Current Topics of International Litigation

Edited by
ROLF STÜRNER and
MASANORI KAWANO

Mohr Siebeck

Problems of Transnational Civil Procedure

Volume
I

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Preface

This first volume of a book series is the result of the international symposium "Current Topics of Transnational Civil Procedure", held on February 18–19, 2006 at the Nagoya Castle Hotel in Nagoya, Japan. The symposium was planned as part of an international research program sponsored by the Japan Society for the Promotion of Science from 2005 to 2010.

The main idea of this project is to develop and encourage methods of comparative study of civil procedure by establishing a personal network for the exchange of legal information. The purpose of such a personal network is the intensive discussion of common and differing features of proceedings in business litigation matters. In our globally integrated society, legal disputes are inevitably expanding beyond national borders. But in each jurisdiction, legal system and practice have developed their own different traditions. Such differences may sometimes cause special difficulties in transnational litigation. Therefore, it is necessary to promote harmonization of special rules of transnational civil procedure. This form of harmonization is very different from unification of law. Some visitors of this symposium were members of the Working Group of the joint project of the ALI and Unidroit "Principles of Transnational Civil Procedure" from 2000–2003. This present Japanese project takes the ALI/Unidroit Principles as a basis for continuing research and exchange. To further close and continuous cooperation between legal scholars with different legal backgrounds, we scheduled two international symposia annually, one in Japan and the other in varying European universities. This volume documents the first symposium of our project.

We would like to express our gratitude to all participating members who actively contributed to the symposium and who travelled the long way from Europe and the United States to Japan.

This volume was edited by the Institute for Business Litigation of Nagoya University at Freiburg University, Germany. The Institute was established to perform this project in collaboration with and the kind support of Freiburg University. We would also like to thank Dr. Natalie Konomi who organized the

editing work for this book, Ms Tohko Hayakawa for her invaluable assistance and the Japan Society for the Promotion of Science for its kind financial support.

Rolf Stürner, Germany
Masanori Kawano, Nagoya, Japan
Freiburg/Nagoya, December 2008

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Opening of the Symposium

Professor Shin-ichi Hirano, President of Nagoya University

Good morning ladies and gentlemen, distinguished guests. It is my great honour to have you here in Nagoya and to get together with you here in Nagoya city on this occasion of the International Symposium on Current Topics of Transnational Civil Procedure, which is the first symposium in a series of upcoming conferences to be held in Nagoya. On behalf of Nagoya University and on my own behalf, I would also like to take this opportunity to welcome you all to this symposium. A special welcome goes to those of you who have come from all over the world and outside of Nagoya. I believe some of you have not visited Nagoya before. Please relax and feel at home during your short stay in Nagoya and please enjoy this symposium.

Some of you I have already met during the opening ceremony of the Nagoya University Institute for Business Litigation in Freiburg. We opened the Institute in Freiburg on November 25th last year. I mentioned during my opening address then that the opening of the Institute was a very important milestone for us. Today I would like to point out that the holding of this symposium is another important milestone in the fruitful process of this project. I am aware that the theme of this symposium "Current Topics of Transnational Civil Procedure" is a matter of interest to many countries. I am, therefore, confident that the symposium will offer a good opportunity for the experts of various fields present to share experiences and formulate appropriate recommendations on how best to address the issues relating to this topic. It is now my pleasure and privilege to declare this first symposium open.

I wish you a good symposium and a happy and enjoyable stay in Nagoya, especially those of you who have travelled long distances to come to Nagoya. Thank you very much for attending, and I hope you have fruitful discussions and results. Thank you very much.

Professor Haruo Saburi, Dean of the Graduate School of Law, Nagoya University

Welcome to Nagoya. In particular, I would like to extend my heartfelt welcome to the guests who have come all the way to Japan from Europe and America. I would like to say a few words regarding our sponsor. This symposium is the first international symposium of the special project titled "Establishing a new framework for realizing effective transnational business litigation", which we submitted in a proposal to the Japan Society for the Promotion of Science, for a grant towards creative scientific research. Also, regarding myself, I am a specialist in international law and international economic law and I consider the activities of WTO.

Nowadays, many social systems have collapsed and transnational company activities have been expanding. The market economy has been expanding horizontally as well as vertically with economic globalization. Since its birth, the WTO has been active in the legal resolution of various conflicts. The handling of conflicts by the WTO entails dealing with economic conflicts between nations. However, as the economy becomes globalized, it is more and more important to have a legal framework to resolve economic conflicts between private persons transnationally, which is quite clear even for a private person.

In order to have a clear understanding about the current status of transnational civil procedures, it is of great significance for us to have an international symposium with esteemed guests from Europe and the US. Despite economic globalization, there are differences in legal cultures and legal systems among different countries. Therefore, for future harmonization and mutual understanding, international or transnational civil procedural law is very important. This first symposium marks a beginning for this project. I believe the symposium is an important starting point towards the success of this project. I hope we have a fruitful discussion at this symposium and that we are moving towards a brighter future thanks to your cooperation.

Thank you very much.

Professor Masanori Kawano, Nagoya University

Good morning, Ladies and Gentlemen. Welcome to Nagoya. I greatly appreciate the very warm greetings from Professor Hirano, President of our University and the Dean, Professor Saburi. Many friends and distinguished scholars from around the world are here today. This is the first symposium for our project. Although the preparation period was very short, fortunately many participants who came here to attend are also good friends. It is my pleasure and honour to be holding such a very interesting symposium.

Before we start our symposium, I would like to explain our project briefly. You have all heard about it by now. It is an international cooperative project for the discussion of current problems in transnational litigation, especially in the field of business disputes. Recently, there have been, on the one hand, tendencies towards economic globalization and calls for harmonization of national legal systems, especially transnational litigation systems. On the other hand, it is not so easy to harmonize transnational litigation systems. Harmonization also entails retaining and respecting the special characteristics and legal history and legal cultures of each country. It is not easy to realize this.

For that purpose, we would like to encourage and further promote mutual understanding, international studies, and cooperation. Unfortunately, until now, we did not have such opportunities. For a long time, of course, we discussed comparative studies for the previously mentioned purposes. But for those purposes, we mainly used books or printed materials. As you know, printed materials are not always up to date, so if you are looking for information on actual problems, it is necessary to discuss with each other. This is why I think that we have to establish human relationships or human networks for that purpose. This is the main reason why I wanted to establish this project. It is a five-year project and this is the first symposium. My plan is to have such a 'get-together' at least once a year in Nagoya. But, in addition, I would like to have such a symposium, for example in Freiburg, Germany, perhaps in September of this year (2006), which I am discussing with my colleagues.

Unfortunately, one professor from Lyon, Professor Ferrand, could not attend today's symposium, but she promised me that she would hold a similar symposium in Lyon next year. I would like to discuss certain international problems not only in Japan, but also in Europe, for example. Moreover, in Europe and the United States, there is no good information available on the Japanese system. Therefore, another goal is to give some information about the Japanese legal system to our foreign colleagues. These are the first steps of our project.

Fortunately for this symposium, we have many guests from foreign countries. Here I would like to, very briefly, introduce some members. First of all, I would like to introduce our colleagues: Professor Stürner from Germany, Professor Murray from Harvard in the United States, Professor Trocker from Florence, Italy, Professor Kengyel from Hungary, Professor Andrews from Cambridge in England, and Professor Ervo from Finland. They are the 'permanent staff' of our project. We already discussed future cooperation in a meeting last night. We would like to start our international cooperation from this year and continue for five years.

Thank you very much for your attention.

Chapter 1

Provisional Measures and Prohibitory Injunctions

Provisional Measures for Prohibition of Actions – New Tendencies in Japan

Masanori Kawano

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I. Introduction

Timeliness of legal remedies is one of the most important aspects of effective justice. Delayed legal remedies mean sometimes non justice and are regarded as the same of it's deny. In the most countries timeliness of remedies has been and is always a subject of discussion of legal reform and amendment of legislation and practice. The ordinary system of civil justice, however, because of its nature to provide fair procedure, contains inevitably some time consuming formality with full procedural equipments. In most jurisdictions, therefore, parallel or followed by ordinary civil procedure, provisional remedies before ordinary judgments have been developed and provided for applying to the immediate and adequate relief required urgently.[1] Without such provisional remedies civil justice can not satisfy social needs for resolving different kinds of urgent disputes swiftly. But they can perform their task only when the instruments work well. Effectiveness and satisfaction of such legal remedies can be proved mainly by their real social function and satisfaction of the need for them.

Compared with ordinary civil procedures, such provisional procedures are composed of special summary procedures. Our discussions should be focused

[1] General view of provisional measures in European countries, see, *Stürner*, Einstweiliger Rechtsschutz, Generalbericht, in *Storme* ed., Procedural Laws in Europe, 2003, p. 143; as to the new movement in Europe see, *Andrews*, Toward an European protective order in civil matters, in *Storme* ed., Procedural Laws in Europe, 2003, p. 267.

only on the judicial orders for prompt remedies to regulate legal relationship between parties before judgment. They are such instruments as *Hozen Shobun* in Japan, Einstweiliger Rechtsschutz in Germany[2], Preliminary Injunctions or Temporary Restraining Orders in the USA[3] or Injunctions in England[4]. Here "Provisional measures" will be used as a general term for describing such procedures.[5]

Provisional measures are provided in most jurisdictions as a legal remedy for securing and preserving realization of following judgments rendered by courts with ordinary procedures. In the European countries they have common roots, but the present features differ slightly from country to country.[6] Generally speaking, they are provided not only arrest for the money judgments, but also provisional measures for sequestering individual property. Provisional measures for regulating legal relationships between parties are provided, too. The last measures can be applied to many different kinds of urgent dispute. In our current social life there are many legal disputes which require temporal decisions for making peaceful relationships between disputing parties even temporally. Provisional measures for regulating temporal legal relationships, *einstweilige Verfügung auf Handlung* or *Unterlassung*, can have some direct function on the legal and social relationship between disputing parties. They invoke social attention to the judicial remedies.

My presentation will focus mainly on the new developments of the provisional measures especially for prohibiting from some actions of opponents in Japan. They relate to some business cases in which provisional measures were applied to the dispute between mega banks in Japan. They suggest some new tendencies of applying provisional measures as an instrument for resolving business disputes and deciding important business policies.

II. Need for Immediate Remedies for Resolving New Kinds of Disputes

1. Japanese system of provisional measures

In Japan the provisional measures were provided in the Code of Civil Procedure of 1890 which was the first modern code of civil procedure based on the German Code of Civil Procedure of 1877. Provisional measures were provided in "Book 6 Coercive Enforcement". They were provided as a part of civil enforce-

[2] *Baur/Stürner/Bruns*, Zwangsvollstreckungsrecht, 13. Aufl. 2006, Rdnr. 50.1.

[3] *James/Hazard/Leubsdorf*, Civil Procedure, 5th ed., 2001, p. 338.

[4] *Andrews*, English Civil Procedure, 2003, 18.41, 18.44 (Classification of injunction).

[5] Brussels I Regulations Section 10 uses "Provisional, including protective, measures".

[6] As to the common roots of provisional measures of regulations in European countries , *Stürner*, Einstweiliger Rechtsschutz Generalbericht, op. cit. note 1, p. 169.

ment, and attached part of it. They were regulated by only 26 simplified provisions. Before the Second World War provisional measures were not popularly applied, and consequently they were paid scant attention from academic world. There was no successful attempt to encourage to use them, nor to prove their problems or to amend them. They kept their original features for about 90 years.

First in 1979, the provisions relating to the enforcement in the Code Civil Procedure were totally amended and were divided from the Code of Civil Procedure and established as an independent form as the Code of Civil Enforcement. As to the provisional measures, however, only the part of their execution was moved into this new Code of Civil Execution, but without substantive changes, and other parts of them remained in the Code of Civil Procedure. The consequence of this reformation was somewhat grotesque: Procedures of provisional orders and their enforcement were separately provided in different codes.

In 1989 regulations of provisional measures were totally rearranged and were provided as a form of independent code. The new code, "Code of Civil Provisional Remedies, or *Minji Hozen-hoh* promulgated in 1989, came into force on January 1, 1991. This code contains 67 articles and provides also attached Rules of Civil Provisional Remedies with 48 articles.[7] This Code is a general code for provisional measures applied to normal civil cases, for which civil procedures are regarded as main procedures.

The Japanese system of provisional measures based originally on the German system[8] was changed by the new Code of 1989. Fundamental structure and characteristics of German system remain. They are composed of previous tentative orders by the court and their enforcement procedures. They can be applied to freeze the defendant's property to secure successful enforcement of money judgments and to secure individual objectives of litigation to prevent to be dismissed. They can be applied to regulate the temporal legal relationships. These provisional measures for regulating a legal situation or *status quo* have had a different function: They decide the legal relationship tentatively. But they have a real function to decide it definitely by the interference of the court order, even though they were reserved the subsequent examination by the ordinary procedures. Sometimes because of the radical interference by them and of the definite changes of urgent situations between disputing parties, they make no use of reexamination in the following ordinary procedure. By considering such radical influences there have been such practical tendencies that they were ordered after the time consuming examination by the court. But such a practice

[7] According to Article 77 of the Japanese Constitution, Supreme Court is given a rule-making power relating to the procedural matters.

[8] Book 8 Chap. 5 of the German Code of Civil Procedure of 1877.

was contrary to their original functions of the provisional measures. They should be changed to rehabilitate their original functions as a timely remedy.

2. Case Developments of Provisional Measures in Japan

Before the Second World War provisional measures were not popular and were not used frequently in Japan. Such situations were changed just after the end of the Second World War in Japan. At the time, because of the social and economic confusion after the total destruction, there occurred many new and serious daily disputes which required immediate solution. They were brought to courts and provisional measures especially for tentative regulation have been applied. Depending on the changing situations in Japanese society, provisional measures have been applied to the various types of disputes:[9]

First, at the time just after the end of World War II and until the 1960s, there were many disputes relating to housing problems and labor relationships. Because of scarcity of houses in Japan provisional measures for evacuation of houses were applied frequently. At the time labor relations were not sure and the workers were not paid satisfactorily. There were many labor disputes. In labor cases petitioners who were discharged of their positions have applied provisional measures for securing their *status quo*.

Secondly, from the 1970s, there were many disputes relating to construction and to nuisance cases. In these times the Japanese economy has been rehabilitated immediately and developed very actively. But they brought some shadow sides, too: Constructions of high buildings destroyed the situation of surrounding neighbors seriously. They applied provisional measures for prohibiting from further construction. Active economic activities brought nuisance and pollution of water, noise, shock, ground subsides and bad smell etc. There were many cases to apply provisional measures for prohibiting from such harmful economic activities.

In such cases of provisional measures, courts examined cautiously because of their serious influences on the social relationships between disputing parties. So the examination had been made sometimes by oral hearings like an ordinary civil procedure. Under the old system the decision of courts in such cases had to be rendered only by the form of judgment.[10] The procedures were operated similar to the ordinary procedure of the main litigations. It was called the shifting phenomenon of provisional measures into ordinary procedure.

As a consequence of the old system of Japanese procedure of provisional measures their examination required long time. They were criticized because of

[9] Generally, *Takeshita/ Fujita* ed., Minji hozen-hou (Law of Civil Provisional Measures), 1997, p. 2.

[10] Old Code of Civil Procedure Art. 741 Sub.2, § 922 ZPO: Court Decision should be given in the form of judgment, if the examination was rendered after oral hearing, otherwise by a simple order.