



Preservation of Property in Civil Litigation: An insurance Premium to Satisfy Guarantee Requirements

Featured Article

The essence of litigation lies in not only the result of judgment, but also favorable judgment being enforced effectively. Preservation of property is a measure to prevent debtors' disposal of their assets and to ensure a favorable judgment possibly enforced. This short article provides an overview of guarantee requirements for preservation of property in Chinese civil litigation, especially a letter of guarantee provided by an insurance company in lieu of other forms of a guarantee, i.e., a prerequisite for preservation.

1. Chinese Civil Procedure Law provides legal bases for the provision of security for preservation of property in civil litigation disputes.

In civil litigation disputes, in order to prevent one party from economic losses due to the other party's wrong application for preservation of property, the court will ask the party, who applies for preservation of property, to provide security, otherwise the application for preservation of property will be dismissed. Chinese Civil Procedure Law has the following specific provisions related to this:

Article 100 If a judgment might be difficult to be executed or other damages might be caused to the other party due to an act of one party or for other reasons, a people's court may, at the request of the other party, make a ruling for preservation of property, order it to do certain acts or prohibit it from doing certain acts. In the absence of such request, the people's court may, when necessary, also rule to adopt measures for the preservation of property. When a people's court adopts measures for the preservation of property, it may order the applicant to provide

property, it may order the applicant to provide security. If the applicant fails to provide security, his application shall be rejected. After accepting an application from a party, the people's court must, if the case is urgent, make a ruling within 48 hours. If the people's court rules to adopt measures for the preservation of property, the implementation of such ruling shall be commenced immediately.

Article 101 Where, due to urgent circumstances, the lawful rights and interests of an interested party would be irreparably harmed if he did not immediately apply for preservation of property, such person may apply to the people's court of the place where the property to be preserved is located, the place of domicile of the respondent or people's courts that have jurisdiction over the case requesting measures for the preservation of property prior to the institution of an action or applying for arbitration. The applicant shall provide security. If the applicant fails to provide security, his application shall be rejected. After accepting an application, the people's court must make a ruling within 48 hours. If the people's court

ruling within 48 hours. If the people's court rules to adopt measures for the preservation of property, the implementation of such ruling shall be commenced immediately. If the applicant fails to institute an action or apply for arbitration within 30 days after the people's court has adopted preservation measures, the people's court shall cancel the property preservation order.

In practice, few preservation measures are adopted by the court ex officio on its own initiative. Generally speaking, the preservation application is put forward by one party, and the court decides whether to accept the application for preservation. If the court decides to adopt preservation of property, it will generally require the party to provide corresponding security.

2. There are many disadvantages in the traditional ways of providing security in China, which are not conducive to the parties' application for property preservation

In Chinese traditional practice, there are three ways to provide security, including the applicant's own financial guarantee, bank guarantee and letter of guarantee issued by some guarantee company. Each of the three ways has its own disadvantages as below:

1) The applicant's own financial guarantee: this way is for an applicant to provide cash guarantee, which could be recognized by all Chinese courts. Although this way could gain a strong recognition, it costs the most to the applicant, because the cash value provided by an applicant generally needs to be almost equivalent to the value of the property to be preserved. In addition, an applicant can also provide real estate guarantee, which is also highly recognized, but most Chinese courts only recognize the real estate or land without mortgage. This obviously increases the difficulty for an applicant to provide such guarantee.

2) Bank guarantee: this kind of guarantee is issued by some bank, which is also highly recognized, especially the guarantee provided by some large state-owned bank. Since such kind of guarantee is based on the credit of the bank,

guarantee is based on the credit of the bank, there is almost no possibility that the bank would fail to fulfill the responsibility of guarantee. However, in practice, this way is cumbersome, time-consuming and often attached with harsh conditions to an applicant. For example, the deposit amount of the applicant in the bank is required to be greater than the amount of guarantee.

3) Letter of guarantee issued by some guarantee company: this kind of guarantee is low cost, but it is time-consuming and has low credit. Thus, there is high possibility that some Chinese court might not accept it.

Obviously, the requirements of the above-mentioned traditional guarantee methods are demanding, which keeps an applicant who cannot provide cash, physical property or bank deposits from putting forward preservation of property. Sometimes, it is also difficult to meet the possible urgent requirements of an applicant for preservation. In practice, it has caused great trouble to applicants and difficulties of execution to Chinese courts. In this context, a new liability insurance for preservation of property with convenience, good reputation and strong recognition has come into being.

3. Chinese courts and insurance regulatory agency have jointly taken efforts to launch liability insurance for preservation of property.

Since Chinese laws and judicial interpretations do not strictly limit the identities of providing guarantee, after the liability insurance for preservation of property issued by insurance companies are permitted to be sold to the public by insurance regulatory agency, this kind of guarantee can be adopted as security for preservation of property, as long as it is accepted by Chinese courts. Whether to accept such kind of guarantee shall be decided by the specific Chinese courts. Thus, at the early of 2014 and 2015, some Chinese courts, such as those in Guangxi Province, Hunan Province and Wuhan and other places, began to accept letter of guarantee for preservation of property issued by insurance companies in civil litigation, which

insurance companies in civil litigation, which achieved remarkable positive results.

Due to relatively low costs, liability insurance for preservation of property launched by insurance companies has greatly lowered the threshold of safeguarding legal rights, improved the rate of preservation, and protected the parties from stepping into awkward situation of "winning the lawsuit but losing money". Due to the obvious advantages, such insurance for preservation of property was soon accepted by many Chinese courts.

On Oct. 17, 2016, the Supreme People's Court convened a plenary meeting of the judicial committee and finally approved, in principle, the Provisions of the Supreme People's Court on Several Issues Concerning Handling Preservation of Property Cases ("the Provisions"), which explicitly stipulates in Article 8 that an applicant of preservation could conclude a contract of liability insurance for preservation of property as a guarantee to the preservation, and the contract shall ensure that the other party can be compensated for the loss he might suffer due to a mistake application for preservation of property.

on Nov. 7, 2016, the Supreme People's Court formally announced "the Provisions", which took into effect on Dec. 1, 2016. The Article 7 of "the Provisions" regulates: If an insurer provides the guarantee for the preservation of property by concluding a contract of liability insurance for preservation of property with an applicant of preservation, it shall issue a letter of guarantee to Chinese court. The letter of guarantee shall clearly state that the insurer shall compensate the other side's loss due to an improper application for preservation, and, in addition, the relevant evidences shall also be provided.

The above provisions issued by the Supreme People's Court offer a clear basis for the introduction of a letter of guarantee for the preservation of property issued by insurance companies in civil litigation. Since then, letter of guarantee for preservation of property issued by insurance companies in civil litigation has become popular and widely accepted by Chinese courts, which has also promoted order and healthy development of insurance for

healthy development of insurance for preservation of property in China.

4. Chinese courts and insurance companies follow some requirements for adopting letter of guarantee for preservation of property.

The liability insurance for preservation of property generally refer to an application of preservation of property as a policy-holder to sign an insurance contract with an insurer, agreeing that the policy-holder shall provide insurance expenses and the insurer shall undertake the liabilities for the compensation or the payment as agreed. If an improper preservation occurs, as agreed, the applicant can require the insurance company to undertake the compensation for the loss suffered by the other side within the insurance limit, so as to realize the purpose of the guarantee for preservation of property.

According to the requirements of Chinese courts, an applicant for the preservation of property shall submit the following materials with courts to adopt letter of guarantee for preservation of property in civil litigation :

- a. an application form for preservation of property;
- b. complaint letter and relevant evidence materials;
- c. clues of preservation of property and relevant evidence materials;
- d. materials about letter of guarantee for preservation of property.

When undertaking such insurance, insurance companies commonly follow some basic principles. Insurance companies are generally willing to accept simple cases with clear liabilities and solid evidences. On the contrary, insurance companies will be very cautious towards complex cases with unclear facts and insufficient evidence, or the cases out of the limitation of action.

In practice, insurance companies are very willing to promote such insurance, as there is very low possibility for them to undertake liability for compensation. From the aspects of applicants for preservation, they are also willing to accept such

preservation, they are also willing to accept such insurance, as the costs relatively low, commonly about 1.5%-2.5% of the property's value to be preserved.

When concluding an insurance contract between an insurer and an applicant, the insurer generally would require the applicant to provide the following documents:

- a. complaint letter
- b. an application form for preservation of property;
- c. filing receipt of the litigation case issued by Chinese court (not necessary for the preservation of pre-litigation);
- d. evidence list of the case;
- e. detailed list of targets to be preserved;
- f. certificates of incorporation or identities of the parties involved in the case;
- g. copy of ID card of the legal representatives of the applicant.

5. It is even more convenient for foreign parties to adopt letter of guarantee issued by insurance companies for preservation of property in practical operation.

In a recent case of 2nd IP dispute (trademark and unfair competitiveness) handled by our firm, our client as the plaintiff won in the 1st instance, where the court ruled the defendant to compensate our client CNY 3,000,000. Then the defendant filed an appeal with a higher court, our client tried to apply a preservation of property with the higher court against the defendant's property during the 2nd instance. If we adopt traditional ways of providing security for preservation of property, according to the requirements of the court, our client would need to provide a guarantee of CNY 3,000,000. In this case, our client is a foreign enterprise, if it provides cash guarantee, the amount is too big for the enterprise, and moreover the capital would likely be frozen for about one year or even longer, which would cause great pressures on the capital flow of the enterprise. And what's more, the procedure of remitting money from abroad to the Chinese court's account and

abroad to the Chinese court's account and subsequently the court refunding to foreign enterprise would also be very complicated. In this regard, we suggested our client take the method of a letter of guarantee for preservation of property issued by an insurance company, which can not only solve the above mentioned problems, meet the requirements of the court, but the costs are not high.

In the mentioned case, the insurance policy issued by the insurance company indicates that the applicant for the preservation of property is our client, a foreign enterprise, while the respondent for the preservation of property is the appellant of the 2nd instance, and the insurance amount was CNY 3,000,000 supported by the judgment of the 1st instance. After the insurance company issued the insurance policy, it directly mailed the "liability insurance policy for preservation of property" signed by the insurance company as the insurer and the "letter of guarantee" signed by the insurance company as the guarantor to the court. The "letter of guarantee" shows that the insurance company's guarantee liability: if the applicant's application for preservation of property wrongly causes the respondent to suffer losses, the applicant for preservation of property should bear the responsibility according to the law, and the guarantor shall make the compensation incontestably within the scope of compensation. The validity period of the guarantee: from the date when the applicant applies for preservation of property with the court till the date when the action of preservation is closed and also the time for application for enforcement is expired, including the date when the action of preservation of property is closed due to a wrong preservation of property and the time for application for enforcement is expired.

In practice, before choosing an appropriate insurance company, to be cautious, it is generally necessary firstly to contact the court by enquiring whether the court has special requirements for the insurance company. For example, some courts would require that it must

example, some courts would require that it must be a local insurance company, or the name of the insurance company shall be in the court's recorded list. Moreover, the applicant needs to check the qualification certificates provided by the insurance company to ensure that the insurance company has obtained the qualification to underwrite such kind of insurance. In addition, in the case of a foreign party as an applicant for preservation of property, due to the cumbersome procedure, long time and limited effectiveness of signing a

contract directly with an insurance company in China, it is recommended the Chinese local law firm of the foreign party sign a contract with the insurance company as the policy holder, which stipulates that the foreign party is the insured. In this regard, the insurance fee could be paid by the law firm directly to the insurance company. By adopting this way, it could settle the problems for foreign parties to provide security when applying for preservation of property in Chinese civil litigation quickly, conveniently and efficiently at low cost.

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Ms. Sui is a senior trademark attorney and attorney at Law at Lung Tin. She is very experienced in Chinese legal system, particularly in trademark practices including the trademark registration, cancellation, monitoring, opposition, dispute, review, administrative litigation, complaint, legal documents written and negotiation for trademark assignment for both foreign and domestic clients. Furthermore, she offers high qualified services in connection with Customs recordation, Customs detainment, copyright, domain name and other relevant property matters in China for both domestic and foreign clients. Since joined Lung Tin in 2010, she has successfully handled a lot of complicated trademark dispute cases, especially she has well safeguarded the clients' interests in several administrative complaint and litigation cases.