

Unjust uses of provisional attachments in Korea



By Jang-Ju Lee

In Korea, it has become a customary practice that a creditor file for a provisional attachment against a debtor's property in order to secure payment of a claim prior to filing a lawsuit. Even so, oftentimes creditors will unjustly inflate the amount of the debt prior to filing the provisional attachment in order to secure a disproportionate amount of property to cover the debt. This may allow the creditor to unjustly pressure the debtor into settlement by wrongfully attaching assets that would prevent the debtor from obtaining loans or other means for securing the funds necessary to pay the creditor. In such instances, a debtor may be forced to submit to the demands of a creditor in order to have access to assets to operate its business or to avoid bankruptcy. Recently, however, Korean courts have begun to rule that such practices may be unlawful and that a debtor may actually claim for damages against a creditor when a creditor has unjustly attached property over and beyond a debt amount.

Korean courts generally acknowledge and respect that a creditor must secure his/her debt in order to prevent a debtor from illegally disposing of assets prior to the completion of a legal proceeding. However, Korean law prohibits creditors from creating circumstances wherein an unjust burden is placed on the defendant.

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Korean courts have ruled that a claim for a provisional attachment is unlawful in the event where:

- (i) the creditor pursues a claim despite being aware that the claim or legal relationship argued in the relevant lawsuit has no factual or legal basis; a reasonable person is able to recognise the malicious intent of the creditor; or
- (ii) where it is presumed that the creditor has wrongful intent or is negligent in claiming an inflated amount of debt in an application for provisional attachment.

Based on the foregoing, Korean courts have issued measures allowing for additional analysis of provisional attachments including the lengthening of the explanation process for claims exceeding KRW 100,000,000 (approx. US\$84,454). In addition, Korean courts have become more reluctant to allow preservative measures such as provisional attachments, especially where the creditor is unable to clearly prove its rights over the debtor.

On the other hand, although the laws have been codified, it has yet to be seen whether Korean courts will begin to issue meaningful damage awards against creditors when the creditor has unjustly inflated his claims over the debtor.

In the light of the above, the standards for granting preservative measure orders should be governed more stringently and the compensatory damages for provisional dispositions acknowledged in order to make the judicial system more

accessible to the public and to guarantee their rights.

Lee International IP & Law Group

14F Kukdong Bldg., Chungmuro 3-Ka
Chung-Ku, Seoul 100-705, Korea

Tel: (82) 2 2262 6258

Fax: (82) 2 2279 5020

Email: jjlee@leeinternational.com

www.leeinternational.com

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