

Regarding Jurisdiction to grant Provisional including Protective Measures in International Litigation (summary)

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1. Introduction

The purpose of this article is to examine what kinds of factors are relevant for Jurisdiction to grant provisional including protective measures in international litigation.

2. Bases for the jurisdiction to grant provisional measures

As the provisions of some relatively recent international instruments (including preliminary draft convention, etc.) as to jurisdictional rules show, there seem to be a certain bases for the jurisdiction to grant provisional measures, which not a few States consider as reasonable. For example, if a State has jurisdiction over the substance of the matter, the courts of the State should also have power to grant provisional measures addressed. Other than that, the courts of the States where defendants' assets exist, and/or the States in whose territory provisional measures may effectively be executed, are vested with power to grant provisional measures. Those latter bases, however, apply usually with some conditions.

3. What matters? "Effectivity" or any other factors?

The fact that a court has jurisdiction over the substance of the matter does not always mean that the object of the provisional measure exists inside the territorial boundary of the country that the court belongs to. In several countries, such as France or Switzerland, it is submitted that the measures like French 'saisies conservatoires' or Swiss 'séquestre' cannot be authorized by a court in the territorial boundary of which the defendant's assets do not exist, even if the court has jurisdiction over the substance of the matter. Some say that it is because as a matter of fact, this type of measures belongs to enforcement measures. Others say that it is due to the nature of the measure, and also to the law the measure is based on. Both French law and Swiss law require "specificity" of

the assets as the object of the measures. And both 'saisies conservatoires' and 'séquestre' may be classified as 'measures in rem'. In either case, the issue of "effectivity", or in other words, whether a provisional measure addressed can be issued and "effectively" enforced there with enough possibility, seems to be at least one of relevant factors to be considered to decide the court's power to grant a certain provisional measure.

4. Preserving assets abroad by the way of "measures in personam"

It is well known that English 'Mareva injunction' can have a kind of 'indirect extra-territorial effect' mainly because of its character as "a measure in personam". In France, admiring this English invention, it is suggested that they may be able to use the same structure as "Mareva" and that it might be possible for French courts' orders to have extra-territorial effect as those of English courts enjoy. Yes, it may be possible. However, still we should note that the provisional measures granted with extensive effect must be legal and appropriate from the viewpoint of the order of international society.

5. Extraterritorial effect of provisional measures and the considerations of sovereignty

One of the issues of "legality" of provisional measures is whether a measure with 'indirect', extra-territorial effect can be undue interference with the executive jurisdiction of the States other than that of the court granting the measure. This question has been often asked as to English Mareva injunction, the disobedience to which can constitute "contempt of court". It seems, however, that the legality or appropriateness of provisional measures should be considered separately from that of the sanctions against disobedience.

6. Relations between jurisdiction over the substance of the matter and the power to issue provisional measures

As seen above, the courts of the State which has jurisdiction over the substance of the matter are usually vested with the power to issue provisional measures. What is the reason for this? We can give several reasons, one of which is that those courts are supposed to have enough "connection with the case". Con-

versely, it seems reasonable that we should make it a general condition for a court to grant a provisional measure that there exists a certain connection between the case and the territorial boundary of the court. Thus, the provisional measures granted by a court without enough connection with the case should be properly controlled by any means.

7. Conclusion

Some types of provisional measures have their specific ways of enforcement. If they cannot make use of such a specific way, taking the measure turns out to be just impossible. In that sense, not only the element of a certain “connection with the case” but also the factor of a certain “effectivity”, which corresponds to the type of the measure, seems to be examined to see if a court has a power to grant the provisional measure.