PROVISIONAL RELIEF IN A COMPARATIVE PERSPECTIVE*

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I

Colleagues and friends have come over to Athens in order to examine modern problems and trends pertaining to provisional relief. Indeed, the more provisional the persistence and effect of a judicial measure, the more perennial the scholarly discourse thereon is likely to become. Recent publications, congresses, working group projects, reports, or colloquia do confirm what otherwise might seem as a professional distortion or a logical paradox. In search for an explanation for this explosion of interest, attention is drawn to the remark that, since provisional adjudication is short-lived but concentrated, passing away but incisive, such sharp-edged weapon has to be well considered, particularly beforehand. Thus, intellectual focusing may make up for what is lacking in actual practice in terms of duration and perseverence. Awareness of efficience of provisional relief produces an incentive towards reflection down to the roots. Time saved on legal effects must be spent on their choice and preparation. As T. S. Eliot wrote (Four Quartets: Burnt Norton II 89), "Only through time time is conquered".

There may be a second reason, why provisional measures have come to attract, across national boundaries and legal families' classifications, a growing interest of proceduralists around the globe. This is the increasing relevance of time in civil litigation —indeed in any litigation—. It belongs to traditional wisdom that provisional measures are considered or granted mainly because ordinary adjudication is everywhere extremely slow. In an ideal world which, among other things, would in-

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clude instantaneous adjudication and automatic enforcement of all and any claims, provisional measures would be hardly necessary or even conceivable. Since reality, however, is more and more getting away from the ideal world, other methods have to come in in order to fill in, or to reduce the vacuum. One of these methods consists in expanding the arsenal of provisional measures which substitute the increasing sluggishness of regular procedures. Thus, provisional adjudication concurrently tries to catch up on time and to eliminate time as decisive parameters of the function of juctice. An important german textbook on civil procedure starts with the startling proposition that time spent on litigation is time lost.

No specific themes with regard to particular aspects of provisional measures appear on the present program. By contrast, presentations have been assigned and papers and contributions are expected under criteria relying on legal families rather than on specific issues. To be sure, advantages and disadvantages are connected to such an approach. At least one advantage can, however, be hardly denied. Modern comparative methods —and this is an exercise in comparative application— increasingly require a wider and deeper knowledge of the rules and their operation in each system under consideration. Comparative law cannot any longer live on abstract speculation. Instead, a detailed knowledge of what —and how— is going on in any system under comparison is required. At best —and this is how work has been designed and carried on by all serious working groups towards European legal harmonization, foremost in the Lando Commission on Contract Law— a specific case —real or fictional— is dealt with in detail under all relevant systems.

We are starting our exploration with the provisional measures in common law jurisdictions. This is, by the way, the reason why English has been chosen as the language of this introductory presentation: *common law* can hardly be reflected upon in any other language than English.

II

Before going into the details of provisional adjudication under common law it may be appropriate to summarize, in a general and rough way, the main issues which many legal systems are presently confronted with in this area. It seems to me that four such issues clearly emerge and deserve our comparative attention.

First, one wonders what the genuine requirements are for provisional measures to be taken. They generally depend on making likely, on the one hand, the existence and extent of the main claim and, on the other hand, an imminent danger which, unless some provisional relief is granted, may well frustrate any subsequent adjudication. Much relies, however, on the adequate mixture of these two ingredients. In truth, they are not only disparate, but also divergent. Showing here a cause of action is not essentially different for what is expected from the plaintiff in regular adjudication as well. Of course, the required standard of proof may be lower than otherwise. But is such evidence-related distinction enough to justify and support an overall division between provisional and ordinary adjudication? Precisely on this point, some systems go further so as to highlight the division and enhance the distinctiveness of provisional measures. In those systems no provisional measure may result in satisfying the main claim. What is proposed under this approach is to make provisional adjudication not only easier but shorter as well *vis*-à-*vis* ordinary adjudication. Even under the just enunciated conditions of easiness in access and reduction in scope, provisional measures are still qualified as belonging to adjudication rather than administration. By contrast, strengthening the second requirement of provisional measures, to wit the need to face an imminent danger, brings the whole field away from adjudication. If, and to the extent that, the function of provisional measures consists in confronting imminent dangers, then what we are talking about becomes a kind of judicial police rather than judicial cognition. The ambivalence between judicial cognition and judicial police, between reflection under the law and reaction against the force of facts permeates the whole area of provisional measures and predicates the answers to particular problems.

III

The second issue pertains to what might be called the struggle between revocability versus stability of provisional measures. Of course, they are called provisional in a double sense: not only because they cannot stand against regular adjudication and its results, but also because they are provisional among themselves as well, that is because they may be revoked, modified, expanded or reduced if the circumstances under which they were granted in the first place have changed. How far should alterability of provisional relief go? The question includes at least two

aspects, a more theoretical and a more practical one. Under the former, one wonders whether mistakes in the law in the original grant may be reviewable on the basis of a request for modification, i.e. whether such modification may assume the function of appellate review as well. Under the latter practical aspect, interest is focused on how quick judges should be in entertaining requests for revocation or modification of provisional relief. Any judicial protection, including the provisional one, must be accompanied by a certain degree of stability. The fundamental problem lies in striking a reasonable balance in order to keep provisional relief in equal distance away from the temptations of self-righteous rigidity and unreflected fluidity.

IV

Precisely the revocability of provisional relief leads to the third outstanding issue, namely the liability of persons acting on reliance on injunctions granted. Like all judicial decisions, provisional measures, even without being accompanied by res judicata or other binding effects, create a certain level of reliability which may become relevant to all people coming in contact with, or within the context of, the relationship or transaction provisionally determined by an injunction. Particularly with regard to negligence, the issue arises whether, under what conditions and to what extent, a behavior may be justified solely because it is based on provisional relief —and that—, against better knowledge, or at least the likelihood of a subsequent modification. For instance does a bank act negligently, or at its own risk, when opening up a substantial line of credit to a business whose main competitor has been through an injunction prevented from using an important trademark? Obviously, the circumstances of the case may well tilt the balance of considerations to the one or the other result. The fundamental issue would, however, turn on the general status of provisional relief within the life of law. At the end of the day, such reflection depends on the relationship between provisional measures and substantive law with regard to standards, scope of application and function.

V

Finally we have to face the international dimension of provisional relief, particularly in respect of both jurisdiction and effects to be given abroad. With regard to jurisdiction, most legal systems seem to automatically transplant to transnational litigation the traditional jurisdictional standards applicable to domestic provisional relief. As rules on domestic jurisdiction (or competence) on the merits are usually expanded to a transnational context, so are rules on provisional remedies as well. Only in exceptional cases did the transnational connotation call for a deviation. Thus, in Asahi Metal Indus. Co. *vs.* Superior Court, the United States Supreme Court warned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field" and found unreasonable the exercise of personal jurisdiction over a japanese corporation which had manufactured the tire valve, had few or no contacts with the forum state, and the relevant transaction had occurred in Taiwan. Inversely, taking into account the transnational element may also lead to asserting international jurisdiction even where an otherwise necessary requirement could hardly be met in the international context. Thus, under french law, a protective attachment of assets located in France may be confirmed by the local court rather than by the court of defendant's domicile, as under the usual domestic rule, if the latter is domiciled abroad.

With regard to exterritoriality of the provisional relief, modern legal systems follow quite divergent paths. Some systems, like german law, instead of discriminating against provisional remedies, insist on their judicial nature and do not set any specific obstacles against their admissibility because of prospective enforcement abroad. By contrast, several systems do not allow provisional remedies designed to be enforced abroad; such limitation usually implies lack of jurisdiction. This second group of systems probably focuses, without expressing it, on the provisional attachment of property located abroad and considered to be outside the jurisdictional reach of the court dispensing the provisional relief; other provisional remedies beyond attachment are usually not mentioned. In some countries such narrow meaning of extraterritoriality is indeed spoken out, either by statute or in the general opinion. A variety within this second group is to be seen in Italian law which makes the issue depend on whether or not the foreign state is willing to enforce the remedy

and, accordingly, operates on the level of plaintiff's interest to request such remedy than on the level of jurisdiction. Finally, a third approach is adopted by *common law*: in the United States, the main distinction is between injunction *in personam* and *in rem*. where the former as opposed to the latter does have extraterritorial effects; the *Mareva* injuction of english law, operating *in personam* and potentially developing worldwide effects follows the same line; and in Israel, a recent *Mareva*-type case temporarily prevented an Israeli from disposing of his assets which were held in foreign bank accounts. In sum, then, it appears that under modern comparative conceptions provisional remedies may be granted even if they are designed to be enforced abroad, or abroad only, provided they operate *in personam* rather than *in rem*.

VI

Nothing which has been so far said is new or unknown to specialists gathered today at Athens University. The purpose of my observations is in fact limited to the function of a mere reminder, a flashlight turned to charted fields.