RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA

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AUSTRALIA

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A  INTRODUCTION
1 Decisions of courts of foreign countries may be enforced in
Australia in one of two ways. First, in respect of certain courts of
countries with which Australia has reciprocal arrangements as specified
in the Schedule to the Foreign Judgments Regulations 1992 (Cth)
(“FJR”), by registration of the foreign judgment in the Supreme Court of
an Australian State or Territory pursuant to the Foreign Judgments
Act 1991 (Cth) (“FJA”). Subject to a successful application to set aside
registration, the foreign judgment takes effect as though it were a
judgment of the Supreme Court in which it is registered, and it may be
executed according to that court’s procedural rules for the execution of
judgments. Secondly, in relation to judgments from courts of countries
other than those listed in the Schedule to the FJR, these are enforceable
in accordance with the common law principles relating to the recognition
and enforcement of foreign judgments.2

B  APPLICABLE REGIMES
2 Under the FJA, reciprocity of arrangements for recognition and
enforcement of judgments to which the FJA applies provides the basis
for the enforcement in Australia through registration under the FJA of
foreign judgments from the courts of countries which are listed in the

1 Special arrangements now apply for New Zealand judgments under the
Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement,
which entered into force on 11 October 2013.
2 See Martin Davies, Andrew S Bell & Paul Brereton, Nygh’s Conflict of Laws in
Australia (LexisNexis, 9th Ed, 2014).
Schedule to the FJR. A bilateral or multilateral agreement is not strictly required; what is required is that the Governor-General of Australia be satisfied that “substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all Australian superior courts”. One way that such satisfaction may be secured is through the existence of a bilateral or multilateral agreement.

3 Under the FJA, a final money judgment of a large number of countries including, relevantly for present purposes, the:

(a) Supreme Court of Singapore (High Court and Court of Appeal);
(b) High Court of Hong Kong (comprising the Court of First Instance and the Court of Appeal) and the Court of Final Appeal; and
(c) Supreme Court, Appellate Courts, District Courts, Family Court, Patent Court and Administrative Court of the Republic of Korea

may, within six years of the date of the judgment, be registered in Australia and, subject to any application being made to set aside registration, will take effect as though it was a judgment of the Supreme Court of the Australian state or territory in which the foreign judgment is registered. By reason of section 10(1) of the FJA, a final money judgment from the above mentioned courts may only be enforced in Australia under the FJA.

4 In contrast, to entitle a foreign judgment to recognition at common law in Australia, in a fresh action (which will be founded on the cause of action for a debt that has accrued and is payable based on the judgment rendered in the foreign court), four broad conditions must be satisfied:

(a) the foreign court must have exercised a jurisdiction that Australian courts recognise; (b) the foreign judgment must be final and conclusive;
(c) there must be an identity of parties; and (d) if based on a judgment in personam, the judgment must be for a fixed debt.

5 The onus of establishing the existence of those conditions rests on the party seeking to rely upon the foreign judgment. That party must not only establish that the foreign court had jurisdiction in the international sense, but also that the foreign judgment was final and conclusive according to the law under which it was pronounced. Once that onus is satisfied, the judgment is prima facie, entitled to enforcement as a valid obligation, unless the defendant can establish one or more of the recognised defences to the enforcement of a foreign judgment such as that it was procured by fraud, entailed a denial of procedural fairness or that it or its enforcement was contrary to public policy.

6 At common law, reciprocity of enforcement is not required for a foreign judgment to be enforced in Australia, and does not provide the theoretical basis for such enforcement. Thus, a judgment of an Indonesian court satisfying the common law requirements for enforcement may be enforced in Australia even though, as a general proposition, foreign judgments, including Australian judgments, are not enforceable in Indonesia.

7 The theoretical underpinnings for the enforcement of foreign judgments at common law in Australia have never been judicially stated, in part no doubt because the relevant principles were inherited from the English common law where final money judgments were enforceable on the basis that they were prima facie evidence of a debt. The contemporary theoretical justification for enforcement of a foreign judgment may be seen to rest on the same broad principles that underpin the doctrines of res judicata and issue estoppel, namely that where the respective parties have participated in a hearing and or submitted to the jurisdiction of a foreign court that has resulted in a final judgment, then, subject to

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7  *R v McLeod* (1890) 11 LR (NSW) 218 at 221, per Windeyer J. See also para 14 below.
9  See para 16 below.
10  *Crick v Hennessy* [1973] WAR 74; *Malaysia–Singapore Airlines Ltd v Parker* [1972] 3 SASR 300 at 304.
appellate review, that judgment should not be permitted to be re-opened but should be given effect.

C RECOGNITION AND ENFORCEMENT OF FOREIGN MONETARY JUDGMENTS IN PERSONAM

i Position under the Foreign Judgments Act 1991

8 Under the FJA, a foreign money judgment given by a court of a country to which Part 2 of the FJA applies, may be registered and then enforced as though it were a judgment of a Supreme Court of an Australian state or territory.

9 A money judgment under the FJA is one under which is payable an amount of money including any interest payable under the law of the country that has rendered the judgment. Under section 6(7)(c) of the FJA, the amount for which a judgment is registered carries interest. Judgments under which amounts are payable in respect of taxes (other than New Zealand tax and Papua New Guinea income tax), fines or other penalties are not registrable under the FJA. Where a foreign money judgment requiring the payment of money but only as to part in respect of tax or a fine or penalty, the judgment may be registered in respect of that part that was not in respect of the payment of tax, a fine or a penalty.

10 Under the FJA, in cases to which Part 2 of that Act applies, for a money judgment to be registrable, it must be final and conclusive. By section 5(4) of that Act, a foreign judgment may be taken to be final and conclusive notwithstanding that:

(a) an appeal may be pending against it; or
(b) it may still be subject to an appeal in the courts of the country of the original court.

11 If the court in which a judgment is registered is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, against the judgment, the court may order that enforcement of the judgment be stayed pending the final determination of the appeal, until a specified day or for a specified period.
Recognition and Enforcement of Foreign Judgments in Asia

12 A default judgment from a court of a country listed in the Schedule to the FJA may be enforced as a final judgment under the FJA if:11

(i) the judgment debtor voluntarily submitted to the jurisdiction of the [foreign] court; or

(iii) … the judgment debtor … had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court; or

(iv) … the judgment debtor …, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court; or

(v) … the proceedings in [the foreign] court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or

(vi) … there is an amount of money payable in respect of New Zealand tax under the judgment …

13 The Australian courts are neither required to nor do they examine the merits of the foreign court’s judgment at the stage of recognition or enforcement. This is so whether the judgment is being enforced through registration under the FJA or at common law.12 Accordingly, the courts of Australia cannot refuse to recognise or enforce a foreign judgment because the foreign court made an error of fact or an error of law or both, unless the error of fact or error of law is so egregious that it would mean that the enforcement of the foreign judgment in Australia would be contrary to public policy or its making involved a denial of procedural fairness.

14 The courts of Australia will not recognise or enforce a foreign money judgment where the foreign court did not have jurisdiction “in the international sense” to hear the case. Jurisdiction under the procedural

11 Foreign Judgments Act 1991 (Cth) s 7(3)(a).
12 Godard v Gray (1870) LR 6 QB 139. See also Ainslie v Ainslie (1927) 39 CLR 381 at 402, per Higgins J; Norsemeter Holding AS v Boele (No 1) [2002] NSWSC 370 at [14], per Einstein J (reversed on other grounds as Boele v Norsemeter Holding AS [2002] NSWCA 363); Benefit Strategies Group Inc v Prider (2005) 91 SASR 544 at 567, per Bleby J; RDCW Diamonds v Da Gloria [2006] NSWSC 450 at [31], per Rothman J.
Country Report: Australia

and jurisdictional provisions of the foreign court is not relevant in these circumstances. Under the FJA, the courts of the foreign country which has rendered the judgment are taken to have had jurisdiction:13

(a) in the case of a judgment given in an action in personam:
   (i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court; or
   (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
   (iii) if the judgment debtor was a defendant in the original court and had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court; or
   (iv) if the judgment debtor was a defendant in the original court and, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court; or
   (v) if the judgment debtor was a defendant in the original court and the proceedings in that court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or
   (vi) if there is an amount of money payable in respect of New Zealand tax under the judgment.

(b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property – if the property in question was, at the time of the proceedings in the original, court situated in the country of that court …

15 Note that section 11 of the FJA provides that contesting a foreign court’s jurisdiction or asking a foreign court to decline to exercise jurisdiction does not amount to voluntary submission to the foreign court’s jurisdiction.

13 Foreign Judgments Act 1991 (Cth) s 7(3).
Recognition and Enforcement of Foreign Judgments in Asia

Under the FJA, an otherwise registrable foreign judgment under the FJA must be set aside where:14

(i) the judgment is not, or has ceased to be, a judgment to which [Part 2 of the FJA] applies; or
(ii) that the judgment was registered for an amount greater than the amount payable under it at the date of registration; or
(iii) that the judgment was registered in contravention of [the FJA]; or
(iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
(v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or
(vi) that the judgment was obtained by fraud; or
(vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court;
(viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or
(ix) that the judgment has been discharged;
(x) that the judgment has been wholly satisfied; or
(xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy …

In relation to fraud, Australian authority is divided as to whether or not refusal of recognition or enforcement depends upon whether the matter has actually been raised in the foreign court or was capable of being raised in the foreign court. Different rules do not apply to different forms of fraud.

In relation to public policy, this is assessed against the foreign judgment itself (and not the original cause of action that was litigated before the foreign court).

Under the FJA, the courts of Australia may set aside registration of an otherwise registrable foreign judgment where it conflicts with a

14 Foreign Judgments Act 1991 (Cth) s 7(2)(a).
judgment involving the same parties and same subject matter that is rendered by the court of Australia.\(^\text{15}\)

**ii Position at common law**

20 At common law, foreign money judgments other than those involving the payment of tax\(^\text{16}\) or a penalty\(^\text{17}\) may be enforced in Australia against the foreign judgment debtor.\(^\text{18}\) Such enforcement extends to the extent of any interest payable on the foreign judgment up until the time of enforcement. Similar principles to those under the FJA apply in relation to enforcement at common law. That is to say, a foreign tax\(^\text{19}\) or penal judgment\(^\text{20}\) may not be enforced but a foreign money judgment comprising various components may be enforced to the extent of those components not relating to tax, a fine or a penalty.\(^\text{21}\)

21 At common law, judgments which are not final may not be enforced although certain foreign interlocutory judgments may generate an issue estoppel which will preclude an issue finally determined in that interlocutory judgment being re-agitated in an Australian court. Thus there is Australian authority to the effect that a foreign interlocutory

\(^{15}\) Foreign Judgments Act 1991 (Cth) s 7(2)(b).

\(^{16}\) This is subject to statutory exceptions in the case of New Zealand tax and Papua New Guinea income tax; see the definition of enforceable money judgment in s 3 of the Foreign Judgments Act 1991 (Cth).

\(^{17}\) A limited statutory exception exists in respect of tax payable by way of penalty for contravention of a New Zealand tax law; see definition of New Zealand tax in s 3 of the Foreign Judgments Act 1991 (Cth).

\(^{18}\) The leading authorities are identified in Martin Davies, Andrew S Bell & Paul Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis, 9th Ed, 2014) ch 40.

\(^{19}\) Both attempts at direct enforcement (*Re Visser: Queen of Holland v Drukker* [1928] Ch 877) but also any foreign claim that by indirect means seeks to enforce a foreign revenue debt will be rebuffed. In respect of the latter, see *Government of India v Taylor* [1955] AC 491; *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (NSW) (Pt 1) 44; *Rothwells Ltd (in liq) v Connell* (1993) 119 ALR 538 at 545–546, per Fitzgerald P andWilliams J and at 548–549, per McPherson JA.

\(^{20}\) *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140.

\(^{21}\) *Schnabel v Yang Lai* [2002] NSWSC 15 at [180], per Bergin J. See also *Lewis v Eliades* [2004] 1 WLR 692, severing the unenforceable punitive component of an award of damages from an enforceable award of compensatory damages.
Recognition and Enforcement of Foreign Judgments in Asia

judgment which involves a final hearing on the merits on a particular issue (for example, as to whether or not a contract contained an exclusive jurisdiction clause or whether or not such a clause was exclusive or non-exclusive) may generate an issue estoppel which would be given effect to in subsequent Australian proceedings.22

22 An Australian court is not required to refuse to recognise or enforce a foreign judgment still amenable to appeal in the foreign court.23 An Australian court may enforce the foreign judgment by giving judgment in favour of the foreign judgment creditor but stay the enforcement of that Australian judgment pending the outcome of the foreign appeal.24 Alternatively, in an appropriate case, the Australian enforcement proceedings may be stayed.25

23 At common law, to be enforceable, the foreign court that issued the judgment must have had jurisdiction “in the international sense”.26 This requires the defendant in the foreign proceedings to have been served with process whilst in the foreign jurisdiction27 or to have submitted to the courts of that jurisdiction, either by way of entering an appearance28

22 Makhoul v Barnes (1995) 60 FCR 572; Santos v Delhi Petroleum Pty Ltd [2002] SASC 272 at [399], per Lander J; Iansmurch Community Inc v Bright [2006] NSWCA 99 at [60], per Beazley JA; Castillion v P & O Ports Ltd [2007] QCA 364 at [54]–[58], per Holmes JA. 23 Colt Industries Inc v Sarlie (No 2) [1966] 1 WLR 1287; [1966] 3 All ER 85. 24 JP Morgan Chase Bank NA v PT Indah Kiat Pulp and Paper Corp [2012] NSWSC 1279. 25 XPlore Technologies Corp of America v Tought Corp Pty Ltd [2008] NSWSC 1267. 26 R v McLeod (1890) 11 LR (NSW) 218 at 221, per Windeyer J. 27 Herman v Meallin (1891) 8 WN (NSW) 38; Close v Arnott BC9706194 (21 November 1997) (SC, NSW) Graham AJ. 28 The mere filing of an unqualified appearance amounts to submission (Victorian Phillip Stephen Photo Litho Co v Davies (1890) 11 LR (NSW) 257) except in circumstances where the appearance was entered by a solicitor without authority from the client (Redhead v Redhead [1926] NZLR 131) or the appearance was withdrawn with the leave of the foreign court or accordance with its rules (Malaysia Singapore Airlines v Parker (1972) 3 SASR 300). A litigant who commences proceedings in a foreign court as plaintiff is bound by the outcome whether it favours the plaintiff or not: Schibbye v Westonbolz (1870) LR 6 QB 155 at 166. Nor can the plaintiff complain if the defendant recovers damages by way of set-off, cross-action or counter-claim: Burpee v Burpee [1929] 3 DLR 18.
or agreeing by way of contract to submit to jurisdiction. An agreement to submit to jurisdiction will include an agreement to the exclusive or non-exclusive jurisdiction of the courts of that country. At common law, if the judgment debtor has submitted to the jurisdiction of the foreign court notwithstanding the terms of any choice of court agreement, the foreign judgment may be enforced in Australia. However, submission to the foreign court’s jurisdiction simply for the purposes of protesting jurisdiction including by reference to the choice of court clause will not be treated as a submission to the foreign jurisdiction.

24 Just as under the FJA, a foreign default money judgment may be enforced as a final judgment at common law provided that the judgment debtor has submitted to the jurisdiction of the foreign court so as to give it jurisdiction in the international sense. Where the (foreign) judgment debtor has not submitted to the foreign court either by agreement (such as a forum or jurisdiction or submission to suit clause) or by appearance and or participation in the foreign proceedings, an Australian court will not regard the foreign court as having had jurisdiction in the international sense and thus a requirement for enforcement at common law will not have been satisfied.

25 As set out above, both under the FJA and at common law, the Australian courts are neither required to nor do they examine the merits of the foreign court’s judgment at the stage of recognition or enforcement.

26 At common law, grounds for refusing to enforce a foreign judgment include that:

(a) it was rendered in circumstances involving a denial of procedural fairness. Procedural fairness may involve the lack of a hearing or a fair hearing, or bias on the part of the foreign judge. Whether or not enforcement would be refused on this basis may be

29 Dunbee v Gilman & Co (Australia) Pty Ltd (1968) 70 SR (NSW) 219.
30 Foreign Judgments Act 1991 (Cth) s 11(b). However, if the defendant proceeds to argue the merits it is submission: see Re Williams (1904) 2 N & S 183; Bushfield Aircraft Co v Great Western Aviation Pty Ltd (1996) 16 SR(WA) 97.
31 Price v Dewhurst (1837) 8 Sim 279; 59 ER 111.
Recognition and Enforcement of Foreign Judgments in Asia

affected by the existence or otherwise of appeal rights in the foreign jurisdiction, and whether or not they have been exercised.32

(b) The foreign judgment conflicts with a judgment involving the same parties and same subject matter that has been rendered by an Australian court.33 Common law principles of *res judicata* and issue estoppel apply in Australian courts34 and operate to preclude the recognition of a cause of action or issue estoppel that has already been determined in litigation between the same parties or their privies.

(c) The foreign judgment was procured by fraud.35

(d) The foreign judgment or its enforcement would be contrary to public policy.36

27 In respect of what would happen at common law if the court in Australia is faced with two conflicting foreign judgments, each of which is entitled to recognition/enforcement in its own right, there is, as far as this reporter is aware, no Australian decision that deals with the issue


35 Fraud includes not only actual fraud but also the equitable notion of constructive fraud (see, eg, *Larnach v Alleyne* (1862) 1 W & W (E) 342).

36 A foreign judgment may be denied enforcement because it is founded on a law that is not acceptable to the public policy of the forum, for example, a judgment for the wages of a prostitute, or an order for the maintenance of a child not confirmed to minority or other specified period: *Re Macartney* [1921] 1 Ch 522. A foreign judgment may also be contrary to public policy because it was obtained in a manner obnoxious to the law of the forum, such as by duress (*Re Meyer* [1971] P 298) or undue influence (*Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137; [1983] 3 All ER 129). The authors of *Nygh’s Conflict of Laws in Australia* consider that the public policy ground for refusal of enforcement should be narrowly confined and the offence against Australian public policy should be profound before refusal to enforce is warranted; see Tamberlin J in *Stern v National Australia Bank* [1999] FCA 1421 at [133]–[147] and Atkinson J in *De Santis v Russo* (2001) 27 Fam LR 414 at 419, [19].
of how the court would determine which judgment should prevail. Australian courts would have regard to decisions of other common law jurisdictions dealing with this issue but would not consider themselves bound to follow or apply such decisions. As a matter of principle, the foreign judgment rendered first in time would be likely to be given priority and therefore to prevail.

D RECOGNITION AND ENFORCEMENT OF FOREIGN NON-MONETARY JUDGMENTS IN PERSONAM

i Position under the Foreign Judgments Act 1991

28 Under the FJA, provision is made for the enforcement of non-money judgments if the Governor-General is satisfied that, in the event of the benefits conferred by Part 2 of the FJA being applied to all or some non-money judgments given in courts of a country in relation to which this Part extends, substantial reciprocity of treatment will be assured in relation to the enforcement in that country of all or some non-money judgments given in Australian courts.

ii Position at common law

29 At common law, foreign non-money judgments will not be enforced per se but, in equity, Australian courts have lent their assistance to certain orders of foreign courts appointing receivers and for the taking of an account following the obtaining of a declaration and order for account made in a foreign country in circumstances where there is a sufficient connection between the defendant and the foreign jurisdiction in which the order was made so as to justify recognition of the foreign order.

37 Such as Showlag v Mansour [1995] 1 AC 431.
39 Houlditch v Marquess of Donegal (1834) 2 CI & F 470.
40 White v Verkouille [1990] 2 Qd R 191.
Recognition and Enforcement of Foreign Judgments in Asia

30 In respect of the enforcement of foreign asset-freezing orders (also known as “Mareva injunctions”), strictly speaking Australia does not allow for the enforcement of a Mareva or freezing order, although an Australian court may grant a freezing order over assets of a foreign judgment debtor or a prospective foreign judgment debtor in certain circumstances including where it is intended to enforce the foreign judgment in Australia. This may but need not be in circumstances where a foreign court has also made a Mareva or freezing order.\(^1\)

E RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN REM

31 Australia does not allow for the enforcement of foreign judgments against property. Both under the FJA and at common law, as a general matter, it is only foreign money judgments that may be enforced.

32 Judgments in relation to interests in property may at common law be recognised in Australia in the sense that an issue estoppel may preclude a party from raising an inconsistent position in any Australian proceedings to that established by the foreign judgment.

F HAGUE CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS

33 A Bill, entitled the International Civil Law Bill to implement the Hague Convention of 30 June 2005 on Choice of Court Agreements and the Hague Principles on Choice of Law in International Commercial Contracts and support party autonomy in choice of court and choice of law in international contracts, is expected to be enacted by the Australian Parliament in 2017.

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\(^1\) See *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 325 ALR 168; [2015] HCA 36.