## 3. Law of Civil Procedure and Bankruptcy

**Civil Provisional Relief Act 1989.**

Promulgated on December 22, 1989. Ch. 91, and scheduled to be put into force within 3 years.

Consisting of 65 articles and 41 supplementary provisions.

*[Outline of the Act]*

The Civil Provisional Relief Act 1989 provides for the proceedings of civil provisional remedies. The term "civil provisional remedies" is a general name of provisional attachment and provisional disposition. These are procedural devices designed to secure the enforceability and effectiveness of a future judgment for plaintiff or prospective plaintiff. Litigants frequently apply for these remedies prior to an action or while it is pending.

Provisional attachment is a procedure whereby a debtor's property may be temporarily seized or garnished, thereby prevents the debtor from disposing of his/her property. It secures execution of a future judgment on a monetary claim or a claim which can be converted into a monetary claim.

Provisional dispositions can be classified into two forms: the so-called "provisional disposition with respect to the subject matter in dispute" and the "provisional disposition temporarily fixing the state of affairs with respect to the legal relation in dispute." The former, like provisional attachment, is a remedy to ensure satisfaction of a future judgment. But, different from provisional attachment, it may be utilized for a non-monetary claim. The latter is a remedy essentially to grant a creditor, through establishing a temporary legal relation, all or part of the specific relief he/she seeks. This is considerably different from the provisional disposition with respect to the subject matter in dispute. This type of provisional disposition may be granted, either prior to or during an action, only when it is necessary to forestall substantial damage to the legal relation or

when other compelling reasons exist.

The (unofficial) synoptical table of the Act is as follows:



***[Legislative Background]***

Originally, the procedure of provisional remedies was provided for in the Code of Civil Procedure enacted in 1890. But, with the enactment of the Civil Execution Act in 1979, the procedure of provisional remedies was separated into two proceedings and provided for in different codes in an anomalous form. That is, the order-issuing proceedings of provisional remedies were provided for in the Code of Civil Procedure while execution proceedings of such remedies were provided for in the Code of Civil Execution. Although such regulation was unavoidable for various reasons concerning the enactment of the Civil Execution Act, the necessity for integration of the proceedings has been strongly indicated. Thus, it can be said that the present legislation is an inevitable result following the enactment

of the Civil Execution Act.

Moreover, the regulation of provisional remedies has been little reformed since the original enactment in 1890. At the time of very extensive amendment to the Code of Civil Procedure made in 1926 and even at the time of amendment made by enactment of the Civil Execution Act in 1979, the provisions of provisional remedies themselves were little revised. Therefore, the provisions of provisional remedies had become insufficient to cope with the various problems which have arisen with the development of society and the economy. In practice, difficulty such as the lack of provisions has been resolved by practical application and construction. But there are limits to such application and construction. Additionally, the problem has arisen that some uses of application and construction are not in harmony with others. Therefore, it is necessary to consistently define the requirements and validity of provisional remedies in disputes through legislation.

***[Points of the Act]***

There are two principal points in this Act. First, with respect to decisions on civil provisional remedies, ruling proceedings shall be adopted completely. Second, on typical provisional dispositions their requirements and effects are clearly regulated.

(1) Complete adoption of ruling proceedings.

The court shall always render its decision on civil provisional remedies, whether oral proceedings or a main hearing is held or not, in the form of an order or ruling, and not of a judgment.

This means that the court may examine a case, which contains not only a case of application for civil provisional remedies but also a case of petition of objection or vacatur to civil provisional relief, through ruling proceedings — where the form of the decision is an order, not a judgment, and *ex officio* procedure applies. Additionally, even if oral proceedings must be held, the court may also render its decision in the form of an order.

Until now, the decision on application for these remedies, depending on whether oral proceedings had to be held or not, was divided into two forms, i.e.,a judgment and an order. With respect to

a decision on an application for provisional attachment, it was up to the discretion of the court whether oral proceedings should be held or not. On the other hand, with respect to a decision on application for provisional disposition, in principle, the court had to hold oral proceedings (in exceptionally urgent cases, however, it was permissible for the court to render its decision without holding oral proceedings). In both cases, the form of the decision was a judgment if oral proceedings were held, and an order if not. Moreover, with respect to a decision on petition of objection or vacatur of provisional relief, the court, necessarily holding oral proceedings, had to render its decision in the form of a judgment.

As for the time of examination, it can be said generally that the cases which must be examined with proceedings leading to a judgment tend to take very long time. Instances such as long examination were remarkable, especially in cases of objection or vacatur to provisional relief. But such a situation is contrary to the purpose of the system of provisional remedies, i.e.,the quick relief of a party's rights.

Thus, in this Act, ruling proceedings are completely adopted in order to have the system of civil provisional remedies carry out its primary function. Needless to say, the guarantee of a party's procedural rights is taken into consideration in the legislation.

(2) Clarification of requirements and effects of typical provisional dispositions.

In practice the "provisional disposition prohibiting disposal" and the "provisional disposition prohibiting transfer of possession" are utilized most frequently. They are the typical provisional dispositions belonging to the so-called "provisional disposition with respect to the subject matter in dispute". The former is utilized most frequently in order to secure a claim for registration of a right on immovables. The latter is also used frequently in order to secure claims concerning delivery or surrender of immovables.

Until now, however, there existed only one general provision concerning the method of provisional disposition, and there was no provision on its effect. Therefore, precedents and memoranda have been chiefly applied to those two types of provisional remedies as men-

tioned above. But there are limits to such practice. So, a lot of problems in practice arose because of the lack of provisions.

Thus, in this Act, as far as it concerns those two typical types of provisional disposition on immovables in the greatest demand in practice, their requirements and effects are defined respectively. Regulations of other types of provisional disposition are not made, because the time for such regulations is not ripe yet.

**Prof. TETSUO KATO**
**NORIYUKI HONMA**

## 4. International Law

**— Treaties and Agreements —**

*Multilateral:*

International Natural Rubber Agreement, 1987, instrument of acceptance deposited on June 3, 1988, provisionally entered into force on December 29, 1988.

Amendment to Article VIII (a) of the Articles of Agreement of the International Bank for Reconstruction and Development, instrument of acceptance deposited on May 4, 1988, entered into force on February 16, 1989.

Agreement Establishing the Common Fund for Commodities, instrument of acceptance deposited on June 15, 1981, entered into force on June 19, 1989.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, instrument of accession deposited on July 26, 1989, entered into force with respect to Japan on October 26, 1989.

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks