

WA Supreme Court Awards Freezing Order in Dispute Pending Arbitration

Without enforcement, an arbitration process and subsequent awards can be a pointless exercise. Freezing orders are an important tool in any dispute and a recent decision by the Supreme Court of Western Australia suggests that courts are willing to protect the enforceability of future awards.

In a dispute arising out of works performed as part of the Roy Hill Iron Ore Project (Project), Trans Global Projects (**TGP**) applied to the Supreme Court for a freezing order against Duro Felguera Australia (**Duro**) which would keep Duro's assets in the jurisdiction until an arbitral award could be made. TGP also sought an ancillary order against Duro for the disclosure of its assets and liabilities.

The Supreme Court ordered that AU\$20 million of Duro's assets be subject to a freezing order, on the basis that there is a danger that any arbitral award against Duro may not be satisfied because the assets of Duro would be removed from Australia or disposed of, dealt with or diminished in value. The court also decided that Duro should disclose its assets and liabilities.

The Supreme Court held:

- The court has inherent jurisdiction to make a freezing order to protect both the arbitral process and the court's ability to enforce arbitral awards,¹ and that jurisdiction is conferred by Article 17J of the UNCITRAL Model Law on Commercial Arbitration²
- Duro would not suffer reputational damage as result of such an order
- The freezing order should remain in place until further order of the court to prevent the dissipation of assets prior to the enforcement of any award
- Duro should disclose its assets (including any securities granted over them) and liabilities.

Trans Global Projects Pty Ltd (In Liquidation) v Duro Felguera Australia Pty Ltd [2018] WASC 136

Background

Duro is the wholly owned subsidiary of Duro S.A, which has its headquarters in Gijón, Spain.

In 2014, Duro and TGP entered into a contract where TGP were to provide transport services. TGP served a notice of reference to arbitration for claims valued at approximately AU\$30 million against Duro, under the arbitration agreement in the contract.

In 2015, TGP was placed into voluntary administration, however, by January 2018, TGP had reached a litigation funding agreement with its liquidators.

Relevantly, Duro exhibited limited ongoing business activities. Furthermore, as relied on by the court, Duro is party to multiple other disputes arising out of the project – including with the project's head contractor, Samsung C&T Corporation (**Samsung**) – some of which are also the subject of arbitral proceedings.

Decision

In deciding whether to grant the freezing order, the Supreme Court considered:

- Does the plaintiff have a "good arguable" case?
- Is there a danger that any future award in favour of the plaintiff will remain unsatisfied, as a result of the defendant's removal or disposal of assets outside Australia?
- Is it in the interest of justice to grant a freezing order?

The court found that TGP had a good arguable case on its claims and Duro had cross-claims that it claimed to be entitled to be set off. The presence of counterclaims did not preclude the Supreme Court from finding in favour of TGP.

The court held that Duro's overarching submissions – that a court should not assume that all of TGP's claims would succeed and that all of Duro's counterclaims would fail – did not focus on the question of whether TGP had a good arguable case. Although the court did not set an exact threshold, it is apparent from the judgment and previous authorities that a plaintiff is not required to satisfy a high threshold to meet the first question. This consideration, in the absence of all others, broadens a party's access to freezing order applications and may make them a viable protective mechanism in the circumstances where an arbitral tribunal has yet to be constituted.

As to the second question, the tenuous financial position of Duro's parent company and the evidence of a previous inter-company loan made to it by the subsidiary represented a real risk that Duro S.A. would "exert effective control over the affairs of [Duro]".³ This inference was compounded by the ongoing arbitration between Duro and Samsung, which, should Duro be successful, by award or settlement, would result in significant funds being made available to Duro.

¹ *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 [46], Article 35 of the UNCITRAL Model Law, and 052A of the *Rules of the Supreme Court 1971* (WA).

² As conferred by s 16 of the *International Arbitration Act*.

³ *Trans Global Projects Pty Ltd (In Liquidation) v Duro Felguera Australia Pty Ltd* [2018] WASC 136, [64].

As a result, the dissipation of Duro's assets outside of Australia was not unrealistic and, in turn, the danger that any award in favour of TGP remaining unsatisfied was a conceivable risk. The court also considered the limited ongoing business activities and conduct of Duro, highlighting the need for potential plaintiffs to demonstrate a strong factual basis for any concerns of asset dissipation.

In answering the third question, the court referred to the answers it gave to the first two questions.

This case will likely serve as authority for the fact that a freezing order will be in the interests of justice where it is found that the plaintiff has a good arguable case and there is a danger that any future award in favour of the plaintiff will remain unsatisfied.

It is important to note that the terms of the freezing order were such that they permitted Duro to continue to conduct its ordinary business. This consideration appears to be a necessary step in dispelling any claims made by a defendant that freezing orders are not in the interest of justice.

Implications

This decision demonstrates the Supreme Court's willingness to preserve its inherent jurisdiction to make orders that protect the arbitral process and the court's ability to enforce arbitral awards.⁴

Furthermore, the Supreme Court's decision should provide comfort to potential claimants in international arbitrations, on the basis that the courts can, and will, intervene to protect the long-term position of at-risk parties, pending final arbitral awards.

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⁴ *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 [46] and Article 35 of the UNICTRAL Model Law.