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Out in the cold: WA Court of Appeal upholds freezing order against Spanish-owned construction company involved in arbitration

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Abstract

Elinor Buys and Erika Williams outline how a recent Western Australian Court of Appeal decision has confirmed the willingness of Australian Courts to issue freezing orders to prevent the frustration of arbitral awards, reinforcing Australia's reputation as a safe arbitral seat. The case of Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq) [2018] WASCA 174 usefully and clearly spells out the basis for the court's jurisdiction, and the relevant test, for granting a freezing order in aid of an arbitration seated in Australia, even before the tribunal has been constituted. However, the authors point out that courts still take the view that freezing orders are drastic remedies, which should only be granted if there are compelling reasons to do so.

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The Western Australian Court of Appeal (**WA Court of Appeal**) has recently confirmed the willingness of Australian Courts to issue freezing orders to prevent the frustration of arbitral awards, reinforcing Australia's reputation as a safe arbitral seat. On 11 October 2018, the WA Court of Appeal upheld a freezing order against Duro Felguera Australia Pty Ltd (**Duro**), prohibiting it from disposing of any prospective proceeds awarded to Duro out of its ongoing arbitration against Samsung C&T Corporation (**Samsung**), seated in Singapore (**Samsung Arbitration**).[3] The freezing order was sought by Trans Global Projects Pty Ltd (in liquidation) (**TGP**), who is engaged in a separate Australian-seated arbitration against Duro. TGP applied for the order due to concerns that Duro would loan the Samsung Arbitration proceeds to its Spanish parent company, Duro Felguera SA (**Duro SA**) and default on any potential award in favour of TGP. Overall, the decision clarifies the law around freezing orders in relation to arbitral proceedings and exemplifies the willingness of Australian Courts to protect the integrity of the arbitral process and the enforcement of prospective arbitral awards.

Background

Duro performed work over several years for the Roy Hill Iron Project (**Project**) under a contract with Samsung. In May 2014, Duro and TGP entered into a subcontract (**Subcontract**) pursuant to which TGP agreed to transport processing facility components for the Project. Within a year of the Subcontract's commencement, Duro and TGP had substantial claims against each other and on 19 June 2015, TGP served a notice of a reference to arbitration. Both parties agreed that the *International Arbitration Act 1974* (Cth) (**IAA**) applied to the dispute.

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[3] *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASCA 174

TGP was placed into voluntary administration on 30 July 2015 and then in liquidation on 15 September 2016. A few years later on 11 April 2018, TGP's liquidators gave notice of their intention to pursue TGP's claims against Duro under the Subcontract and sought an undertaking from Duro not to deal with its assets. Duro declined to provide the requested undertaking. Understandably, TGP applied to the Western Australian Supreme Court on 19 April 2018 for a freezing order against Duro to prevent it from dealing with, disposing of or removing its assets from Australia before an arbitral award could be made and enforced.

Primary decision

On 7 May 2018, Justice Tottle, the primary judge in the Supreme Court of Western Australia, granted the freezing order pursuant to Order 52A rule 5(4) of the *Rules of the Supreme Court 1971* (WA) (**Rules**), operative 'until further order'.[4] Order 52A rule 5(4) provides:

> *(5) 'The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur —*
>
> *a. the judgment debtor, prospective judgment debtor or another person absconds; or*
>
> *b. the assets of the judgment debtor, prospective judgment debtor or another person are —*
>
> *(i) removed from Australia or from a place inside or outside Australia; or*
>
> *(ii) disposed of, dealt with or diminished in value.'*

Therefore, to make a freezing order, the Court must be satisfied of three elements:

a. one or more of the events described in order 52A sub-rule 5(4)(a) or (b) might occur;

b. there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied; and

c. that danger arises because one or more of the events described in order 52A sub-rules 5(4)(a) or (b) might occur.

Utilising these elements, Tottle J elucidated the following three-pronged test for whether it is appropriate in the circumstances to grant a freezing order:

a. Did TGP have a 'good arguable case on an accrued or prospective cause of action'?[5]

b. Was there a danger that a future arbitral award and any judgement in favour of TGP would be unsatisfied, because Duro's assets would be removed from Australia or disposed of?

c. Was it in the interests of justice to grant a freezing order?

Answering each question in the affirmative, Tottle J was particularly persuaded by evidence indicating that Duro SA was in need of funds that would likely be extracted from Duro and sent to Duro SA (in

[4] See *Trans Global Projects Pty Ltd (in liq) v Duro Felguera Australia Pty Ltd* [2018] WASC 136

[5] Ibid [20]

Spain). Justice Tottle referred to the fact that significant funds had been transferred to Duro SA in the past and that the board and management of Duro SA were in a position to exert effective control over Duro's affairs.

Duro appealed this decision on two grounds:

a. the primary judge erred in fact and law in being satisfied under O 52A r 5(4)(b)(ii) of the Rules that there was a danger the prospective judgment would be wholly or partly unsatisfied because the assets of Duro would be disposed of, dealt with or diminished in value; and

b. in the alternative, the primary judge erred in making the freezing order operate 'until further order'; rather, it should operate only until the arbitral tribunal had a reasonable opportunity to consider for itself whether to grant equivalent relief.

Appeal decision

Prior to addressing the two grounds of appeal, the WA Court of Appeal, constituted of Buss P, Murphy JA and Mitchell JA, gave significant consideration to jurisdictional matters. The Court confirmed that its power to make a freezing order was derived from two concurrent sources: (1) the UNCITRAL Model Law on International Commercial Arbitration (1985) (**Model Law**), which has the force of law in Australia under s16 IAA; and (2) the inherent or implied power of the Court.

First, art 17J of the Model Law bestows courts with the same power as an arbitral tribunal to grant interim measures in relation to arbitration proceedings, which courts must exercise in accordance with their own procedures.[6] That power is conferred for the purpose of protecting the integrity of the arbitration process.[7] An order under art 17J can be made by a State Court exercising its federal jurisdiction arising under the IAA, as conferred by s 39(2) of the *Judiciary Act 1903* (Cth), read in conjunction with s 76(ii) of the *Australian Constitution*. Second, the Court has inherent or implied power to make a freezing order under art 35(1) of the Model Law, which states that an arbitral award shall be recognised and enforced by a competent court irrespective of the country in which it is made.[8] This provision confers federal jurisdiction on Courts to make enforcement orders, and in doing so, implicitly empowers them to make other orders necessary for the proper exercise of that jurisdiction. This inherent or implied power extends to making a freezing order in relation to an anticipated arbitral award.[9]

Having established the Court's jurisdiction to grant an order, the WA Court of Appeal dismissed the appeal for the reasons below.

Ground 1

The first ground involved a consideration of order 52A rule 5(4)(b)(ii) of the Rules, which as indicated above, provides that the Court may make a freezing order against a prospective judgment debtor if satisfied that there is a danger that a prospective judgment will be wholly or partly unsatisfied because the assets of the prospective judgment debtor are disposed of, dealt with or diminished in value. As such, the

[6] In other words, the WASC must exercise it power to grant a freezing order in accordance with O 52A of the Rules
[7] *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASCA 174 [149]
[8] Ibid
[9] O 52A of the Rules is then picked up and applied as federal law by s 79 of the *Judiciary Act 1903* (Cth)

Court must be satisfied of a causal connection between the relevant removal of or dealing with the asset and the danger that a prospective judgment will not be satisfied.[10]

The WA Court of Appeal noted that the language of this provision was intended to reflect the general law in relation to the inherent or implied power of a Court to grant a freezing order. In line with these general law principles, the Court stressed that it was not sufficient to merely show that one or more of the events described in O 52 r 5(4)(a) or (b) might occur. Instead, the Court must be satisfied that the award will be party or wholly unsatisfied *because* one or more of those events might occur.[11] To this end, the applicant must prove, on the balance of probabilities, a set of facts from which the Court can infer the existence of a 'real or substantial risk' that the award will not be satisfied.[12] Additionally, the applicant need not show that there is something irregular in the nature of the assets, or provide evidence that the respondent acts with the purpose of frustrating the satisfaction of the judgment. However, if shown, these may be 'powerful discretionary considerations' for the Court.[13]

The WA Court of Appeal noted that if the Samsung Arbitration resulted in a significant payment of money to Duro, then it would be by way of payment to funds into a bank account held by Duro. Duro would then hold those funds as a chose in action (being, the debt owed by the bank to Duro for the amount standing to the credit of Duro in the bank account). A transfer of funds by Duro to Duro SA would involve the reduction in the debt owed by the bank to Duro and the creation of a debt in the same amount owed by Duro SA to Duro. The value of Duro's net assets would not be affected so long as the debt owed by Duro SA is enforceable by Duro and Duro SA has the capacity to repay the loan on the due date. In that event, the dealing in Duro's assets would change the identity of the debtor but would not alter the value of the receivable. The dealing would not give rise to a danger that the prospective judgment would be unsatisfied.[14]

Whist the WA Court of Appeal accepted TGP's submission that the enforcement of the prospective judgment would be more difficult if the asset was a debt owed by a foreign company rather than an Australian bank, the Court emphasised that:[15]

> *'the test is not whether satisfaction of the prospective judgment will be more difficult because of a dealing with Duro's assets. The court must be satisfied that there is a danger that the prospective judgment will be wholly or partly unsatisfied because of the relevant dealing. Increased difficulty in enforcing a prospective judgment will only be relevant if it establishes a danger that the judgment will be unsatisfied.'*

Nevertheless, considering all the circumstances of the case, the WA Court of Appeal agreed it was open to the primary judge to infer that there was a danger a prospective arbitral award would be wholly or partly unsatisfied because Duro's assets might be dealt with. Their Honours accepted evidence from TGP that Duro would lend funds to Duro SA, who was in 'significant need for funds' and was in 'financial difficulties'.[16] Stemming from this state of affairs, there was a real and not remote risk that any proceeds from the Samsung Arbitration would be lent to Duro SA, and accordingly:

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[10] *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASCA 174 [109]
[11] ibid [41]
[12] ibid [43]
[13] ibid [55]
[14] ibid [112]
[15] ibid [113]
[16] ibid [125]

a. Duro SA would not have the capacity to repay the loan to Duro at the time when it fell due for repayment; and

b. Duro's remaining assets would be insufficient to wholly satisfy an arbitral award in favour of TGP.

The Court emphasised that the freezing order was not justified merely because Duro would likely lend the Samsung Award funds Duro SA; the important additional element was the evidence establishing that Duro SA was in a precarious financial position. It was this fact which was held to give rise to a real risk that Duro SA would lack the capacity to repay the loan when Duro needed the money to satisfy an award in favour of TGP. This risk was compounded by Duro's own precarious financial position, and limited presence in Australia. Accordingly, Duro's first ground of appeal was rejected.

Ground 2

The second ground was dealt with in more brevity by the Court. The Court first acknowledged that it should not make an order inconsistent with an arbitration agreement or that usurps the role of the arbitral tribunal.[17] Along these lines, the Court opined that it should exercise its statutory and implied or inherent powers to grant a freezing order in relation to arbitral proceedings sparingly. However, the WA Court of Appeal also noted that in assessing whether the order may impinge upon the arbitration agreement, it is necessary to take account of art 9 of the Model Law. Article 9 is one of the 'specific features of international arbitration' to which art 17J of the Model Law refers. Article 9 expressly provides that it is not incompatible with an arbitration agreement for a court to grant an interim measure (which includes a freezing order under art 17J) during arbitral proceedings. It follows that art 9 is inconsistent with Duro's submission that the Court should only make a freezing order which operates until an arbitral tribunal has been established and has had a reasonable opportunity to make such an order itself.[18]

As such, their Honours concluded that where an applicant satisfies the onerous requirements for obtaining a freezing order, the Court was entitled to grant a freezing order until 'further order', as there is no reason why the order should only be made until the arbitral tribunal can consider the question.[19] As such, it was open to the primary judge to make the freezing order operate until further order and Duro's second ground of appeal was therefore rejected.[20]

Final thoughts

Freezing orders can be a valuable tool for managing risks in litigation and arbitration proceedings, particularly in circumstances where a prospective judgment debtor, or its foreign parent, are in a precarious financial position and are likely to dispose of their assets. However, as acknowledged by the WA Court of Appeal, a freezing order is generally viewed as a drastic remedy that should be granted with a 'high degree of caution' and only if there are compelling reasons to do so.[21] It will not be sufficient merely to provide evidence that the assets in question will be removed. An applicant must prove a causal connection between the removal of or dealing with the assets, and the danger that the prospective award will not be satisfied. Despite the challenges that applicants may face in proving this casual connection, the

[17] Ibid [150]
[18] Ibid [150]
[19] Ibid [153]
[20] Ibid [155]
[21] Ibid [153]

WA Court of Appeal has nevertheless demonstrated that Courts are indeed willing and able to grant a freezing order in relation to arbitration proceedings where such requirements are met. This decision is certainly in line with Australia's strong pro-arbitration stance and reinforces the willingness of Australian Courts to make orders within their power to prevent the frustration of prospective arbitral awards. Furthermore, although *Duro v TGP* concerns the *Rules of the Supreme Court 1971* (WA), particularly order 52A r 5(4), a substantially similar rule is embodied within the civil procedure rules of every other state and territory in Australia.[22] Accordingly, practitioners may utilise this decision of the WA Court of Appeal as a *persuasive* authority in all other Australian state and territory jurisdictions.

[22] See, *Uniform Civil Procedures Rules 1999* (Qld) r 260D(3); *Uniform Civil Procedure Rules 2005* (NSW) reg 25.14(4); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) reg 37A.05(4); *Supreme Court Civil Rules 2006* (SA) r 247(5)(d); *Court Procedures Rules 2006* (ACT) reg 743(4); *Supreme Court Rules 2000* (Tas) r 937E(4); *Supreme Court Rules* (NT) r 37A.05(4).

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