COURT PLACES ASSETS IN THE FREEZER

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Australia Real Estate Alert

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The Supreme Court of Western Australia has recently made a freezing order in the matter of *Trans Global Projects Pty Ltd (In Liquidation)* (TGP) *v Duro Felguera Australia Pty Ltd* (Duro) [2018] WASC 136.

This decision sheds light on:

- the factors that the Court will consider in granting a freezing order (i.e. an order whereby the assets of a company are "frozen" so that the company cannot dispose of or deal with those assets)
- the circumstances in which a Court will issue a freezing order to enforce an arbitral award.

In short, the Court ordered that AUD20 million of Duro's assets be frozen as Justice Tottle was persuaded that there was a danger that a prospective judgment based on an arbitral award against Duro would be wholly or partly unsatisfied because there was danger that the assets of Duro would be removed from Australia (or disposed of, dealt with or diminished in value). The Court made this determination notwithstanding Duro's cross claims against TGP.

BACKGROUND

Duro is a wholly owned subsidiary of a Spanish Company, Duro SA. In 2014, Duro entered into a contract with TGP, under which TGP agreed to transport processing facility components for the Roy Hill Iron Ore Project (Project).

A dispute arose in respect of the Project and in June 2015, TGP served a notice of reference to arbitration (in accordance with the relevant contract) for claims valued at approximately AUD30 million against Duro. Relevantly, Duro is involved in another dispute arising from the Project with the head contractor, Samsung (Head Contract Dispute). In the Head Contract Dispute, Duro is claiming AUD310 million from Samsung in an arbitration being heard in Singapore.

In July 2015, TGP was placed into voluntary administration. Later in January 2018, TGP and its liquidators entered into a litigation funding agreement. By an originating summons issued on 19 April 2018, TGP applied for a freezing order against Duro, and an ancillary order against Duro requiring it to disclose details of its assets and liabilities.

SUPREME COURT PROCEEDINGS

In deciding whether to grant the freezing order, the Court addressed three primary questions:

1. Did TGP show that it had a good arguable case on an accrued or prospective cause of action?

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2. Was there a danger that a prospective arbitral award and any judgement in TGP's favour would be unsatisfied, because Duro's assets would be removed from Australia (or disposed of, or dealt with, or diminished in value)?
3. Was this a case in which it is in the interest of justice to grant a freezing order?

'GOOD ARGUABLE' CASE

In deciding what constituted a "good arguable" case, Justice Tottle considered the decision of *Ninemia Maritime Corp v Trave Shiffahrtsgesellschaft GmbH & Co KG* [1984] 1 All ER 398. In that case, Justice Mustill held that that the requirement of a "good arguable" case is satisfied when a case is "more than barely capable of serious argument".

The Court found that TGP had shown a good arguable case in respect of its claims and that the presence of Duro's cross-claims (primarily in respect of set-off) did not reduce or limit the quantum of TGP's claims. In that regard, Duro submitted that the Court should not assume that TGP would succeed in its claims and that Duro's claim would fail entirely. The Court was not persuaded by this argument and held that that Duro's submissions did not focus on the critical question as to whether TGP had a good arguable case.

'DANGER THAT ANY FUTURE AWARD WILL REMAIN UNSATISFIED'

The Court was of the view that if Duro had any significant success in its claims against Samsung under the Head Contract Dispute, it would receive funds that exceeded its operational requirements. In a report dated 17 March 2017 by Duro SA's auditor, the auditor stated that Duro SA's circumstances indicated there was a material uncertainty that could give rise to significant doubts surrounding the company's ability to continue as a going concern. Later in December 2017, Duro SA published a Results Report stating that in FY 17, the company carried out an intense search for partners in a context of financial difficulty. Due to the tenuous financial difficulties of its parent company Duro SA, the Court held that it was likely that Duro SA would "exert its control over the defendant to obtain the benefit of the latter's funds" and consequently, there would be a danger that a judgement against Duro (which has paid-up capital of AUD1), would remain unsatisfied.

'INTERESTS OF JUSTICE'

The Court held that the grant of the freezing order was in the interests of justice. This conclusion was reached based on the findings that TGP had good arguable claims and that there was a danger that a judgment would not be satisfied. Furthermore, the Court held that the freezing order would not cause Duro reputational damage and it permitted Duro to continue to conduct its ordinary business.

WHAT THIS MEANS FOR YOU

This decision is significant for parties involved in a dispute where there is a danger that a judgment or prospective judgement will be wholly or partly unsatisfied, because the assets of the prospective judgment debtor will or could be removed from Australia or from a place outside of Australia, disposed of, dealt with or diminished in value.

It means that when arbitral decisions are still pending, parties may apply for freezing orders and the Court is willing to intervene to prevent the dissipation of assets prior to the enforcement of any award.

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