

Case Note

**Security for Amount in Dispute Ordered by  
Arbitration Tribunal – When Awarded, Whose  
‘Property’ and How to Get it Paid Out**

***Dalian Huarui Heavy Industry International Company Ltd v Clyde &  
Co Australia (a firm) [2020] WASC 132***

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**Abstract**

*This case provides an illustration of the use by an international arbitration tribunal of a pre-award power to direct security for the amount in dispute. The source of the power was s 12(1)(g) of the Singapore International Arbitration Act 1994 ('SIAA'). There is no equivalent power in the International Arbitration Act 1974 (Cth) ('IAA'), although such a power could be given to a tribunal by agreement. The WA Supreme Court considered the effect of a direction to give security in the exercise of that power and the terms of a trust agreement entered into by the parties to implement the direction. The court considered whether the circumstances were distinct from those applicable to a freezing order and gave rise to a security interest in the security monies under the Personal Property Securities Act 2009 (Cth) ('PPSA'), and whether a later insolvency of the party giving the security made any difference.*

**The International Arbitration**

The history of the arbitration was outlined by the court. The plaintiff ('Dalian') and the second defendant (Duro Felguera Australia Pty Ltd ('Duro')) were parties to a subcontract for the design and supply by Dalian of heavy machinery for the Roy Hill Iron Ore Project in the Pilbara, Western Australia. Dalian claimed the balance of the subcontract sum. The dispute ended up in arbitration before a distinguished arbitration panel, seated in Singapore.

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Some months after the hearing but before any award, Dalian applied to the tribunal for interim relief. The relief sought was payment of A\$27 million as security for some of the amount in dispute, or alternatively a freezing or asset preservation order, pending the award.

The application for security was made under s 12(1)(g) of the *SIAA*. Relevantly, ss 12(1)(g), (h) and (i) of the *SIAA* state:

Without prejudice to the powers set out in any of the other provisions of this Act and in the Model Law, an arbitral tribunal shall have the powers to make orders or give directions to any party for –

...

(g) securing the amount in dispute;

(h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;

(i) an interim injunction or any other interim measure.

The tribunal granted the order for security in the sum sought. After weighing the alternatives, it decided monetary security under s 12(1)(g) of the *SIAA* was appropriate. This was because the tribunal was about to make an award and Dalian would likely suffer irreparable harm if it could not be enforced. Duro had received a substantial sum and much of that was likely to be transferred out of the jurisdiction, and other means of security might not be available to Dalian.

The order was that, on the basis of a cross undertaking as to damages from Dalian and pending further order, Duro must forthwith take all necessary steps to deposit A\$27 million into a bank account in the joint names of the solicitors for each party to be dealt with in accordance with the agreement of the parties or the direction of the tribunal.

The parties entered into a Trust Agreement to give effect to this order. For commercial reasons, the money was transferred into a controlled monies account in the name of the solicitors for Duro.

The tribunal later awarded Dalian about double the amount of the security. Dalian requested payment of the security, but this was not made. Dalian then obtained a direction of the tribunal (Procedural Order 17 (PO17)) that the trust monies be paid out to it. However, the monies were not paid to Dalian.

## **The Court Case**

Dalian commenced court proceedings to enforce the award and applied for a direction that the trustee pay the security monies to Dalian. Days afterwards, Duro went into voluntary administration and enforcement was put on hold. Duro's administrators demanded that the trustee not pay the monies to

Dalian pending the outcome of the administration and opposed the application. The trustee eventually sought a direction from the court under s 92(1) of the *Trustees Act 1962* (WA) as to how to deal with the competing demands.

## Issues

The court had to decide three questions: (1) Whether the trustee was obliged to pay the A\$27 million to Dalian; (2) If so, from when; (3) Did the trustee's obligation continue where voluntary administrators were appointed to Duro.

The court examined the arbitration background and the history and scope of s 12(1)(g) of the *SIAA*. The court also considered the nature of each party's interest in the trust monies, whether Dalian's interest constituted a 'security interest' for the purposes of the *PPSA* and various relevant provisions of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

## Court Decision

The court noted the somewhat unique aspects of the *SIAA* which expands on the Model Law, intended to be part of an enhancement of Singapore's attractiveness as a seat, and the limited discussion of s 12(1)(g) by Singaporean courts.

The power to grant security under s 12(1)(g) was considered to be clearly distinguished from the power to grant a freezing order and of an 'ostensibly stronger and elevated character'. This power was considered to go 'well beyond' the freezing order power and was more akin to an order to pay money as a condition for leave to defend an action.

This distinction has significant implications in insolvency. As the court noted, security over a dedicated fund for the purpose of providing some assurance of recovery in the event of a successful outcome, if akin to a payment for leave to defend, would result in the party being treated as a secured creditor. On the other hand, there is long-established authority that a beneficiary of an 'in personam' freezing order would not obtain any superior interest above other unsecured creditors.

Central to the court's decision was the Trust Agreement, in which there was a term that the trust monies may only be released or paid in accordance with a direction to the Trustee by a nominated partner of both the solicitors for Dalian and Duro, or a direction of the tribunal.

The court determined that an express trust was created by the Trust Agreement in respect of the A\$27 million, on the terms of that trust, and the status of those monies was similar to where a neutral stakeholder holds funds pending a property settlement. Dalian held a contingent equitable interest in the funds, contingent on winning its case in the arbitration, by reason of the trust agreement and upon receipt of the funds into the nominated account.

Crucially, it was also determined that Dalian's interest altered once the tribunal made PO17. At that point, the interest matured or was 'perfected' and was fully vested such that Dalian's interest became an absolute and unqualified beneficial entitlement in equity to receive the funds.

Duro had some degree of residual equitable interest in the funds (an interest that they be held on the terms of the trust) before PO17, but no such interest after that.

The appointment of voluntary administrators to Duro occurred about six weeks after PO17. The court examined the operation of the *PPSA* and the *Corporations Act* to determine if the position under those statutes changed the position of the parties' respective interests.

In the court's view, Duro's rights to the funds before PO17 could be classed as 'property' within the meaning of that term in the relevant provisions of the *PPSA* and the *Corporations Act*.

As well, Dalian's rights until PO17 would come within the meaning of a 'security interest' and be subject to obligations under s 12 of the *PPSA*. Until PO17, the trust funds were retained under a 'transaction', as that term is used in the definition of 'security interest', as the Trust Agreement secured payment or performance of an obligation.

The court concluded that, while Dalian's security interest could have been perfected and protected by registration under the *PPSA* before the tribunal directed PO17, the direction operated as a 'perfection' of Dalian's interest within the meaning of that term in s 21 of the *PPSA*.

In relation to the *Corporations Act*, Duro argued that the trust funds were property of Duro and should be available to all creditors under ss 437A and 437B and the funds were 'property' within the meaning of ss 9 and 437D and governed by s 440B. The court disposed of these arguments and other similar arguments<sup>2</sup> on the basis that the trust funds were not the property of Duro after PO17, but instead the property of Dalian.

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<sup>2</sup> Based on ss 441AA, 441A, 441B and 441D.

In the end result, the court answered the three questions of it as follows: (1) The trust monies must be paid to Dalian; (2) This should have occurred from the time of the tribunal's direction, PO17; (3) The obligation on the trustee to pay the trust monies to Dalian continued despite the appointment of administrators to Duro (although no orders to this effect were made to allow the administrators to consider whether to seek a preservation order to keep the monies in Australia, which application was later made and dismissed<sup>3</sup>).

## Comments

This case illustrates the exercise, by an international arbitration tribunal, of the power under s 12(1)(g) of the *SIAA* to order pre-award security for the amount in dispute. By that unique provision, the tribunal also has a broad discretion how that might be done. There is no equivalent provision under the *IAA*. However, it is possible for parties to give such a power to the tribunal by agreement.

Unlike the position in relation to a freezing order, a 'security interest' or other proprietary interest may be created for the purposes of the *PPSA* and the *Corporations Act* by an order for pre-award security, depending on the form of the order and how it is implemented.

In the court's view, the distinction between an order for pre-award security and a freezing order would also have insolvency implications; the beneficiary of a pre-award security order would have secured creditor status. For a claimant, empowering the tribunal with a power to order pre-award security is obviously attractive.

Typically, a tribunal has power to order security in connection with an interim measure.<sup>4</sup> It is unclear (given this was not before the court) what would be the position as regards the existence of a 'security interest' and in an insolvency where, by that power, the tribunal provides for a mechanism for the giving of monetary security and the parties agree a trust arrangement in similar terms to those in this case.

The court's determination of the rights of the parties to the security funds in the context of the *PPSA* and the insolvency provisions of the *Corporations Act* is of assistance to parties who enter into such consensual arrangements or who are the subject of a direction to secure all or some of the amount in dispute. It appears from this decision that a security interest may arise from the time of the security order or stakeholder/trust agreement in favour of the party to whom the security is provided, and that party would be well advised to consider perfecting and protecting that interest by registration under the *PPSA*.

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<sup>3</sup> *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia (a Firm) [No 2]* [2020] WASC 245.

<sup>4</sup> For example, under Art 17E of the Model Law encapsulated in the *IAA*, Art 33.4 *ACICA Rules 2016* and Art 28.1 *ICC Arbitration Rules 2017*.

*Compensation Act* 1988 (Cth), and particularly the use of expert conclaves, would greatly assist arbitrators.<sup>37</sup>

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<sup>37</sup> Administrative Appeals Tribunal Guideline, 'Persons Giving Expert and Opinion Evidence.'  
Available at <https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/persons-giving-expert-and-opinion-evidence-guidelines>