



Précis Paper

Enforcing Australian Rulings in Foreign Jurisdictions

A discussion about the enforcement of judgements rendered outside of Australia through an Australian court via the common law of Australia.

Discussion Includes

- Theories of Enforcement
- Common Law
- Identity
- Jurisdiction
- Final judgment
- Defences of judgement debtor
- Public Policy
- Denial of natural or substantive justice
- Takeaways

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Enforcing Australian Rulings in Foreign Jurisdictions

In this edition of BenchTV, Dr Harry Melkonian (Honorary Associate, Macquarie Law School, Sydney) and Professor Jeanne Huang (Associate Professor, University of Sydney Law School, Sydney) discuss the enforcement of judgements rendered outside of Australia through an Australian court via the common law of Australia.

Theories of Enforcement

1. One theory of enforcement is that judgements should be able to travel across borders and into other countries. For example, if one receives a judgement in a Chinese Court, the obligation theory requires the judgement debtor to enforce the judgement if he or she has an asset in Australia.
2. There are three levels of enforcement
 - a. The common law region where one can recognise foreign country judgements in Australia under the common law
 - b. The statutory region is foreign judgement statute, the *Trans-Tasman Proceedings Act* 2010 (Cth) which provides favourable reaching for recognition and enforcement of Australian and New Zealand judgements across Tasman
 - c. The interstate recognition and enforcement, for example a judgement in Western Australia to be recognised in NSW.

Common Law

3. Common law is universal for whatever country a person a monetary judgement, however judgements can also be enforced under equity.
4. Monetary judgement means that the judgement has a fixed amount of money or the judgement provides a person a way to calculate how much money.
5. When one considers judgement recognition and enforcement in Australia there are two fundamental issues:
 - a. The first is for the plaintiff, that is the plaintiff has the onus of proof to demonstrate the foreign judgement and if they win will fulfil the requirement for recognition enforcement
 - b. If the plaintiff, the judgement creditor satisfies the onus of proof and the requirements for recognition enforcement, the onus of proof will shift to the debtor which is the defendant. The defendant must then offer defenses for not recognising other enforcement of the foreign judgement

6. Here the plaintiff in Australian judgement recognition enforcement proceedings the judgement creditor and the defendant is the judgement debtor.

Identity

7. An important requirement for recognition enforcement is the identity of the parties. The judgement creditor which is the plaintiff in Australian proceeding should assume the identity of the party who wins the judgement in the foreign country proceeding.

Jurisdiction

8. Besides the identity requirement, there are two additional important requirements to recognise and enforce a foreign judgement. The first one is international jurisdiction. In order to establish jurisdiction, the party must have presence in Australia. In terms of corporations or business entities, the presence means carrying on business in Australia.
9. The case of *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2008] EWHC 1878 (Ch) was decided in an English Court, which is good law in Australia as we follow English precedent.
10. In this case a US party won a US judgement against an English party, a company incorporated in the UK. When Star Wars became popular, a UK company began to manufacture a Star Wars souvenirs and sold them online to US customers. This, according to the US plaintiff, breached US copyright law. The US plaintiff brought the case in a Californian court. The UK party defended the case in terms of jurisdiction and failed. The Californian Court issued a judgement favourable to the US party. The UK party had no assets in the US and believed that the judgement could not be enforced outside the United States.
11. The US party took the judgment to a UK court and applied to the UK Court to recognise the judgement, enforce it and get the money. The UK party defended the case in terms of international jurisdiction arguing that according to the UK law, the US Court has no jurisdiction at all. A UK website sells Star Wars souvenirs to US customers. On the website the prices are in both US dollars and UK pounds. The website also provided international deliveries to the US.
12. In order to determine whether the UK company had presence in the US, the court held that are three components to consider:
 - a. The UK company must have an agent in the US
 - b. There must be a fixed and designated workplace
 - c. The UK company must operate/have operated in the US for a sufficient period of time
13. The Lukas case focused on the second component. The UK court held that there was no fixed and definite place in the US. Therefore, the California court has no jurisdiction and as such the UK Court could not enforce the judgement.

14. In the enforcement of a foreign judgement, we are using a very different definition to the normal statutes if we are suing someone domestically.
15. Under the normal common law in Australia against a foreign company, if the case was initiated under the common law the court will look at the presence, if the defendant is a corporation, presence means carrying on business in Australia *Eden v Pienaar* 2001 (1) SA 158.
16. However, in certain circumstances such as in the *Competition and Consumer Act* 2010 (Cth) there exists statutory ground for a court to exercise jurisdiction. For example, the competition and consumer act has a different interpretation regarding the meaning of carrying on business in Australia. A case brought under the consumer law has a much broader and lower threshold for jurisdiction than the common law.

Final Judgement

17. Together with international jurisdiction, the second requirement for recognition and enforcement is that the judgement must be a final one. If it is not a final judgement it would create uncertainty in Australia for judgement recognition.
18. The definition of finality under common law may not be the same as under civil law countries. In Australia the meaning of finality means the judgment creates res judicata effect. This refers to the court pronouncing the judgement and therefore, if there is a foreign judgement pending appeal, it will still be considered as final in Australian courts. However, in this scenario the judgement debtor can apply to the court to stay the proceeding pending the appeal proceeding in the foreign country.
19. The court may stay proceedings pending the outcome in the foreign country, however this may also give the defendant time to manipulate the asset in Australia, so the court may grant the stay however at the same time require the judgement debtor to provide a monetary guarantee or undertaking that they will not do so.
20. The Court may also decide whether the judgement is going to be recognised and enforced without granting the stay.

Defences of the judgement debtor

21. The first defence that can be put forward by the judgement debtor is fraud. Fraud is important as it provides an opportunity for the judgement debtor to reopen the merits of the case. In other circumstances, the judgement recognition enforcement proceedings are generally not an opportunity for the defendant to reopen the merits and substance of the case, however fraud opens this possibility.
22. In Australia, in different states there is a difference in the meaning of fraud. Some courts in Australia follow the English approach whereas other courts follow the Canadian approach.

23. The English approach distinguishes the fraud in domestic judgement and international judgements. For domestic judgement, according to the English Court, if the fraud has been litigated one will not be permitted to open the case to argue fraud again. However, for international judgement, the English Court held that even if the fraud issue has been argued in the foreign proceeding, one is able to argue fraud again.
24. The Canadian approach is that there is no reason to discredit the foreign judgment so for fraud to be relitigated in court, the apply the so-called new evidence rules to the foreign judgement just as the domestic judgement.
25. In NSW the leading case is *Keele v Findley* (1990) 21 NSWLR 445. In this case the court looked at English authority *Abouloff v Oppenheimer* (1882) 10 QBD 295 which established the English approach.
26. In *Keele v Findley* the NSW Supreme Court held that there is no reason for Australia to distinguish or discriminate a foreign judgement. The Court looked at NZ practice as well as Canadian practice which applies the fraud rule for domestic judgement to international judgements, meaning that the court will require new evidence if fraud has already been argued. In this case, the Court held that it was going to follow the Canadian approach.
27. The matter of *Yoon v Song* (2000) 158 FLR 295 is a South Korean judgment which also looks at this issue. It was decided before South Korea was added to the *Foreign Judgments Act* 1991 (Cth). Today, South Korean judgement can be enforced under the statute, however when this judgement was decided, it had to go through the common law proceedings.
28. In this case, the court decided that *Abouloff v Oppenheimer* (1882) 10 QBD 295 was good law and that it should be followed. In terms of fraud, the picture in Australia is mixed.

Public policy

29. The second defence against judgement recognition enforcement is public policy. The public policy in Australia has a very high threshold. The case of *Benefit Strategies Group Inc v Prider* [2005] SASC 194 in which the judgement creditor sought to recognise and enforce a Californian judgement in South Australia.
30. This case involved US punitive damages and in Australia, there are two arguments relating to US punitive damages;
 - a. The first is that punitive damages violates Australian public policy;
 - b. The second is that punitive damages are a penal law. They are not for compensation, and solely for a deterrence purpose and as such should not be recognised and enforced in Australia.
31. The threshold for public policy in Australia is very high, that is that it should be fundamental to the public welfare. For example, freedom of speech and democracy are pillars of Australian public welfare *Benefit Strategies Group Inc v Prider* [2005] SASC 194. The court considered when deciding whether a judgement is penal in nature; one should look at who the final beneficiary of the punitive damages is.

32. The case of *Benefit Strategies Group Inc v Prider* [2005] SASC 194 involved telecommunication fraud in the US. In this case the Californian court issued punitive damages for the plaintiff who was the victim of the telecommunication fraud.
33. In Australia, the court considered who is the final beneficiary and concluded that the beneficiaries were private parties. The punitive damages were not for deterrence but for compensation to the plaintiff and therefore should be recognised and enforced.
34. If the punitive damages are payable to the government, as in *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* [1991] 175 ALR 1, the court considered who the final beneficiary of the judgement was and found it was the government and therefore should not be enforced.

Denial of natural or substantive justice

35. Denial of natural or substantive justice focuses on procedural issues. For example, whether the judgement debtor in the judgement rendered in Court has been properly summoned. Here the denial of natural or substantive justice is based on the law of the judgement rendered in the foreign court rather than the Australian Court.

Takeaways

36. The plaintiff has the onus of proof to demonstrate that the foreign judgement fulfils the requirements of recognition/enforcement including international jurisdiction, final and conclusive judgement, the identity of the parties as well as some monetary amount.
37. The defendant has the onus of proof to defend the proceedings which may include defenses of fraud, public policy defenses and penal law issues and natural and substantive justice.

BIOGRAPHY

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Dr Melkonian is admitted to practice in England, New York, California and New South Wales. He is a scholar on the Constitution of the United States. He has conducted over 1000 jury trials in the USA and is now resident in Sydney, where he practices law specialising in media and defamation, constitutional issues and private international law.

He is a Faculty member of Macquarie University Law School and the author of *Freedom of Speech and Society: A Social Approach to Freedom of Expression and Defamation*, *Libel Tourism and the Speech Act of 2010: The First Amendment Colliding with the Common Law*. He was the lead trial lawyer in the landmark *Meinhold v US* case in which the right of gays to serve in the US military was first established. He represented the Chief of Police during the aftermath of the riots in Los Angeles following the Rodney King trial

Professor Jeanne Huang

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Jeanne Huang specialises in conflict of laws and digital trade/e-commerce regulations. She is widely recognised as an active and productive scholar in the interdisciplinary study between conflict of laws and data economy. In leading peer-reviewed journals, she has published on jurisdiction and applicable law in China, Australia, the US and the EU litigations on data protection, arbitration and data protection/e-commerce regulations in free trade agreements. She has also written extensively about arbitration, litigation and judgement enforcement involving China and Chinese parties.

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