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Reform project of the system of provisional remedies: Draft Outline on the System of Provisional Attachment and Provisional Disposition.

The reform of the system of provisional attachment (kari-sashiosae) and provisional disposition (kari-shobun) — putting both of them together, we call the system "provisional remedies (hozen-shobun)" — had been discussed within the Civil Procedure Law Division of the Legislative Council, an advisory body to the Minister of Justice, since Oct. 1983. The basic study on all the matters for revision came to an end within the Division, and on Dec. 23, 1986, the "Draft Outline on the System of Provisional Attachment and Provisional Disposition" was published. At the same time, 'Comments on the "Draft Outline on the System of Provisional Attachment and Provisional Disposition"' was also published as material for understanding the aim and contents of the "Draft Outline".

The "Draft Outline" is definitely not a final bill concerning the reform of the system of provisional remedies. It only shows the development of the study within the Division and a tentative plan for revision. It was published in order to again inquire for the opinions of concerned circles. Taking those opinions into consideration, the Division is continuing the work on revision. By taking such a step it is expected to achieve an excellent revision of provisional remedies.

The deadline for presenting opinions to the "Draft Outline" is

Apr. 30, 1987. After that the discussion will be reopened within the Division in June 1987. The final reform bill is scheduled to be presented in spring 1988.

In the following, based primarily on the "Comments" of the "Draft Outline", the necessity for the reform of the system of provisional remedies and the summary of the "Draft Outline" are described.

(1) The necessity for the reform of the system of the provisional remedies

The reasons why the reform of the system of the provisional remedies is demanded are as follows.

First, with the developments of the society and the economy, the legal relationship between debtors and creditors has become complex and diverse. The provisions of provisional remedies in the Code, however, are insufficient and scanty. Therefore, many problems have arisen in practice.

Originally the system of provisional remedies was provided in Part VI, "Compulsory Execution", of the Code of Civil Procedure enacted in 1890. Thereafter, at the time of a very extensive amendment to the Code of Civil Procedure in 1926 and even at the time of an amendment caused by the enactment of the Civil Execution Act in 1979, the system of provisional remedies itself was little revised. Before World War II this system was not taken notice of nor used very much. Nowadays, however, its frequency of use is very high. And it is well understood that the system is very important for the citizens to secure their rights quickly.

Under such circumstances, the lack of provisions on provisional remedies has been in question for a long time. In practice such difficulties have been resolved by interpretation or practical use of the system. But there are limits to such interpretation or practical use. Additionally, there has been the problem that interpretation and practical use in individual courts are not always in harmony with each other.

The system of provisional remedies has great influence not only on the legal relationship between a debtor and a creditor

but on the right of a third party who has an interest in such a relationship. Accordingly, it is necessary to define the requirements and validity of provisional remedies consistently.

Secondly, another reason for reform is that the system of provisional remedies is separated into two proceedings, that is, decision-making proceedings (saiban tetsuzuki) and execution proceedings (shikkō tetsuzuki), and is provided for in different codes in an anomalous form. Before the enactment of the Civil Execution Act, the procedures for provisional remedies were provided as a whole in the Code of Civil Procedure, Part VI "Compulsory Execution", Chap. IV "Provisional Attachment and Provisional Disposition". But, on the enactment of the Civil Execution Act, the decision-making proceedings and the execution proceedings of provisional remedies were separated. The former is provided in the Code of Civil Procedure, Part VI "Provisional Attachment and Provisional Disposition", and the latter is in the Code of Civil Execution, Chap. III "Provisional Attachment and Provisional Disposition". Such regulation was unavoidable for various reasons on the enactment of the Civil Execution Act. Thus, the necessity for radical reform on the system of provisional remedies has been pointed out. In that context it can be said that the present reform movement on the system of provisional remedies is to some extent an inevitable current following the enactment of the Civil Execution Act.

(2) The summary of the "Draft Outline"

The "Draft Outline" consists of four titles — General Provisions, Proceedings of Provisional Remedies, Proceedings of Provisional Attachment, and Proceedings of Provisional Disposition — and contains 38 matters for revision in all. In the following, the principal matters for revision are briefly mentioned.

(a) Complete adoption of informal proceedings (kettei tetsuzuki)

The first principal point of revision in the "Draft Outline" is that the court may always render its decision on provisional remedies in the form of an order (kettei), and not of a judgment

(hanketsu). That is, the court may render its decision on provisional remedies without holding oral proceedings (kōtō benron: the main hearing). And even if the oral proceedings are held, the court may render its decision in the form of an order (kettei). The decision on provisional remedies contains a decision on application (shinsei) for provisional remedies and a decision on petition of objection (igi) or vacatur (torikeshi) to provisional relief.

Under current law, the decision on application for provisional remedies, depending on whether oral proceedings are held or not, is divided into two forms, i.e. a judgment and an order. On a decision on an application for provisional attachment, it depends on the discretion of the court whether the oral proceedings should be held or not (Code of Civil Procedure, §741 (1)). On the other hand, on a decision on an application for provisional disposition, the court must in principle hold oral proceedings, but in an exceptionally urgent case it is permissible for the court to render its decision without holding oral proceedings (Code of Civil Procedure, §757 (2)). In both of the remedies, the form of the decision is a judgment if oral proceedings are held, and an order if not (Code of Civil Procedure, §§742 (1) and 756).

On a decision on petition of objection or vacatur to provisional relief, the court, necessarily holding oral proceedings, must render its decision in the form of a judgment under present law (Code of Civil Procedure, §§ 745, 746 (2) and 747(2)).

In practice, however, oral proceedings are seldom held on a decision on application for provisional remedies. Most of the cases are disposed of through informal proceedings (kettei tetsuzuki — where the form of the decision is an order, not a judgment, and ex officio procedure applies). Statistics show that almost 100% of the provisional attachment application cases and approximately 98% of the provisional disposition application cases are disposed of through informal proceedings. This means that, apart from the principle of the law, as regards the decision on application for provisional remedies, the court can render jus-

tice sufficiently with informal proceedings. And, as for the time of examination, it can be said generally that such cases are dealt with quickly.

The problem is the examination of application for provisional disposition handled with proceedings leading to a judgment (hanketsu tetsuzuki). In such an examination, though it may be easily supposed that the legal relations of the case are highly complex, it takes too long to examine the case. And such phenomena as long examination are especially remarkable in a case of filing objection or vacatur to provisional relief, which must be examined with proceedings leading to a judgment.

Such a situation is contrary to the purpose of the system of provisional remedies, i.e. the quick relief of a party's rights. The aim of the proposal in the "Draft Outline" is to have the system of provisional remedies display its primary function.

Needless to say, the "Draft Outline" has some provisions protecting a party in order that his right may not be injured by completely adopting informal proceedings.

(b) The clarification of the effect of provisional disposition

The second principal point of revision in the "Draft Outline" is that, as concerns the provisional disposition prohibiting disposal of immovables and the provisional disposition prohibiting transfer of possession, their requirements and effects are defined respectively.

The Code of Civil Procedure has a general provision concerning the method of provisional disposition in §758, but there is no provision on its effect under current law. Therefore, in the "Draft Outline", the stipulation of the requirements, contents, and effects of the main types of provisional dispositions was studied.

In practice the provisional disposition prohibiting disposal and the provisional disposition prohibiting transfer of possession are used most frequently. They are the typical provisional dispositions. However, as mentioned above, there are few provisions on those kinds of provisional dispositions under current law. Chiefly precedents and memoranda hava been applied to them.

But there are limits to such practice. And there have arisen lots of problems in practice. So, as those two types of provisional dispositions have been in greatest demand in practice, they are provided in the "Draft Outline". Provision for other types of provisional dispositions has been postponed, because the time for regulation is not yet ripe.

First, applications for the provisional disposition prohibiting disposal are made most frequently in order to secure a claim for registration concerning a right on immovables. And the execution of such provisional disposition is made by means of writing down an order (meirei) of provisional disposition prohibiting disposal of immovables in an official register book. So, on enforcement of such right as secured by such provisional disposition, other registrations in lower rank must be crossed out. But, under current law there is no provision on this cancellation. Cancellation of such registrations has been made by interpretation or memoranda in practice. However, in light of the protection of the third party, it is questionable to continue such practice without any provision on such cancellation. In the "Draft Outline", confirming the current practice in principle, provisions on provisional disposition prohibiting disposal of immovables are proposed, and at the same time provisions for registration proceedings are also proposed.

At present, this provisional disposition prohibiting disposal of immovables is also applied in order to secure claims concerning creation of a security interest etc. However, in this case there is a problem that effects exceeding the original purpose of securing the right concerned come to be granted, so that a debtor is likely to suffer unfair results. Therefore, provisions on such provisional disposition are proposed in the "Draft Outline".

Secondly, the provisional disposition prohibiting transfer of possession may be granted in order to secure claims concerning delivery (hikiwatashi) or surrender (akewatashi) of things. This kind of provisional disposition is also very significant when it is made on immovables. And there arise many problems concerning the effects of such provisional disposition in such cases. In par-

ticular, the biggest issue is whether or not the effect of such a provisional disposition may reach a third party who, not based on succession from a debtor, possessed the object after the execution of such provisional disposition. Based on practical demand, it is proposed in the "Draft Outline" that the effect of the provisional disposition prohibiting transfer of possession shall in principle reach such a third party. However, in order to protect such a third party, it is also proposed that, by bringing an action, the third party may object to the issuance of an execution clause if the third party is in good faith and faultless with respect to the execution of such provisional disposition.

(3) The above-mentioned matters are the chief points of reform in the "Draft Outline". In addition to them, the "Draft Outline" is intended to improve provisions concerning many matters which have come into question in practice because of defects or lack of law. For example, it is proposed that applications for provisional remedies etc. should be filed in written form, and there is a proposal to define the cases where guarantee can be demanded back, and so on. There is no room here to describe all the proposals in the "Draft Outline". But, summing them up, it may be said that the specific character of the proposals for revision is in that they will enable the courts to deal with cases on provisional remedies quickly and to adjust the interests of the parties.

Further, what form the legislation should take is left as a problem to be examined later. Though the "Draft Outline" was published in the form of a single law, it remains an open question whether the reform act should be enacted as a single law or as amendments to the Code of Civil Procedure, Part VI. It also remains an open question how its relationship to the Civil Execution Act should be adjusted.

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