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FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

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Simon Bushell, partner, +44 (0) 20 7466 2024, simon.bushell@hsf.com

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

Introduction

- What is a freezing injunction in the English law context?
 - In personam order
 - Restrains dealing with and disposal of property
 - Does not create security interests
 - Binds third parties with notice and who are subject to the court's jurisdiction
 - Coupled with ancillary asset disclosure requirements
 - Very serious consequences for disobedience e.g. committal or sequestration of assets
 - Distinguish the proprietary freezing injunction
 - Distinguish domestic and worldwide freezing injunctions

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

- What is the objective and how to achieve it?
 - To preserve the status quo e.g. specific property – shares?
 - To ensure the funds are available against which to enforce any award
 - To obtain information about the assets i.e. extent and location of profits made which may have been secreted
 - What are the characteristics of the dispute and the nature of the counterparty? i.e. are the allegations founded on dishonesty and impropriety/ is the claim hostile?
 - Will the counterparty be a reluctant participant in the arbitral process?

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- Assuming the power to freeze assets is available, when is it appropriate?
- Where there are multi-party claims both within the arbitral framework and also satellite claims (e.g. in the offshore jurisdictions)
- Where there is no tribunal formed and urgent relief is needed to restrain the disposal of assets
- The claimant must be able to show:
 - a) A good arguable case;
 - b) A real risk that the defendant will dissipate his assets if the order is not made; and
 - c) That the injunction is just and convenient

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

- The English High Court has a statutory power to grant an injunction in all cases where it appears just and convenient to do so
- s.44 Arbitration Act 1996
 - 1) Unless otherwise agreed by the parties, the court has for the purpose of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings
 - 2) Those matters are –
 - a) The taking of the evidence of witnesses;
 - b) The preservation of evidence...
 - c) The granting of an interim injunction...

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- s.2(3) Arbitration Act 1996

s.44 powers apply even if the seat is outside England and Wales or Northern Ireland or no seat has been designated or determined, but the court can decline to exercise its jurisdiction if the fact that the seat is abroad (or may be) makes it “inappropriate” to do so.

- s. 44(3) Arbitration Act 1996

In a case of urgency the court may make “necessary” orders to preserve evidence or assets, upon the application of a party or proposed party to the arbitral proceedings.

- s. 44(4) Arbitration Act 1996

In the absence of urgency, the court “shall only act” on the application of a party to the arbitral proceedings (upon notice to the other parties and the tribunal) made with “the permission of the tribunal or the agreement in writing of the other parties”

- s. 44(5) Arbitration Act 1996

In any case the court shall act only if or to the extent that the arbitral tribunal has “no power or is unable for the time being to act effectively”

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

- Practical considerations
 - Seeking the freezing injunction before commencement of arbitral process – dangers
 - Undertaking to commence the arbitration
 - If the seat is elsewhere, is the defendant present in England?
 - If the seat is elsewhere, are the assets in England?
 - If the seat is elsewhere, in the absence of an exceptional feature, the claimant must establish a link to the jurisdiction in the form of the defendant's presence or assets.
 - The existence of a large scale international fraud may be such an exceptional feature

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

- A closer look at the worldwide freezing injunction
 - Ex parte (full and frank disclosure/ element of surprise)
 - Urgency (particularly important - s. 44(4) Arbitration Act 1996)
 - Delay
 - Real risk of dissipation
 - Limited to the approximate value of the claim
 - Ordinary living expenses/ legal expenses
 - No interference with the ordinary course of business
 - Insufficient assets within the jurisdiction
 - Cross undertaking in damages

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

- Satisfying the test for a freezing injunction
 - Good arguable case (i.e. a better argument than the defendant on the facts known at the outset and an existing cause of action)
 - Real risk of dissipation (e.g. manipulation of assets through the use of international/ offshore vehicles and accounts; defendant's conduct in relation to the dispute or previous conduct; failure to answer reasonable questions and provide explanations; lack of ties to the jurisdiction)
 - Just and convenient (the court will consider all of the circumstances in deciding whether to use its discretion to make the order – delay might be one factor, and so might the claimant's own conduct)

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- The need to give full and frank disclosure on an ex parte application
 - Disclosure to the court of all material facts including those adverse to the claimant
 - The claimant must anticipate what the defendant's potential response might be to the claim
 - Is there anything known about the respondent which would militate against the risk of dissipation?
 - Has all claimant's evidence been obtained lawfully?
 - Effect of any order on respondent's business
 - Serious consequences of failure to give full and frank disclosure

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

- Essential features of the worldwide freezing injunction
 - Preservation of specific assets
 - Restraint on dealing with assets up to the value of the claim
 - Asset disclosure by the defendant – affidavit
 - Asset disclosure by third parties (e.g. banks)
 - Service on the defendant/ substituted service
 - Service on third parties
 - Assets legally owned and beneficially owned
 - The effect of a worldwide freezing injunctions overseas

FREEZING INJUNCTIONS IN INTERNATIONAL ARBITRATION

- Do the costs of a freezing injunction from the courts outweigh the benefits?
- Do interim measures from the tribunal provide a meaningful alternative?

Any questions?



-  Herbert Smith Freehills office
-  Associated office
-  Group

ABU DHABI

Herbert Smith Freehills LLP
T +971 2 813 5000
F +971 2 813 5100

BANGKOK

Herbert Smith Freehills (Thailand) Ltd
T +66 2657 3888
F +66 2636 0657

BEIJING

Herbert Smith Freehills LLP
T +86 10 6535 5000
F +86 10 6535 5055

BELFAST

Herbert Smith Freehills LLP
T +44 28 9025 8200
F +44 28 9025 8201

BRISBANE

Herbert Smith Freehills
T +61 7 3258 6666
F +61 7 3258 6444

BRUSSELS

Herbert Smith Freehills LLP
T +32 2 511 7450
F +32 2 511 7772

DAMMAM

Al-Ghazzawi Professional Association
Herbert Smith Freehills LLP
associated firm
T +966 3 8331611
F +966 3 8331981

DOHA

Herbert Smith Freehills Middle East LLP
T +974 4452 8955
F +974 4452 8960

DUBAI

Herbert Smith Freehills LLP
T +971 4 428 6300
F +971 4 365 3171

HONG KONG

Herbert Smith Freehills
T +852 2845 6639
F +852 2845 9099

JAKARTA

Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP
associated firm
T +62 21 574 4010
F +62 21 574 4670

JEDDAH

Al-Ghazzawi Professional Association
Herbert Smith Freehills LLP
associated firm
T +966 2 6531576
F +966 2 6532612

LONDON

Herbert Smith Freehills LLP
T +44 20 7374 8000
F +44 20 7374 0888

MADRID

Herbert Smith Freehills Spain LLP
T +34 91 423 4000
F +34 91 423 4001

MELBOURNE

Herbert Smith Freehills
T +61 3 9288 1234
F +61 3 9288 1567

MOSCOW

Herbert Smith Freehills CIS LLP
T +7 495 363 6500
F +7 495 363 6501

NEW YORK

Herbert Smith Freehills New York LLP
T +1 212 519 9855
F +1 212 519 9856

PARIS

Herbert Smith Freehills Paris LLP
T +33 1 53 57 70 70
F +33 1 53 57 70 80

PERTH

Herbert Smith Freehills
T +61 8 9211 7777
F +61 8 9211 7878

RIYADH

Al-Ghazzawi Professional Association
Herbert Smith Freehills LLP
associated firm
T +966 1 4632374
F +966 1 4627566

SHANGHAI

Herbert Smith Freehills LLP
T +86 21 2322 2000
F +86 21 2322 2322

SINGAPORE

Herbert Smith Freehills LLP
T +65 6868 8000
F +65 6868 8001

SYDNEY

Herbert Smith Freehills
T +61 2 9225 5000
F +61 2 9322 4000

TOKYO

Herbert Smith Freehills
T +81 3 5412 5412
F +81 3 5412 5413