

Herbert Smith

Freezing Orders

Kiev Arbitration Days 2011

Matthew Weiniger, Herbert Smith LLP, London
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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

Alliance offices

Abu Dhabi

Herbert Smith LLP
Suite 302, 3rd Floor
Al Bateen Towers C2 Building
Al Bateen
PO Box 106178
Abu Dhabi UAE
T: +971 2 412 1700
F: +971 2 412 1701

Amsterdam

Stibbe
Stibbetoren
Strawinskylaan 2001
PO Box 75640
1070 AP Amsterdam
T: +31 20 546 06 06
F: +31 20 546 01 23

Bangkok

Herbert Smith (Thailand) Ltd
1403 Abdulrahim Place
990 Rama IV Road
Bangkok 10500
T: +66 2657 3888
F: +66 2636 0657

Beijing

Herbert Smith LLP
28th Floor Office Tower
Beijing Yintai Centre
2 Jianguomenwai Avenue
Chaoyang District
Beijing PRC 100022
T: +86 10 6535 5000
F: +86 10 6535 5055

Belfast

Herbert Smith LLP
3 Cromac Quay
Ormeau Gasworks
Belfast BT7 2JD
T: +44 28 9025 8200
F: +44 28 9025 8201

Berlin

Gleiss Lutz
Friedrichstrasse 71
10117 Berlin
T: +49 30 800 979-0
F: +49 30 800 979-979

Brussels

Herbert Smith LLP
Central Plaza
Rue de Loxum 25
1000 Brussels
T: +32 2 511 7450
F: +32 2 511 7772

Gleiss Lutz

Central Plaza
Rue de Loxum 25
1000 Brussels
T: +32 2 551 1020
F: +32 2 551 1039

Stibbe

Central Plaza
Rue de Loxum 25
1000 Brussels
T: +32 2 533 5211
F: +32 2 533 5212

Budapest

Bán, S. Szabó & Partners
Gleiss Lutz associated firm
József nádor tér 5-6
1051 Budapest
T: +36 1 266-3522
F: +36 1 266-3523

Dubai

Herbert Smith LLP
Dubai International Financial
Centre
Gate Village 7, Level 4
PO Box 506631
Dubai UAE
T: +971 4 428 6300
F: +971 4 365 3171

Dubai (continued)

Stibbe
Dubai International Financial
Centre
Gate Village 7, Level 4
PO Box 506631
Dubai UAE
T: +971 4 428 6300
F: +971 4 365 3171

Düsseldorf

Gleiss Lutz
Bleichstrasse 8-10
40211 Düsseldorf
T: +49 211 54061-0
F: +49 211 54061-111

Frankfurt

Gleiss Lutz
Mendelssohnstrasse 87
60325 Frankfurt/Main
T: +49 69 95514-0
F: +49 69 95514-198

Hamburg

Gleiss Lutz
Hohe Bleichen 19
20354 Hamburg
T: +49 40 460017-0
F: +49 40 460017-28

Hong Kong

Herbert Smith
23rd Floor, Gloucester Tower
15 Queen's Road Central
Hong Kong
T: +852 2845 6639
F: +852 2845 9099

Jakarta

Hiswara Bunjamin and Tandjung
Herbert Smith LLP
associated firm
23rd Floor, Gedung BRI II
Jl. Jend. Sudirman Kav. 44-46
Jakarta, 10210
T: +62 21 574 4010
F: +62 21 574 4670

London

Herbert Smith LLP
Exchange House
Primrose Street
London EC2A 2HS
T: +44 20 7374 8000
F: +44 20 7374 0888

Stibbe

Exchange House
Primrose Street
London EC2A 2ST
T: +44 20 7466 6300
F: +44 20 7466 6311

Luxembourg

Stibbe Luxembourg, Avocats
Rue Jean Monnet 6
2180 Luxembourg
T: +352 26 61 81
F: +352 26 61 82

Madrid

Herbert Smith Spain LLP
Paseo de la Castellana 66
28046 Madrid
T: +34 91 423 4000
F: +34 91 423 4001

Moscow

Herbert Smith CIS LLP
10 Ulitsa Nikolskaya
Moscow 109012
T: +7 495 363 6500
F: +7 495 363 6501

Munich

Gleiss Lutz
Karl-Schamagl-Ring 6
80539 Munich
T: +49 89 21667-0
F: +49 89 21667-111

New York

Stibbe
489 Fifth Avenue, 32nd floor
New York, NY 10017
T: +1 212 972 4000
F: +1 212 972 4929

Paris

Herbert Smith Paris LLP
66, Avenue Marceau
75008 Paris
T: +33 1 53 57 70 70
F: +33 1 53 57 70 80

Prague

Kubánek & Nedelka v.o.s.
Gleiss Lutz
associated firm
nám. Republiky 1a
110 00 Prague 1
T: +420 225 996-500
F: +420 225 996-555

Saudi Arabia

Al-Ghazzawi Professional
Association
Herbert Smith LLP
associated firm
Jeddah Commercial Centre, 3rd
Floor, Al Maady Street
Comiche Al Hamra
P.O. Box 7346, Jeddah 21462
T: +966 2 6531576
F: +966 2 6532612

Al-Ghazzawi Professional Association

Herbert Smith LLP
associated firm
Arabian Business Center
Prince Muhammad Street
PO Box 381, Dammam 31411
T: +966 3 8331611
F: +966 3 8331981

Al-Ghazzawi Professional Association

Herbert Smith LLP
associated firm
King Faisal Foundation
North Tower, 4th Floor
K. Fahd Road
PO Box 9029, Riyadh 11413
T: +966 1 4632374
F: +966 1 4627566

Shanghai

Herbert Smith LLP
38th Floor, Bund Center
222 Yan An Road East
Shanghai 200002
T: +86 21 2322 2000
F: +86 21 2322 2322

Singapore

Herbert Smith LLP
50 Raffles Place
#24-01 Singapore Land Tower
Singapore 048623
T: +65 6868 8000
F: +65 6868 8001

Stuttgart

Gleiss Lutz
Maybachstrasse 6
70469 Stuttgart
T: +49 711 8997-0
F: +49 711 855096

Tokyo

Herbert Smith
41st Floor, Midtown Tower
9-7-1 Akasaka, Minato-ku
Tokyo 107-6241
T: +81 3 5412 5412
F: +81 3 5412 5413

Warsaw

Pietrzak Siewierzynski
Bogen Sp. k.
Gleiss Lutz
associated firm
ul. Zlota 59
00-120 Warsaw
T: +48 22 22242-00
F: +48 22 22242-99