

Herbert Smith

# Freezing Orders

## *Kiev Arbitration Days 2011*

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Herbert Smith in association with  
Gleiss Lutz and Stibbe

# Freezing Orders

- An order restraining a party from dealing with or disposing of their assets
- Sought by Claimant as a means of preserving a Respondent's assets until judgment
- Often also prevents third parties from breaching the order or assisting the Respondent to do so
- Cross-undertaking in damages

# Familiar part of English court procedure (1)

- CPR Rule 25.1(1)

“The Court may grant the following interim remedies –

... (f) an order (referred to as a “freezing injunction”) –

- (i) restraining a party from removing from the jurisdiction assets located there; or
- (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;
- (g) An order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction”.

# Familiar part of English court procedure (2)

Applicant must show:

- A good arguable case on merits
- A risk of dissipation of assets

# Evidence required

Court will consider:

- Type of asset – easy to move?
- The nature and financial standing of the Respondent's business
- Domicile of Respondent
- Whether the Respondent has made a threat or shown an intention to dissipate assets
- Respondent's behaviour in response to the claim
- Whether the Respondent has demonstrated any dishonesty connected with dissipation

# Advantages of going to court

- Quick
- Possibility of ex parte order
- Order can bind third parties

BUT

- Will the court have jurisdiction over the Respondent or its assets?

# Can you get such orders from an arbitral tribunal?

*“[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side, there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.”*

Lord Mustill in *Coppée-Levalin NV v Ken-Ren Fertilizers and Chemicals* [1994] 2 Lloyd’s Rep. 109 at 116.

# Problems with arbitration

- Can be slow to constitute tribunal (but note emergency arbitrator provisions)
- Lack of coercive power – even New York Convention may not help
- Will not bind third parties

# Approach of UK Courts

- Will assist even in arbitrations where the seat is not England (however the court has a discretion if the arbitration takes place overseas)
- Applicants will need to undertake to commence the arbitration as soon as possible
- Court prepared to work with tribunals i.e. grant the order *ex parte* and then refer the matter to the tribunal for further consideration

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