Freezing Orders co
Enforcement of Int
Domestic Arbitral A

The recent High Court of Australia decision in PT Bayan Resources TBK v BCBC Singapore Pte Ltd[1] considered the doctrinal basis for freezing orders (also known as asset preservation orders, and, inaptly, 'Mareva injunctions'). In that decision, the High Court confirmed the potential breadth of such an order, in a way that assists parties to arbitrations.

The High Court confirmed that a freezing order is available in respect of an anticipated award in a domestic arbitration, and its reasons make clear that such orders are available in respect of anticipated awards in international arbitrations as well, regardless of the seat of the arbitration or underlying law of the dispute.

The decision puts another arrow in the quiver of parties who have agreed to resolve disputes by arbitration, and is a further demonstration of the Australian judiciary's support for arbitrations international and domestic.

THE DECISION IN BAYAN V BCBC

The fundamental issue in Bayan v BCBC was a short one: did the Supreme Court of Western Australia have the power to make a freezing order in anticipation of an enforceable money judgment in foreign proceedings?

Bayan and BCBC were both shareholders in a company incorporated in Indonesia, PT Kaltim Supacoal. Their rights and obligations as shareholders were the subject of a joint venture agreement governed by the law of Singapore. BCBC commenced litigation in the High Court of Singapore claiming (among other things) damages for breach of the joint venture agreement. Soon after commencing the Singapore proceeding, BCBC applied to the Supreme Court of Western Australia for a freezing order over shares owned by Bayan in an Australian company (Kangaroo Resources Ltd). There were no other proceedings on foot in Western Australia and there was no prospect of any before judgment in the Singapore litigation.

In the High Court, Bayan accepted that there was a factual foundation for the freezing order under the relevant Western Australian Court rules:

- BCBC had a good arguable case in its Singapore proceeding;
- this gave rise to a sufficient prospect of obtaining a judgment in its favour;
- this judgment could be registered in, or enforced by, the Supreme Court of Western Australia; and

CORRS
CHAMBERS
WESTGARTH
lawyers

David Starkoff and Lee Carroll

- there was a danger that, before satisfaction of that judgment, Bayan may dispose of its Australian assets.

However, Bayan contended that the Supreme Court did not (and does not) have the power to make a freezing order in relation to a prospective judgment of a foreign court.

The High Court disagreed, holding that the Supreme Court has the power to make a freezing order in the exercise of its inherent power[2]. A money judgment in the Singapore proceeding is a prospective judgment of the Supreme Court of Western Australia as it can be registered under the Foreign Judgments Act 1991 (Cth) and enforced as a judgment of the Supreme Court. The freezing order is made to prevent frustration of that judgment[3]. It is relief appurtenant to a prospective judgment; there does not need to be an underlying cause of action appurtenant to the freezing order before the Supreme Court.

In summary, the High Court concluded that the process which a freezing order is designed to protect is a prospective enforcement process so it does not matter that the freezing order is in anticipation of a foreign judgment coming into existence. This is so even if there are other conditions or contingencies (in addition to the outcome of the foreign proceeding) that need to be satisfied before the order can come into existence[4].

APPLICATION TO ARBITRAL AWARDS

Like foreign judgments, although under a different statutory regime, domestic and international arbitral awards are enforceable by Australian courts (subject to certain exceptions)[5]. So the High Court's reasoning should apply equally to anticipated arbitral awards, both domestic and international, regardless of the seat of the arbitration or the underlying law of the dispute. Interim measures made by courts—such as freezing orders—are not incompatible with an arbitration agreement[6]. In exceptional circumstances, a freezing order may be sought before an arbitration commences.

Indeed, all seven Justices specifically approved a 'frequently applied' 1984 decision of the Supreme Court of New South Wales[7], holding that a freezing order is available to support (domestic) arbitrations[8]. In that case, the Court said that in providing protection where a party is exposed to the risk that their opponent may dissipate their assets, there is no reason to distinguish between arbitral proceedings and proceedings instituted in court.

PRACTICAL ISSUES

Although the High Court has confirmed that there is no inherent doctrinal or theoretical reason preventing freezing orders being made in connection with a domestic arbitration (and by logical extension, international arbitration), there are still practical considerations to be aware of:

1. Not a general security for judgment
Freezing orders are not a general security for a potential judgment: they prevent the disposal of assets to frustrate the court's processes by depriving the plaintiff of the fruits of any judgment[9].

2. An exceptional order
A freezing order is an exceptional order, which has been described as one of the law's 'nuclear weapons'[10]. They are not granted lightly, and will be tailored to the specific circumstances of the case[11]. They must generally be supported by an undertaking as to damages[12], which can be costly[13].

3. Need to comply with relevant rules
Freezing orders are now the subject of model rules prepared by a harmonisation committee of judges appointed by the Council of Chief Justices of Australia and New Zealand, which have been adopted in all Australian States and Territories as well as in the Federal Court. They require cogent evidence that the applicant has 'a good arguable case on an accrued or prospective cause of action', there is a 'sufficient prospect' of obtaining an enforceable judgment, and for the court to be satisfied 'that there is a danger that [the] judgment will be wholly or partly unsatisfied'. They may be made ex parte, which requires full disclosure of all relevant facts.

4. The Federal Court has jurisdiction in relation to international arbitrations
The High Court held in Bayan v BCBC that the connection with the Foreign Judgments Act 1991 (Cth) meant that federal jurisdiction arose[14]. That reasoning also means that the Federal Court of Australia can hear applications

David Starkoff

David is a construction and projects disputes lawyer with a reputation for legal excellence, problem solving, and quickly understanding legal and commercial issues. His background in mathematics and computer science means that he is adept with technical issues as well.

Complementing his projects practice, David also has expertise in competition and regulatory law, and has acted on both sides of the regulatory divide.

Endnotes

1 (2015) 89 ALJR 975; 325 ALR 168; [2015] HCA 36.

2 The inherent power of the Supreme Court of a State includes the power to make orders 'to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction' (Jackson v Sterling Industries Ltd (1987) 162 CLR 612, 623) of which the freezing order is a paradigm example.

3 (2015) 89 ALJR 975, 982–983 [41], 984 [51] (French CJ, Kiefel, Bell, Gageler, and Gordon JJ).

4 (2015) 89 ALJR 975, 983 [47] (French CJ, Kiefel, Bell, Gageler, and Gordon JJ).

5 Foreign arbitral awards may be enforced in a court of a state or territory or in the federal court as if they were a judgment of that court: International Arbitration Act 1974 (Cth) s 8(2), (3). See also s 16 of the International Arbitration Act 1974 which picks up international arbitral awards made in Australia. Domestic arbitral awards may be enforced under s 35 of the uniform Commercial Arbitration Acts.

6 Article 9 of the of the Model Law, given effect by section 9 of the International Arbitration Act 1974 (Cth) and section 9 of the uniform Commercial Arbitration Acts.

7 Construction Engineering (Aust) Pty Ltd v Tambel (Australasia) Pty Ltd [1984] 1 NSWLR 274.

8 (2015) 89 ALJR 975, 983–984 [48] (French CJ, Kiefel, Bell, Gageler, Gordon JJ), 989 [81] (Keane and Nettle JJ).

9 (2015) 89 ALJR 975, 988 [77] (Keane and Nettle JJ). See Jackson v Sterling Industries Ltd (1987) 162 CLR 612, 625 (Deane J).

10 See Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, 158 [265] (Kirby J), 312 [284] (Callinan J).

11 See Cardile v LED Builders Pty Ltd (1999) 198 CLR 380, 403–404, 405 [51], [56] (Gaudron, McHugh, Gummow, and Callinan JJ).

12 Cardile v LED Builders Pty Ltd (1999) 198 CLR 380, 401
[43] (Gaudron, McHugh, Gummow, and Callinan JJ).

13 See, eg, European Bank Ltd v Evans (2010) 240 CLR 432.

14 (2015) 89 ALJR 975, 984–985 [51]–[55] (French CJ, Kiefel, Bell, Gageler, and Gordon JJ).

Lee Carroll

Lee has experience in trial and appellate litigation and alternative dispute resolution processes including domestic and international arbitration, mediation, statutory adjudication, and dispute resolution boards.

Lee has also gained international expertise from her time practising at a leading global law firm in London.