


ENFORCEMENT OF FOREIGN JUDGMENTS

Australia



 LEXOLOGY
Getting The Deal Through

Australia editor
Trevor Withane
Ironbridge Legal

 IRONBRIDGE
LEGAL

Enforcement of Foreign Judgments

Australia editor

Trevor Withane

Ironbridge Legal

Quick reference guide enabling side-by-side comparison of local insights into relevant treaties, conventions and other sources of law; limitation periods; types of enforceable order; competent courts; separation of recognition and enforcement; opposition; jurisdiction of the foreign court; awards and security for appeals; enforcement and pitfalls; and recent trends.

Generated 30 August 2023

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2023 Law Business Research

Table of contents

LEGISLATION

Treaties

Intra-state variations

Sources of law

Hague Convention requirements

BRINGING A CLAIM FOR ENFORCEMENT

Limitation periods

Types of enforceable order

Competent courts

Separation of recognition and enforcement

OPPOSITION

Defences

Injunctive relief

REQUIREMENTS FOR RECOGNITION

Basic requirements for recognition

Other factors

Procedural equivalence

JURISDICTION OF THE FOREIGN COURT

Personal jurisdiction

Subject-matter jurisdiction

Service

Fairness of foreign jurisdiction

EXAMINATION OF THE FOREIGN JUDGMENT

Vitiating by fraud

Public policy

Conflicting decisions

Enforcement against third parties

Alternative dispute resolution

Favourably treated jurisdictions

Alteration of awards

Effect of sanctions

AWARDS AND SECURITY FOR APPEALS

Currency, interest, costs

Security

ENFORCEMENT AND PITFALLS

Enforcement process

Pitfalls

UPDATE AND TRENDS

Hot topics

Contributors

Australia



Trevor Withane

trevor.withane@ironbridgelegal.com.au

Ironbridge Legal



LEGISLATION

Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties, and what, if any, amendments or reservations has your country made to such treaties?

Australia has not entered into any multilateral treaties for the reciprocal recognition of foreign judgments (including the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971). The main statutory regime for the procedure and scope of recognition and enforcement of foreign judgments in Australia is the Foreign Judgments Act 1991 (Cth) (the FJA), and the Foreign Judgments Regulations 1992 (Cth) (the FJR) made pursuant to the FJA. These instruments have the effect that a foreign judgment of a superior court (or a specified lower court based on substantial reciprocity) from any prescribed country can be registered in Australia and have the same force as that of an Australian judgment.

Australia is party to two bilateral treaties: with New Zealand (Trans-Tasman Proceedings Act 2010 (Cth) (the TTPA) and with the United Kingdom (Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994) (the RREJCCM). For the purpose of this article, we will not be focusing on the RREJCCM, as the UK is one of the prescribed countries in the FJR.

Foreign judgments from countries not prescribed in the FJR, TTPA or RREJCCM must proceed under the common law principles of private international law.

Australia is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959 (the New York Convention). This allows for recognition and enforcement of arbitral awards made in foreign states. The New York Convention is given domestic effect in the International Arbitration Act 1974 (Cth) (the IAA). Due to the popularity of the New York Convention and the fact that 'judgment' is defined in the FJA to include arbitral awards under the IAA, the enforcement of arbitral awards has become a popular alternative to seeking the more traditional enforcement of foreign judgments.

Law stated - 04 August 2023

Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Ordinarily, the enforcement of foreign judgments in Australia is uniformly governed at the Commonwealth level. However, since foreign judgments may be registered in the Supreme Court of a state or territory, some states may choose to impose their own procedural stipulations in relation to the registration of judgments.

Law stated - 04 August 2023

Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Australia's regime regarding the enforcement of foreign judgments is primarily governed under the FJA, the FJR, the TTPA (New Zealand) and common law principles of private international law.

Law stated - 04 August 2023

Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Australia is not a party to the Hague Convention and any judgment produced in a jurisdiction that is not listed in the FJR or TTPA must proceed under the common law rules of recognition.

Law stated - 04 August 2023

BRINGING A CLAIM FOR ENFORCEMENT

Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Foreign Judgments Act 1991

Under the Foreign Judgments Act 1991 (Cth) (the FJA), a judgment creditor must apply for registration within six years of the date of the foreign judgment. This may be extended at the court's discretion.

Trans-Tasman Proceedings Act 2010

The Trans-Tasman Proceedings Act 2010 (Cth) (TTPA) similarly contains a six-year limit for the registration of judgments.

Common law

Under the common law, the process of recognition is not unified, as under the FJA. The relevant limitation period for recognising and enforcing a foreign judgment varies depending on the state and territory in which the judgment is sought to be enforced. Generally, the relevant limitation periods are as follows:

- New South Wales: 12 years
- Victoria: 15 years
- Queensland: 12 years
- South Australia: 15 years
- Tasmania: 12 years
- Northern Territory: 12 years
- Australian Capital Territory: 12 years

Time limits are amenable to extensions at the court's discretion. An Australian court will not have regard to the limitation period in the foreign jurisdiction.

Law stated - 04 August 2023

Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

FJA

Section 5(4) of the FJA permits the registration and enforcement of monetary judgments (except those relating to tax or punitive damages). Section 5(6) offers a mechanism by which the Governor-General can extend this permission to non-monetary remedies. Such permission has not yet been made.

TTPA

In addition to the ordinary monetary judgments referenced above, the TTPA allows for judgments relating to tax, interest and punitive damages to be recognised and enforced.

Common law

The traditional common law authority stands for the proposition that only definite sums of money (with the exception of tax revenue and punitive damages) are to be ordered in the enforcement of foreign judgments. However, recently this has been called into question and there is the possibility that, where a defendant has behaved with exceptional bad faith, punitive damages may be enforceable (*Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544).

UNCITRAL and the Cross-Border Insolvency Act 2008 (Cth)

In addition to remedies proceeding from foreign judgments, Australian courts have the capacity to assist with a foreign court's proceedings. In cases of insolvency, this is facilitated by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (1997) (the Model Law), which has been largely signed into Australian law (with a number of variations) in the Cross-Border Insolvency Act 2008 (Cth) . Article 15(1) of the Model Law entitles authorised persons in foreign insolvency proceedings to apply to the Australian courts in seeking to reorganise or administer the liquidation of a debtor's assets. Article 17 requires that such proceedings must be subject to the oversight of a forum for the purposes of liquidation. Upon recognition, Australian courts have the powers to:

- stay commencement or continuation of actions or proceedings concerning the debtor;
- stay execution against the debtor's assets;
- suspend the right to transfer or otherwise dispose of any assets of the debtor;
- examine witnesses and take relevant evidence;
- entrust the administration of the debtor's assets to a representative designated by the court; and
- grant relief to a person or body administering the reorganisation or liquidation of assets.

Freezing orders

Where concerns arise that a defendant may attempt to move assets to dissipate, Australian courts are empowered to grant freezing orders. These can be made even before enforcement is sought in Australia, provided that the individual or their assets are located in Australia (*PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1). For a freezing order to be made, the courts must have good grounds for substantive relief and there must be a real concern that the defendant might seek to hide or dispose of their assets.

Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Ordinarily, a plaintiff seeking the enforcement of a foreign judgment in Australia should bring their claim before the superior courts (state Supreme Courts), as the jurisdictional scope of those courts is more likely to be sufficient for enforcement than lower forums.

Law stated - 04 August 2023

Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

FJA

Pursuant to the FJA, a judgment given in a jurisdiction listed on the Foreign Judgments Regulations 1992 (Cth) (the FJR) is registerable and, upon registration, is immediately recognised by the Australian courts. This process renders the legal issues at hand decisively concluded, but this does not affirm the existence of any underlying rights that the foreign forum might have found. Upon registration, a judgment is enforceable in the ordinary manner.

TTPA

The same is true for the TTPA.

Common law

At common law, a foreign judgment must first undergo tests for recognition. Upon satisfying those, the plaintiff may rely on the foreign judgment as instituting a debt owed by the defendant. Alternatively, the plaintiff might bring a new action in the Australian courts, estopping the defendant from raising any defences that have been previously used (or could have been used) in the foreign court.

Law stated - 04 August 2023

OPPOSITION

Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Foreign Judgments Act 1991

Under section 7(2)(a) of the Foreign Judgments Act 1991 (Cth) (the FJA), a court can set aside registration of a foreign judgment if it is satisfied that:

- the judgment is not a judgment to which the FJA applies;
- the judgment was registered for a greater amount than the amount payable at the date of registration;
- the judgment was registered in contravention of the FJA;
- the original court had no jurisdiction in the case;
- the judgment debtor did not receive sufficient notice of the proceedings;
- the judgment was obtained by fraud;
- the judgment has been reversed on appeal or otherwise set aside by the original court;
- the rights under the judgment are not vested in the person by whom the application was made;
- the judgment has been discharged or wholly satisfied; or
- the enforcement of the judgment would be contrary to public policy.

Trans-Tasman Proceedings Act 2010

The defences to registration under the Trans-Tasman Proceedings Act 2010 (Cth) (the TTPA) are far fewer. Setting aside a New Zealand judgment is only possible where:

- the judgment conflicts with public policy;
- registration is not covered by the TTPA; or
- the judgment relates to in rem rights to movable property in New Zealand or the subject matter is immovable property located in New Zealand.

Common law

At common law, generally speaking, the grounds for challenge are limited to:

- if the judgment was procured by fraud;
- if the judgment was procured in the absence of natural justice;
- if the judgment was contrary to Australian public policy; and
- if there is some other reason under the rules of private international law for why the judgment should not be enforced.

Law stated - 04 August 2023

Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

It is difficult to prevent enforcement proceedings in Australia. Courts will only refuse to entertain a foreign suit if it is shown that Australia is a 'clearly inappropriate forum' for that suit (*Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491). However, a defendant might be able to successfully mount an anti-suit injunction against the Australian courts from the original jurisdiction.

Law stated - 04 August 2023

REQUIREMENTS FOR RECOGNITION

Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Foreign Judgments Act 1991

The Foreign Judgments Act 1991 (Cth) (the FJA) makes provision for Australian courts to enforce money judgments of foreign jurisdictions, provided that those jurisdictions are listed by the Foreign Judgments Regulations 1992 (Cth) (the FJR). Where a jurisdiction is listed under the FJR, only the judgments of their superior courts (and the lower courts of specified jurisdictions) will be considered enforceable.

Under the FJA regime, for a judgment from one of the FJR jurisdictions to be enforceable, it need only be registered to be recognised and enforced. Given this, a debtor does not need to voluntarily submit to the jurisdiction of the court and many applications are made ex parte.

The FJA requires that, for a judgment to be recognised, it must:

- have been given within a six-year period from the point of registration (this can be extended under certain conditions);
- be final and conclusive;
- be for a specific amount of money;
- be for a sum that has, of yet, not been fully satisfied; and
- be enforceable by the foreign court of origin.

Trans-Tasman Proceedings Act 2010

Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth) (the TTPA) establishes a similar but more extensive regime than that of the FJA. The TTPA only applies to New Zealand judgments, extending registrability to:

- money judgments;
- non-money judgments;
- criminal judgments that require:
 - the payment of compensation, damages or reparation; or
 - the payment of a regulatory regime criminal fine;
- orders made to pay the expenses of witnesses served with subpoenas in Australia or appearing remotely in a New Zealand court from Australia;
- market proceeding judgments; and
- judgments registered under the Reciprocal Enforcement of Judgments Act 1934 of New Zealand.

Section 66(2) of the TTPA provides that registration will not extend to:

- excluded matters;
- non-money judgments prescribed by regulations;
- orders under proceeds of crime legislation;
- orders concerned with the granting of probate or letters of administration;
- orders relating to the guardianship or care of a person or the management of their property;

- orders relating to the care, control or welfare of a child;
- orders imposing a civil pecuniary penalty;
- orders that, if contravened, will make the person liable to conviction for an offence in the place where it was made; or
- matters of a kind prescribed by the regulations.

In addition to this, judgments may also be set aside where they conflict with domestic public policy or concern immovable property (or in rem rights to movable property) that is not located in New Zealand.

Common law

For jurisdictions that are not listed in the FJA, common law rules of recognition apply. At common law, four conditions must be satisfied (*Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544):

- that Australian courts recognise the jurisdiction exercised by the foreign court;
- that the foreign judgment is final and conclusive;
- that the parties have the same identity; and
- that the judgment must be for a fixed amount if it is in personam.

The party seeking the enforcement of a foreign judgment must prove that these requirements have been satisfied. Upon doing so, the judgment is prima facie enforceable, subject only to the opposing party successfully mounting a recognised defence.

To be recognised by an Australian court, jurisdiction must ordinarily be invoked whilst the defendant is present or resident within the jurisdiction (this might be ascertained by establishing whether the person is domiciled or has citizenship rights in a specific territory). Alternatively, the person might submit themselves to the jurisdiction in question, so long as that submission is voluntary. In addition to obvious instances where an appearance might be understood to be involuntary (eg, fraud, physical coercion, or error), section 11 of the FJA provides a list of additional reasons why a party might make an appearance to the court that can be considered involuntary. For corporations, operating for more than a minimal period of time from their own fixed place of business (owned or leased) in the jurisdiction shall be sufficient. Corporations might also accrue this status due to the activity of an agent based in the jurisdiction provided that they have authority to bind the company and are operating for more than a minimal amount of time (*Adams v Cape Industries plc* [1990] Ch 433).

The burden of establishing that a judgment is final and conclusive is on the plaintiff. They must demonstrate that the forum has put an end to the dispute at hand and settled the issue definitively. Even where an appeal is pending, a judgment will be determined to be final and conclusive. Rather, finality refers to whether the judgment is capable of being altered by the court that made it. For the purposes of this requirement, default judgments may be treated as final and conclusive unless the defendant has initiated the process of trying to get it set aside.

The parties appearing must be the same as those present in the foreign judgment. This means that, where a foreign judgment is made against a partnership, the entire enforcement of that judgment cannot be carried out against an individual member. However, where the judgment refers to multiple defendants individually, the Australian courts can bring enforcement against them separately.

The foreign judgment must be for a fixed amount to be enforceable. This is a common law restriction and does not apply to equitable remedies.

Law stated - 04 August 2023

Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and, if so, what factors?

The principle of reciprocity is a marginal consideration for the Australian courts, only applying with respect to matrimonial cases. Though several attempts have been made to apply the principle to in personam cases, they have been unsuccessful.

Law stated - 04 August 2023

Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction and, if so, how is that requirement evaluated?

FJA

The FJA requires that the judgment debtor be given due notice of proceedings, for a judgment to be enforceable. This is accompanied by defences on the grounds of fraud and public policy, which can apply with respect to the procedural process followed by the foreign forum. This defence is based on common law principles and therefore centres on the notion of 'natural justice', which is elaborated on below.

TTPA

Similar to both the FJA and the common law, the TTPA provides that a judgment that procedurally contravenes Australian public policy can be rejected by the Australian courts.

Common law

Under common law, a judgment that passes the requirements set to be recognised is prima facie enforceable. Given this, it is the responsibility of the defendant to establish grounds to prove that a judgment is unsound. There are several defences that may be relied upon that amount to the Australian courts demanding a level of procedural equivalence.

The judgment is contrary to principles of natural justice where either party:

- has not had the opportunity to be heard before an impartial adjudicator; and
- has not been given due notice of the proceedings.

The Australian courts will not superimpose their own methodology of trial upon a foreign tribunal. Instead, the determination is whether either party has been granted an unreasonable advantage by virtue of court procedure. For instance, if only one party is entitled to bring evidence before the court, this would constitute a breach. The same normative rationale grounds the demand that adjudication be carried out by an impartial tribunal.

In a similar vein, Australian courts approach the giving of notice to parties with broad strokes, generally looking to see if notice has been given in good faith and in accordance with the rules of the foreign jurisdiction. If these are satisfied, the notice will ordinarily be acceptable.

JURISDICTION OF THE FOREIGN COURT

Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant and, if so, how is that requirement met?

To be recognised by an Australian court, jurisdiction must ordinarily be invoked while the defendant is present or resident within the foreign jurisdiction. The Supreme Court of New South Wales has shown a willingness to look beyond mere facts of residency in establishing this, examining an individual's citizenship and voting rights (*Federal Finance & Mortgage Ltd v Winternitz* (Supreme Court of New South Wales, Sully J, 9 November 1989)).

Alternatively, the party might submit themselves to the jurisdiction in question, so long as that submission is voluntary. Ordinarily, a mere presence at the tribunal to present a case is sufficient to establish this. However, it has been recognised that in instances where property is held or is being threatened by proceedings, an individual may feel like they have no option but to appear and contest the proceedings. Given this, in addition to obvious instances where an appearance might be understood to be involuntary (eg, fraud, physical coercion or error), the FJA provides that an appearance based on the following may be 'involuntary':

- protecting or attempting to release property that has been seized or is being threatened to be seized;
- contesting the court's jurisdiction; or
- inviting the court in its discretion not to exercise its jurisdiction.

This defence is available with respect to proceedings based in common law, by virtue of section 11 of the Foreign Judgments Act 1991 (Cth) (the FJA), and with respect to actions brought under the statutory regime, by section 7(5) of the FJA .

Law stated - 04 August 2023

Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy and, if so, how is that requirement met?

A foreign court's decision will not be rejected based on any error made in its own law. For an Australian court to dismiss a foreign decision, the error must be that the issue is outside the subject matter jurisdiction of the foreign court. For instance, if a foreign court did not have the competence to make determinations about corporate solvency domestically, any judgment it made pertaining to the subject would be unenforceable in Australia.

Law stated - 04 August 2023

Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The common law rules regarding the adequate service of a defendant by a foreign court are principally based on two considerations of natural justice: that the defendant ought to have notice of the proceedings and that they ought to be able to attend them. The Australian courts do not adopt a strict approach in this analysis, ordinarily finding that, if notice of the original action has been given in good faith and in compliance with the rules of the foreign tribunal, the service is satisfactory. However, it is not sufficient to simply make the defendant aware of the proceedings; if the notice is unreasonably short, is executed in bad faith or substantially violates the procedural rules of the foreign jurisdiction, the court will find a breach of natural justice.

Law stated - 04 August 2023

Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The Australian courts do not make provision for a forum non conveniens application on behalf of the defendant where a foreign judgment has already been delivered. Rather, the question of jurisdictional legitimacy is determined by establishing whether the foreign court had jurisdiction in the international sense over the case at hand.

Law stated - 04 August 2023

EXAMINATION OF THE FOREIGN JUDGMENT

Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

If the defendant successfully raises the defence that a fraud amounting to an intentional and deliberate misleading of the court was perpetrated to obtain a judgment, this will be grounds for the Australian courts to reject that foreign judgment. However, the fraud must be in relation to facts that were not before the court in the original proceedings. This deviates from the English authority, that any fraud in the proceedings might be examined by the domestic court. This departure has been the subject of debate in Australia for some time and, while it has not been conclusively settled, it appears that the courts favour rejecting the English position, preferring a more pragmatic approach.

This defence is available both in recognition proceedings at common law and registration proceedings following the Foreign Judgments Act 1991 (Cth) (the FJA). The registration defence is found at section 7(2)(a)(iv) of the FJA .

Law stated - 04 August 2023

Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

FJA

The provision for an Australian Court to reject the enforcement of a judgment registrable under the FJA, on the grounds of public policy considerations, is contained in section 7(2)(a)(xi) . This provision derives from the common law concept and consequently takes the same form, also serving to exclude punitive damages and the enforcement of revenue debt (excepting the payment of New Zealand tax).

Trans-Tasman Proceedings Act 2010

The Trans-Tasman Proceedings Act 2010 (Cth) (the TTPA) contains a similar provision for setting aside registration on public policy grounds.

Common law

Koc v Resorts World at Sentosa Pte Ltd (2017) 323 FLR 45 clarifies that the broad scope of 'public policy' ought to be construed at the national, rather than state, level and should be strictly limited to instances where the enforcement of a judgment would:

- violate a fundamental principle of justice, common public morality or tradition;
- violate a sacrosanct moral, social or economic principle that demands to be defended without exception and at all costs; or
- offend public policy fundamentally.

In addition to this, the Australian courts have historically refused to enforce punitive damages and the payment of revenue debt on the basis of a foreign judgment. However, the sturdiness of this exclusion has come into question in *Benefit Strategies Group v Prider* (2005) 91 SASR 544, where it was posited, obiter, by a full court judgment of the Supreme Court of South Australia that there may indeed be instances where the defendant's behaviour is so deliberate and fraudulent that the public policy consideration ordinarily prohibiting the enforcement of punitive damages is obviated.

Law stated - 04 August 2023

Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Conflicting foreign judgments

In the event that conflicting 'final and conclusive' judgments exist from the same jurisdiction, the court will seek to enforce the earliest available. It is likely that this practice would also extend to the issue of conflicting third-country judgments, following English precedent. However, this has not, of yet, been conclusively determined in an Australian court.

Domestic judgments

Where an earlier domestic judgment is contrary to a foreign judgment, Australian courts will prefer their own judgment.

Law stated - 04 August 2023

Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Under Australian law, a foreign judgment that has been recognised is to be treated as a judgment debt solely between the debtor and creditor. However, there are a number of ways to establish the liability of a third party, provided that:

- the court can pierce the corporate veil, revealing that the judgment debtor is really a façade and that, in reality, liability attaches to a third party behind the corporate veil (*Adams v Cape Industries plc* [1990] Ch 443);
- the foreign court issues a charging order against the debtor's property (held by a third party); or
- the Australian court issues a garnishee order against a third party, in respect of monies payable by the third party to the judgment debtor.

Law stated - 04 August 2023

Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

A defendant might apply to the Australian courts to exercise anti-suit injunctions against foreign proceedings, where the commencement of those proceedings is deemed to be in breach of an arbitration clause. The basis for this is that an arbitration clause constitutes an implied agreement to avoid using the courts to litigate disputes. However, the case law surrounding this indicates that, for the injunction to be issued, foreign proceedings must be at an early stage (*The Angelic Grace* [1995] 1 Lloyd's Rep 87). Recent UK Supreme Court authority extends this principle even further, proposing that an anti-suit injunction issued by a court may have the effect of enforcing arbitration clauses even before the arbitration has begun (*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35). Where a judgment has already been made by the foreign court, the defendant must successfully challenge the jurisdiction of that court.

Law stated - 04 August 2023

Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

FJA

Decisions of the superior courts (and specified lower courts) of jurisdictions listed in the schedule of the Foreign Judgments Regulations 1992 (Cth) (the FJR) are entitled to be recognised under the FJA registration process. This process dispenses with the first element of the common law test for recognition, namely: does the Australian court recognise the jurisdiction of the foreign forum? This lowers the boundary significantly in comparison to non-listed jurisdictions and is predicated on a degree of international reciprocity (not in the judicial sense) between jurisdictions.

TTPA

Judgments of New Zealand courts are afforded an even greater deference by virtue of the TTPA. According to this Act, the Australian courts can enforce remedies that are not recognisable with respect to other jurisdictions. New Zealand is also excluded from the general rule that Australian courts will not enforce tax revenue debts.

Commonwealth jurisdictions

Australian jurisprudence relies on precedent from across the Commonwealth, with a particular focus on English judgments.

Law stated - 04 August 2023

Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

As a general rule of principle, Australian courts do not award punitive damages or tax revenue debts (with the exception of New Zealand) ordered by foreign judgments and will enforce a foreign judgment separate from any such awards. However, in *Benefit Strategies Group v Prider* (2005) 91 SASR 544, a judgment of the Supreme Court of South Australia stated, obiter, that, where a defendant's fraudulent behaviour reaches a certain threshold of deliberate callousness, the public policy consideration that ordinarily restrains the enforcement of foreign punitive damages may cease to have effect. Otherwise, there is little case law regarding the alteration of awards by Australian courts.

Law stated - 04 August 2023

Effect of sanctions

What effect do foreign or domestic sanctions have on the enforcement of foreign judgments in your jurisdiction? Will a court refuse enforcement of a judgment against or in favour of a sanctioned entity or individual? If so, which sanctions regimes do the courts of your jurisdiction recognise?

Australia implements UN Security Council sanctions in addition to its own autonomous regime. A list of sanctioned individuals and entities can be found on the Consolidated List published by the Australian government. These designated persons will be subject to the freezing of their assets, and it is prohibited for other parties to use or deal with those assets. This presents significant issues in enforcing judgments against or for sanctioned persons as any interference might be considered as dealing with the sanctioned assets. For the payment of a judgment debt, an application would have to be made for a sanctions permit to the Minister for Foreign Affairs on the basis of a 'legally required dealing' and the judgment debt must have been given before the sanctions regime came into force (Regulation 20(4)(b) Autonomous Sanctions Regulations 2011).

Law stated - 04 August 2023

AWARDS AND SECURITY FOR APPEALS

Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Conversion to local currency

Under sections 6(11) and 6(11A) of the Foreign Judgments Act 1991 (Cth) (the FJA), the damage award arising from the recognition of a foreign judgment may be expressed in two different ways:

- in the original foreign currency, if requested by the judgment creditor; or
- in the equivalent amount in Australian dollars.

Trans-Tasman Proceedings Act 2010

There are special provisions for the recognition of judgments from New Zealand. Here, the exchange rate used to calculate the damage award is to be determined based on the rate published by the Reserve Bank of Australia the working day before the application is made (subsections 18 and 69 of the TTPA).

Factors to consider: interest, court costs and exchange controls

Interest is payable as of the date of registration, at the same rate and in respect of the same period as it would have been under the laws of the foreign court.

Any reasonable costs incidental to or incurred in applying for the registration of the judgment are recoverable, and will be included in the registered amount (section 6(15) of the FJA).

Exchange controls are not a major factor to consider – the Australian government has no restrictions on inward investments and outward exchange flows.

Law stated - 04 August 2023

Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

The foreign judgment will be subject to the usual appellate procedures governing appeals in Australia. However, this right to appeal will be on the basis of the recognition and enforcement of the judgment, rather than the substantive issues brought before the foreign court (so far as these do not relate to jurisdiction). A foreign registered judgment shall be set aside if the judgment was registered in contravention of the FJA, the TTPA or common law rules. Once affirmed, the judgment will be enforceable as if it were a domestic judgment (section 6(7) of the FJA). Enforcement will operate as if the judgment had been made by an Australian court, subject to certain limitations (eg, punitive damages).

The Australian courts are also empowered to issue freezing orders against a party's assets, subject to the usual tests. There must be a risk of dissipation of the assets.

Law stated - 04 August 2023

ENFORCEMENT AND PITFALLS

Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once a judgment is recognised under the Foreign Judgments Act 1991 (Cth) (the FJA), the Trans-Tasman Proceedings Act 2010 (Cth) (the TTPA) or common law, it has the same force and effect as if it had been handed down by the court in which it was registered, making the registered foreign debt enforceable under the ordinary process. Generally, in Australia, a judgment debt can be enforced through a garnishee order, charging orders of statutory demand (in the case of a debt owned by a company) and bankruptcy (in the case a debt owed by an individual). There is also the possibility of seeking an order to examine the judgment debtor's assets.

Law stated - 04 August 2023

Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Forum choice

It is key to ensure that recognition and enforcement proceedings are brought before the correct court. Often, applying in the Supreme Court of a given state is the best option as it will have the widest jurisdictional scope of any first instance forum.

Estoppel

Defendants should be aware that, in enforcement proceedings, previously accessible defences may not be available. Even where a defence has not been previously raised, the court might estop a party from raising an issue that could have been brought before the foreign forum.

Law stated - 04 August 2023

UPDATE AND TRENDS

Hot topics

Are there any emerging trends or hot topics in foreign judgment enforcement in your jurisdiction?

Fraud

Pre-existing English authority allows for fraud to be re-examined and used as a defence against recognition, even where it has previously been examined by the foreign court. While this has not, of yet, been decisively rejected by the Australian courts (receiving only an obiter treatment in *Quarter Investments Pty Ltd v Allardyce* (2014) 85 NSWLR 404), it appears that the old authority is no longer binding and, upon a future opportunity, may be rejected.

Punitive damages

In addition to this, it appears that there might be an opportunity for a plaintiff to challenge the old public policy prohibition on the enforcement of a foreign judgment's award of punitive damages. In *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544, it was stated obiter that a defendant's behaviour might be so deliberately 'brazen and

fraudulent' as to obviate the public policy element and render punitive awards available.

Law stated - 04 August 2023

Jurisdictions

	Australia	Ironbridge Legal
	Austria	WEBER & CO.
	Bahrain	Charles Russell Speechlys
	Egypt	Soliman, Hashish & Partners
	France	Signature Litigation
	Germany	Willkie Farr & Gallagher LLP
	Greece	PotamitisVekris
	Iran	Dadflamingo
	Italy	Ughi e Nunziante
	Japan	TMI Associates
	Jordan	Hammouri & Partners
	Nigeria	Streamsowers & Köhn
	Switzerland	Walder Wyss Ltd
	Turkey	Gün + Partners
	United Arab Emirates	Charles Russell Speechlys
	United Arab Emirates - Abu Dhabi	Charles Russell Speechlys
	United Arab Emirates - DIFC	Charles Russell Speechlys
	United Kingdom	Winston & Strawn LLP
	USA	Freshfields Bruckhaus Deringer