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A Cross Border Study of Freezing Orders and Provisional Measures

Does Mareva Rule the Waves?

Springer

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[*Unlike in the bygone age of slow-moving capital and comparatively immobile wealth, today*] *increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity.*[1]

[1] From the concurring and dissenting opinion in *Grupo Mexicano de DeSarrollo, S.A. v. Alliance Bond Fund, Inc.* 527 U.S. 308 (1999). [Hereinafter: *Grupo Mexicano*].

Preface

The idea of a cross-border study of arrest measures originated from a public lecture delivered in April 2013 at CEU in Budapest comparing the English Mareva Injunction (Freezing Order) with the French Civil Law Conservative Arrest (Saisie Conservatoire). After the lecture, Professor Tajti invited his English colleague to write an article on the subject for publication. It occurred to both authors in the course of editing the text that there was surprisingly little literature devoted to comparative studies of provisional measures involving the arrest of assets. Consequently, the scope of the paper was considerably extended resulting in the present work.

The authors decided that the inclusion of another major jurisdiction outside of Europe (the USA) would be very beneficial to the examination of the issues discussed. And then, the further decision was taken to incorporate a review of the existing law of an emergent former Soviet Bloc state in Central Europe to highlight some of the shortcomings of legal systems which had not yet developed their law in this field. The final work is a comprehensive survey of the provisional measures of France and the UK, including, by way of contrast, a presentation of the law of the USA representing a very developed jurisdiction in comparison with the less developed state of the law of Hungary, a traditional legal system of Central Europe.

In the quest for a model for interim relief, the English Mareva Injunction, subsequently renamed as the 'Freezing Order', is taken as the benchmark to which each of the targeted systems herein are primarily compared. This is because international scholarship, as well as the US Supreme Court, positions the Mareva Injunction as the most efficient and most far-reaching provisional remedy known today deserving its label of the '*nuclear weapon of the law*'.

Besides giving a comparison of English and US law on provisional measures, this monograph uniquely analyses not only the distinguishing features of the widely used French *Saisie Conservatoire* but also the so far neglected Hungarian law; each of them representing a distinct approach. While English law relies on injunctions as in personam relief, French law achieves comparable results by employing the *in rem Saisie Conservatoire*. As opposed to the latter solutions, US law combines the two yet affords more weight to remedies within *rem effects*. Hungarian law

represents out of the four the only system that has survived without *ex parte provisional* measures so far.

Yet, it is not only the scarcity of comparative law scholarship in this area that makes the topic of provisional measures of heightened importance. The increased speed with which commerce is unfolding in the twenty-first century inevitably makes the value of provisional measures of greater significance, because they are the effective tools in the hands of courts which can redress abuses and inequalities among the parties. The speed with which things change obviously is and will continue to be dictated by the ever-faster advancing technologies. So, as the concurring and dissenting Justices of the US Supreme Court expressed in the famous Grupo Mexicano case in 1999, the '*age of slow-moving capital and comparatively immobile wealth'* is bygone and the twenty-first century requires a fresh look at the law of provisional measures.

It should not come as a surprise consequently that the European Union found it important to introduce its own version of provisional measures, the European Account Preservation Order (EAPO), or that the Uniform Law Commission of the USA launched its Uniform Asset-Protection Orders Act not long ago in 2012. Consequently, it was important to reflect on these developments in the book as well.

It is by no means a coincidence that text which follows is the collaboration of an academic and a practising lawyer. Leaving aside its obvious academic interest, the subject is of course of immense practical importance. Every legal advisor knows that obtaining a favourable judgment in a legal action is of little benefit to a client if it cannot be successfully enforced against its debtor. The English author has been practising in the arena of international litigation for over thirty years and has considerable experience of the problems encountered in attempting to enforce arbitration awards or judgments. The overwhelming tendency of modern global commerce today is the resort to offshore corporate vehicles without assets for trading purposes, making enforcement of judgments a difficult and frustrating exercise. In addition, it is very common that parties active in international commerce will elect to have their disputes resolved in leading centres (London, Paris, New York, etc) where neither party is physically present. Consequently at a very early stage, consideration must be given to the fundamental issue of how an award or judgment will be satisfied. This, in particular, includes the law on freezing order and other types of provisional (interim) measures focused upon in this work.

The authors have endeavoured to present an objective analysis of the solutions of four very different international jurisdictions to the typical problems encountered in this area. The fundamental cultural and social traditions of the two major common law countries and two civil law nations can explain the radically different treatment of some of the issues involved. The history and development of the relevant provisional arrest measures are examined for each jurisdiction attempting to highlight their advantages and possible failings. The result is, it is hoped, a broad panoramic spectrum presenting the existing legal solutions available to a potential creditor who wishes to secure his claim by arresting assets of his debtor before obtaining a final judgment.

As both the authors themselves come from quite different backgrounds, this may provide a more original perspective to the discussion of the issues involved. On the one hand, there are the pragmatic views of a dual qualified practising Anglo French lawyer, and on the other, the insight of a distinguished academic lawyer from Central Europe who also holds law degrees (LL.M. and S.J.D.) from the USA. It is thought that the text should be of interest to the graduate and postgraduate student as well as the practitioner.

It cannot be emphasised enough that the subject of this work has received surprisingly little attention to date from comparative lawyers. The authors sincerely hope that this pioneering study may encourage others to explore this field themselves in their own jurisdictions.

Last but not least, a word of gratitude to various institutions and persons who have been the source of inspiration for this co-authored monograph is due. Thus, Peter Iglikowski would like to express his gratitude to all the members of the Legal Studies Department of CEU including the postgraduate students who attended his lecture on 17 April 2013 as well as the trainee students from his postgraduate course at Paris V University who assisted him with the research. Professor Tajti would like to extend his thankfulness to Central European University (CEU), Budapest, for the support leading to this co-authored paper and specifically to the staff of CEU Library for their research-related assistance. Special thanks go also to Assistant Professor Jessica Lawrence (CEU) for the exchanges related to some parts of this monograph.

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