

ENFORCEMENT OF FOREIGN JUDGMENTS AND FOREIGN ARBITRAL AWARDS IN AUSTRALIA

**(Presented at seminar at Shanghai No 1 Intermediate People's Court, Shanghai on 16
October 2018)**

(Presented at seminar at Yunnan High People's Court, Kunming on 29 October 2018)

- [1] This paper deals with the two possible ways in which the judgment of a court of a foreign country may be enforced in Australia. Australia has facilitated the enforcement of judgments of the courts of certain foreign countries by a national scheme of registration pursuant to the *Foreign Judgments Act 1991* (Cth).¹ The other means to enforce a foreign judgment in Australia is pursuant to the common law. This paper also addresses the enforcement of foreign arbitral awards in Australia. Foreign arbitral awards may be enforced in Australia pursuant to Australia's *International Arbitration Act 1974* (Cth).²

Enforcement of foreign judgments under the *Foreign Judgments Act 1991*

- [2] The most straightforward means to enforce a foreign judgment in Australia commences with registration of the judgment regulated by the *Foreign Judgments Act 1991*, but that does not have universal application.
- [3] The application of Part 2 of the *Foreign Judgments Act 1991* is limited to the foreign judgments given in courts of a country where substantial reciprocity of treatment will be given to the enforcement in that country of similar judgments given in Australian courts. The countries to which the Act applies are identified in the schedule to the *Foreign Judgments Regulations 1992 (Regulations)*.³ It is primarily the judgments of the superior courts of those listed countries to which the Act applies. The application of the Act is extended by regulation 5 to specified inferior courts of the United Kingdom, certain provinces of Canada, Switzerland and Poland. Part 2 of the Act does not apply to a judgment given by a court of New Zealand as enforcement in Australia of judgments given by courts of New Zealand is governed by Part 7 of the *Trans-Tasman Proceedings Act 2010*.⁴

¹ <https://www.legislation.gov.au/Details/C2013C00640>.

² <https://www.legislation.gov.au/Details/C2016C01110>.

³ <https://www.legislation.gov.au/Details/F2015C01003>.

⁴ <https://www.legislation.gov.au/Details/C2013C00646>.

- [4] The *Foreign Judgments Act 1991* applies to an enforceable money judgment that is final and conclusive.
- [5] The definition of “judgment” in section 3(1) of the *Foreign Judgments Act 1991* is:
- “judgment** means:
- (a) a final or interlocutory judgment or order given or made by a court in civil proceedings; or
 - (b) a judgment or order given or made by a court in criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party; or
 - (c) an award (other than an award given in a dispute of a kind referred to in paragraph 34(a) of the *International Arbitration Act 1974* or an award that may be enforced under subsection 35(2) of that Act) in proceedings on an arbitration conducted in, and under the law applying in, a country, being an award that has become enforceable in a court of that country in the same manner as a judgment or order given by that court.”
- [6] Section 5(5) of the *Foreign Judgments Act 1991* provides expressly that a judgment is taken to be final and conclusive, even though an appeal may be pending against it or it may still be subject to appeal in the courts of the foreign jurisdiction. In a case in the Supreme Court of Queensland, *Bank Polska Kasa Opieki Spolka Akcyjna v Opara* [2010] QSC 93,⁵ the judgment of a Polish court was found not to be final and conclusive for the purpose of enforcement in Australia, as the judgment could be set aside by an anti-enforcement proceeding in Poland that had to be brought in a separate proceeding where the merits of the plaintiff’s claim could then be fully examined by the court, despite the earlier judgment.
- [7] Because of Australia’s history as a British colony, it is not surprising that the United Kingdom and many other former British colonies are amongst 35 countries (or provinces of countries) that are listed in the schedule to the *Regulations*. Neither the courts of the People’s Republic of China (except for Hong Kong) nor the courts of the United States of America or any of the States of the USA are listed in the schedule.
- [8] Provision is made in section 5(6) of the *Foreign Judgments Act 1991* for the *Regulations* to apply to non-money judgments given in the courts of a country to which the application

⁵ <https://archive.sclqld.org.au/qjudgment/2010/QSC10-093.pdf>.

of Part 2 is extended on the basis of substantial reciprocity of enforcement in that jurisdiction of a non-money judgment given in an Australian court. No regulations allowing enforcement in Australia of non-money judgments of foreign courts have yet been made.

- [9] Section 6 of the *Foreign Judgments Act 1991* sets out in general terms the process for the registration of foreign judgments and the effect of that registration. Under section 6(1), the judgment creditor must apply within six years after the date of the judgment or, where there have been proceedings by way of appeal against the judgment, the date of the last judgment in those proceedings, to have the judgment registered in the Australian court. In the case of a money judgment, the appropriate court will be the Supreme Court of a State or Territory. The relevant Supreme Court must order the judgment be registered, if it complies with the provisions of the *Foreign Judgments Act 1991* and the applicable Rules of Court. In Queensland, the detailed rules for the registration of a foreign judgment under the *Foreign Judgments Act 1991* are set out in chapter 20A of the *Uniform Civil Procedure Rules 1999 (UCPR)*.⁶
- [10] Under rule 947D of the *UCPR* an application for registration of a foreign judgment in reliance on the *Foreign Judgments Act 1991* may be made without notice to the defendant. The court may in an appropriate case order the plaintiff to give notice of the application to the defendant. If the defendant appears on the application to register the judgment, the defendant may oppose the application for registration on any of the grounds which would have been available to the defendant after registration to set aside the registration of the judgment. If that judgment is registered without a contest, section 6(4) of the *Foreign Judgments Act 1991* requires the court's order registering the judgment to state the period within which an application may be made under section 7 to have the registration of the judgment set aside. Rule 947J of the *UCPR* requires a plaintiff within 28 days from the registration of the foreign judgment, or such extended period allowed by the court, to serve notice of registration of the foreign judgment on the defendant. The rules do not specify the time that must be set out in the court's order for the defendant to apply to have the registered judgment set aside after receiving notice of the registration of the judgment.

⁶ <https://www.legislation.qld.gov.au/view/html/inforce/current/sl-1999-0111#ch.20A>.

It is left to the court's discretion to select the time period, but the time that is specified for the purpose should be a reasonable time in the circumstances.

- [11] There are numerous grounds set out in section 7(2) for setting aside the registration of the judgment. These grounds include that it is not a judgment to which Part 2 of the *Foreign Judgments Act 1991* applies, it was registered in contravention of that Act, the judgment was obtained by fraud, the rights under the judgment are not vested in the person by whom the application for registration was made, the judgment has been discharged or wholly satisfied, or the enforcement of the judgment would be contrary to public policy.
- [12] The Registrar of the Court must keep the register of registered judgments. After the notice of registration of the judgment has been served on the defendant (if there is no application to set aside the registration), the plaintiff can then use the processes for enforcement of judgments under the *UCPR* for enforcing the registered foreign judgment against the defendant in the jurisdiction of Queensland.
- [13] Section 8 of the *Foreign Judgments Act 1991* expressly regulates the stay of enforcement of a registered foreign judgment where the Australian court in which the foreign judgment is registered is satisfied that the defendant has appealed, or is entitled and intends to appeal, against the judgment in the jurisdiction of the foreign court. The Australian court may order that enforcement of the foreign judgment be stayed pending the final determination of the appeal, until a specified day, or for a specified period.

Enforcement of foreign judgments under the common law

- [14] Under the common law, a party seeking to enforce a foreign judgment must satisfy four conditions:
- (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;

- (d) if based on a judgment *in personam*,⁷ the judgment must be for a fixed amount.

- [15] The first condition will usually be satisfied if the defendant was physically present in the jurisdiction of the foreign court at the time the originating process was served or submitted to the jurisdiction of the foreign court generally by filing an appearance or making submissions on the merits of the claim. If the defendant is required by the procedure of the foreign court to make submissions on the merits of the plaintiff's claim at the same time as objecting to the jurisdiction of the foreign court, that may not amount to submitting to the jurisdiction. Section 11 of the *Foreign Judgments Act 1991* applies to a proceeding brought in Australia to enforce the foreign judgment that is not one to which Part 2 of that Act applies and expressly provides the court is not taken to have had jurisdiction to give the judgment, because the defendant entered an appearance or participated in the proceeding in the court only to such extent as was necessary for the purpose of protecting or obtaining the release of property the subject of the proceeding, contesting the jurisdiction of the court or inviting the court in its discretion not to exercise its jurisdiction in the proceeding.
- [16] The second condition will be satisfied if the judgment puts an end to the controversy between the parties, even if there is a right of appeal or an appeal pending.
- [17] The third condition requires the parties to the enforcement proceeding to be the same as the parties to the foreign judgment.
- [18] The fourth condition requires the judgment to be for a fixed sum of money.
- [19] The judgment is enforced at common law by the judgment creditor commencing a new proceeding in the Australian court with appropriate jurisdiction to recover as a debt the judgment sum determined by the foreign court. After service of the initiating claim, the judgment creditor will usually apply for summary disposal of the proceeding based on the judgment of the foreign court.

⁷ A term used to describe a right or claim vested in one person against a specific person that imposes a personal liability such as a claim for payment of money.

- [20] Courts in Australia that exercise equitable jurisdiction can permit the enforcement of judgments of foreign courts that grant equitable relief and are not limited by the requirement that the judgment is for a fixed sum of money. A court that exercises equitable jurisdiction will aid in the enforcement of a foreign judgment, if there is sufficient connection between the defendant and the jurisdiction in which the equitable relief has been ordered.
- [21] An example of the exercise of the equitable jurisdiction to assist in the enforcement of a foreign judgment without requiring the foreign judgment to be made a judgment of the Supreme Court of Queensland is *White v Verkouille* [1990] 2 Qd R 191. The plaintiffs in a District Court in the State of Nevada in the USA obtained a judgment against Mr Verkouille for total damages of US\$467,300 for deceit or fraud and breach of warranty. The plaintiffs in the proceeding in Nevada obtained an order from the District Court appointing Mr White as receiver on their behalf to carry into effect the judgment given by that court. Mr White commenced a proceeding in the Supreme Court of Queensland against Mr Verkouille, seeking a declaration that Mr White was entitled to all moneys held in the name, or to the credit, of Mr Verkouille at an identified branch in Queensland of a named bank. The amount in the account in Mr Verkouille's name was about AUD\$341,000. The judge of the Supreme Court of Queensland, McPherson J, was satisfied (at 196-197) that Mr Verkouille was subject to the jurisdiction of the Nevada District Court when the judgment was entered against him and had a sufficient connection with Nevada to justify recognition and enforcement of the order made by the District Court appointing the plaintiff as receiver. It was declared that the receiver was entitled to receive, and to give to the bank a good discharge for the receipt, of all the money standing to the credit of the bank account in Queensland in the name of Mr Verkouille.
- [22] A practical application of using this equitable jurisdiction in aid of pending international litigation could be the granting of a freezing order in respect of the Australian assets of a foreign defendant to ensure those assets are available for enforcement proceedings, when the foreign judgment against the defendant is eventually obtained and sought to be enforced in Australia.

[23] The making of freezing orders became such a common practice that it is now incorporated in the *UCPR*. Rule 260A⁸ provides:

- “(1) The court may make an order (a *freezing order*) for the purpose of preventing the frustration or inhibition of the court’s process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.
- (2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.”

[24] A freezing order is usually made in advance of, or at an early stage in a proceeding, before judgment has been obtained. The plaintiff must give to the court the usual undertaking as to damages to pay compensation to the defendant or any other party affected by the operation of the order, in order to obtain the freezing order. A pro forma freezing order is set out in the appendix to Supreme Court of Queensland Practice Direction No 1 of 2007.⁹

[25] Rule 260D¹⁰ expressly provides for the making of a freezing order if judgment has been given in favour of the plaintiff in another court (whether in or outside Australia) and there is sufficient prospect that the judgment of the other court will be registered in, or enforced by, the Supreme Court of Queensland. Rule 260D is not limited to judgments that are registrable under the *Foreign Judgments Act 1991*.

[26] The dispute between an Indian company (Bhushan) and a Swiss company (Severstal) pending before the High Court of Delhi resulted in a freezing order made by the Supreme Court of New South Wales under the equivalent rule to rule 260D of the *UCPR*: *Bhushan Steel Ltd v Severstal Export GmbH v Bhushan Steel Ltd* [2012] NSWSC 583¹¹ (Sackar J) that was affirmed on appeal in *Severstal Export GmbH v Bhushan Steel Ltd* [2013] NSWCA 102.¹² It is an example of an international dispute with no connection with Australia, except the defendant may have assets in Australia. That may give rise to the plaintiff seeking a freezing order in Australia, in anticipation of the judgment of the foreign court being enforced against the assets within Australia of the foreign defendant,

⁸ <https://www.legislation.qld.gov.au/view/html/inforce/current/sl-1999-0111#sec.260A>.

⁹ https://www.courts.qld.gov.au/_data/assets/pdf_file/0020/86411/sc-pd-1of2007.pdf.

¹⁰ <https://www.legislation.qld.gov.au/view/html/inforce/current/sl-1999-0111#sec.260D>.

¹¹ <https://www.caselaw.nsw.gov.au/decision/54a637ad3004de94513d9a2a>.

¹² <https://www.caselaw.nsw.gov.au/decision/54a639983004de94513da93e>.

rather than in the country of the foreign defendant. This will usually be due to a perception that enforcement in the Australian jurisdiction will be more effective than in the foreign jurisdiction.

- [27] Bhushan was the manufacturer of secondary steel products and entered into a number of separate contracts to purchase certain steel products from Severstal which was an exporter of steel products. Severstal obtained a judgment against Bhushan in a proceeding between the companies in Switzerland that it registered under the *Foreign Judgments Act 1991* in New South Wales, as Bhushan had assets in Australia. Bhushan was unsuccessful in obtaining a stay of the registered judgment and delivered cheques in the sum of AUD\$2,670,017 to the Australian lawyers of Severstal. In the proceeding between the companies in the High Court of Delhi, Bhushan as the plaintiff was claiming over AUD\$3,000,000 from Severstal as the defendant and the proceeding was part heard. Immediately on delivering the cheques to Severstal's lawyers, Bhushan applied to the Supreme Court of New South Wales under the equivalent rule to rule 260D of the *UCPR* to restrain transmission of the cheques, or the proceeds of the cheques, out of Australia. At first instance, Sackar J was satisfied that Severstal would oppose Bhushan enforcing in Switzerland any judgment obtained in the Indian proceeding and that Bhushan intended to enforce the Indian judgment in Australia (if the proceeds of the cheques remained in Australia). Sackar J granted the freezing order on the basis that it was reasonably open to infer there was a real risk that Severstal would remove the funds from the jurisdiction.
- [28] On the appeal, the Court of Appeal confirmed at [50] of the judgment that the equivalent rule 260D on its terms could apply to a foreign judgment. The court considered at [69] it was finely balanced, but there was evidence from which the primary judge could be satisfied there was a danger that a prospective Indian judgment would not be satisfied, if the proceeds of the cheques were remitted by Severstal to Switzerland. The Court of Appeal concluded that the primary judge was not wrong in making the freezing order, but did note at [71] "that freezing orders of this nature should not be granted lightly".
- [29] The High Court of Australia in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36¹³ considered the rule in Western Australia that is equivalent to rule 260D.

¹³ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2015/36.html>.

The High Court held that the Supreme Court of Western Australia had inherent power to make a freezing order in relation to the anticipated judgment of a foreign court that would be registrable in the Supreme Court under the *Foreign Judgments Act 1991* and affirmed the making of a freezing order in relation to the assets within Western Australia of an Indonesian company against which a Singaporean company had a proceeding pending in the High Court of Singapore for damages for breach of the parties' joint venture agreement.

Enforcement of foreign arbitral awards

- [30] The *International Arbitration Act 1974* (the Act) regulates international commercial arbitrations and the enforcement of foreign arbitral awards in Australia. Part II of the Act gives effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting (New York Convention). The English text of the New York Convention is set out in schedule 1 to the Act.¹⁴ Part III of the Act gives effect to the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments as adopted by that Commission on 7 July 2006) by section 16 giving the Model Law the force of law in Australia. The English text of the Model Law is set out in schedule 2 to the Act.¹⁵ Part IV of the Act provides for the enforcement of awards made by or under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) which concerns disputes in which one party is a country and the other party is a national of another country. The English text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Investment Convention) is set out in schedule 3 to the Act.¹⁶
- [31] Section 20 of the Act creates the order of precedence in the operation of the New York Convention and the Model Law (where both could apply) by declaring that Chapter VIII of the Model Law will not apply in relation to the award, if Part II of the Act would apply

¹⁴ http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/iaa1974276/sch1.html.

¹⁵ http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/iaa1974276/sch2.html.

¹⁶ http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/iaa1974276/sch3.html.

in relation to the same award. Section 34 of the Act (which is within Part IV of the Act) specifies that other laws relating to the recognition and enforcement of arbitral awards, including the provision of Parts II and III, do not apply to an ICSID award. Section 35 of the Act designates the Supreme Court of each State and Territory and the Federal Court of Australia as courts for the purpose of Article 54 of the Investment Convention in which an ICSID award may be enforced with the leave of that court, as if the award were a judgment or order of that court.

[32] The enforcement provisions of the New York Convention and the Model Law mean that, in most cases, there will be no need to enforce a foreign arbitral award in Australia in reliance on the common law, but it can be enforced using the provisions of the Act. In relation to Part II of the Act, section 8 permits a foreign award to be enforced in a court of a State or Territory or the Federal Court of Australia, as if the award were a judgment or order of the relevant court. A foreign award is defined in section 3(1) of the Act as an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia and in relation to which the New York Convention applies.

[33] In addition, the definition of “judgment” in section 3 of the *Foreign Judgments Act 1991* means that a foreign arbitral award (other than an ICSID award) will be treated as a judgment that is registrable under the *Foreign Judgments Act 1991*, if that award has become enforceable in a court of a country to which Part 2 of that Act applies.

[34] If a foreign arbitral award is likely to be enforced in Australia as a judgment of the court of an Australian jurisdiction, the claimant is also entitled to rely on the processes available before the award is made to protect the enforcement of the award. Rule 260D of the *UCPR*, or the equivalent rules in other Australian jurisdictions, can therefore be used to obtain a freezing order in advance of the determination of the award to protect the enforcement of the award, if it is likely that the award will be enforced in the Australian jurisdiction.

Conclusion

[35] As globalisation increases, a streamlined system for enforcement of foreign judgments and foreign arbitral awards is essential. The availability of freezing orders in advance of

the judgment or award to facilitate the enforcement of the foreign judgment or foreign award in Australia (where assets of the party against whom the judgment or award will arguably be made are available in the jurisdiction) has been an effectual development in the process of enforcement.

Justice Debra Mullins
Supreme Court of Queensland
9 August 2018