Interim Measures and Civil Litigation

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1 A Court Drama for an Un-performed Drama

Let me begin by telling a story about a court drama that took place in the Swedish city of Malmö. Once upon a time—or just over a decade ago, to be more precise—the theatre company "Hipp" was about to stage the world premier of Jacques Prévet's play *Les Enfants de Paradis*. Just a few hours before the first performance one Friday afternoon, the district court in Malmö issued an injunction with immediate effect, forbidding the performance of the play. Earlier that day, before lunch, the heirs to the playwright applied to the district court[1] for an interim injunction with immediate effect. A judge granted an injunction a few hours later. In his preliminary opinion, the judge found that Hipp was about to commit an infringement of copyrights. He considered that an immediate injunction was necessary in order to protect the copyright owner from the harms that might be caused by an unauthorized performance of the play. An immediate injunction was granted as judgment on the merit of the case could not be delivered in time to prevent such harms, and a subsequent judgment would not be able to repair the damages that would have already occurred.

The injunction granted was an interim order valid indefinitely until the case was settled in a final judgment. The order also set out a fine that the defendant had to pay if the injunction were not observed. A sum of 100 000 Swedish crowns would be payable[2] for each breach of the injunction by the theatre company. As it turned out, Hipp did not breach the order. The theatre company cancelled the premier at the last minute and chose instead to let the legal drama play out in the courtrooms.

The issue involved in this case was whether Hipp intended to perform the play without permission from the rightful owner of the work, thereby committing an infringement of copyrights. The heir to Prévet claimed that irreparable damages would be done to the *renommée* of the playwright if the performance were to go ahead as planned. Hipp had, of course, a entirely different view of the matter. It claimed that an oral agreement had already been reached a few months earlier regarding the right to perform the work. According to Hipp, only further details remained to be settled, *viz.* the amount of compensation to Jacques Prévet's heir for the theatre's acquisition of the performing rights. It was based on such an understanding that the theatre had made great economic and personnel investments in the preparation of the play for the world premier. The theatre asserted that the heir was fully aware of those circumstances.

Hipp appealed against the district court's injunction and was successful. This success, however, was short-lived. The court of appeal actually quashed the injunction;[3] it found that the application for an interim injunction was defective on one point.

As security against the damages that Hipp might suffer as a result of a wrongful injunction, the heir offered a guarantee to a certain amount. Unlike the district court, the court of appeal found that the amount offered was too low. The damages that the injunction would entail for the theatre would—according to the

1 *See* Malmö District Court's order of 29 September 1995 in case T 3389/95.

2 This fine would have been paid to the State and not the heir of the playwright.

3 *See* the order of the Court of Appeal for Skåne and Blekinge of 4 October 1995 in case Ö 153/95.

court of appeal—be greater than those assessed by the district court. But surprisingly, the court of appeal also mentioned in passing the amount of security that would have been appropriate. The heir, quickly enough, presented securities to this higher amount and turned again to the district court for a new interim injunction on Hipp's performance of the play.

At this point, the theatre company had second thoughts on letting the drama play out in the courts.

What happened next was that the parties agreed on a settlement. The courts were never required to hold any real oral hearings on the question of breach of copyright. The parties never demanded a judgment in the case. Consequently, neither they nor the general public would know whether the court, after more careful consideration, would arrive at the conclusion that the theatre company Hipp might—after all—have acquired the right of performance through an oral contract. Jacques Prévet's heir was compensated for the theatre's right to perform the play. The world premier could be held. This copyright drama was over in a little more than a week. That took a considerably shorter time than it would have taken if the dispute were to be settled through an ordinary process of civil litigation.

Speediness had its price though, if one is inclined to believe the legal counsel for the theatre company. He claimed, later, that the applicant had used the interim measure for the purpose of driving up the compensation for the right of performance:[4]

> The heir took the fullest advantage of the situation. She obtained conditions for the right of performance that must be unique in the history of European theatres for similar works. The compensation demanded was of a size way over the customary amount for the branch and conditions were made on the performance that were totally unheard of. All this happened without the theatre having had an opportunity to adduce evidence that it was not a case of infringement in copyright, and therefore, that there was no probable ground for the plaintiff's case.

This drama is just one among many of the cases that run a similar course and may have received more or less attention in the media. The reports in the newspapers and television on similar court cases seldom make it clear that the court decisions reported are actually only meant as an interim solution, not a final judgment. In theory, such relieves are not intended to determine the final outcome of the dispute, nor are they meant to be used as instruments putting pressure on the parties to abstain from going further with the litigation, and to seek, instead, to resolve the dispute through settlement. However, this will—ironically—often be exactly what will happen in practice.

2 Purposes of this Study

The drama described in the preceding section constitutes the introduction to my treatise on interim measures in civil litigation (*ca.* 1 250 pages, published in four separate volumes). This treatise is broadly based and problem-oriented: it examines the intended and actual functions of interim measures within the framework

4 Luterkort, *Brand News* 1/96, pp. 28 ff.

of a normative survey of, above all, published and unpublished Swedish court decisions. The 'official' conception of the purpose of interim measures—*viz.* foremost as guarantees for enforcement—is set against the other purposes that such measures have in practice, in particular their function in conflict resolution—*viz.* as a substitute for litigation. Aspects of interim measures are examined that would explain the growing importance and effect of these measures. Furthermore, the treatise also provides a critical evaluation of the *raison d'être* for the institution of interim measures and its present structure.

On the matter of methodology (of legal science), this problem-oriented study adopts *the perspective of the parties*. The purpose for using this perspective is not to provide the parties with a toolbox of legal advice on strategies for successful litigation, and even less so to suggests tricks and schemes for the workshop of advocacy. Another matter is, however, that the 'practical side' of the law is *one* important—even if sometimes en unwanted—element of reality and this practical side is therefore mirrored in this study through its material, description and analysis. The disloyalty—from a legal-political point of view—that might be inherent in the downsides of such a party-based 'instrumentalism' is perhaps food for thought for both the legislator and the adjudicator.

The study has not started with a parties' perspective from the very beginning. The idea has rather emerged successively from the material and its processing. It is only after a time-consuming process that one comes to realize fully the difficulties in treating the subject only in the classical perspectives of the legislator and the courts. Gradually, the need arises to draw inspiration from the arguments of the parties in order to arrive at a richer picture of the functions, practical significance and development of the institution of interim measures (such as the idea of guarantee for enforcement and a form conflict resolution). Those who are familiar with orders on security measures in Swedish case law know very well that these orders are often cursory and in a great deal of cases even devoid of meaning. Furthermore, neither the *travaux préparatoires* nor other sources of law on the whole give any guidance, be it in concrete cases, or on questions of principle. In this perspective, the arguments of the parties can at least breathe some life into the case law and give it more substance, thus contributing to an understanding of the lines of thoughts that may have been followed or rejected by the courts.

But there is more to the parties' perspective than this. One aspect of the behaviour of the parties is that a litigant should be a *catalyst for practical needs* borne out in reality and requiring legal protection. The parties are in this way the initiator of legal development through case law. It is the role of the parties to present different situations and to insist on remedies. It is the role of the courts to prune the flora of needs, and to match changes in society and the blossoming of new types of conflicts to the timeless need of stable forms for a reasonable, foreseeable and organic development of the law.

Another aspect of the behaviour of the parties is the aforementioned party-based instrumentalism, which can take the shape of egoism. A system of rules or a procedure can be used for purposes other than those intended. One may encounter good purposes (which for some reason is not explicitly expressed in the legal order), but perhaps, equally often, these other purposes are bad or controversial. The law must also deal and live with this side of the coin. The interesting point here is when this instrumentalism takes over and gains such a significant influence that it affects the possibilities for reaching the stated goal of the law.

For a study of the party-based perspective, it is of course necessary to analyze and process the arguments of the parties; set against the case law, this gives at its best information on the functions of interim measures and changes in functions and the driving forces behind them.

For the purpose of this study, a large amount of unpublished cases have been gathered and scrutinized, encompassing so-called Ö-cases from four of the six courts of appeal over a period of over twenty years (1981-2002).[5] In the analysis of the cases, special attention has been paid to the scrutiny of the parties' written submissions in order to understand what the parties apparently wish to achieve through the interim measure, and to survey the content and structure of the parties' argumentation. This direction of the investigation can be explained, *inter alia*, by the value of trying to determine what role the parties may have had or will have as a driving-force in the development of legal processes on interim measures, especially the changes in the functions of interim measures. Admittedly one may suspect that much of the legal argument in the submissions would reflect points already known and identifiable through the usual sources of law. But as legal sources in this area are scarce, there ought to be a great deal of 'creative development' of perhaps known lines of thought in the parties' submissions as well as some 'defendable' new thinking—perhaps as a consequences of international influences and the parties' close contact with a rapidly changing reality.

In order to deepen and to isolate the lines of thought and arguments that can be traced to the parties and the courts in the Swedish context, I have made use of ideas and reasoning in foreign law.[6] Here, it is not a question of a traditional *Länderstudium* in which the different jurisdictions are presented respectively, nor is the purpose here to carry out a proper comparative investigation. The problems faced by the parties and the courts are remarkably similar throughout the part of the world influenced by western culture. Admittedly, solutions to these problems often show great variations; but the starting-points for the solutions—and the basic principles of law—coincide to a great extent. The basic elements found in interim measures are, on the whole, the same. These circumstances encourage, rather than prevent, the free movement of legal thinking across national boundaries. The differences between legal systems also entail that it is easier to describe, understand and critically assess the Swedish model.

Against this background, I shall provide in the following a synopsis of the major results arrived at through my study.

3 Conventional Wisdom on Interim Measures

The case of Jacques Prévet's play described above is a kind of court drama. This drama stands in sharp contrast against the rather dull conception of interim measures given by the legal rules, the *travaux préparatoires* and the standard lit-

5 Ö-cases are in this context appeals on questions of procedure. The cases studied have come from the southernmost four courts of appeal in the country.

6 Foremost in the literature and journals from the English-speaking area (Australia, England, Ireland, Canada, Scotland and the United States) and the German-speaking area (Switzerland, Germany and Austria). Belgian, French, Dutch, Italian and Spanish law are studied through English or German authors (often in comparative studies).

erature in this area. In practice, this area is not dominated by high-profile court dramas that draw the attention of the general public. The most common form of interim measures that passes through the courts every day is the order of seizure[7] in cases concerning the payment of debt. Through an order of seizure, the court orders that the property of the defendant (debtor) be taken into possession—or secured by other means—to ensure that the plaintiff (creditor) has the practical possibility at a later stage to obtain payment for a debt under dispute. The ground for an order of seizure lies usually in that the debtor is suspected of using his money or other assets for other, often questionable, purposes than to pay his debts. If the defendant is not stopped, he would put himself into a position where he is unable to pay his debts. It would then be difficult or even impossible to enforce a future judgment to pay, as the debtor would no longer possess any distrainable property. The purpose of the order of seizure is to create a guarantee so that the imminent judgment can be enforced successfully when it is time for the enforcement.

Seizure is merely *one* form of interim measures or, as it is also called, *a* form of security measure in civil litigation. Another form of security measure is an interim *injunction*, forbidding the defendant to perform a certain act or to carry out a certain activity.[8] Another example is an interim *order of specific performance* directing the defendant to take certain measures, *e.g.* to deliver certain goods. It is also possible for the court to appoint a *trustee* who will have the task of temporarily administering a certain property. The trustee may also be given the duty to assume the responsibility of the defendant for a certain activity or to take certain measures.

Officially, it is stressed that security measures and the process dealing with such measures constitute a rather legal-technical and inchoate appendix to the ordinary civil trial. On the surface, there appears not to be any controversial feature that merits a critical examination and survey of the structure and functions of interim measures. The institution is plainly concerned with preventing the defendant from recklessly and impudently trying to render himself practically immune from court judgments. On the whole, the conventional picture regarding interim measures looks as follows:

Essentially, the need for security measures—such as seizure and injunction—in civil litigation is connected to two factors: the slowness of the ordinary civil trial and the tendency of some defendants to take so-called sabotage measures. As a matter of experience, it may take considerable time from the point when a dispute arises to the point when the dispute is resolved through a final judgment. There is thus a time-gap that provides ample room for a defendant to obstruct the plaintiff's rights. On the side of the defendant, one could hide or sell

7 *See* the order of Malmö district court of 5 August 1991 in case T 2661/91 where the Canadian sprinter Ben Johnson requested that the property of MAI be seized in order to secure his demand on payment due to him for his participation in the MAI-gala, an athletic competition. Johnson claimed that terminated the contract without reasonable ground while MAI declared that Johnson's participation in the event was unwanted. However, the application was withdrawn before the court decided on the issue.

8 *See* the judgment of the Swedish Labour Court of 25 September 1998 in case AD B 119/98, in which a large media enterprise tried, on the basis of an employment contract, to persuade the court to forbid with immediate effect a former editor-in-chief to engage in the activities of an competitor.

the property in question, carry out competing commercial activities in breach of contract, take advantage of the inventions of the plaintiff, shirk one's responsibility for a debt by emptying a company of its assets, *etc*. There are many reasons why a defendant would take any of these improper measures: sometimes he is simply malicious and basically wishes to harm the plaintiff, at other times he is merely indifferent to the plaintiff's rightful interests. It may also happen that the defendant erroneously believes that the plaintiff's claim is unfounded or that the defendant obstinately maintain that although the plaintiff's demand is *per se* well-grounded, it must yield to other, considerably more important, interests.

The plaintiff reacts by parrying the imminent threat immediately. This is done through an application to the courts for a quick, legal, provisional relief that interim measures offer. This court order is meant to stop or steer the defendant's reaction or, through other means, to set out the boundaries for his freedom of action during the continued litigation. It is not the intention that the order should—neither fully nor definitively—determine the real substantive dispute between the parties. The court decision should only prevent the defendant from taking measures during the trial that would render a judgment on the substantive claim meaningless or of less value to the plaintiff. Interim measures are thus designed to function as provisional measures; they serve as temporary relieves guaranteeing that the expected future judgments could be a reality for the plaintiff and will actually provide the benefits sought after. The intimate connection between interim measures and the judgment constitutes the explanation for the fact that an application for interim measures is dealt with as a procedural question in civil litigation. This special form of case management—the procedure for interim measures—constitutes, put simply, a 'process within a process'.

Described in this way, interim measures appears to function as a necessary instrument in the administration of justice. Interim measures are meant to serve as a support to civil litigation and not a replacement; they are not designed to encourage settlements. Nor are interim measures meant to be used as means to bring pressure on the defendant to satisfy the plaintiff's substantive claim. The provisional relief is, through interim measures, meant to function as a kind of guarantee for security and protection provided by law.

4 A Different Picture

The conventional picture of provisional relieves is, on closer inspection, too simple and too one-sided. The stated objectives of the rules on interim measures are not precise; nor is reality so obligingly streamlined that it is always possible in practice to apply interim measures strictly within the frame of their intended functions, *i.e.* foremost to provide a kind of guarantee for enforcement.

The fact that interim measures can in fact function as a surrogate for trial in civil claims raises many thoughts and questions. One is used to saying that a civil judgment—and accordingly the civil process itself—would loose its practical significance if security measures were not available. Such measures are needed to stop (or to exercise some control on) events that would otherwise destroy or deteriorate *ex ante* the possibilities of enforcing the pending judgment, or to render the judgment meaningless or in other ways less valuable for the winning party.

In practice, the use of security measures have frequently had a totally different effect than to preserve or strengthen the significance of the civil trial as a means of conflict resolution. It also appears that orders for interim measures, to some extent, have taken over the functions of final judgments and thereby making the civil trial superfluous and unnecessary. Such a radical change of course—*from* a slow procedure characterized by a high degree of legal certainty *to* a speedy procedure with a much lower degree of legal certainty—ought to have generated a great deal of debates. Given the intrusive and devastating effects that interim measures may entail, there ought to be vociferous charges of suspicion that these forceful measures have been decided on all too 'loose grounds'. But we do not hear any outcry.

It is possible to interpret the silence as an expression that the procedure for security measures responds on the whole better to the market's needs for conflict resolution than the traditional civil litigation. What the market seeks is a speedy, forceful and a more-or-less reliable decision. In a world full of compromises, legal certainty would be just one of the merchandises for the actors of the market.[9] On the question of interim measures as a substitute for civil litigation, one English commentator has maintained that "[t]he present procedure of interlocutory relief must be accepted for what it is: a compromise in quality for the sake of timeliness, with potential harmful consequences to entitlements of a permanent nature".[10] Today, it is not uncommon that lawyers and their clients—who are often engaged in commercial disputes—consider speed as equivalent to legal certainty. Even among the legislators, the same thought can be discerned for some time.

Legal certainty and speed are not kept apart; they have in time rather merged and mixed together and this has occurred in a way that makes an analysis of the tension between certainty and speed more difficult and confused. By letting speed to become a part of legal certainty, the requirement of good 'process economy' has attained a higher status than previously. This critical remark is not meant to imply that speed could not have a high value—even a higher value than legal certainty. But that is another question.

If only a few critical voices on interim measures effect on conflict resolution have been raised in Sweden, the picture is completely different when one examines the foreign literature. Ever since 1960-70, there have been discussions on, and attentions have been drawn to, the paradoxical phenomenon of the process for obtaining interim relief becoming a surrogate for the civil trial itself. The question here is whether the development in Sweden is moving in the same direction—Have the practical importance and content of interim measures deviated significantly from their intended functions? If this is the case, does it put into play the justifications of interim measures? These questions are worth investigating—the task in the context of legal science is *to survey and critically examine the functions of interim measures*, be this a question of the functions sought by the parties, those that the parties have in fact achieved, those functions that are officially sanctioned or those that in general are unwanted.

9 *Cf.* the English literature showing support for letting the procedure for security measures as model for a new form of conflict resolution, Zuckerman, 14 *Oxford Journal of Legal Studies* (1994) 354: "However, in view of the expense and delay involved in the present process of law, it makes sense to trade some quality for speed and economy".

10 Zuckerman, *ibid*.

5 Overview of the Swedish Regulation

5.1 Basic Principles

A fundamental point of departure regarding interim measures is the *prohibition on premature enforcement*. This prohibition means that no one shall be subject to enforcement of a claim before that claim has finally been decided in a judgment.[11] The defendant[12] shall, as a rule, be free from coercive measures during the process of civil litigation. The normal situation is that the system of rules involving interim relief is designed to the advantage of the defendant—manifested through the absence of an order of interim measure. It is the defendant's need for protection that comes in the first place.

When dealing with an application for an interim measure, the court is deciding whether to make a *departure* from the prohibition of premature enforcement. Such a departure means that the court will be making—through a special decision—a provisional order in the pending case to the advantage of the applicant of the interim measure. The order, normally valid until further notice or at the latest until the final judgment of the case, can be reconsidered at any time during the process. A decision on interim measure does not acquire the force of *res judicata*—be it in relation to the substantive claim, or in relation to a subsequent application for interim measures. The order is inherently provisional in nature.

Both the plaintiff and the defendant may apply for an interim measure. However, it is extremely rare that a defendant makes an application and is granted an interim relief. An order may, in principle, only be made with binding effect on the applicant's counter-part in the process. An order of interim measure cannot, in principle, be directed against someone outside of the process (a third party) .

An interim measure shall and can only be ordered *to ensure a meaningful judgment*. Based on the basic ideas of interim measures, a measure may be ordered for attaining three *purposes*. The main purpose is to *secure enforcement of a future judgment* expected to be given in favour of the applicant. The second purpose—albeit almost of an exceptional character—is to ensure that the application should *immediately be able to enjoy his substantive rights*, *i.e.* to obtain the protection that he in reality should only be able to obtain through a judgment. Finally, an interim measure may be ordered with a view to *provisionally regulating the relationship* between the parties. The question concerning what other purposes for which interim measures may be used has not received much attention in Swedish law, and the same can be said of the question on the abuse of the institution of security measures in civil litigation.

An interim measure may be ordered both *before* and *after* hearing the defendant (*ex parte* and *inter partes*, respectively). If a delay *per se* constitutes a danger, the court may—according to Chapter 15 Section 5 of the Code of Judicial Procedure—consider and decide on the application without first giving the defendant an opportunity to express his opinion. The 'danger in delay' can be seen as a constituent element of the risk of sabotage; when there is 'danger in delay', there is an acute need of interim relieves.

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11 Fitger, *Rättegångsbalken I*, 15:3, Suppl. 21, Aug. 1996.

12 I shall use the term "defendant" to denote the one against whom a security measure is directed. The party who makes an application for a security measure will be called the "plaintiff".

The application for interim measures is normally dealt with in a *written procedure*. In the strict perspective of procedural law, the process concerning interim measures is construed as an incidental process within the ordinary trial.[13] The process regarding interim measures constitutes thus an appendix to the civil litigation. The issue of interim measures belongs to the category of question concerning the trial—an issue that should be addressed to, in principle, by the court seized for the substantive claim.[14] An order of interim measure is conditional upon the civil litigation having commenced or, at the least, that the substantive claim will shortly[15] be lodged before the court for determination. In this perspective, the interim measure is an instrument for enabling the main proceeding to fulfil its function. An interim measure cannot arise, exist or subsist without connection to an imminent or on-going civil litigation; nor may an order of interim measure be transformed to something of definitive nature.

It is not necessary that the substantive claim be decided within the frame of a civil litigation process. An interim measure may be applied for even if the substantive claim is to be decided through *adjudication of a similar kind*, *e.g.* through arbitration.

An order of interim relief is meant to be an *exceptional measure*. A departure from the above-mentioned prohibition on premature enforcement must be restricted to special cases. It is a prerequisite that a risk of sabotage exists. The applicant's need of protection must be acute and has a direct link to a current dispute between the parties. It is not the intention that interim relief be granted for an eventuality, *i.e.* in the event that a situation may arise in the future where an interim measure is needed.

Interim measures bear the characteristics of both *administration of justice* and *enforcement*. In earlier law, the enforcement aspect was stressed and interim measures formed part of the law on execution of judgments. Nowadays, administration of justice is lifted to the foreground. The institution is, thus, regulated mainly in the Code of Judicial Procedure. This cannot, however, hide the fact that in important parts, the law on enforcement of judgments provides interim measures with both force and content, in particular concerning seizures. For a defendant whose property is being seized, there is, for example, a significant difference whether the seized property is to be taken from his possession or if the seizure consists only in that he is forbidden to use the property in certain particular manner. The way in which the order of seizure is secured is decided in an enforcement proceeding and is regulated in the Code of Execution of Judgments.

The granting of interim measures is based principally on *statutory grounds*, with the conditions laid down in law. There is no sufficient published case law so that the institution can be said to any greater extent as having obtained its

13 If the substantive claim shall not be decided by a court—*e.g.* through arbitration instead—the application for interim measure is classified as a T-case at the district court, *i.e.* as civil litigation and not as "other business". This administrative routine does not entail, however, that the question on interim measures should be handled as an ordinary case of civil litigation. *Cf.* on this point Chapter 15 Section 5 para. 4, Code of Judicial Procedure.

14 Decision of the Supreme Court in NJA 2001 p. 282.

15 According to Chapter 15 Section 7 Code of Judicial Procedure, the substantive claim must be made within one month of the order of interim measure. If the order was made *ex parte* and is later confirmed after a hearing *inter partes*, the time limit is calculated from the date of the later decision. Government Bill 1980/81 no. 84, p. 414.

form and content by the development of law through the Supreme Court's precedents. In the published case law, one cannot discern, for instance, any expression of a general theory on what conducts of the defendant in principle would count as a sabotage measure.

Not all conditions for the granting of interim relieves, however, are statutory. Some of the these have been created by the courts on the basis of interpretations of the character and purposes of the institution, *inter alia* those mentioned or suggested in the *travaux préparatoires*. As an example, one may mention the condition that the dispute must normally concern a specific performance in order that interim measures may be granted as security for the principal claim. Another example of the conditions is the requirement of proportionality. The case law requires that the damages that the applicant stands to suffer (if the application is not granted) shall be greater and more serious than the damages that the defendant risks suffering (if the interim measure is granted). When the situation is reversed, the application shall in principle be denied even if other conditions for the granting of interim measures are fulfilled.[16]

5.2 The General Provision

The general rules on interim measures are found in Chapter 15 of the Code of Judicial Procedure. These rules are intended—in principle—to be applicable to all types of civil litigation and not only to situations in which the applicant wishes to obtain interim relief in order to secure a future court judgment in civil matters or future decisions in proceedings comparable to a civil trial,[17] an example of which is arbitration. The fact that the parties have agreed that the substantive claimed be adjudicated through arbitration does not betake the civil court of its competence to issue orders of interim measures,[18] at the same time as an arbitration panel would also have some competence in ordering security measures. An order by an arbitrator would not, however, be immediately exigible[19] and it is still unclear in which way such orders are binding on the parties. Another example of a situation in which the civil court may order an interim measure without anticipating a subsequent trial of the substantive claim is when the substantive issue is to be heard at a foreign court, provided that the a judgment of that foreign is enforceable in Sweden.[20]

There are a number of rules in private law regulations *deviating from or supplementary to* the general regulation in Chapter 15 of the Code of Judicial Procedure. These special rules are found foremost in the area of intellectual properties. These special rules have priorities over the general rules in the Code of Ju-

16 At least in cases concerning infringement of copyrights, a proportionality test should not be performed if the civil claim is manifest or speaks clearly in favour of the applicant. Decision of the Supreme Court NJA 1995 p. 631. Concerning pecuniary claims, see NJA 2005 p. 29.

17 *See* Government Bill 1980/81:84, p. 227.

18 It is not uncommon that parties put forth arguments that an arbitration clause would bar the court from hearing applications on interim measures for lack of competence. Such an argument, however, would not entail a rejection of the application (as it will normally be the case for lack of competence); *see* the district court's decision of 17 April 2000 in Case SH Ö 2593/00 and Heuman, *Arbitration Law of Sweden*, p. 329.

19 Heuman, *Arbitration Law of Sweden*, pp. 332 ff.

20 Judgment of the Supreme Court NJA 1983 p. 814.

dicial Procedure. The courts will not have discretion over the choice between the application of the general and the special rules based, for instance, on considerations such as what is equitable in the concrete case. On the other hand, the special rules outside of the Code of Judicial Procedure are not meant to be exclusionary, nor exhaustive, in relation to Chapter 15 of the Code of Judicial Procedure. If a special rule does not regulate a certain part of the problem explicitly, it is for the court to fall back on and apply the general rules of the Code of Judicial procedure.

There are four main provisions in the general regulation of security measures in Chapter 15 of the Code of Judicial Procedure. Sections 1–3 of the Chapter form a group as such, while Section 4, which deals primarily with the restoration of possession, differs from Sections 1–3 in several respects. In the following, attention is paid only on Chapter 15, Sections 1–3, of the Code of Judicial Procedure.

Sections 1–3 were originally constructed with the aim to distinguish between different kinds of substantive claims: Section 1 dealt with seizures for securing a payment claim, Section 2 laid down rules on seizure in connection with claims of better title to a certain property while Section 3 was concerned with appropriate measures to secure other claims. In earlier case law,[21] it was assumed that the area of application of these rules were clearly distinguished; seizure, for instance, was the only relief available for securing a payment claim. The legislator reacted to this judicial interpretation and legislative amendments were made, which entered into force 1 July 2000.[22] The current position of the law is that Section 3 may also be applied with regard to claims for payment or delivery claims and claims on better title to property.

The structure of the rules in Sections 1–3 follows a common pattern. In order *for an application for security measure to be granted*, the rules require *that* the applicant shows reasonable grounds for his substantive claim, *that* this claim is or can be assumed to be the subject of a proceeding in civil litigation or similar proceedings and *that* it is reasonable to assume that there is a danger of the defendant acting—or will be acting—in a way that could obstruct the enforcement of a final judgment in the applicant's favour or in another way to diminish the value of the judgment or the applicant's rights. If the applicant wishes to have an order of security measure before first hearing the defendant, there must exist, moreover, risks in delaying the order (Section 5 para. 3). Furthermore, according to Section 6 para. 1, an applicant can in principle apply for a security measure only if he himself provides security for the damages that may be incurred on his counterpart. As mentioned earlier, further conditions have been created in the case law.

Besides the rules presented above, there are also rules in Section 5 of Chapter 15 on questions of case management (forum, requirement of a written application, other management issues concerning with the measure and costs) and in Sections 7–9 on the duration of the security measure (restoration, annulment and

21 *See* judgment of the Supreme Court NJA 1987 p. 829 on the boundary between Sections 2 and 3 of Chapter 15, Code of Judicial Procedure. *See* also the loose-leaf commentary on the Code: Fitger, *Rättegångsbalken I*, 15:9, suppl. 31, April 2000.

22 For the *travaux préparatoires* see the Government Bill prop. 1999/2000:26.

prolongation in connection with the decision in the case). There is also a rule in Section 10 on the so-called rules of enforcement.

In general, it should be noted that the rules in Chapter 15 Code of Judicial Procedure have primarily arisen, and in practice have developed, in the perspective of a *normal case* for an order of security measure.

This 'normal case' can be summarized in the following way: Chapter 15 Code of Judicial Procedure is designed primarily to fit *typical situations of domestic civil litigation*. It is concerned thus with an application for security measure made immediately before or simultaneously with the lodging of a substantive claim at the court. The application arises as an *incidental question* to the case in which the main claim is—or will soon be—the subject of adjudication by the court. The purpose of the security measure is normally to *secure enforcement* of a forthcoming judgment in the case. The applicant must therefore in principle make a claim that is immediately enforceable.

The majority of the conditions for granting a security measure taken up in Chapter 15 of the Code of Judicial Procedure, through statements in the *travaux préparatoires* on basic principles as well as the case law have precisely the normal case in mind. Thus, one should be careful when these conditions are considered in other situations.[23]

The text of Chapter 15 is unclear, except on one point, *viz.* whether the parties themselves may agree *inter se* on other terms concerning the conditions for granting an interim measure: the court—according to Section 6 para. 2—may not consider the adequacy of the security provided by the applicant if it is accepted by the defendant. The published case law has not provided any answer either to the general question whether the conditions for granting an interim measure are mandatory rules or whether the courts can apply terms agreed on by the parties. On the other hand, different positions on parts of the questions within the complex of problems have been taken, primarily, in unpublished decisions of the courts.[24]

6 A Definitive Provisional Measure?

My study of the institution of provisional legal protection in civil litigation has confirmed that this protection shows a number of odd contrasts. This institution is both what it is meant to be and what is not; this is already apparent through a study of the written rules in this area and becomes even clearer when the case law is investigated. The statutory rules are formulated in such a way that they promote the supporting role of interim measures in civil litigation; but at the

23 An example can be given here: In cases where the applicant applies for an interim measure in order for provisionally regulating the relationship between the parties, or for immediate enjoyment of the applicant's rights, there should not, for instance, in principle be good reasons for demanding the applicant to lodge a claim of specific performance.

24 *See*, for example, decision of the court of appeal for Western Sweden of 5 November 1993 in case HVS Ö 2193/93. An estate in bankruptcy applied to the district court for, and was granted, an order of seizure in order to secure a certain debt. The defendant appealed the district court's order and the estate in bankruptcy accepted the claim on appeal. The court of appeal found that the order of seizure should be quashed as the estate in bankruptcy had accepted the claim on appeal. pi

same time, these rules do not have such a structure as to directly hinder or obstruct the institution's role as substitutes for civil litigation. Some of the rules leave rooms for their application that directly promote the substitutive effects of security measures. There are unwritten basic principles that underline the purpose of security measures as supportive of civil litigation, but it does not appear that they have been followed in practice in order to prevent security measures from fulfilling the role of substitutes for litigation.

Both the legislator and the courts are ambivalent about the tasks of provisional protective measures. Some judges manage and determine the question of security measures in a spirit that promote the substitutive effect while others act with the intention to frustrate this effect. There are statements in the *travaux préparatoires* emphasizing that interim measures shall serve to secure the realization of the judgment in civil litigation. At the same time, one can also find statements that uncritically and unreflectively acclaim the positive aspects in the institution of security measure's having an indirect conflict resolution function, *e.g.* through settlement between the parties. Is it always desirable that the defendant be forced—under the pressure of an interim security measure—to agree to a settlement with significant compromises? Ought one, in this context, really disregard the considerable risk that the interim measure is ordered on the basis of insufficient material and therefore that the measure should never have been ordered if adequate material is available for consideration?

The vagueness of the rules and the unevenness in their application by the courts invite litigants and their counsels to resort to tactical moves. An important strategy of the applicant is to persuade the courts to 'stretch' the area of application of the rules. Sometimes, this takes place openly; in this case, an extension of the area of application may be a welcomed development of the law. However, this may sometimes happen covertly and may amount to attempts to obtain interim measures for unintended purposes. It may be difficult for the courts to investigate successfully and see through this strategy. Not only is there no rule that clearly and exhaustively defines the purposes for which security measures should not be used; provisions requiring the courts to perform checks on the purpose of the application for interim measures are also conspicuous in its absence. Application of the existing rules can to a certain limited degree work against the abuse of the institution of provisional security measures. There exist principles of law[25] from which it is entirely possible to derive norms that would permit the courts to perform a check on the purpose of the application so as to prevent an abuse of interim measures in civil litigation. There is, however, no evidence showing that the courts have interpreted theses principles in such a way as to systematically frustrate a possible abuse.

The Swedish law does not differ—considering especially its current stage of development—from what is observed in other legal systems. It is however another question whether Swedish law has gone as far as the law of other countries. Neither the legislator nor the courts have taken clear positions on the question whether and to what extent security measures should serve as substitutes for civil litigation. There is also silence on the part of the legislator on the role that the courts ought to play in the development of the institution of security measures. Moreover, there is a need for general guidelines from both the legislator

25 As examples one can mention the prohibition on premature enforcement and the prohibition on prognosis of the outcome of the case .

and the Supreme Court, on the basis of which legal development ought to be driven.

There will no doubt be different opinions on *the good and the bad* in a development that shifts security measures in civil litigation from being provisional protective relives more and more towards being final measures. In this shift in function, *some* may discern a seed to a modern and competitive alternative to the slow and arduous civil litigation process.[26] The alternative can be understood as superior to the trial in civil litigation in order to satisfy the needs of the market for a speedy, efficient and authoritative decision. To satisfy such needs contributes towards the creation of good conditions for a desirable development of an administration of justice that stands in the service of the market. Moreover, one must also bear in mind that public resources are limited and shrinking—they are not enough for the creation and maintenance of an advanced administration of justice. The institution of interim measures provide a way to an administration of justice that is cheaper for the state, the citizens and the parties.

Others maintains that the change in function is another clear sign of the process of disarmament of public administration that has already begun: Democratic insight and the checking of the impact of legislation in society are jeopardized not only through the development of forms of private conflict resolution replacing civil litigation in courts, but also through case management and adjudication in courts that more and more comes to bear a summary character. The need for speed is prioritized over the thorough application and development of the substantive rules decided in democratic order.

Whether one is for or against the function of provisional measures as substitutes for civil litigation, the question remains whether it is reasonable or possible to work against or limit the substitutive function. Is it instead the case that a provisional protective measure, which is to be supportive of the substantive litigation, is also necessarily one that is at least to some extent substitutive? Or is it perhaps that the substitutive function is only a price that one must pay if provisional protective measures were to serve a supportive function in civil litigation?

7 The Inevitable Substitute to Litigation

It is not only one, but several, parts of the institution of provisional protective relief that contribute to this protection's function as a substitute for civil litigation: foremost (1) the content of the order of interim measure, (2) the prognostic test (the question of reasonable grounds for the applicant's substantive claim) and (3) the legal and actual effects of the order. Moreover, one needs also take into account the legal possibilities to require oral merit and evidential hearings within the frame of the process of application for interim measure.

The substitutive function of interim measures is most apparent when (1) *the order of interim measure has the same content as the forthcoming judgment* that the measure is meant to secure. It is concerned with situations in which the applicant already succeeds in getting—through the interim measure—what he can obtain, strictly speaking, only through a final judgment. Whether the order has

26 *See, e.g.*, Blankenburg *et al.*, "Summarischer Rechtsschutz als Alternative zum Normalverfahren", in *Neue Methoden im Zivilverfahren*, pp. 109 ff. and Zuckerman, "Quality and Economy in civil Procedure", 14 *Oxford Journal of Legal studies* (1994) 353.

such a content, the interim measure may have a substitutive effect (2) through the *prognostic test* on which the order of interim measure is based. The position of the court on the question whether the applicant has reasonable grounds for his claim in civil law gives *preliminary indication* on which of the parties would emerge as the winner of the case. The party designated as the losing party may for different reasons—*e.g.* on economic grounds—concede the counter-party's claim and refrain from pursuing the matter further. In the same way, the defendant may act on the basis of (3) *the legal and practical effects of the order of interim measure*, even if the order does not have the same content as the forthcoming judgment.

For several reasons, one may question whether it really is possible to counteract the substitutive function connected with the three elements of provisional measures mentioned above.

As far as (2), *the prognostic test*, is concerned, practical problems as well as problems of principle are created through the tension between two principles of procedural law: *on the one hand*, there is the principle that, in a trial, a court should not form an opinion on the substantive issue before the whole case material is presented and that the position is then to be taken through the final judgment in the case; and, *on the other hand*, the principle that a party should not be subject to enforcement measures in a civil claim before the court has made a final decision on the matter.

As a matter of principle, there are good reasons why the prognostic test should be characterized by a relatively low standard of proof and by a summary consideration of the civil claim. This view takes its point of departure from the general principle that, *in a trial, the court should not form an opinion on the substantive issue before the entire case material is presented and that the position is then to be taken through the final judgment in the case*. Inherent in this principle is the requirement that the court ought, as far as possible, to avoid constructing the prognostic test in such a way, or to give a prediction in such a form, that the position taken becomes a full substitute of the final judgment. It is the task of the courts to limit or simplify the determination of the substantive matter. This ought preferably be carried out in a way that comes into minimum conflict with the general principle. Pointing to the same direction is also the need of an applicant for interim measures to have the application considered speedily and that the shortage of time would, many times, deprive the parties of the possibilities to gather, reflect and present a complete case material in a fully satisfactory manner.

There are, however, good reasons for objecting to a low standard of proof and the summary process, *inter alia* as this standard and the summary process would favour the applicant disproportionately. The objection may also have its roots in the principle of procedural law that *a party should not be subject to enforcement measures regarding a civil claim before the court has made a final decision in the matter*. This maxim would be void of content if the applicant is unduly favoured by a low standard of proof regarding the substantive claim. The tendency to object to a low standard of proof is perhaps the strongest in cases when the court knows or strongly suspects that a decision on interim measure would attain "final" force.

In line with the perspective sketched above, the requirement that the applicant shows reasonable grounds for the substantive claim should not be understood as a directive to making a summary judgment—whether on a question of

facts or a question of law. Instead, the content of this requirement should be determined by the facts *that* the case material in an application for interim measure is often incomplete, *that* the application is normally dealt with in a written process, *that* there is seldom oral presentation of evidence and *that* imperfections in the presentation of facts are normal. All these are factors that can affect the certainty of the prediction that the court's preliminary finding. These factors also justify the rule that the court should only express an opinion on whether the applicant has reasonable grounds for the substantial claim. After all, in normal cases, one would not encounter higher degrees of certainty than just 'reasonable grounds'. This prediction is not built on a summary consideration of the case material but rather on an ordinary consideration of the case based on an incomplete and not fully-presented material.

The tension between the two principles of procedural law mentioned above can be resolved in different ways. One way is to *minimize* the number of cases in which the court assesses the strength of the applicant's substantive claim. The thought behind this is that the courts should never carry out a prognostic test if the application can be rejected on other grounds, *e.g.* that the applicant has offered insufficient security against damages to the defendant. The court should, accordingly, first investigate the other conditions for granting the interim relief and try to form a view quickly on whether any of these conditions is unfulfilled. Even if it turns out that the application meets all such other conditions, it is still possible to counteract the giving of preliminary information that would steer the disposition of the case. One way is to *refrain from giving a clear and careful account* of the positions that the court has taken in the different questions under assessment. In unpublished cases, it is highly frequent that the courts stop at a brief declaration that the applicant has—or does not have—reasonable grounds for his claim, without giving any more precise reasons for the finding. Even if the court writes more than this in the decision, it is usual that it is done with expressions that are vague, general, or in other way indicative of the provisional nature of the interim measure through appropriate wordings.

The disadvantage of this system is that the brevity in reasoning in the court decisions gives the impression of a primitive standard in the administration of justice. It is also questionable whether the brevity in the court's account really serve to attain its purpose; it is still possible for the parties to form an opinion on the strength of the prediction. A party who is creative can certainly draw sufficient conclusions through a comparison of a brief decision with his own intuitive view on the relative strengths of his and his counterpart's place, and how well the parties have presented their cases in court. If the party is of the opinion that the cases have been well and fully argued for in court on the basis of a relatively complete case material, the party can—despite a brief decision with not much substance—still assess the strength of the court's prediction and accordingly give it its steering effect in his subsequent conduct. What is of decisive significance in such assessments is the party's view on the depth of the prognostic test. If a party believes that the courts would usually carry out the prognostic test only cursorily and superficially, there would not be any reason to let the preliminary decision have any decisive influence on the party's further litigation.

It appears to be quite frequent that a party tries in different ways to influence the strength of the preliminary decision. The applicant would be interested in presenting as much material as feasible and in the clearest way possible. Preferably, the assessment of interim measures is done under conditions similar to

the ordinary trial. It is quite usual that the party would request an oral hearing and to present evidence orally. Hitherto, however, the courts have inclined—with the exception of certain cases in intellectual property—not to give in to the parties' aspirations to create a substitute for litigation in this way.

The parties' tendency to make use of interim measures as a substitute for litigation may entail, in different ways, stresses on the administration of justice. The English example (*American Cyanamid Co.* v. *Ethicon Ltd* [27] and its progeny)[28] shows that the matter is not so simple that one would win significant advantages through abandoning or toning down the prognostic test and focus instead on the weighing of interests that corresponds to the so-called test of proportionality in Swedish law. A decision that has not been preceded by a consideration of the substantive claim may in many situations still have 'final' force and therefore constitute a substitute for a final judgment in the case. This is often connected to the fact that legal and practical effects associated with the interim measure may persuade the unsuccessful defendant to give in to the demands of the plaintiff. This 'discovery' has led the English courts to modify the principle in *American Cyanamid*. The lower courts have reintroduced the more comprehensive prognostic test, *inter alia*, in cases when the order of interim measure can be assumed to have a final effect. The principal reason for this reintroduction of the test is that it would otherwise be too easy for the applicant to obtain an interim relief at the cost of the defendant.

The reactions to *American Cyanamid* can be criticized. The idea of setting a high standard of proof with respect to the applicant is often built on a skew and mistaken conception of the balance of interests between the parties. This can be illustrated by means of an example concerning a dispute about breach of a restraint from competition clause in a contract of employment and collaboration.[29]

The validity in time of a clause restraining competition is often relatively short. Upon suspicion of a breach of the clause, the risk is great that *the agreed period would expire before a judgment on the case can be given at all*. An interim injunction against the competing enterprise will in theses case not only be the only genuine protection available to the party threatened by the enterprise; it is also often the case that the interim proceeding is the only adjudication process in which the court has a chance to assess the applicant's claim before the expiry of the time period. If a successful application for interim measure decides definitively the conflict[30] between the parties,[31] then there is an argument for setting a

27 [1975] A.C. 396.

28 *See, e.g.*, Martin, 4 *King's College Law Journal* (1994) 52.

29 In English law, precisely this case is usually taken as the classical example of the problem at issue, see Zuckerman, 14 *Oxford Journal of Legal Studies* 353, 366 where the author noted that this case is an example of a case in which the proceeding on interim measure really is the only 'trial' offered to the parties for the resolution of the conflict.

30 Hammond, 30 *University of Toronto Law Journal* (1980) 240, 280 deals with the case where the court knows that the order of interim measure will determine the outcome of the main conflict.

31 *See* decision of the Svea court of appeal of 11 June 1990 in case SH Ö 1146/90, in which the court of appeal held that compelling reasons are required for granting an interim measure, when the applicant would like to obtain an order entailing that he would come to an immediate enjoyment of his rights.

high standard of proof for the applicant.[32] This would be one way to protect and compensate the defendant for the deprivation of his fundamental right to an ordinary trial concerning his civil rights (*cf.* Art. 6, European convention on Human Rights).

The question, however, is whether this line of reasoning is an expression of a misunderstanding of what is at stake in the conflict, as the argument is built on the premise that the applicant will win the case for interim relief. It is precisely under this condition that it would be particularly distressing for the defendant if the standard of proof is set to 'low' for the applicant. If one conducts a thought-experiment, supposing that the application did not win the case for interim relief, the decision can still be a substitute for litigation, but this time to the disadvantage of the applicant. In this case, it will be the applicant who is deprived of his fundamental right to an ordinary trial in matters concerning his civil rights. It would therefore be particularly distressing for him if a high standard of proof were set for him on the question of the substantive claim.

This example shows that it is not possible to explain or defend the idea that any particular party would be favoured at the cost of the other through a low or high standard of proof. The conflict of interests here ought to be resolved by other means. One solution would be to justify a high or low standard of proof on the grounds that one of the parties' rights is more worthy of protection than the other's—*e.g.* the right to be protected from competition as having a higher value than the right to exercise a profession and be subject to something similar to a restraint on trade.[33] Another solution would be to focus on a general weighing of interests within the framework of a proportionality test rather than on the prognostic test.

With regard to (3) above—the *practical effects* associated with the order of interim measure—one can generally regard the current system within the framework of a proportionality test. As an example of such practical effects one can mention that common knowledge of the fact that the defendant's property is subject to, *e.g.*, seizure may affect the defendant's credit standing. This may entail that he could miss a loan that could save his company from a liquidity crisis or bankruptcy. If such a practical effect of ordering an interim measure is thought to entail too excessive consequences compared to the purpose of the measure, the courts have two possibilities for acting. One possibility is to—in accordance with the principle of least interference—decide on a measure than is more lenient than the one asked for by the applicant. If it is not possible to find such a more lenient measure, the other possibility for the court is to reject the application for interim relief despite the fulfilment of the conditions for granting such a relief. For the defendant to enjoy protection in this sense, it is necessary that he succeeds in describing concretely what practical effects would arise and, in such cases, in what they will consist concretely.

It is neither reasonable nor possible to provide the defendant with a better protection against the practical effects of an interim measure than is given by the

32 Other such cases that are normally seen as definitive are disputes regarding trademarks, as these are often as to facts and the only remaining issues would be questions of law. See Zuckerman, 14 *Oxford Journal of Legal Studies* 353, 382.

33 *Cf.* Leubsdorf, 91*Harvard Law Review* 525, 550 in which the author compared the situation of a publicly employed teacher with that of a teacher in private employment and noted the former's possibility to invoke the First Amendment of the Constitution.

proportionality test. Whether, and to what extent, practical effects will harm the defendant in a concrete case is often dependent on circumstances that are unique for each situation. It is not a simple task to distinguish some of these effects as typically more important than others, not to say to establish a rule to determine under which conditions should the applicant's interests normally and reasonably yield in favour of the defendant. The requirement of equal treatment of the parties is best met through a proportionality test.

When one looks at the legal effect of an interim measure—see (3) above—it can be said that an interim measure does not give rise to *legal effects* that would consistently or often affect the defendant harshly, *e.g.* when compared with the strength in the reasons that speak for the applicant's need of an efficient protection. There is consequently no need of a legislative reform to abolish or restructure the current system; the existing system of rules is capable of seeing to the defendant's interests when there are circumstances unique to the case that would entail extraordinary hardship for the defendant. Just as in the case of practical effects, the court can generally take into consideration the legal effects in a concrete case within the framework of a proportionality test. Furthermore, it is possible to address the defendant's need of a more lenient measure both in the court's assessment and in the course of enforcement. As an example, it can be mentioned that on application by the defendant, the enforcement authority may dispense with the general prohibition on *all* uses of a certain property as a result of a seizure and in an individual case permit the defendant to use the seized property in given situations.

At first sight, one may be much more doubtful concerning case (1) discussed above, *viz.* when an order of interim measure is permitted to have the *same content* as the judgment that the measure is meant to secure. There is something deeply self-contradictory in the fact that an applicant may, already through an order of interim measure, obtain what he really should be able to obtain only through a final judgment. How can this be a question of *provisional* relief? How can one rationally speak of *securing* something in the future if the applicant is to obtain this immediately?

The extension of interim relieves to cover the kind of measures just mentioned is due to the insight that the defendant's acts of sabotage may render a forthcoming judgment meaningless in two ways, *I* and *II*. One way *(I)* is that the defendant takes or refrains from certain measures that would make the *enforcement of a forthcoming judgment* impossible, or at least make the judgment much more difficult to enforce. A security measure that prevents such acts of the defendant *secures* the enforcement of the judgment—the security measure preserves the actual conditions that must exist for the successful enforcement of the judgment.

The other way *(II)* can come into question when the defendant takes or refrains from certain measures that do not threaten the enforcement of the judgment but in some other sense would render the judgment *valueless* or of a *much less value* for the applicant. This can be illustrated in the example where an injunction is not imposed on a defendant who, by carrying out some business activity, breaches the applicant's exclusive rights (*e.g.* copyrights). At this stage, the activity of the defendant does not deprive the applicant of his possibilities to enforce and realize a forthcoming judgment effectively. This prohibition can be driven through by means of, *e.g.*, a threat of a substantial fine for breaches of the prohibition. The applicant's worries lie, however, elsewhere. If he cannot obtain

an interim relief immediately with the same content as the forthcoming judgment, the defendant's activity will cause great and irreparable damages to the applicant's copyrights. This right can be so diluted in value and substance that the applicant would not be served by the relief that a subsequent injunction could give. There are, for all purposes, no copyrights left to protect.

The problem with the kind of reasoning like *II* is that it is actually applicable in all cases. For the plaintiff it is better if he, already through an order of interim relief, can force the defendant to pay for a debt, rather than to wait for a final judgment. To extend interim relieves to such a length would however be equivalent to abolishing, the—for the rule of law—fundamental principle that enforcement of a civil claim cannot take place before a court has adjudicated the claim. This has led to a rough distinction into two groups of cases, where an interim measure forestalling the final judgment would be justifiable in one group and not the other. The pattern formed thereby can be described as a difference between *genuine and quasi substitutes for judgment*. Inherent in these concepts is the idea that an interim measure may not in principle be given a content that, already at the time of the order, renders the final judgment superfluous—such an order does not secure a meaningful judgment, it replaces the judgment. If, on the other hand, the interim measure does not render the forthcoming judgement superfluous but only provides protection up to the judgment, the value of the final judgment is secured through the interim measure. The judgment is not replaced by the security measure serving as a kind of substitute.

It is discussable whether this rough distinction between genuine substitute and quasi-substitute for judgment is successful and defensible. It happens that, upon a closer inspection, one discovers cases of interim measures as genuine substitutes but where it cannot be denied that the applicant has a justified need for an exception to the general prohibition on premature enforcement. These exceptions give rise to thoughts whether it would not be possible to re-evaluate the ideas behind the institution of interim relieves. Has the development gone so far that the difference between an interim measure's supportive function and substitutive function is no longer a *difference in kind* but only a *difference in degree?* The right of the applicant to obtain an interim measure should not be dependent on the type of the interim measure—*viz.* whether it secures a judgment or makes the judgment superfluous—but rather on the relative strength of the parties' need of protection in the concrete case. The court should evaluate these strengths through a general weighing of interests. This assessment should not be governed by strictly-defined norms, but rather be characterized by the use of discretion. Flexibility in the institution of security measures should be a more important concern for the administration than foreseeability. Can all this be so simple?

8 Flexible and Prospective Enforcement of Justice

If the development were to continue in the present direction, the use of interim measures would to a greater and greater extent replace civil litigation as the form for conflict resolution. Such a shift in conflict resolution mechanism from civil litigation to interim measures entails, *inter alia*, a change in the method of obtaining justice. The question is what kind of method is inherent in the use of interim measures and what are its consequences if it were to dominate the en-

forcement of justice in civil and commercial matters. How well is it tailored for achieving a reasonable balance in conflict resolution, a reasonable protection of rights? What are the implications of this method on the development and realization of substantive legal rules on civil and commercial matters?

The shift from civil litigation to proceedings concerning interim measures can hardly be seen as a case of the courts departing from a strict application of the law and embarking on a course of conflict resolution based freely on 'justice and equity', a point that has often been raised in connection with arbitration. Instead, here we are dealing with the strict application of the substantive law being replaced by a *combination of a simplified application of law and a general weighing of interests*, the latter being characterized by the idea of proportionality. There is no given norms defining how this combination should look like exactly and I shall in the following point to two kinds of combination. Common for both of them is that the outcome of the judicial assessment is steered by the relative weights of the result from both a substantive evaluation (the prognostic test) and a discretionary appraisal of the relative risks for damages between the parties (the proportionality test). If such a weighing of interests is to succeed with due attention paid to relevant circumstances, it is necessary that the norms or guidelines for this weighing should have a flexible content.

In *one combination*, the relative weighing can be illustrated by a model of the sliding scale: the weaker support an applicant has for his substantive claim, the greater preponderance of factors in the applicant's favour is required in the risk determination for granting the application (and *vice versa*). The norm for weighing does not bear the stamp of rigidity but rather of flexibility. It is the circumstances unique for each case and the gravity of the parties' interests that determine whether a clear preponderance of weight in the applicant's favour would speak for the granting of an interim relief. Sometimes a small preponderance of weight will suffice.

In *the other combination*, no proportionality test is carried out at all when the applicant either has very strong or very weak support for his substantive claim. The proportionality test serves its function when the claims of the parties weigh equally in the prognostic test (*i.e.*, equal chance of winning the substantive case) and when there is a slight preponderance of weight in either party's favour in the ordinary prognostic test (*i.e.* when one party has a slightly greater chance of winning the substantive case). An interim measure will only be granted if the outcome of the proportionality tests speaks in the applicant's favour. In other words, the applicant will only be successful if he is the party who bears a relatively greater risk of suffering damages.

In both these combinations, focus is not put on substantive rights in line with classical legal thinking. The reasoning in terms of justice that is inherent in the idea of rights is modified by the conception of justice founded on proportionality. The idea of proportionality gives rise to the shield that a coercive measure for the protection of a right cannot be taken to whatever price it may require. There is a limit for compromise that cannot be exceeded. Respects for rights in a society governed by the rule of law requires that rights are not given an absolute protection. The idea of a limit for reasonable sacrifices can be linked to the idea of commutative justice (none of the parties in a legal relationship should give or take more than the other).

Admittedly, the idea of a limit of sacrifices can be found in different places in the field of private law; but it has not occupied a prominent place—be it in

statute law nor in the case law. Through the shift from civil litigation to proceedings for interim measures, not only is the idea given more room in the process of conflict resolution, it is also promoted within the frame of a summary process. Here we are concerned with the fact that *a right founded on probable bases* may not be asserted against *a risk shown to be likely to occur*, if the limit of sacrifice is not to be overstepped. It is not a case of not asserting an established right against an established transgression of the limit of sacrifice.

That the idea of proportionality has received more room in interim measure proceedings can be explained by the need for questions of interim relieves to be decided speedily and on the basis of incomplete case material. The summary character of the process entails a significant danger for the court's making a decision on interim relief in favour of the party who does not win the subsequent trial on the substantive claim or who should not have won if the case had received a full trial concluding in a final judgment. The uncertainties that may arise regarding the correctness of the prognostic test—*viz.* which of the parties will turn out to be the winning party in a judgment?—on its own is not considered to be a sufficient ground to justify a coercive measure. A justification would require that the decision be preceded, moreover, by due consideration of the risks of harm to the losing party as a result of a wrong decision by the court. The risk of damages for each party much be quantified and compared. The proportionality test has become a tool for *distributing the risks of future damages* between the parties. Thus, one not only take into account the damages that will arise with certainty but also damages that one believes may arise. Having in mind that the damages here are future damages, it is often difficult to predict the size of such damages. It will often be a case of making uncertain predictions on whether these damages will be small, normal or great.

As legal method, the institution of interim relief with the element of proportionality testing is clearly *prospective*. The ideas of proportionality and a limit of sacrifice means that the court shall consider what consequence the conflict resolution will have in the long run and let an evaluation of this influence the content of the court's decision. Generally speaking, this means that the administration of justice will be directly concerned with *future uses of resources*. This concern can be given different directions. The administration of justice is aimed at *avoiding unnecessary or serious destruction of values*. Here, the court will decide which of the parties shall avoid bearing the risk of damages as a result of the decision on interim measure. The evaluation does not have the aim to determine which of the parties who has the greatest need of the resources or who is most capable to use these resources for *future investments*. Such administration of justice would mean that the court—*e.g.* in a business dispute—would have to, within the proportionality test, take into account factors like which party would have the best business concept, which party would be most capable of successfully implementing the business concept and which business concept would give the highest return. It is possible that this way of administering justice will be a feature of the courts of the future—in particular as it has become more important to focus on a rational utilization of scare and important resources. At present, however, there is scepticism against courts being given or taking on such tasks through *e.g.* the so-called business judgment rule—it is not the function of the courts to determine what is good or bad business within the frame of the administration of justice. Business judgments are not considerations that fall—nor should fall—under the institution of administration of justice. However, whether one agrees with

this view, it is hardly possible to keep this kind of judgments outside of an administration of justice that claims to make an all-round assessment of the circumstances.

It is not only 'the prospective angle' that gives the legal method of interim relief an advantage over the classical method of civil litigation. Another advantage of interim relieves is the clear gain in time that can be achieved through the order of interim measure functioning as a substitute for a final judgment. For certain parties and in certain contexts, the gain in time can be valued highly—higher than legal certainty consisting in the judgment being based on a complete case material and well-thought considerations. The value given to speed is certainly a decisive driving force for the tactical use of interim measures in civil litigation. But, perhaps as it has been maintained in American law, a procedure that provides a possibility of a preliminary indication of the outcome of the case 'would most likely only be utilized in those commercial cases where businessmen seek a swift, "impressionistic" answer from the court'.

In order to maintain and develop a simplified and cursory method of administering justice, certain conditions must be fulfilled. The legislator must create substantive rules suited for this style of doing justice. Another condition is a the existence of procedural rules that clearly limit the extent of the parties' litigation. As an example one may mention limits on the possibility for presenting evidence and the amount of case material. The courts must develop principles for interpretation and application of law that facilitate the simplified procedure. The parties must develop forms of argument that promote speediness in case management and decision-making. The parties must, in the same spirit, make a disciplined choice of case material to be submitted to the courts.

There is reason to be sceptical of claims about developments in the direction towards a refinement or the *simplification* in the administration of justice through interim measures. We see today already signs that the parties for various reasons are not satisfied with a summary assessment of their substantive claims. A good number of defendants try their best to complicate the assessment and the court's handling of the case, primarily in the belief that they have everything to win through delays. Other parties also try in different ways to persuade the courts to carry out a more careful and secure evaluation, precisely because too great values are at stake for an court assessment that leaves much room to chance. Applications for interim measures often contain comprehensive accounts of the facts and detailed analyses of questions of law. It is often difficult to see the difference between what is labelled 'application for interim measure' and what is 'civil claim'. The choice of label entails, however, that interim cases are given priority at the expense of other cases—some parties simply jump the queue for civil judgments. Relevant evidence is gathered and presented forcefully; nothing—it appears—is spared. The parties are also trying, more often, to arrange for hearings in which oral presentation of evidence is permitted. On the whole, one gets the impression that the parties—not least in commercial disputes—will try, if possible, to achieve a process for interim measures that is rather similar to the normal trial in civil litigation, with the exception that the aim here is to arrive at a decision much more quickly than in an ordinary trial. If proceedings for interim measures are increasingly taking over the conflict resolution functions of civil litigation, more and more cases on interim measure will be competing for a quick decision. Taking this development to its end, we shall soon be complaining of slow and complicated proceedings for interim measures.

There are possibly two other ways to avoid interim measures from being used to too great an extent as substitutes for civil litigation. One way is to reform the existing system of civil litigation radically to meet the demand of speediness in conflict resolution at the expense of legal certainty. The bearing idea would be to distribute evenly the total available time for quick conflict resolution among a large number of cases. This could be a way to prevent more parties attempting to jump the queue and be given priority through a process for interim measure.

Another possibility is to pick out the group of interim measure cases that pertain to genuine and quasi-substitutions for final judgments. Such a reform—as little as the first possibility mentioned above—will surely not entirely eliminate the need for interim measures, but will certainly diminish that need. Both reform proposals presuppose that the judges can be made to offer guidance to the litigants—in formal as well as substantive issues—than it is the case at present. Such guidance by the court must be combined with the implementation of rules that to a high degree would limit the room for digressive and time-consuming manners of litigation.