

To what extent can you double-freeze?

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Double Freeze - where an application is made for a freezing order against a particular respondent or in relation to particular assets, in circumstances where there is an existing freezing order against that Respondent or over those assets.

Enforcement overseas of a WFO granted here

Double Freeze can occur where a worldwide freezing order is granted by the English court and is enforced by additional orders obtained abroad.

The standard form freezing order contains an undertaking not to enforce abroad, but the claimant can apply for permission to do so.

Undertaking was first offered in **Derby v Weldon** [1990] Ch 48.

It was subsequently expanded, to the form it now has.

The scope of the undertaking not to enforce abroad considered recently, in **Snoras v Antonov** [2018] EWHC 887 (Comm)

The court (Peter MacDonald Eggers Q.C.) considered:

- the undertaking was one not to seek an order of a similar nature or effect as an order enforcing the freezing order (i.e. a narrow interpretation),
- the undertaking was not an undertaking not to seek an order of a similar nature and effect as the freezing order itself (wide interpretation).

i.e. the English court was not concerned with whether the claimant exercised an independent right to obtain security in another jurisdiction, as long as the English freezing order was not the basis for obtaining it.

When will the court permit enforcement abroad?

See guidelines in **Dadourian Group International Inc v Simms (Practice Note)** [2006] 1 WLR 2499.

Freezing order here in support of order granted elsewhere

If the English courts grant freezing orders here in support of foreign proceedings, there can be a double freeze.

An order was granted here in **Ryan v Friction Dynamics Ltd** [2001] C.P. Rep. 75. Neuberger J (as he then was) summarised the relevant principles when granting an injunction in aid of foreign proceedings that overlaps with an injunction made in those foreign proceedings, including the following:

- The fact that there is a worldwide freezing order granted by the principal foreign court does not prevent this court from granting a freezing order.
- To hold otherwise “*would involve implying an absolute fetter on a statutory jurisdiction which on its face appears to be intended to give a wide and flexible discretion.*”
- Before such an overlapping freezing order is made under s.25 the court should expect to be given cogent reasons to justify it.
 - Overlapping orders mean overlapping applications
 - result in substantial increased costs and court time
 - can lead to a risk of double jeopardy for defendants
 - and the opportunity for forum shopping by a claimant.
- There is an even stronger case for discouraging a multiplicity of applications for overlapping freezing orders against the same defendants in respect of the same assets in different jurisdictions.
- The English court should consider which court is to have the primary role for enforcing the overlapping injunction.
- The overlapping injunction should track the terms of the order made by the foreign court, unless there is good reason to depart.
- Bear in mind that inconsistency could lead to uncertainty and extra complications for a defendant, which would be unfair.
- Worse, it could in some cases lead to a position where a defendant finds itself bound to be in breach of one order or the other.

Ryan was applied in **GFH Capital Ltd v Haigh** [2014] EWHC 3157 (Comm), see especially [16]-[20].

See also **Motorola Credit Corp v Uzan (No 2)** [2004] 1 WLR 113, where Potter LJ explained the considerations to be borne in mind in granting a freezing order which overlap with those granted in another jurisdiction:

1. Whether the making of the order will interfere with the management of the case in the primary court - is the proposed order inconsistent with an order in the primary court or does it just overlap with it?
2. Whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders.
3. Whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the respondent resides or where the assets affected are located.
4. Whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction which renders it inappropriate and inexpedient to make a worldwide order.
5. Whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.

Freezing Orders obtained by different claimants over the same assets

There have been cases where over-lapping freezing orders have been granted to different claimants, but in each case there has been no detailed analysis of the applicable principles.

See **Ambey Capital Private Ltd v Mascarenhas** [2018] EWHC 3000 (QB).

Double freeze may have been justified in that case because one claim was much larger than the other.

In **Khan v Edgbaston Holdings Ltd** [2007] EWHC 2444 (QB) the justification may have been that one order was obtained by the Serious Fraud Office, and the other by a private claimant.

In **Aeroflot v Glushov** [2018] 4 Costs LR 775 the claimant was notified that its freezing order in Switzerland was to be lifted, which prompted it to seek and obtain an overlapping freezing order from the English court, before the Swiss order was discharged. Possibly the justification was the imminent release of the Swiss order made dissipation again likely.

Principles which it can be inferred would apply

1. Need to meet the ordinary test for a freezing order.
 2. Need to consider the application of the principles which apply when considering the interaction of foreign freezing order and one granted here.
- **Good arguable case on the merits** – case specific.
 - **Risk of dissipation.**
 - If there is already a freezing order in place, how is there a risk of dissipation?
 - Will depend on the facts.
 - Potentially risk because original freezing order may be discharged, or may not be for a sufficient sum.
 - Original freezing order might be discharged because
 - it was wrongly obtained,
 - those parties settle,
 - claimant fails to provide fortification for the undertaking in damages.
 - Applicant for 2nd freezing order may or may not know the circumstances.
 - if Applicant does know, it may be able to show discharge is a realistic possibility;
 - if Applicant does not know, it can rely on that to say it cannot know if suddenly the only restraint on the defendant (the original freezing order) will fall away.
 - **Just and convenient to make the order**
 - Bear in mind potentially oppressive nature of multiple freezing orders.
 - Ensure you have thought through the interaction between your freezing order and the existing freezing order, and can satisfy concerns about unfairness to the defendant.

It may be appropriate to make the application on notice, depending on whether it is more extensive.

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