

The Risks Associated With Worldwide Freezing Orders

Skadden

04 / 19 / 17

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

David Kavanagh QC

London
44.20.7519.7288
david.kavanagh@skadden.com

Alex R. van der Zwaan

London
44.20.7519.7361
alex.vanderzwaan@skadden.com

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London
40 Bank Street, Canary Wharf
London, E14 5DS
44.20.7519.7000

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

A worldwide freezing order is an injunction granted by the English courts to restrain individuals or businesses from disposing of or dealing with assets on a worldwide basis. The order can be sought before, or contemporaneously with, proceedings being issued or even after judgment has been obtained (to prevent the disposal of assets before judgment is satisfied).

A freezing order is highly restrictive, and, given the serious obligations that often result from such an order, persons affected by one must act with the utmost care in ensuring its terms are observed. The drastic consequences resulting from a freezing order prompted a leading member of the English judiciary to describe it as “one of the law’s [...] nuclear weapons.”¹ A breach of a freezing order may have a wide variety of effects, ranging from a serious negative impact on the subjected party’s case, to imprisonment. Here we set out some of the main issues that a business or individual may have to consider if faced with a freezing injunction, including its immediate consequences and how to challenge one.

Application Process

Applicants typically apply to the court for the grant of a freezing order without giving any notice to the party intended to be subjected to the freezing order. This practice may be justified in order to prevent warning the subjected party, who may in turn dissipate its assets before an order is granted. Given the serious consequences of a freezing order, the English courts impose stringent requirements on applicants seeking them. In order to be successful, an applicant must demonstrate to the English court that (1) it has a good arguable case; (2) a real risk of dissipation of assets exists; and (3) the order is just and convenient in all the circumstances.² Where the freezing order is sought without notice to the subjected party, the applicant and its lawyers are placed under a duty of “full and frank disclosure.” This duty obliges an applicant to disclose all material matters to the court, *i.e.*, including potential defences to the claim or the application itself.

Challenging a Freezing Order

Given the difficulties associated with being subjected to a freezing order, many parties may consider challenging it upon receipt. There are often multiple potential grounds to challenge a freezing order that will require careful examination by the subjected party’s lawyers, including considering the applicant’s case and circumstances. In a recent High Court decision, such a challenge was made successfully.³

Immediate Consequences

Disposal of assets

A freezing order restricts a subjected party’s ability to “deal with or dispose of” any assets covered by the freezing order. This often includes all of the assets within a particular jurisdiction, or, under a worldwide freezing order, includes all relevant assets wherever located, unless the total value of those assets exceeds the value of the claim on which the freezing order is contingent. While the scope of the assets affected will vary

¹ Lord Justice Donaldson in *Bank Mellat v. Nikpour* [1985] F.S.R. 87.

² Certain other technical requirements must also be satisfied.

³ Skadden represented Mr. Gennadiy Bogolyubov in the recent case of *PJSC Tatneft v. Bogolyubov and Ors*. An appeal on the matter will be heard in July 2017.

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from case to case, the prohibition on dealing with or disposing of them is very broad. A party subject to a freezing order must consider whether ongoing or pending personal and/or corporate transactions should be halted pending detailed consideration by lawyers. Immediate observance of the freezing order and its terms is of paramount importance. Any breaches of a freezing order may be used to allege that the subjected party is of “bad character” and may lead to serious criminal consequences depending on the severity of the breach, which can include severe fines, imprisonment or the seizure of certain assets.

Living expenses

A freezing order will make provision for the expenditure of certain funds for living expenses. A subjected party typically will find that the allocated amount is inadequate and out of line with normal expenditures. As a result, urgent action by both parties’ lawyers is usually required to reach an agreement with respect to the allocated amounts in order to ensure that the banks concerned are able to service the subjected party accordingly, as well as to avoid spending in excess of the limit prior to its variation, which potentially carries criminal consequences.

Asset disclosure

A party subjected to a freezing order typically will be required to produce a list detailing assets exceeding a certain (often very low) value. The value range can vary significantly. The list must be provided to the applicant’s lawyers, within a very short period — usually within 48 hours of receiving a freezing order. A freezing order often will expand on this requirement to stipulate that the value, location and details of such assets must be disclosed. Assets will need to be disclosed whether or not they are in the name of the subjected party, and whether they are solely or jointly owned. The disclosure obligation may extend to assets held under a trust, nominee arrangement, establishment, foundation or any similar structure set up to hold or receive assets for that person. Assets held by an organisation, in which the subjected party holds the position of settlor, trustee, beneficiary (including under a discretionary trust) or protector, may also be included.

Following the provision of an initial asset list, a subjected party will then have a short period to prepare and provide a more detailed sworn list to the applicant’s lawyers, confirming the accuracy of the information provided.

Given the breadth and timing of requirements, asset disclosure is often the most intrusive aspect of a freezing order, putting a subjected party under severe pressure to disclose a full picture of assets, the privacy of which may previously have been carefully guarded. It is common for a subjected party to hold assets through complicated structures that will in turn raise complex issues relating to the ownership and valuation of those assets. Questions regarding the intermediate chain of ownership and its disclosure will also arise. There are numerous potential pitfalls associated with this process, which are exacerbated by the scope of the disclosure obligation and the requirement to swear to the accuracy of the final asset disclosure. While lawyers often can secure a deadline extension for the client, any such extension is short, if granted, and the asset disclosure process remains intensive.

It is important to note that while all relevant assets must be disclosed, a freezing order does not provide the applicant with any security or other proprietary interest over the assets disclosed, regardless of the jurisdiction in which they are located, nor does it give the applicant any prior rights over assets ahead of any other creditors of the subjected party.

Relations with third parties and counterparties

Freezing orders typically contain exemptions permitting the subjected party to continue to transact in “the ordinary course of business.” While this exemption may appear broad, banks and their legal representatives often will adopt a very restrictive view of what falls within “the ordinary course of business” as a result of the serious consequences that can attach to aiding the breach of a freezing order by a third party. In practice, a subjected party may face the systemic blocking of usually routine payments by its banks that, through adopting a risk-averse approach, will freeze all payments in order to ensure the freezing order in question is not breached. In such an event, a subjected party will be faced with the time-consuming prospect of requesting confirmation of certain transactions from the applicant’s lawyers and having to engage at length with banks in order to ensure that routine transactions can be processed, both on a personal and corporate level.

Financial harm may result from the inability to make payments and to enter into other more significant transactions in a normal manner. It is crucial to properly document such harm or potential harm over the course of the freezing order, in order to facilitate a future claim in damages against the applicant.

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Negative publicity

A party subjected to a freezing order may receive negative press coverage, and applicants often will make known counterparties and associates aware of the freezing order's existence in order to ensure that no assets can be dissipated. In practice, this often will result in strained relationships with commercial counterparties though reactions are seldom uniform. Therefore, it is important to consider how best to approach different counterparties in order to maintain ongoing business relationships.

To the extent that any breaches of a freezing order are discovered by applicants, they may apply to the court for sanction, creating further distractions from the underlying proceedings and creating a negative image of the subjected party in the proceedings themselves, which often may prove troublesome as the case progresses.

Conclusion

While the vast adverse effects of a freezing order may be manageable in isolation, when taken together the fallout may prove overwhelming for individuals and corporate entities. Commercial litigators, with experience in this area, are able to approach these risks with a mind to strategy. Through understanding the wider legal context, business interests and commercial aims of a client, litigators are able to better manage these risks and the impact of a freezing order on a clients' life and business interests.