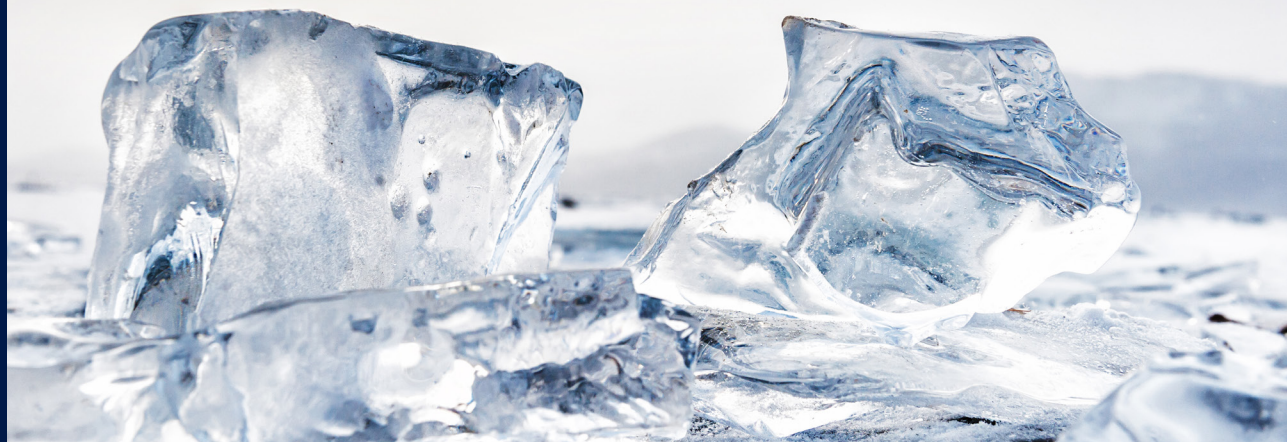
Dispute Resolution

November 2015

FREEZING DOWN UNDER! PROSPECTIVE FREEZING ORDERS VALID IN AUSTRALIA



In a recent decision of the High Court of Australia (which is the highest appellate court in Australia), a freezing order in respect of a prospective foreign judgment has been unanimously upheld.

This is a significant decision as the High Court has confirmed the validity of prospective freezing orders, a point previously the subject of some uncertainty in Australia, thereby greatly improving the position of parties seeking security in Australia in respect of foreign proceedings.

Background

The decision in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*[1] concerned substantive proceedings in the High Court of Singapore, in relation to disputes under a joint venture agreement governed by Singapore law.

After the Singapore proceedings had commenced, but before judgment had been obtained, BCBC Singapore Pte Ltd (BCBC) applied to the Supreme Court of Western Australia (SCWA) for a freezing order in respect of shares owned by PT Bayan Resources TBK (Bayan) in an Australian-registered company.

The SCWA granted the freezing order on the basis that, if successful in the Singapore proceedings, BCBC would be entitled to register and enforce its judgment in Australia pursuant to the Foreign Judgments Act 1991 (Cth) (FJA).

The other usual requirements for obtaining urgent injunctive relief having been satisfied, Bayan's appeal to the Court of Appeal was dismissed, and Bayan subsequently appealed to the High Court of Australia.

1 [2015] HCA 36

Decision

On appeal, Bayan argued that because there were no substantive proceedings commenced in the SCWA and no judgment had been obtained in the Singapore proceedings, the court did not have the power to grant such a freezing order as this would go beyond both the SCWA's statutory and inherent jurisdiction.

In particular, Bayan contended that the SCWA's power to grant a freezing order in respect of a prospective, as opposed to an actual, foreign judgment would be inconsistent with the FJA and therefore constitutionally invalid.

The High Court rejected Bayan's arguments, holding that the SCWA had the power to regulate and safeguard the processes for the registration and enforcement of foreign judgments, and that its power extended to granting a freezing order in respect of a prospective judgment of a foreign court which would, if made, be registerable under the FJA and enforceable by the SCWA.

Bayan's appeal was therefore dismissed, and BCBC was entitled to have its freezing order continued.

Ramifications

In Australia, certain foreign judgments may be registered under the FJA and subsequently enforced, usually in the case of countries having in place a reciprocal arrangement with Australia. Similarly, Australia is a signatory to the New York Convention and has enacted legislation providing for the recognition and enforcement of foreign arbitral awards to which the convention applies.

However, neither of these regimes expressly provides for the granting of anticipatory relief, to assist parties seeking to obtain security against assets located in Australia in respect of a prospective foreign judgment or arbitral award.

This High Court decision confirms that the SCWA – and most probably the Supreme Courts of the other Australian States and Territories - has the power to grant a freezing order in respect of a prospective foreign judgment that would be registerable under the FJA.

This is likely to be highly relevant for parties engaged in international litigation and dispute resolution, since the FJA provides for the local registration of judgments of the superior courts of for example,the United Kingdom, Hong Kong, Singapore, Canada, Germany, France and Japan.

Whilst the position is less clear with respect to countries outside the purview of the FJA, such as the United States, the High Court specifically noted that there is authority in some Australian courts for the granting of freezing orders in aid of pending foreign arbitral proceedings. Whilst this precedent, and the position in relation to non-FJA countries, has yet to be confirmed by the High Court, this recent decision provides a clear indication of the court's willingness to assist foreign litigants with prospective rights against assets located in Australia.

The High Court's ruling is therefore good news for parties seeking security against Australian assets, not only in the context of foreign court proceedings, but likely also in the fast-growing world of international arbitration.



For more information, please contact the authors of this briefing:

Simon Shaddick
Senior Associate, Melbourne
T: +61 (0)3 8601 4554
E: simon.shaddick@hfw.com

HFW's Melbourne office is part of an international network of 13 offices in 11 countries. For further information about dispute resolution related issues in other jurisdictions, please contact:

Gavin Vallely
Partner, Melbourne
T: +61 (0)3 8601 4523
E: gavin.vallely@hfw.com

Stephen Thompson
Partner, Sydney
T: +61 (0)2 9320 4646
E: stephen.thompson@hfw.com

Hazel Brewer
Partner, Perth
T: +61 (0)8 9422 4702
E: hazel.brewer@hfw.com

Jeremy Shebson
Partner, São Paulo
T: +55 11 3179 2900
E: jeremy.shebson@hfw.com

Damian Honey
Partner, London
T: +44 (0)20 7264 8354
E: damian.honey@hfw.com

Guillaume Brajeux
Partner, Paris
T: +33 1 44 94 40 50
E: guillaume.brajeux@hfw.com

Pierre Frühling
Partner, Brussels
T: +32 (0) 2643 3406
E: pierre.fruhling@hfw.com

Michael Buisset
Partner, Geneva
T: +41 (0)22 322 4801
E: michael.buisset@hfw.com

Dimitri Vassos
Partner, Piraeus
T: +30 210 429 3978
E: dimitri.vassos@hfw.com

Simon Cartwright
Partner, Dubai
T: +971 4 423 0520
E: simon.cartwright@hfw.com

Nick Poynder
Partner, Shanghai
T: +86 21 2080 1001
E: nick.poynder@hfw.com

Paul Hatzer
Partner, Hong Kong
T: +852 3983 7666
E: paul.hatzer@hfw.com

Lawyers for international commerce

hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth