

Enforcement of Foreign Judgments

In 28 jurisdictions worldwide

Contributing editor
Patrick Doris



2015

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Enforcement of Foreign Judgments 2015

Contributing editor

Patrick Doris

Gibson, Dunn & Crutcher LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledeu
george.ingledeu@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com

**Law
Business
Research**



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

© Law Business Research Ltd 2014
No photocopying: copyright licences do not apply.
First published 2011
fourth edition
ISSN 2048-464X

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2014, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Australia	4	Japan	72
Colin Loveday and Sheena McKie Clayton Utz		Shinya Tago, Ryohei Kudo and Fumiya Beppu Iwata Godo	
Austria	10	Korea	76
Katharina Kitzberger and Stefan Weber Weber & Co Rechtsanwälte GmbH		Woo Young Choi, Sang Bong Lee and Ji Yun Seok Hwang Mok Park PC	
Belarus	15	Latvia	80
Alexey Anischenko and Daria Denisiuk SORAINEN		Agris Repšs, Valts Nerets and Agita Sprūde SORAINEN	
Bermuda	20	Lithuania	85
Delroy B Duncan Trott & Duncan Limited		Kęstutis Švirinas, Renata Beržanskienė and Almina Ivanauskaitė SORAINEN	
Brazil	24	Mexico	91
Marcus Alexandre Matteucci Gomes and Fabiana Bruno Solano Pereira Felsberg Advogados		José María Abascal, Romualdo Segovia and Héctor Flores Abascal, Segovia & Asociados	
Canada	28	New Zealand	95
Peter J Cavanagh and Chloe A Snider Dentons Canada LLP		Margaret A Helen Macfarlane, Sarah Holderness, Michael O'Brien, Claire Perry and Shukti Sharma Hesketh Henry	
Cayman Islands	34	Nigeria	100
James Corbett QC and Pamella Mitchel Kobre & Kim LLP		Etigwe Uwa SAN, Adeyinka Aderemi and Chinasa Unaegbunam Streamsovers & Köhn	
China	38	Russia	105
Tim Meng GoldenGate Lawyers		Andrey Zelenin, Artem Antonov and Evgeny Lidzhiev Lidings	
Ecuador	42	Switzerland	110
Rodrigo Jijón-Letort and Juan Manuel Marchán Perez Bustamante & Ponce		Dieter A Hofmann and Oliver M Kunz Walder Wyss Ltd	
Estonia	46	Turkey	115
Carri Ginter and Triin Toom SORAINEN		Pelin Baysal and Beril Yayla Gün + Partners	
France	51	Ukraine	119
Anke Sprengel Endrös-Baum Associés		Timur Bondaryev, Markian Malsky and Volodymyr Yaremko Arzinger	
Germany	57	United Kingdom	124
Christoph Wagner Heuking Kühn Lüer Wojtek		Charles Falconer, Patrick Doris, Sunita Patel, Meghan Higgins and Jennifer Darcy Gibson, Dunn & Crutcher LLP	
Greece	62	United States	131
Aphrodite Vassardani A. Vassardanis & Partners Law Firm		Scott A Edelman, Perlette Michèle Jura, Nathaniel L Bach and Miguel Loza Jr Gibson, Dunn & Crutcher LLP	
Guatemala	68	Venezuela	136
Concepción Villeda and Rafael Pinto Mayora & Mayora, SC		Carlos Dominguez Hoet Pelaez Castillo & Duque	

New Zealand

Margaret A Helen Macfarlane, Sarah Holderness, Michael O'Brien,
Claire Perry and Shukti Sharma
Hesketh Henry

1 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?

At present, New Zealand is not party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments.

However, the Reciprocal Enforcement of Judgments Act 1934 (REJA) provides for the enforcement of judgments given in the United Kingdom. The REJA also extends to other courts and countries specified by government regulations (Orders in Council).

At the time of writing, Orders in Council stand in respect of the following regions: Botswana, Belgium, Cameroon, Fiji, France, Hong Kong, India, Kiribati, Lesotho, Malaysia, Nigeria, Norfolk Island, North Borneo, Pakistan, Papua New Guinea, Sarawak, Sri Lanka, Singapore, Solomon Islands, Swaziland, Tonga and Western Samoa.

Excluded from the scope of the REJA are Australian judgments, which are enforceable under the Trans-Tasman Proceedings Act 2010 (TTPA).

2 Intra-state variations

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

New Zealand does not have a federal system made up of multiple states but rather is a single jurisdiction with laws that are applicable to the whole country. Consequently, foreign judgment enforcement schemes are the same across the entire jurisdiction (country).

3 Sources of law

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

There are four ways in which foreign judgments can be enforced in New Zealand. These are:

- registration of an Australian judgment under the TTPA;
- otherwise, registration under the REJA where it applies; and
- where the REJA does not apply; then:
 - a memorial of a judgment obtained in a Commonwealth country may be registered under the Judicature Act 1908 (JA); or
 - an action may be brought at common law.

The TTPA enables a 'registrable judgment' (a final and conclusive judgment given by an Australian court or acknowledged tribunal) to be registered in a New Zealand court. The TTPA reflects the strong relationship between New Zealand and Australia by minimising impediments to enforcing certain Australian judgments and regulatory sanctions. Once registered, the Australian judgment may be enforced as if it was a decision of a New Zealand court.

The REJA applies to all judgments of the United Kingdom or other countries as specified by Orders in Council (a current list of which is set out in question 1). Further Orders in Council may be made in respect of any country not presently acknowledged where New Zealand is satisfied that substantial reciprocity of treatment will be assured (with respect to enforcement) for money judgments given in New Zealand courts. If the

REJA applies, a person may have the foreign judgment registered in a New Zealand court and enforced.

Registering a memorial of a judgment under the JA is rarely used. It is relevant to cases where the REJA and TTPA do not apply and the country of original judgment is part of the Commonwealth.

Enforcement at common law involves bringing a fresh set of proceedings in New Zealand that are based on the foreign judgment. This can only be done if the REJA and TTPA do not apply. Judgment creditors will usually make an application for summary judgment (a short form proceeding where the applicant or creditor alleges that there is no arguable defence to their claim) with affidavit evidence providing certain information about the foreign judgment (including a copy of the judgment) and the debt owed.

4 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?

New Zealand is not a signatory.

5 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?

An application to register a foreign judgment under either the TTPA or REJA must be made within six years after the day on which the judgment is given (or the last date of judgment, if there have been appellate proceedings).

Judgments registered under the JA are treated as contract debts and are subject to the Limitation Act 2010 (which applies to all common law actions). The Limitation Act 2010 requires that a proceeding must be brought within six years of the date on which judgment was given in the foreign court.

A New Zealand court, in determining whether to register a foreign judgment to which the TTPA or the REJA applies, may consider the limitation period of the foreign jurisdiction. Both Acts require that for a judgment to be registered with a New Zealand court the judgments must be enforceable in the country of original proceedings, that is, their limitation periods must have not expired in the original country.

6 Types of enforceable order

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

Money judgments are enforceable using the procedures outlined in question 3.

Orders for specific performance or injunctions are enforceable if the TTPA or the REJA apply. If these Acts do not apply, these types of orders are not enforceable unless they are for payment of a definite sum of money. But orders for specific performance or injunctions against the Crown (the state), or judgments in rem against Crown property (eg, aircraft or ships), are not enforceable.

Foreign interim orders are enforceable under the REJA to the same extent that a foreign final order is enforceable. However, caution needs to be taken with interim orders: when enforcing a foreign judgment, the judgment must be 'final and conclusive'. The orders sought must not be capable of variation by the foreign court.

Arbitration awards are enforceable under the Arbitration Act 1996. Further, New Zealand is a signatory to the Convention of the Recognition and Enforcement of Arbitral Awards (New York Convention). The New York Convention makes arbitral awards of Convention states enforceable in all other Convention states as if they were domestic arbitral awards.

With regard to personal insolvency, a person adjudicated bankrupt in another country will not be recognised as a bankrupt in New Zealand.

7 Competent courts

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

A plaintiff seeking enforcement under the REJA must register the foreign judgment with the High Court. Under the TTPA, a foreign judgment can be registered with the High Court or a lower court that has jurisdiction to issue the relief claimed. Actions brought under the JA or the common law are also commenced in the High Court.

8 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?

New Zealand law separates recognition and enforcement of foreign judgments.

With respect to the former, registration of the foreign judgment is not a requirement, and there is no formal process per se. If the REJA applies (or would apply if the foreign judgment was a money judgment), then the REJA states that, whether or not the judgment is or can be registered, it will be recognised as being conclusive between the parties for all proceedings founded on the same cause of action. Similarly, at common law, the court may recognise the foreign judgment as giving rise to an estoppel if a party raises that issue in the same or similar claim brought in a New Zealand court.

With respect to the latter process, registration is the usual first step to enforcement. The REJA, TTPA and JA all provide for enforcement by registering certain foreign judgments (or memorials of foreign judgments in the case of the JA). Once a judgment is registered, it has the same force and effect as if it were originally given in the High Court. This allows a judgment creditor to commence proceedings and seek any of the enforcement remedies available under New Zealand law.

For all remaining judgments not covered by the REJA, TTPA or JA, a common law enforcement process may be followed. This law requires fresh proceedings to be commenced in New Zealand. The creditor must show that the foreign judgment was final and conclusive, and the foreign court had jurisdiction according to New Zealand rules of private international law. Issues of jurisdiction are discussed further in question 14.

9 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?

A defendant cannot raise merits-based defences to liability or to the scope of the award. The defendant is limited to narrower grounds for challenging a foreign judgment, namely, applying to have its registration set aside or resisting its enforcement. The underlying principles for these grounds depend upon the way the foreign judgment was registered, as set out below.

Under the REJA, a judgment debtor can apply to set aside a registered judgment on the following grounds:

- the REJA does not apply;
- the foreign court lacked jurisdiction to issue the judgment;
- the judgment debtor did not receive sufficient notice of the original proceedings to be able to defend them;
- the judgment was obtained by fraud;
- the enforcement of the judgment would be contrary to New Zealand public policy; and

- the rights under the judgment are not vested in the person who applied for registration.

Registration may also be set aside if, before the date of the foreign judgment, the matter was subject to a final and conclusive judgment in another court with jurisdiction over the proceeding.

Under the TTPA, a registered judgment may be set aside on the following grounds:

- the TTPA does not apply;
- enforcement of the judgment would be contrary to New Zealand public policy; and
- the subject matter of the judgment was immovable property or a judgment in rem with regard to movable property, and the property at the time of the original proceeding was not based in Australia.

Section 61 of the TTPA states that these are the only grounds upon which a registered judgment may be set aside. As such, and unlike the REJA, fraud is not a standalone ground for the setting aside of a judgment. It remains to be determined whether fraud may nonetheless fall within the public policy exception.

At common law (and under the JA), a judgment debtor may resist enforcement upon the following grounds:

- the judgment was obtained by fraud;
- enforcement would be contrary to New Zealand public policy; and
- the proceedings giving rise to the judgment were contrary to natural justice.

10 Injunctive relief

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

No. Under the REJA or TTPA, the entitled party or creditor is able to register an applicable foreign judgment as of right. The judgment debtor's ability to 'defend' the foreign judgment is then limited to applying to set it aside based on the grounds set out in question 9.

Similarly, where an entitled party or creditor attempts to either register a memorial of the foreign judgment under the JA or bring an action at common law, the judgment debtor can only oppose the entitled party or creditor's application or proceeding on the grounds in question 9.

11 Basic requirements for recognition

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

For a foreign judgment to be recognised under the REJA, it must be from (or, upon application, declared to be from) a country to which the REJA applies (see question 1). The judgment must also be enforceable in the originating country and cannot already have been satisfied. Money judgments need to be final and conclusive and cannot be for the payment of taxes, fines or similar penalties. For non-money judgments, the New Zealand court must be satisfied that a similar order could be enforced in the country of the original court.

Under the TTPA, a judgment of an Australian court can be recognised if it is final and conclusive. The TTPA does, however, list some specific judgments and orders that are not recognised.

A judgment will be recognised under the common law and the JA if the following are satisfied:

- the foreign court's jurisdiction over the judgment debtor is recognised by New Zealand law;
- the judgment is for a debt or a definite sum of money (excluding taxes, fines and other such penalties); and
- the judgment is final and conclusive.

12 Other factors

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

Other factors may prevent recognition (and enforcement). These include the grounds under the REJA and TTPA upon which a judgment debtor can rely to set aside registration of a foreign judgment; likewise, the grounds for resisting enforcement under the common law (see question 9).

13 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?

There is no positive requirement that, for a foreign judgment to be enforceable, it must have been determined in a country with similar judicial procedures as New Zealand. However, there are certain grounds for avoiding enforcement that implicate this notion.

For example, a judgment registered under the REJA can be set aside if the judgment debtor (the defendant in the original proceedings) did not receive notice of those proceedings in sufficient time to enable him or her to appear in his or her defence (notwithstanding that the process of the original court may have been followed).

Enforcement through the JA and the common law can be prevented by a judgment debtor if proven that enforcement would be contrary to New Zealand conceptions of natural justice. Breaches of natural justice would include receiving insufficient notice of proceedings to be able to defend them and not having a fair opportunity to present a defence.

The TTPA is silent to any requirements or grounds of resistance as regards to foreign judicial process. As New Zealand and Australia follow similar judicial procedures, it is unlikely that questions of procedural equivalence will be an issue.

14 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?

A judgment registered under the REJA must be set aside if the original court had no jurisdiction, which will be the case when:

- the subject matter of the proceedings was property outside the country of the original court;
- the proceedings were contrary to an agreement to settle out of court and the judgment debtor did not submit to court action; or
- the judgment debtor was entitled to immunity from the foreign jurisdiction.

The REJA states that a court will be deemed to have jurisdiction:

- for a claim in personam, when the judgment debtor submitted to the foreign jurisdiction or the judgment debtor was, at the time the proceedings were initiated, resident in the foreign country; and
- for an in rem claim, where the property was, at the time of the proceedings, in the foreign country.

The TTPA does not expressly include lack of personal jurisdiction as one of the grounds upon which a registered judgment may be set aside (see also question 15).

Under the JA, foreign judgments will not be enforced if the common law test for jurisdiction is not met. The common law will recognise a foreign court's jurisdiction to give either an in rem or in personam judgment on the same basis as the REJA set out above.

It is sufficient to allege, for the purposes of establishing jurisdiction under the JA, that the judgment debtor:

- is a national of the foreign country;
- possesses property in the foreign country;
- is domiciled in the foreign country;
- was present in the foreign country at the commencement of the foreign proceedings; or
- was correctly served outside the foreign country.

Provided that New Zealand can recognise the jurisdiction of the foreign court in light of the factors set out above, it need not matter that the foreign court lacked jurisdiction under the law of its own country.

15 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?

The REJA and TTPA do not include lack of subject matter jurisdiction among the grounds for setting aside a registered judgment.

Of course, judgments registered under the REJA and TTPA are only enforceable in New Zealand if they are enforceable in the country of the original court. If the foreign court lacked subject-matter jurisdiction it would presumably be unable to enforce the judgment. That, however, is a challenge that may well have been raised in the original proceedings in the foreign jurisdiction. Absent express statutory authority to set aside on this basis, it is unlikely a New Zealand court would second-guess a ruling from that jurisdiction.

Moreover, under the TTPA, an application to stay the New Zealand enforcement proceedings may be made to permit a liable party to apply in Australia to set aside, vary or appeal any judgment given by the Australian court. This would seem the more likely route to be adopted by a liable party who wished to raise a challenge to the Australian court's jurisdiction.

Lack of subject matter jurisdiction may be raised at common law. This would, accordingly, also amount to a ground to deny enforcement under the JA.

16 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?

As a general rule, New Zealand does not impose additional service requirements. But a judgment registered under the REJA may be set aside on the grounds that the judgment debtor, as a defendant in the original proceedings, did not appear and did not receive sufficient notice to enable him or her to defend the proceedings.

In addition, under the principles of common law, a judgment debtor may request that the court refuse recognition and enforcement of a foreign judgment on the grounds that a lack of formal service is contrary to the principles of natural justice.

These matters are also discussed in question 13.

17 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?

There is no provision in place allowing a New Zealand court to decline enforcement on the basis of the foreign jurisdiction's inconvenience for the defendant.

18 Vitiation by fraud

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

A foreign judgment obtained by fraud on the part of the successful party or the foreign court will not be recognised or enforced in New Zealand under the REJA or the common law.

The REJA does not require that the evidence of fraud be newly discovered. Further, a judgment debtor does not need to establish a prima facie case of fraud for the court to set down a trial of the issue. A court can exercise its discretion to direct a trial if the court considers that there may have been a fraud, the defendant is acting in good faith and the defendant is not seeking a new trial on effectively the same evidence and issues.

Correspondingly, under common law, it seems irrelevant that the party failed to raise the issue of fraud at the original proceedings despite the relevant facts being known at the time. However, contrary to the REJA, common law requires the party alleging fraud to establish a prima facie case of fraud and disclose full particulars for a court to inquire into the judgment.

Once a memorial of a foreign judgment has been registered in accordance with the JA, the party in whose favour the foreign judgment was given may apply to the New Zealand court to require the defendant to show, within a certain time, why the foreign judgment should not be executed. The defendant may argue that one of the common law defences – such as fraud – is available to it.

With respect to the TTPA, section 61 provides an exclusive list of grounds for the setting aside of a registered judgment. Fraud is not among those grounds. It remains to be seen whether the broad public policy exception might, however, encompass fraud.

19 Public policy

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

A judgment debtor may apply to have a judgment registered under the REJA or TTPA set aside on the ground that it is contrary to public policy. Yet the courts seem reticent to act on these grounds, as the competing consideration to engaging in a public policy analysis is maintaining judicial comity with the foreign jurisdiction.

Common law does not allow for the enforcement of a foreign judgment if enforcement would be contrary to New Zealand public policy. On this basis a court may also find there is insufficient cause to order execution of a foreign judgment under the JA's process.

Under the common law, defences like undue influence, duress and coercion may also come within the umbrella of public policy. To raise them, the defendant must not have already raised them in the foreign court. Moreover, these matters cannot be raised in New Zealand if they could have been raised in the foreign court.

With respect to substantive law, if the foreign judgment is contrary to a New Zealand law, the court may decline to enforce it on public policy grounds, but the public policy exception is a very narrow one. The fact that a foreign judgment may be founded upon causes of action that would not be available in New Zealand does not mean that the foreign judgment is contrary to public policy and hence unenforceable.

It is not contrary to public policy to enforce a foreign judgment if exemplary damages were awarded by the foreign court when, in contrast, if the original proceeding had been heard by a New Zealand court, they could not have been awarded.

20 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?

Under the REJA, a foreign judgment's registration may be set aside if the matter had already been subject to a final and conclusive judgment by another court having jurisdiction. Under general common law principles, where there are two conflicting foreign judgments that are entitled to recognition under New Zealand law, the first in time will prevail.

21 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?

The REJA and TTPA do not make explicit provision for enforcement against other entities, yet both define a judgment debtor or liable person both as the person against whom the judgment was given and a person against whom the judgment is enforceable under the law of the original court. Accordingly, if the foreign judgment is enforceable against a third party under the laws of the original court, then the foreign judgment may be enforced against a third party in New Zealand.

22 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?

There is no provision that allows a New Zealand court to reopen and review the merits of a foreign judgment and, as such, refuse enforcement on the grounds that there was a valid alternate dispute resolution mechanism in place.

However if the existence of the agreement to use alternative dispute resolution was fraudulently concealed, then there may be a basis for resisting enforcement of the foreign judgment in New Zealand on the ground of fraud.

23 Favourably treated jurisdictions

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

There is no explicit deference given. Any deference is probably implicit by way of procedural ease, with the TTPA and REJA's process the most straightforward.

The REJA is based on the principle of reciprocity, and as such, it expresses a preference for foreign jurisdictions that give substantial reciprocity of treatment to a judgment by a New Zealand court. The REJA empowers the Governor-General, by Order in Council, to direct that judgments from certain superior and inferior courts of certain countries be enforceable under the provisions of the REJA. These are outlined in question 1. As also indicated in question 1, certain Australian judgments are enforceable under the TTPA.

The effect of straightforward registration under the TTPA or REJA is to give the foreign judgment the same force and effect as if it were a judgment given by the New Zealand court. This makes enforcement easier.

24 Alteration of awards

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

Under the REJA and TTPA, if a money judgment has been partially satisfied, then the judgment should only be registered in respect of the balance. If a REJA-registered judgment is set aside on the grounds that it has already been partly satisfied, the court may order that the judgment be registered for the balance remaining payable at that date. Similarly, at common law (and under the JA), if the foreign judgment has been partly satisfied, the party in whose favour the judgment was given can pursue the balance.

Otherwise, the JA provides for the execution of the whole of a foreign judgment, and the court cannot decide that only part of the foreign judgment may be recognised unless the judgment is truly severable and different considerations apply to the several parts.

The REJA and TTPA provide that, where a judgment is in respect of different matters (eg, it gives different types of relief), and where the court considers that some (but not all) of the provisions of the judgment would, if contained in a separate judgment, be registrable under the respective acts, then the judgment may be registered in New Zealand in respect of those registrable provisions only.

Other than as set out above, there appears to be no rule empowering the court to alter the judgment's substance.

25 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?

In applying for registration under the REJA or TTPA, a party can ask the court to register judgment in the judgment currency. Otherwise, by default, the judgment will be registered for an equivalent sum of New Zealand currency (based on the exchange rate the working day before the date of application for registration in the case of the TTPA, and the date of the application itself in the case of REJA). The practice is the same under common law and the JA.

Registration under the REJA is both for the principal judgment sum plus any interest that would be due under the laws of the country where the original judgment was issued. That interest is recoverable for the period from the date of the foreign judgment to the date of the New Zealand judgment.

Per the TTPA, interest on money payable under a registered Australian judgment is payable at the same rate and in respect of the same period, as would be applicable in the original Australian court or tribunal.

The only interest payable when enforcement is sought under the JA will be if the foreign court itself, in its judgment, provided for interest.

Under common law, the rate of interest is prescribed either by the law of the country where the original judgment was given (if that rate is adequately proved) or by the rate prescribed in the JA.

A judgment registered under the REJA will also reflect reasonable costs of and incidental to registration, which includes the costs of obtaining a certified copy of the judgment from the original court. In addition to allowing for recovery of the costs and expenses associated with registering the judgment, the TTPA provides for the recovery of reasonable costs and expenses associated with attempting to enforce the judgment.

Under the JA, costs may be awarded to a successful applicant on an order that the foreign judgment be executed.

26 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?

There is a right to apply to the New Zealand court to have a foreign judgment registered under the REJA set aside (see question 9). A judgment registered under the REJA will not be enforced while the defendant can apply to set aside the registration (and, if an application has been made, there will be no enforcement until it has been determined).

Once a memorial of a foreign judgment is filed in the New Zealand court in accordance with the JA, the defendant may resist enforcement if it can establish one of the defences available at common law (see question 9) or because the judgment is not of a kind enforceable at common law. Obviously, the same matters would be available to resist enforcement under common law.

There are no express provisions giving a right to appeal enforcement. Recourse may be had to New Zealand's High Court Rules: a court may stay enforcement of a judgment or set aside the enforcement process on the basis (in the case of the former) that a substantial miscarriage of justice would likely result if the judgment were enforced, or, for the latter, because the enforcement process was issued contrary to either a court order, the agreement of the parties, or good faith. In addition, as noted, under the TTPA, the New Zealand court may stay enforcement for a period to allow the defendant to apply to the relevant Australian court or tribunal to set aside, vary or appeal the original judgment.

In the intervening period, if there was concern that the judgment debtor might remove assets from the jurisdiction, a judgment creditor could ask the court to make a *Mareva* injunction order. New Zealand courts have recognised the importance of granting *Mareva* injunctions as a form of protection to judgment creditors who face the risk of a judgment debtor shifting his or her assets to another jurisdiction.

Assuming registration of the judgment is not set aside (if under the TTPA or REJA), any stay given lapses, and, in the case of the TTPA, the defendant is unsuccessful in setting aside, varying or appealing the original judgment, then the successful party in the foreign judgment will be able to proceed with enforcement.

27 Enforcement process

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

Standard enforcement processes include:

- arrest orders (for non-money judgments) or charging orders over the estate, right, title or interest of the judgment debtor;
- attachment orders;
- possession orders;
- sale orders;
- sequestration orders; and
- bankruptcy or liquidation.

Update and trends

Over the past 12 months the New Zealand courts have started to flesh out issues of scope and interpretation in relation to the TTPA, which came into force in late 2013.

A recently considered issue relating to service under the TTPA has been whether the provisions of the TTPA (and its associated regulations) constitute a code displacing the power of the High Court under the High Court Rules (HCR) to direct how a notice of registration may be served.

In particular, the pertinent regulation under the TTPA does not expressly authorise the court to direct any method of substituted service upon an individual. Considering this to be 'highly inconvenient' and contrary to the purpose of the TTPA 'to minimise existing impediments to enforcing Australian judgments and regulatory sanctions', a recent High Court judgment concluded that the TTPA regulations only displaced the HCR primary rules for service, but did not displace the court's powers to order secondary forms of substituted service. Applying this distinction avoided 'the inconvenience of absconding Australian judgment debtors avoiding service' and met 'the statutory purpose of minimising impediments to enforcing Australian judgments in New Zealand'.

These are early days yet, and one can expect to see further decisions on the interpretation of the TTPA coming before the New Zealand courts. For example, it remains to be seen if the public policy grounds for resisting enforcement may apply to cases of fraud.

It should be noted that the REJA and TTPA explicitly provide that a registered judgment may only be enforced in New Zealand if, and to the extent, that the judgment is capable of being enforced in the country where the original judgment was issued at the time when enforcement action is taken.

28 Pitfalls

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

When pursuing the original foreign proceedings, the plaintiff needs to be cognisant of doing all in its power to avoid any pitfalls to later recognition and enforcement; for example, is there already a final and conclusive judgment on the same subject matter by another court having jurisdiction? Does the foreign court have jurisdiction over the original proceeding according to New Zealand rules of private international law? Additionally, the foreign proceeding needs to be conducted according to natural justice, for example, the defendant needs to have sufficient notice to enable it to defend the proceeding and there should be no suggestion of fraud, undue influence, duress or coercion.

Once the foreign judgment has been obtained, and assuming it is final and conclusive, the judgment creditor (keeping in mind the matters outlined at question 3) needs to ensure it selects the correct avenue of recognition and enforcement in New Zealand (of the TTPA, REJA, JA and common law).

Hesketh Henry

Margaret A Helen Macfarlane
Sarah Holderness
Michael O'Brien
Claire Perry
Shukti Sharma

helen.macfarlane@heskethhenry.co.nz
sarah.holderness@heskethhenry.co.nz
michael.o'brien@heskethhenry.co.nz
claire.perry@heskethhenry.co.nz
shukti.sharma@heskethhenry.co.nz

Level 14, PwC Tower
188 Quay Street
Auckland 1010
New Zealand

Tel: +64 9 375 8700
Fax: +64 9 309 4494
www.heskethhenry.co.nz

Getting the Deal Through

Acquisition Finance	Dispute Resolution	Licensing	Public-Private Partnerships
Advertising & Marketing	Domains and Domain Names	Life Sciences	Public Procurement
Air Transport	Dominance	Mediation	Real Estate
Anti-Corruption Regulation	e-Commerce	Merger Control	Restructuring & Insolvency
Anti-Money Laundering	Electricity Regulation	Mergers & Acquisitions	Right of Publicity
Arbitration	Enforcement of Foreign Judgments	Mining	Securities Finance
Asset Recovery	Environment	Oil Regulation	Ship Finance
Aviation Finance & Leasing	Foreign Investment Review	Outsourcing	Shipbuilding
Banking Regulation	Franchise	Patents	Shipping
Cartel Regulation	Gas Regulation	Pensions & Retirement Plans	State Aid
Climate Regulation	Government Investigations	Pharmaceutical Antitrust	Tax Controversy
Construction	Insurance & Reinsurance	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Insurance Litigation	Private Client	Telecoms and Media
Corporate Governance	Intellectual Property & Antitrust	Private Equity	Trade & Customs
Corporate Immigration	Investment Treaty Arbitration	Product Liability	Trademarks
Data Protection & Privacy	Islamic Finance & Markets	Product Recall	Transfer Pricing
Debt Capital Markets	Labour & Employment	Project Finance	Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



iPad app

Available on iTunes



Enforcement of Foreign
Judgments
ISSN 2048-464X



THE QUEEN'S AWARDS
FOR ENTERPRISE
2012



LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American
Corporate Counsel Association



ABA Section of
International Law
From Gateway to International Practice

Strategic Research Partner of the
ABA Section of International Law