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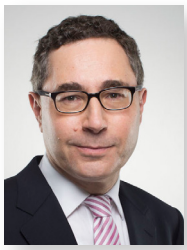
Cross-Border Non-Disclosure Agreements: How Enforceable?

In March 2018, the *Washington Post* reported senior White House staff signed confidentiality agreements stipulating that officials could face monetary penalties if they disclosed confidential White House information to the press or others and that these were intended to remain in effect after the current President is no longer in office. A draft copy of the agreement would have subjected violators to penalties of $10 million, payable to the federal government for each and any unauthorized revelation of "confidential" information.



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This is perhaps the latest high-profile example of the widespread use of a non-disclosure agreement (NDA), including for business, personal and other purposes.

This article highlights some of the issues in the enforceability across borders of breaches of NDAs. The first part will consider the ability to impose "penalties" for breaches of NDAs and how (as an example) that is treated under Australian law. The second part will outline some of the available remedies for breaches of NDAs, weighing up whether parties in their NDAs should provide for resort to Court or arbitral enforcement. The third part of this article will examine the ability to enforce foreign judgments relating to breaches of NDAs and outline practical considerations for interested parties. With the size of transnational trade and a push for transparency in international commercial transactions, it is more important than ever to get your NDA right.

Penalty or Liquidated Damages?

Under both U.S. and Australian law, this distinction is important, as in both jurisdictions a provision in a contract which seeks to impose a penalty upon a contracting party is unenforceable. Generally, a contractual requirement for the wrongdoer to pay more than compensation (or a genuine estimate of compensation) in the event of their breach, will be a penalty.

The relevant law in Australia can be summarized as follows:[1]

- genuine pre-agreed pre-estimates of loss for breach are prima facie enforceable as claims for liquidated damages whereas penalty clauses are void or unenforceable leaving claimants to rely on proof of actual damages;
- whether a clause is a penalty or not is a question of legal construction as at the contract date (not the date of breach) and the parties' private intentions are not relevant; and
- agreed damages provisions are prima facie effective, and the onus is on the promisor to establish that the clause is a penalty.

In Australia whether a clause is to be categorized as a penalty or as a genuine pre-estimate of damages is a test "of degree and would depend on a number of circumstances" including:

- any degree of disproportion between the agreed sum and the loss likely to be suffered by the claimant, that is, how "oppressive" is the clause on the party in breach; and
- the nature of the relationship between the parties becomes relevant with regard to the unconscionability of the claimant in seeking to enforce the clause.

If determined by the courts to be "extravagant," "unconscionable" or "exorbitant" in amount in comparison with the *greatest* loss that could be conceivably proved, the agreed sum would likely in Australia be a penalty.

While the treatment of liquidated damages varies among different state jurisdictions within the U.S., the U.S. courts generally consider at least two elements:

- whether the harm caused by any breach is difficult to calculate; and
- whether the amount of liquidated damages is reasonable in proportion to actual or anticipated harm.

If not, it is a penalty which is against public policy and therefore the clause is unenforceable.

Remedies and Enforcement

Remedies for a breach of an NDA include either:

- injunctive relief, desirable in cases of anticipatory breaches or to prevent future breaches; or
- damages, or recovery of a genuine pre-estimate of damages, where there has been an actual breach.

The decision of where to seek enforcement of these remedies is an important business and strategic consideration. First, the party seeking to enforce the NDA must decide in what country they will seek enforcement. While this is intrinsically related to the express law governing the contract, and any choice of venue clause, it may be subject to a forum non conveniens challenge, which allows courts to dismiss a case where another court, or forum, is much better suited to hear the case. Second, any enforcement through the courts immediately brings the breach into the public realm. Third, where a remedy is granted in one jurisdiction, there is no guarantee that it will be recognized or enforced in another, that is, if damages are awarded by a court in the U.S., there is no guarantee that an Australian Court would enforce that judgment (and vice versa).

Enforcement of Foreign Judgments

While obtaining a judgment in your favor for breach of an NDA is a step in the right direction, it is not necessarily the full solution for all relevant jurisdictions. This hinges on the enforceability of foreign judgments in domestic jurisdictions. For example, in Australia the statutory regime for the recognition and enforcement of certain foreign court judgments is under the *Foreign Judgments Act 1991* (Cth) (FJA). Notably however, there is no general statutory mutual enforcement between the U.S. and Australia. When seeking to enforce a U.S. Court judgment in Australia claimants must resort to the common law principles for enforcement.

In short, four conditions must be satisfied for a foreign judgment to be recognised and enforced in Australia as common law:

- the foreign court must have exercised an 'international' jurisdiction that Australian courts recognize;
- the judgment must be final and conclusive;
- the parties must be the same; and
- the judgment must be for a fixed sum (although certain non-money judgments may be enforceable in equity).

Arbitration

Interestingly, while there is a gap between the U.S. and some countries including Australia in statutory enforcement of court judgments, due to the operation of the New York Convention, to which the U.S. is a signatory, there is far wider recognition of arbitral awards including between the U.S. and Australia. Between signatory countries, a foreign court is obliged to recognize the award, except in certain circumstances. Accordingly, for a cross-border situation, it may be advantageous to consider arbitration as a dispute resolution mechanism.

Conclusion

It is clear that it is of increasing importance to consider the practical enforceability of cross-border NDAs. We must not forget that ultimately remedies and enforcement vary from jurisdiction to jurisdiction. An analysis of each relevant jurisdiction is appropriate. P

1 *Dunlop Pneumatic Tyre v. New Garage & Motor Co Ltd* [1915] UKHL 1 (Lord Dunedin).