hsiao Yu v Wu Cho Ching*¹¹, the High Court of the HKSAR held that the defendant's attempt to re-litigate the issue of fraud, where his allegations of fraud had been examined extensively and thoroughly and determined against him by the courts abroad after six rounds of appeal, amounted to an abuse of process, and the court ordered costs against him on an indemnity basis.

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enforcement proceedings.

¹⁰ *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, *Dicey & Morris*, pp 625 – 626 and *Cheshire and North's Private International Law* (13th ed, 1999), pp 440, 445

¹¹ HCA No. 1690 of 1997, 4 July 2000 (unreported), cited and discussed in *Hong Kong Civil Procedure 2007* (Hong Kong: Sweet & Maxwell), p 401