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# Précis Paper

## Court Orders with an International Dimension

Dr Harry Melkonian with Ian Benson discusses the variety of orders courts make relating to activities in other jurisdictions, including freezing orders, anti-suit injunctions, worldwide injunctions and actions commenced under long-arm provisions.

**Discussion Includes**

- International freezing orders – *PT Bayan Resources TBK v BCBC Singapore PTE Ltd* [2015] HCA 36
- Anti-suit injunctions
- Orders purporting to bind a party in its business activities overseas
- Long arm jurisdiction
- The constitutional approach in the United States to long arm jurisdiction and due process

# Précis Paper

# Court Orders with an International Dimension

1. In this edition of BenchTV, Dr Harry Melkonian (Solicitor) and Ian Benson (Solicitor) present on the variety of control orders courts impose on activities in other jurisdictions, including freezing orders, anti-suit injunctions, worldwide injunctions and actions commenced under long-arm provisions. Dr Melkonian is a lawyer and legal educator with significant expertise in United States constitutional law, media and defamation, and private international law.

Freezing Orders

2. In the course of their discussion, the presenters reflect on the High Court's (French CJ; Kiefel, Bell, Gageler, Keane, Nettle & Gordon JJ) recent decision in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd [2015] HCA 36* which involved a freezing order brought by a Singaporean company as a result of a dispute in Indonesia, targeting assets located in Australia.

3. A freezing order (previously known as a "Mareva injunction") prevents a party from disposing of assets with the intention of frustrating the enforcement of a judgment. The procedural rules of all Australian Supreme Courts provide for freezing orders, including in support of foreign judgments that are enforceable in Australia. The *Foreign Judgments Act 1991* (Cth) (hereafter "FJA") regulates the registration and enforcement in Australia of judgments obtained in certain foreign countries including the United Kingdom, Singapore, Korea, Japan, Italy, Germany, and France.

4. The respondent, BCBC Singapore, had commenced proceedings in Singapore against the appellant, PT Bayan, claiming damages for breach of a $100 million joint venture agreement (which was governed by Singaporean law). Whilst the Singaporean proceedings remained ongoing, BCBC sought freezing orders against the appellant in the Supreme Court of Western Australia pursuant to Order 52A *Supreme Court Rules 1971* (WA).

5. Order 52A r 5(1)(b)(ii) provides that the Supreme Court may make an order against a prospective judgment debtor or third party if an applicant has "a good arguable case on an accrued or prospective cause of action justiciable in … another court" if there is a "sufficient prospect that the other court will give judgment in favour of the applicant" and a "sufficient prospect that the judgment will be registered in or enforced by the Court" (r 5(3)).

6. Bayan argued that the WA Supreme Court did not have any inherent or statutory power under Order 52A of the Rules to make a freezing order as no substantive proceedings had been or were to be commenced in the Supreme Court and no judgment had been made in the foreign proceedings. In addition, Bayan also argued that the existence of such a power

would be inconsistent with ss 17 & 20 of the FJA for the purposes of the *Commonwealth Constitution* s 109 which provides that when "…a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

7. The resolution of these issues in the High Court turned on technical questions of statutory interpretation. Their Honours held at [2] *that the Supreme Court has inherent power to make freezing orders to ensure the effective administration of justice within its authority to adjudicate conferred by s 39(2) of the Judiciary Act 1903 (Cth*). Additionally, the Supreme Court's powers were found to be not inconsistent with the FJA as it did not prescribe the processes or requirements for the enforcement of foreign judgments. At [78], it was noted that:

> *The unchallenged concurrent findings of the primary judge and the Court of Appeal as to the likelihood of the registration of a Singaporean judgment in favour of BCBC under the FJA establish a sufficient connection with the administration of justice by the Supreme Court of Western Australia to engage the power of the Court proleptically to ensure that its processes will not be frustrated by action on the part of Bayan directed to that end.*

Accordingly, the appeal was dismissed.

8. Notwithstanding the complex legal arguments, the decision in *PT Bayan* is particularly significant because the High Court has confirmed that Australian superior courts have the power to make freezing orders in respect of property in Australia that may be available to meet a foreign judgment which, when delivered, would be registrable under the FJA. Nevertheless, in order to obtain a freezing order in these circumstances, it remains necessary to establish that the processes of the Court may be frustrated unless the freezing orders are made, which involves establishing a likelihood that the foreign judgment will be registrable.

<u>Anti-Suit Injunctions</u>

9. Anti-suit injunctions are sought to preclude litigation in other jurisdictions and were particularly important in litigation surrounding the Estate of Laker Airways: *British Airways Board v Laker Airways Ltd* [1985] AC 58 in the House of Lords and *Midland Bank PLC v Laker Airways Ltd* [1986] QB 689 in the Court of Appeal. These cases arose out of anti-trust proceedings brought in the United States by the English liquidator of Laker Airways Ltd, in connection with an alleged conspiracy to drive Laker Airways Ltd out of business, against several defendants including certain British airlines and banks.

10. In *British Airways Board*, the House of Lords intimated that an anti-suit injunction could be granted to restrain foreign proceedings even if the plaintiff in those proceedings would have

no remedy in England. However, such an injunction would only be granted if the bringing of the foreign action would be so unconscionable as to be regarded as the infringement of an equitable right. No such quality was established on the facts as the British airlines, by carrying on business in the United States, had in effect accepted that they were subject to United States law, including anti-trust law. Thus no anti-suit injunction was granted.

11. This result was subsequently distinguished by the Court of Appeal in *Midland* where two British banks were held to be entitled to an injunction restraining the liquidator from joining them to the United States proceedings. The Court of Appeal held that for an English plaintiff to sue them in the United States, on the basis of the extra-territorial application of United States anti-trust law to activities in England that were intended to be governed by British law, would be unconscionable.

12. Following the decision of the European Court of Justice in *Turner v Grovit* (Case C-159/02 [2004] ECR I-3565), the circumstances in which a national court of an EU member state can grant an injunction restraining a party from pursuing court proceedings in the courts of another member state have been severely limited. The Court determined that to allow these anti-suit injunctions would run counter to the principle of mutual trust and cooperation underlying the establishment of the European Union itself. By limiting anti-suit injunctions in this way, the court to which a matter is brought has total responsibility to ensure that they are the relevant forum to determine the dispute.

Worldwide Injunctions

13. *Equustek Solutions Inc v Google Inc.* 2014 BCCA 295 considered the use of worldwide injunctions which seek to restrict a particular action globally. In the case, the Court of Appeal of British Columbia considered the Supreme Court's decision to order Google to de-index certain offending websites which were selling goods that were the subject of an intellectual property infringement claim. The underlying dispute involved a trade-secret misappropriation and passing-off claim by a manufacturer against a rival company. Significantly, Google had de-indexed the website from their Canadian servers but the applicant, Equustek, was seeking an order that Google remove the website from all of its servers worldwide.

14. In refusing to stay the enforcement of the order to delist the infringing website worldwide, the Court of Appeal noted that "[t]he lack of evidence of irreparable harm, in particular, leads… to the conclusion that Google's application must be dismissed." (§ 27). The Court continues by stating at § 30-31 that:

> Google does not lead evidence to the effect, or argue, that it or the public will suffer irreparable harm as a result of the specific order made below. [ . . . ]. Google argues,

> rather, that it will suffer irreparable harm as a result of the precedent established by the granting and enforcement of the injunction. [ . . . ]. It argues the enforcement of the injunction and presumably its observation by Google may result in other jurisdictions regarding Google as a vehicle for global enforcement of their laws. It makes a "floodgates" argument to the effect that similar orders in other jurisdictions may result in global content on the Internet being reduced to the lowest common denominator. It is of the view that compliance with the order would cause users to lose trust in the credibility of the Google search engine and lead to a loss of business.

15. Adopting this legalistic approach, the Court seemingly imposed Canadian law on the business operations of a company operating in jurisdictions which have completely different legal regimes (in fact, the IP rights asserted in the global action may not exist in many of these jurisdictions). These circumstances might justify courts employing a greater degree of self-restraint and sensitivity to the international business environment. However, it should be noted that such an injunction from Canada would not be enforceable in another country's courts although Google would be subsequently held in contempt in Canada for breaching the court order, were they not to comply.

Long Arm Jurisdiction

16. A 'long-arm' statute subjects foreign defendants to the jurisdiction of that State as long as the foreign defendant has some connection with the State. The test to be applied in the United States is whether the foreign defendant has "certain minimum contacts" with the particular State such that the litigation being held and heard in that jurisdiction does not offend "traditional notions of fair play and substantial justice": *International Shore v Washington* 326 US 310 (1945).

17. The exercise of long arm jurisdiction is problematic where there is no specific act connecting the defendant to the jurisdiction. *Daimler AG v. Bauman*, 571 U.S. __, 134 S. Ct. 746 (Jan. 14, 2014) considered this subject with respect to the actions of a subsidiary of Mercedes Benz. The Court concluded that corporations are subject to a State's general jurisdiction only when "their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." The "paradigm bases" for establishing general jurisdiction over a corporation are the corporation's State of incorporation and principal place of business. But when the forum State is not the place of incorporation or principal place of business, jurisdiction is appropriately exercised only in the "exceptional case" in which the corporation's contact with the forum "are so substantial and of such a nature as to render the corporation at home in that State."

18. The decision in *Daimler* clarifies the obstacles that a plaintiff must overcome to establish a court's general jurisdiction, and will likely rein in the exercise of general jurisdiction over foreign entities doing business in the United States through subsidiaries.

**BIOGRAPHY**

Dr Harry Melkonian

Dr Harry Melkonian is admitted to practise in England, New York, California and NSW.

His scholarship includes expertise on the Constitution of the United States, and he has conducted over 1,000 jury trials in the United States.

He is now resident in Sydney, where he practises 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 a landmark case in which the right of gay people to serve in the US military was first established. He represented the Chief of Police during the aftermath of the Los Angeles riots following the Rodney King trial.

Ian Benson

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**BIBLIOGRAPHY**

Focus Case

*PT Bayan Resources TBK v BCBC Singapore PTE Ltd* [2015] HCA 36

Judgment Link

http://www.austlii.edu.au/au/cases/cth/HCA/2015/36.html

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_16-10-2015_insurance.pdf

Cases

*British Airways Board v Laker Airways Ltd* [1985] AC 58
*Daimler AG v. Bauman*, 571 U.S. __, 134 S. Ct. 746 (Jan. 14, 2014)
*Equustek Solutions Inc v Google Inc.* 2014 BCCA 295
*International Shore v Washington* 326 US 310 (1945)
*Midland Bank PLC v Laker Airways Ltd* [1986] QB 689
*Turner v Grovit* (Case C-159/02 [2004] ECR I-3565)

Legislation

*Commonwealth Constitution*
*Foreign Judgments Act 1991* (Cth)
*Judiciary Act 1903* (Cth).
*Supreme Court Rules 1971* (WA)