Frequently Asked Questions on Preservative Relief

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Preface

Since the commencement of application of the Code of Civil Procedure in July 2007, our project (“Project for the Improvement of Training on Civil Matters at Royal School for Judges and Prosecutors”) has received many questions regarding the Code of Civil Procedure from judges and prosecutors and answered these questions so far.

And we came up with the idea that these questions and answers are very helpful information for those who are handling the cases in practice. So our project collected and arranged questions and answers regarding the preservative relief procedure and developed this “Frequently Asked Questions on Preservative Relief” with support by Japan International Cooperation Agency (JICA) and International Cooperation Department, Research and Training Institute, Ministry of Justice of Japan (ICD).

NOTE: answers in this FAQ were made by our project and not authorized officially by Ministry of Justice or any other relevant authorities in the Kingdom of Cambodia .

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1 Please provide an example of “provisional disposition of the subject matter in dispute”?

1. Provisional disposition of the subject matter in dispute means the ”disposition for the maintenance of the status quo of the subject matter of a dispute, in cases where there is an apprehension that alteration of the status thereof would render it impossible, or extremely difficult, for the creditor to enforce his or her rights” (Art. 531(2)).
2. In the Japanese Law on Civil Preservative Relief (hereinafter the article numbers cited in this question refer to those of this Law), “provisional disposition prohibiting disposition” and “provisional disposition prohibiting transfer of possession” are provided as the two types of provisional disposition of the subject matter in dispute available. The outline thereof is provided below for reference:
   (1) Provisional disposition prohibiting disposition (where the right to be preserved is a right to claim registration)
      a. Provisional disposition prohibiting disposition of immovable properties -type 1 (to secure the right to claim registration of ownership transfer of an immovable property, Art. 53(1); Art. 58(1), (2)):

         This type of preservative relief shall be executed by “registering provisional disposition prohibiting disposition” in the registry.

         In cases where the creditor has won the case in the principal suit, the registration made following the “registration of provisional disposition prohibiting disposition” and which conflicts with the creditor’s ownership may be deleted.

      b. Provisional disposition prohibiting disposition of immovable properties –type 2 (to secure the right to claim registration of rights other than ownership (for example, registration of establishment of hypothec or perpetual leases), Art. 53(1), (2); Art. 58(1) through (4)):

         This type of preservative relief shall be executed by “registering provisional disposition prohibiting disposition” and at the same time by “provisionally registering preservative relief” (for example, provisional registration of establishment of hypothec or perpetual leases) in the registry.

         In cases where the creditor has won the case in the principal suit, the registration made following the “registration of provisional disposition prohibiting disposition” and which conflicts with the creditor’s right (for example, perpetual leases) may be deleted.

         In addition, the “provisional registration of preservative relief” may be made definitive. The right formally registered in this way (for example, hypothec, perpetual leases, etc.) may counteract the new owner or new mortgagee who appears after the execution of the above provisional disposition.

c. Provisional disposition prohibiting disposition of an object that can be registered (Art. 54, 61):

With regard to an object other than immovable properties that can be registered (automobile, vessel, aircraft, etc.), the provisions of a. and b. above shall apply *mutatis mutandis* and the same types of provisional disposition prohibiting disposition as above may be made.

(2) Provisional disposition prohibiting transfer of possession (where the right to be preserved is a right to claim delivery)

In order to secure the right to claim delivery of an object, provisional disposition is made by: 1. prohibiting the debtor from transferring possession of the subject matter in dispute, 2. ordering the debtor to release its possession of the subject matter in dispute and to deliver it to a bailiff, 3. ordering the bailiff to keep the subject matter in his/her custody; and by 4. ordering the bailiff to put public notice of 1. and 3. above (Art. 25(3)).

When possession has been transferred to a third party after execution of this provisional disposition, in most cases such third party may not counteract the creditor with his/her right (Art. 62).

3. Direction of operation in Cambodia

The Code of Civil Procedure of Cambodia includes provisions to the same effect as 2 (2) above on provisional disposition prohibiting transfer of possession (Art. 571), and it is considered that the same type of operation as in Japan will be applied.

On the other hand, provisions on provisional disposition prohibiting disposition, which are not included in the Code, may also be necessary. The content of an order to be issued in a ruling of such provisional disposition, its execution method and effect should be set forth in accordance with the actual operation in the future, and Japanese examples may be used for reference.

2 Please provide an example of “provisional disposition” to establish the provisional status .

1. Provisional disposition establishing a provisional status is “disposition establishing a provisional condition until a judgment becomes final and binding, where this is necessary in order to avoid significant damage or imminent risk to the creditor in relation to the right in dispute”(Article 531(iii)).

   While the types of (i) provisional attachment, and (ii) provisional disposition of subject matter in dispute are fixed, there are a variety of (iii) provisional disposition to establish the provisional status, and their types are not fixed (or (iii) may include all types of provisional disposition excluding (i) and (ii))

2. The following examples of provisional disposition are relatively common in Japan.
   (1) Provisional payment
      a. For example, when an employee files a lawsuit against his/her employer for unjust termination of employment, the employee demands a provisional payment of salary due to difficulty in making his/her living before rendition of a judgment in the suit.
      b. For example, when the victim of a traffic accident files a lawsuit against the perpetrator, the victim demands a provisional payment of a part of compensation due to difficulty in making his/her living before rendition of a judgment in the suit.

   (2) Prohibition of construction of a building
   For example, when the debtor begins to construct a building without any authority on the land the ownership of which belongs to the creditor, the creditor demands discontinuance of the construction based on his/her ownership.

   (3) Forced eviction
   For example, when an automobile is parked for weeks in the parking of a restaurant, the owner of the restaurant demands urgent removal of the automobile due to its negative impact on business.

   (4) Prohibition of passage blocking
   When a dispute arises between neighbors over their access right and a neighbor blocks the passage of the other by building a fence, the other demands removal of the fence.

   (5) Prohibition of noise

   (6) Prohibition of access to a certain person, etc.
   Countermeasure against harsh debt-collection by a gangster, against the partner of tangled love relationship who forces to meet

(7) Injunction of publication

3 What are the differences between the provisional disposition of the subject matter in dispute and provisional disposition establishing a provisional status? Into which types are the provisional disposition prohibiting transfer of ownership and provisional disposition prohibiting construction classified each?

1. Definition

Provisional disposition of the subject matter in dispute means the "disposition for the maintenance of the status quo of the subject matter of a dispute, in cases where there is an apprehension that alteration of the status thereof would render it impossible, or extremely difficult, for the creditor to enforce his or her rights" (Art. 531(2)).

Provisional disposition establishing a provisional status means the "disposition establishing a provisional condition until a judgment becomes final and binding, where this is necessary in order to avoid significant damage or imminent risk to the creditor in relation to the right in dispute" (Art. 531(3)).

2. Differences

Provisional disposition of the subject matter of a dispute aims to maintain the status quo of the subject matter of the dispute, in order to secure the realization of a right through future compulsory execution, while provisional disposition establishing a provisional status aims, not to secure the realization of a right through future compulsory execution, but to provisionally eliminate the present risk to the creditor or instability of position caused by the dispute over his/her right.

Looking at their procedural differences, the trial on provisional disposition of the subject matter in dispute is proceeded expeditiously and a ruling is rendered in many cases only by hearing the creditor's arguments without examining the debtor (Art. 539; Art. 114(1),(2)), while more time is spent in a hearing on provisional disposition establishing a provisional status and the debtor is examined in principle (Art. 548(4)). This difference is attributed to the fact that the former provisional disposition requires "confidentiality", aiming at the maintenance of the status quo of the subject matter in dispute, while the latter cases should carefully be examined in consideration that the latter provisional disposition significantly affects the debtor by provisionally fulfilling the creditor's claim.

3. Provisional disposition prohibiting transfer of possession and provisional disposition prohibiting construction

Provisional disposition prohibiting transfer of possession can be considered as a typical example of provisional disposition of the subject matter of a dispute, as it prohibits the debtor from transferring his/her possession of the subject matter to a third party in order to secure future execution of the creditor's claim for delivery.

Provisional disposition prohibiting construction is concerned with a building to be constructed or a building already under construction. As its background there exist

several legal relationships, such as a dispute over a right to use premises or a dispute over a contract for construction work, etc. In any case, this disposition establishes a provisional status of not allowing construction of a building until the judgment becomes final in order to avoid significant damage to the creditor. Moreover, due to the following reasons, this disposition is considered as provisional disposition establishing a provisional status of the subject matter.

- The need for "confidentiality" is not high in this disposition;
- Careful examination is required as the disposition greatly affects the debtor, who is preparing for construction procuring materials and workers.

4 What are the common points and differences between provisional attachment of immovable properties and provisional disposition prohibiting disposition of immovable properties?

1. Definition:

Provisional attachment of immovable properties means the disposition restricting the disposition of property owned by the debtor in order to secure the execution of a monetary claim (cf. Art. 531(1)).

Provisional disposition prohibiting disposition of immovable properties is a type of provisional disposition of the subject matter of a dispute (Art. 531(2)), restricting the disposition of the property in question by the debtor in order to secure compulsory execution of the creditor's right to claim registration of the property under his/her ownership (See Q 1).

2. Common points:

Both types of provisional disposition aim to maintain the status quo of the target property by restricting its disposition by the debtor, and their execution method and execution effect are the same.

In other words, both provisional attachment of immovable properties (Art. 567) and provisional disposition prohibiting disposition of immovable properties shall be executed by means of registration of the property in question, and the bailiff shall not possess the property. Therefore, the debtor shall not be precluded from using in the normal manner or profiting from the property in question.

Furthermore, upon registration of the provisional attachment of the property or registration of the provisional disposition prohibiting disposition of the property, the debtor shall be prohibited from disposing thereof. Even if, after the registration of each of the above, the debtor transfers the property or provides it as security, (although registration of such acts is accepted), he/she may not counteract the creditor with the effect of each of his/her acts. Therefore, in cases where the creditor subsequently commences the compulsory execution procedure, in the procedure it shall be considered that none of the debtor's acts as above shall have effect (See Q 38).

3. Difference

The most essential difference is the right to be secured.

Provisional attachment of immovable properties aims to secure compulsory execution of a monetary claim, which is the right to be secured.

On the other hand, provisional disposition prohibiting disposition of immovable properties aims to secure execution of a right to claim registration regarding the property in question, which is the right to be secured (non-monetary claim).

5 A criminal case consists of criminal offense and civil compensation.

(1) In order to keep present of suspect's property, may the victim submit a motion to court to issue a preservative relief order?

(2) Is the criminal case above deemed as the principal case for civil matter (Art.557)?

1. Yes, the victim may file a motion for preservative relief.

S/he can file a motion for provisional attachment against the suspect's property based on her/his right to demand compensation for damages as the right to be preserved, no matter whether it is before or after the criminal case in question has been filed.

2. A civil action under the Code of Criminal Procedure is deemed as "the principal case" of Art.557 of Code of Civil Procedure.

"The principal case" in Art.557 is not limited to the ordinary suit (75) but it includes the cross –complaint case (86) or demand ruling case (319) because all of these are the proceedings to determine the existence or non-existence of the preserved right by authority.

A civil action under the Code of Criminal Procedure is also the proceeding to determine the existence or non-existence of the preserved right by authority, so a civil action is deemed as "the principal case" of Art. 557.

6 In cases where the name and address of the debtor are not specified in a motion for a ruling of preservative relief (for example, in case of a motion for preservative relief prohibiting construction or prohibiting obstruction of passage, it is unknown who is the builder or who is obstructing the passage), how should the court deal with the motion?

The name and address of the debtor are mandatory items to be entered in a motion for a ruling of preservative relief (Art. 541(1)(a)). Therefore, a motion that lacks this information is illegitimate. When the name or address of the debtor is unknown, it is impossible to follow the subsequent procedure (service of a ruling, execution of preservative relief).

The court shall first orally urge the plaintiff to cure the defect of the motion, and if the plaintiff does not cure the defect, the court shall order it (Art. 539; Art. 78(1)). In cases where the plaintiff fails, even upon the court's order, to cure the defect, the court shall dismiss the motion via ruling (Art. 539; Art. 78(2))

7 (1) In cases where a motion for a ruling of provisional disposition has been dismissed, is it allowed to file another motion for preservative relief in the same case?

(2) In cases where a motion for preservative relief has been admitted, but its execution has become impossible due to the elapse of two weeks, the statutory execution term of preservative relief as prescribed in Art. 562(2), is it allowed to file another motion for preservative relief in the same case?

1 Re: (1)

In cases where, after a motion for a ruling of preservative relief has been dismissed, the same motion has been filed, it may raise a question of whether allowing such a re-filing of the same motion impairs legal stability or litigation economy. But the "right to be preserved" and "necessity of preservative relief" need to be examined in a trial on preservative relief (Art. 541), it should be carefully examined whether the latter motion is identical to the former one.

a In cases where each of the "right to be preserved", "necessity of preservative relief and the "preliminary showing" of the two motions is identical, both motions are identical as explained above, and in this case it is interpreted that re-filing the same motion is simply "bringing up an old issue" and therefore is not allowed under the principle of faith and trust (Art. 5, Civil Code, Art. 4, Code of Civil Procedure).

b In cases where, even if the right to be preserved is the same but the necessity of preservative relief is different, the latter motion shall not be considered as "identical" to the former one, as mentioned above, and filing another motion may be allowed. It is considered that there are many cases where, even if a motion for a ruling of preservative relief has once been dismissed due to unnecessity of the sought preservative relief, subsequent changes in circumstances may give rise to the necessity of the preservative relief. Therefore, in such cases re-filing the motion is permitted.

c In cases where the right to be preserved and the necessity of preservative relief in the latter motion are identical to those in the former motion, but a new material of preliminary showing is added in the latter, several opinions exist regarding whether the two motions are identical or not. One theory holds that, while the right to be preserved and the necessity of preservative relief are identical, there is no room for interpreting other than that the two motions are identical, even if they involve different materials of preliminary showing. Therefore, re-filing the motion is not allowed as it just brings up an old issue. However, in consideration that, in addition to the "provisional" character of the preservative relief procedure, an important material of preliminary showing may be discovered after the filing of a motion, due to collection of preliminary showing materials under time constraint in the former motion, the theory allowing re-filing of the same motion is deemed quite

reasonable.

2. Re: (2)

In cases where, after a ruling affirming the motion for preservative relief has been issued, the same motion has been filed, it may raise a question of whether or not the latter motion lacks necessity, and therefore, it is interpreted that re-filing of the same motion is not permitted in principle. However, in cases where the execution term has elapsed, as in the case of the question, there is no other choice but re-filing the same motion. Therefore, the necessity of re-filing may be exceptionally affirmed

8 Is it necessary to serve a motion for a ruling of preservative relief on the debtor?

Book VII of the Code of Civil Procedure does not include any provisions regarding the service of a motion for a ruling of preservative relief on the debtor. Thus, Art. 79(1) (Book II): "The complaint shall be served on the defendant(s)", and Art. 539:"Except where expressly provided in this Chapter, the provisions of Book II through IV shall apply *mutatis mutandis* to proceedings of preservative relief," of the Code relate to this question.

"Apply *mutatis mutandis*"(Art. 539) means "to apply provisions concerning certain matters to other similar matters with necessary modifications". Then, with regard to this question, there is a question whether or not the provisions of Art. 79(1) regarding the service of a complaint applies to the service of a motion for a ruling of preservative relief.

The provision of Art. 79(1) is inherent to a complaint presuming that a judgment is rendered by giving the defendant sufficient opportunities to present his/her counterarguments under the Principle of *La Contradiction*"(Art. 3(1)). In the preservative relief procedure, on the other hand, the demand for "confidentiality" is emphasized, constituting one of the basic characteristics of the procedure. In other words, if the debtor gets to know the motion for a ruling of preservative relief before execution of the ruling, it may cause the debtor to obstruct the execution of the ruling by hiding the target property of preservative relief, etc., which may undermine the effect of preservative relief. Therefore, the preservative relief procedure needs to be proceeded by keeping it secret from the debtor. As a result, in the preservative relief procedure the application of the Principle of *La Contradiction* is limited to a certain degree (cf. Art. 535(1): Art. 114(1), proviso; Art. 562(3), etc.). As the service of a motion for a ruling of preservative relief goes against the necessity of "confidentiality" in the procedure as explained above, it is interpreted that Art. 79(1) should not apply to the preservative relief procedure.

Therefore, the court should not serve the motion for a ruling of preservative relief on the debtor.

9 If the principal case is pending at Uttor appeal, can the creditor file a motion for preservative relief with the court of first instance having jurisdiction over the subject matter of the dispute?

Yes. It is possible.

According to Art. 540(1), both the court having jurisdiction over principal suit and the court of first instance having jurisdiction over the subject matter of the dispute shall have jurisdiction over the preservative relief case.

Therefore the creditor may file a motion for preservative relief with the court having jurisdiction over principal case (the appellant court in your question case), and the creditor also may file a motion for preservative relief with the court of first instance having jurisdiction over the subject matter of the dispute.

Where the motion for preservative relief is filed with the court of first instance having jurisdiction over the subject matter in the dispute, the court of first instance above shall issue the preservative relief ruling.

10 If the principal case is pending at Satuk appeal, can the creditor file a motion for preservative relief with the court of Uttor appeal?

No, it is not possible.

The court having jurisdiction over the principal suit, or the court of first instance having jurisdiction over the objects to be attached or the subject matter of the dispute, shall have jurisdiction over the preservative relief case (Art. 540(1)).

The court with jurisdiction over the principal suit shall be the court of first instance, except where the principal suit is pending in an appellate court, in which case it shall be the appellate court (Art. 540(2)).

According to the above provisions, where the principal case is pending at Satuk appeal, there is no room the creditor can file a motion for preservative relief with the court of Uttor appeal.

11 Is it possible that a panel of judges handles a preservative relief case?

It is possible.

With regard to the selection of a single-judge or a panel-of-judges system for a preservative relief case, Art. 23 shall apply to the first instance court, and the Court Organization Law (draft) of Cambodia will apply to the appellate court.

12 In cases where a motion for a ruling of preservative relief is filed and the principal suit thereof is already pending, may the judge trying the principal suit take charge of the preservative relief case as well?

It is possible that the judge trying the principal suit of a case takes charge of the motion for a ruling of preservative relief in the same case, as it is not prohibited under the Code of Civil Procedure.

With regard to the distribution of preservative relief cases, Art. 26 applies. Thus, the president of each court should determine the distribution of preservative relief cases each year in advance.

If the president of the court determines, with regard to the distribution of preservative relief cases, that a preservative relief case shall be allocated, if the principal suit of the same case is pending, to the judge trying the principal suit, such preservative relief case will be allocated to the judge charged with the principal suit.

13 Please provide an example of “if there are extraordinary circumstances”(Article 548, paragraph IV, proviso where a ruling of provisional disposition establishing a provisional status can be issued without holding either oral arguments or examination .

1. Generally speaking, it refers to cases where “there is a high possibility that the debtor interferes with execution if examinations are conducted”, or where “there is an imminent danger for the creditor”, etc.
2. Examples:

   - When a person who has purchased an automobile on the installment plan (usually there is an agreement between the seller and the buyer that the ownership of the automobile belongs to the seller till the payment is completed) falls behind in his/her payments for a long time and the seller demands provisional disposition of delivery of the automobile.

   - After a ruling is issued on provisional disposition of vacation of land, a person who clearly colludes with the debtor begins to possess the land in dispute, and the creditor demands another provisional disposition of vacation of land against such a person.

   - When a neighbor begins to dig the ground of an adjoining parcel to construct a building, the other neighbor demands provisional disposition to prohibit continuance of the construction as there is a high possibility of land collapse.

   - In relation to a dispute over a leased house, the lessor has poured concrete into the toilet in the leased house during the lessee’s absence, the lessee demands provisional disposition to remove the concrete.

   - When the publication date of a magazine is coming up containing an article with obviously illegal defamation, the targeted person of defamation demands provisional disposition to suspend the publication.
3. Even in the above types of cases, careful judgment should be made in order not to unduly deprive the debtor an opportunity to provide counterarguments, by taking into account the sufficiency of preliminary showing by the creditor, degree of possibility that the debtor makes reasonable excuses, etc.

14 Is it possible to examine a third party, that is, a person other than the parties, in the trial on a motion for a ruling of preservative relief, or in the trial on the objection to preservative relief?

1. Basically it is not permitted.

Art. 114(2) (applied *mutatis mutandis* to the proceedings of preservative relief under Art. 539) provides, "the court may examine the parties", and the provisions do not include a third party as the subject of examination.

Therefore, in order to obtain testimonial evidence from those other than the parties, oral argument must be held for examination of witnesses (Art. 114(1); Art. 539).

2. However, in cases where the court deems it appropriate to examine a person who deals with clerical matters for the sake of parties or who assists them, it is construed that examination of such a person as a "*quasi*-party" is possible.

This is because, in addition to the fact that such a person may be deemed identical to the party, the person is directly involved in the case in lieu of the party. In this sense, the person has more knowledge on the factual relations of the case than the party, and it is highly necessary to allow examination of the person for the purpose of resolving the case.

For example, when the court deems it appropriate to examine a person who falls under any of the following, it is possible to examine the person as a "*quasi*-party".

- -When a company has filed a motion for preservative relief with regard to one of its businesses, a staff member of the company in charge of such a business.
- -When an employee has filed a motion for provisional disposition against his/her company for provisional payment of salary, etc. asserting that the dismissal was invalid, an officer of the labor union (in case the labor union is deeply involved in the progress of the dismissal).
- -An architect or tax accountant who has dealt with clerical matters in lieu of the party using his/her expertise.
- -A spouse or child of the party who has been involved in negotiations with the opposite party in lieu of the party.

15 Please show the example case where the court issues the ruling of preservative relief without ordering the provision of security.

In Japanese practice, the cases where the judge issues the preservative relief ruling without ordering the provision of security are very limited.

For example, in the case of the provisional disposition establishing the provisional status, which orders the debtor to pay the tentative salary to the ex-employee (creditor) who filed a suit to confirm the status of employee, the judge would issue the preservative relief ruling without ordering the provision of the security.

Or for example, in the case of the provisional disposition establishing the provisional status, which orders the debtor to pay the tentative compensation to the victim (creditor) who filed a suit to demand the compensation for the damage caused by traffic accident, the judge might issue the preservative relief ruling without ordering provision of the security.

Because in these example cases, the reason to issue the ruling, the necessity of ruling, is that the creditor cannot make a living without tentative salary or tentative compensation and the issuance of ruling is necessary to avoid significant damage or imminent risk to the creditor (Art. 548(2)). In these cases, the ordering creditor to deposit security is inconsistent with the reason above, the reason which supports the necessity of preservative relief ruling. Therefore, in Japan, the court tends to issue the preservative relief ruling without ordering the provision of security in these cases. But in almost all cases, the court issues the preservative relief ruling with ordering the provision of security.

16 Is it necessary to serve a ruling concerning the provision of security on the debtor or to notify him/her of the ruling?

1 Re: service

In principle, a ruling takes effect when notice thereof is given (Art. 213(1)), and the service of a ruling is necessary only when it is expressly provided for (cf. Art. 543; Art. 554(3); Art. 557(8); Art. 558(3); Art. 559(3); Art. 419(2), etc.).

As there is no provision concerning the service of a ruling on the provision of security, its service is not necessary.

2 Re: notice

Art. 213(1) (Book II) provides, "A ruling shall take effect when notice thereof is given in a manner deemed proper" and Art. 539 provides, "Except where expressly provided in this Chapter, the provisions of Book II through IV shall apply *mutatis mutandis* to proceedings of preservative relief."

"Apply *mutatis mutandis*" (Art. 539) means "to apply provisions concerning certain matters to other similar matters with necessary modifications". Then, with regard to this question, there is a question whether or not the provisions of Art. 213(1) requiring notice of a ruling applies to a ruling on the provision of security.

If the debtor is notified of a ruling on the provision of security, he/she may get to know the motion for a ruling of preservative relief before its execution, and this goes against the demand for "confidentiality" of the preservative relief procedure, being detrimental to the creditor. Moreover, the ruling on the provision of security itself does not infringe the debtor's right. Even if the debtor is not content with the security amount, he/she may be given an opportunity to assert it in his/her objection to the ruling of preservative relief.

As explained above, Art. 213(1) should not apply to a ruling on the provision of security because notice thereof to the debtor is detrimental to the procedure and the necessity of such notice is not high.

Thus, the court should not notify the debtor of the ruling on the provision of security

17 In case the creditor loses in the principal suit after a ruling of preservative relief has been issued and it has been executed, how shall the loss incurred by the debtor through preservative relief be recovered?

1. The debtor may file a suit for damages against the creditor for his/her act of tort(Article 743(1), Civil Code).
2. There are three requirements for admission of tort: "violation of law", "intention or negligence", and "incurrence of loss". The following explanations how the creditor's losing the case in the principal suit affects the subsequent suit for damages in Japan.

(1) Violation of law

With regard to the fact that the right to be preserved in a ruling of preservative relief has been denied, the biding effect of the judgment (Art. 194) in the principal suit extends to the suit for damages. Therefore, it is considered that the creditor filed a motion for preservative relief based on non-existent right to be preserved, and thus "violence of law" may not be contested in a suit for damage in many cases.

(2) Negligence

The judgment by the Supreme Court of Japan holds as follows: "Generally when an ruling of provisional disposition is cancelled through the objection or appeal procedure, or the plaintiff loses in the principal suit and the judgment becomes final, unless there are any special circumstances otherwise, it is reasonable to infer that the petitioner is in negligence. Therefore, the trial is conducted from the viewpoint of whether or not there are any special circumstances to deny the plaintiff's negligence.

A sample case of special circumstances that deny the petitioner's negligence is when legal relations are complicated and legal interpretation or judgment is difficult, or when the debtor is also at fault causing the creditor to make an erroneous decision (It is said that there are more than a few cases where special circumstances are admitted denying the plaintiff's negligence).

(3) Determination of the scope of damages in a suit for damages

All damages with causal relationships with the preservative relief procedure, including but not limited to: litigation costs, execution cost, shipping cost to recover the original status of the subject matter, interests of monetary amount for release of provisional attachment , rent incurred due to inability to rent the building in dispute during the preservative relief procedure, lost earnings due to inability to do business during the preservative relief procedure, damages for mental or emotional distress, etc. There is a dispute regarding to what extent attorney's costs are included.

3. Payment of the security provided in the preservative relief procedure

The debtor who wins in a suit for damages holds a priority right to receive payment of the security provided by the creditor in the preservative relief procedure (Article 72). The debtor may obtain the security through procedure for return of the deposited object by submitting the judgment in his/her favor to the court where the security has been deposited.

18 What shall the court do when the court had issued a ruling without requiring the provision of security and the damage occurred to debtor? And please explain the difference between deposit of security or non deposit of security?

Where the filing of a motion for preservative relief causes damage to debtor, the debtor may file a suit demanding the compensation for the damage against creditor based on Art. 743 of Civil Code (See Q18).

Where the court has made the creditor deposit security, the debtor may get satisfaction from the security in preference to other person (Art.72) after the debtor has won the case above and the judgment has become final.

The method how to get satisfaction from the security is stipulated in "Ministerial Ordinance on Court Deposit Procedure", which is now being drafted by MOJ.

According to the draft above, a person (the debtor in this question case) who hopes to claim the giving back of the deposited object shall prove his or her right to make the claim. In this question case, the debtor shall submit the judgment above as well as written application for the return of deposited object in order to get the deposited object.

Where the court has not made the creditor deposit security, the debtor cannot get satisfaction from the security.

If the debtor has won the case in which s/he demanded the compensation for damage caused from filing a motion for preservative relief and the judgment has become final, the debtor shall file a motion for compulsory execution based on the judgment above which is to be the title of execution(Art. 350(1),(2)(a)). But if there is no property to be attached, the compulsory execution is impossible. In order to avoid such a case, the court orders the creditor to deposit security in almost all cases when the court issues the preservative relief ruling. In this sense, we can say the judge's discretion to decide whether creditor deposits the security or not is narrow.

19 If the object of preservative relief has been disposed, can court issue ruling of provisional disposition prohibiting disposition or not?

If the object of preservative relief ruling was disposed before the issuance of ruling, the court cannot issue the ruling to prohibit the disposition of objective.

It is logically impossible for the court to prohibit the debtor from disposing the objective that has already been disposed by the debtor.

20 Debtor's property is under hypothec:

(1) Can court issue a ruling of provisional attachment against the above property? What is the procedure of execution of the ruling of provisional attachment?

(2) If it is computed, the debtor's property has nothing; can court issue a ruling of preservative relief?

(1) Yes, you can. The execution of a ruling of provisional attachment shall be carried out in accordance with Art. 567.

(2) The court may provisionally attach the immovable because no article prohibits provisional attachment in the question case. Art. 435 shall not be *mutatis mutandis* applied to provisional attachment against immovable (See Art. 567(4)). In reality, it is rare that the value of either the immovable or the hypothec is specified at the stage of filing a motion for provisional attachment.

21 Is it possible to set forth the “release money of provisional disposition” in the same way as the “release money of provisional attachment”?

1 It is construed to be impossible to set forth the release money of provisional disposition.

While Art. 547(1) provides for the release money of provisional attachment, no provision in the Code of Civil Procedure provides for the “release money of provisional disposition”.

2 The reason why the “release money of provisional disposition” system has not been established – its relation with the purpose of “release money of provisional attachment

(1) There are two reasons as follows for the existence of the “release money of provisional attachment” system:

a As provisional attachment secures a monetary claim, once an amount of money equivalent to the monetary claim is provided by the debtor, the creditor shall not incur any damage even upon cancellation of the execution of the provisional attachment.

b Once the execution of provisional attachment is cancelled upon provision of release money, the debtor may dispose of the target object at his/her own will and therefore the system is useful for the debtor as well.

(2) In case of provisional disposition, as the right to be preserved is not a monetary claim, the release money of provisional disposition lacks the condition of a. above, and therefore it does not conform to the release money system. For example, in case of provisional disposition prohibiting transfer of possession of an immovable property, even if the debtor deposits a certain amount of money, the right to be preserved, that is, the right to claim evacuation of the immovable property in question shall not be secured. Therefore, the release money system for provisional disposition was not provided.

3. However, there may be some types of provisional disposition that, although the rights to be preserved are not monetary claims, their purposes can be fulfilled upon receipt of money. It seems that the draftsmen of the Code considered that, when the debtor deposited money as security in such cases of provisional disposition, the “cancellation of ruling of provisional disposition due to special circumstances” would be granted as prescribed in Art. 559, and therefore the release money system of provisional disposition was not necessary (See Notes of Art. 559).

The following types of provisional disposition are examples of “provisional disposition the purpose of which may be fulfilled in practice upon receipt of money”. However, it should be carefully examined on a case-by-case basis, and even if a certain case falls under any of the following types of provisional disposition, circumstances in the case in question should be comprehensively considered.

- Provisional disposition prohibiting disposition of a monetary claim
- Provisional disposition prohibiting disposition of an immovable property where the right to be preserved is a right to rescind a fraudulent act (Art. 428, Civil Code).
- Provisional disposition prohibiting disposition of an immovable property where the right to be preserved is a right to claim abatement for legally secured portion (Art. 1235, Civil Code)
- Provisional disposition prohibiting logging and carrying woods where the right to be preserved is a right to claim delivery based on ownership

22 Should a ruling of preservative relief set forth the imposition of procedural costs?

1 In order to answer this question, the following two points should be examined:

(1) May the imposition of procedural costs for preservative relief be set forth separately from the imposition of litigation costs in the principal suit? In cases where the procedural costs are set forth in a ruling of preservative relief, won't there be any inconveniences when the conclusion is reversed in the principal suit?

(2) An objection may be filed against a ruling admitting a motion for preservative relief in the same instance. Therefore, doesn't such a ruling correspond to the "decision that terminates the case in the court" as prescribed in Art. 65(1)?

2 With regard to (1) above,

In Japan, while several opinions exist, the prevailing interpretation in practice is that, as the "preservative relief procedure" and "the principal suit" are different procedures, the procedural costs for preservative relief should not be included in the litigation costs in the principal suit, and the former should be set forth separately within the preservative relief procedure.

In cases where the debtor bears the procedural costs based on the ruling of preservative relief, and subsequently the ruling is overturned in the principal suit, the debtor may claim damages against the creditor, including the procedural costs he/she incurred, for filing an illegal motion for preservative relief.

3 With regard to 2) above,

(1) In Japan, from the viewpoint of 2 above, the following operation is established in practice:

a When a decision to dismiss a motion for preservative relief is made, the decision shall set forth the imposition of procedural costs (A *Chomtoah* appeal against this decision may be filed with a higher court, and therefore, this decision corresponds to the "decision that terminates the case in the court", cf. Art. 544).

b When a ruling to admit a motion for preservative relief is made, the ruling shall not set forth the imposition of procedural costs (An objection to this ruling may be filed with the court that issued the ruling, and thus, this ruling does not correspond to the "decision that terminates the case in the court", cf. Art. 550).

c When a ruling on a motion of objection to preservative relief is made, the ruling shall set forth the imposition of procedural costs (A *Chomtoah* appeal against this ruling may be filed with a higher court, and therefore, this ruling corresponds to the "decision that terminates the case in the court", cf. Art. 561).

(2) However, with regard to the operation of b above, a *Chomtoah* appeal may not always be filed against a ruling admitting a motion for preservative relief. In this case, the imposition of procedural costs shall be left undecided. In order to avoid such a situation, it is interpreted to be quite reasonable that the ruling admitting a motion for preservative relief sets forth the imposition of procedural costs.

23 Is it necessary to serve on or notify the debtor of a decision to dismiss a motion for preservative relief or a decision dismissing a *Chomtoah* appeal against such a decision?

1. Arrangement of the provisions of the Code of Civil Procedure

Art. 543, which provides, "The court shall serve a ruling of preservative relief on the parties," does not apply to a decision to dismiss a motion for preservative relief. CCP distinguishes the term "ruling of preservative relief" from the term "a decision to dismiss a motion for preservative relief", and this distinction is made clear by comparing the provisions of Art. 550 (Motion of objection to preservative relief) and 544 (*Chomtoah* appeal against decision to dismiss).

Then, this question is governed by the provisions of Art. 213(1) (in Chapter II) providing "A ruling shall take effect when notice thereof is given in a manner deemed proper" and Art. 539: "Except where expressly provided in this Chapter, the provisions of Book II through IV shall apply *mutatis mutandis* to proceedings of preservative relief".

2. Examination

"*Mutatis mutandis* application" (Art. 539) means "to apply provisions concerning certain matters to other similar matters with necessary modifications". Then, with regard to this question, a question may occur whether or not it is necessary to modify the provisions of Art. 213(1) when applied to a decision to dismiss a motion for preservative relief or a decision dismissing a *Chomtoah* appeal against such a decision (hereinafter these two decisions are referred to as "decisions of dismissal"). In conclusion, modifications are necessary as bellow.

First, it is interpreted that, in cases where the debtor has not been summoned to oral arguments or examination before issuance of a decision of dismissal, the court should not notify the debtor of the decision of dismissal. This is due to the following two reasons:

(1) The decision of dismissal does not infringe the debtor's right, so the debtor gains no interest in filing an objection to the decision.

(2) Many preservative relief motion cases where the debtor is not summoned to oral arguments or examination need to be tried in secret, and if the debtor is notified of the decision of dismissal, there is a risk that the creditor may be hindered from filing a motion for preservative relief again upon arrangement of necessary documents

On the other hand, it is interpreted that in cases where the debtor is summoned to a trial before issuance of a decision of dismissal, the debtor should be notified of the decision as provided for in Art. 213(1). This is because, secrecy in making the decision is not required in this case as the debtor, summoned to the trial, is aware of the motion for preservative relief, and will prepare against the motion afterwards in vain unless he/she is notified of the decision of dismissal.

3. Conclusion

It is construed that notification is necessary when the debtor is summoned to a trial before issuance of a decision of dismissal and not necessary when the debtor is not summoned.

As for the creditor, notification is necessary in any cases.

24 The court issued a ruling which approved a motion for preservative relief partly and dismiss the rest. Shall the court serve the ruling?

Where the court issues the ruling which approved a motion for preservative relief partly and dismisses the rest, this ruling shall be served on the both parties. Because this ruling orders the preservative relief partly, so this ruling is regarded to be the "ruling of preservative relief" in Art. 543.

25 In cases where the judge has issued a ruling of preservative relief and subsequently has found the decision erroneous, is it possible for the judge to cancel or amend the ruling on his/her own authority?

1. Re: Self-binding effect of adjudication

In principle, once adjudication is made, the judge who has made it shall be bound by his/her own adjudication and may not subsequently cancel or amend its content.

2. With regard to "judgment", Art. 191 clearly provides for self-binding effect, and only Art. 192 on "correction" provides for cases where ex-post cancellation or amendment of a judgment is granted.

In contrast, with regard to "rulings", interpretation on the self-binding effect is less strict than that of a "judgment", and it is provided that a ruling relating to control of litigation, etc. may be cancelled at any time (Art. 214, Art. 53, (3); Art. 58(2)). With regard to a ruling which no statutory provisions exist as above, there is room for discussion on whether ex-post cancellation or amendment of such a decision is granted or not. In Japan, under similar statutory provisions, it is construed that some decisions for which no statutory provisions exist as above may, depending on their nature, be cancelled or amended ex-post facto.

3. With regard to a ruling of preservative relief, while the possibility of its cancellation or amendment should be decided based on its nature, the following circumstances should also be considered comprehensively:

(1) Legal stability, necessity of protection of the party in favor of whom a ruling has been made, necessity of preservation of the authority of adjudication, existence of established proceedings for objection, such as objection to preservative relief, cancellation of preservative relief, etc.; and

(2) Reduction of procedural cost and burden in the appeal instance, possibility of boosting the authority of adjudication by the judge's self-correction in case of evident mistake, necessity of expeditious preservation

The author's personal opinion is as follows:

A ruling of preservative relief is quite similar to a judgment, as it judges, although tentatively, on the substantive relations of the subject matter in dispute, and the execution procedure is conducted based on the ruling. Therefore, it should be interpreted that the self-binding effect of a ruling of preservative relief is strong. Even if the judge finds it erroneous, he/she should wait until an objection against the ruling is filed, and the judge himself/herself may not cancel or amend it.

26 When a motion of objection to preservative relief is filed, which judge shall be in charge of its trial, the judge who has issued the original ruling or another judge?

1. It is provided that a debtor may file a motion of objection to a ruling of preservative relief at the court which issued such ruling (Art. 550), and the motion of objection shall be addressed to the court as the public institution in charge (e.g. "Phnom Penh Municipal Court", etc.).

   How to select a judge who takes charge of the trial of the objection from among judges of the court where the motion has been filed shall be decided in accordance with the case distribution method determined in advance (Art. 26).

2. Then, the question here is, how to determine the distribution of cases.

   As CCP does not provide any provisions in relation to this question, no question of illegality may occur regardless of who takes charge of the case.

   From the viewpoint of appropriate determination, there are two opinions as follows:

   (1) As it has a nature of the appeal procedure, it is better that a judge different from the one who has issued a ruling of preservative relief takes charge of the trial of objection thereto so as to easily obtain the debtor's consent.

   (2) As it is not an appeal to a higher court but a motion of objection within the same instance, and its trial has a nature of continuation of the preceding trial, it is better that the judge who has issued a ruling of preservative relief takes charge of the trial of the objection.

3. In Japan, it seems that, under similar situation of statutory provisions, case distribution method is determined in many cases in such a way that a different judge takes charge of the trial of the objection (as 1. above).

   On the other hand, there are also cases where it is determined that, when a panel of judges has issued a ruling of preservative relief, the same panel shall take charge of the objection to preservative relief, or when a motion of objection to preservative relief is filed while the principal case is pending, the judge who was in charge of the principal case shall take charge of the objection case. Thus, the above first method is not always adopted.

   This is a question that should be decided based on the actual situation in Cambodia.

4. With regard to the judge who takes charge of the motion for cancellation of preservative relief provided for in Art. 558 and 559, almost the same theory as above applies thereto.

27 Regarding a motion for provisional disposition establishing a provisional status , a ruling has been issued after examinations (Article 548 IV), and subsequently a motion of objection to the ruling has been filed. In this case, is it necessary to conduct examinations again on the objection (Article 552)?

1. Examinations must be conducted again in the trial on the motion of objection to preservative disposition, as it is provided for in Article 552.
2. In Japan, there are many cases where the judge in charge of the trial at the stage of issuing a ruling of preservative disposition and the judge in charge of the trial on objection are different, although they are in the same instance. In these cases, examinations must be conducted again as a matter of course.
3. It can be said that, even when the same judge takes charge of issuing a ruling of preservative disposition and of conducting the trial on motion of objection, it is significant to conduct examinations again.

   In accordance with the statutory provisions, at the stage of trial on motion of objection, at least one session of examinations in the adversary style is guaranteed (Article 552), whereas there is no such provision for the stage of issuing a ruling of provisional disposition, and the judge may hear the creditor and the debtor individually. Moreover, a determination of concluding the trial is required at the stage of trial on motion of objection (Article 553), while there is no provision regarding such determination at the stage of issuing a ruling.

   In practice, an expeditious ruling is needed in the trial for issuing a ruling, and there are such cases, for example, there are many cases where a ruling is made by individually examining the creditor and the debtor.

   As explained above, the statutory provision requires a more careful trial at the stage of trial on motion of objection than the stage of issuing a ruling, and in many cases it is necessary to supplement the simple trial conducted at the stage of issuing a ruling. Therefore, it is significant to conduct examinations again at the trial on motion of objection.
4. In some cases, sufficient examination has been conducted at the stage of issuing a ruling, and same arguments may be repeated at the trial on objection. In these cases, it may be possible to quickly conclude examinations and make a ruling on motion of objection.

28 How is the main text of the ruling on a motion of objection to preservative relief written?

The main text of the ruling on a motion of objection to preservative relief shall be written as follows, for example.

"The ruling of preservative relief issued by the ○○ court on 20th June 2008, which has been issued on the preservative relief case (case no.999) between creditor A and debtor B, is affirmed."

According to Art. 554(1), when court decided to keep the conclusion of the previous ruling, the court shall affirm the previous ruling. But the court doesn't have to dismiss the motion of objection. Because the motion of objection to the previous ruling is considered as a motion by the debtor asking the court to hold oral argument or examination at which both parties are entitled to be present and examine the previous ruling which has been issued without such oral argument or examination.

Therefore, when the court decided to keep the previous ruling, the court doesn't have to dismiss the motion of objection to the previous ruling but shall issue the ruling to the effect that the court affirm the previous ruling.

On the other hand, when the court decided to cancel the previous ruling, the court shall issue the second ruling to the effect that the court dismiss the motion by the creditor for the previous ruling as well as cancel the previous ruling.

29 Please explain the point of Article 557 (cancellation of the ruling of preservative relief due to failure to file a suit in the principle case, etc.), paragraph 2, which states, "the period prescribed in paragraph 1 shall be not less than 2 weeks". How are the provisions actually operated in Japan?

1. In cases where, after a ruling of preservative relief is issued, the creditor fails to file a suit in principal case, the debtor may file a motion for cancellation of preservative relief in accordance with Article 557, paragraph 1.
   The court that has received the motion shall order the creditor to carry out the following within a certain period of time deemed reasonable.
   1. to file a suit in the principal case
   2. to submit a document proving the filing of a suit in the principal case

   Article 557, paragraph 2 provides that the above-mentioned "certain period of time" should be at least two weeks.
2. The provisions of Article 557, paragraph 2 aim to give the creditor a certain time to prepare for filing a suit in principal case. As the time necessary for preparation may differ by individual cases, the court should decide at its own discretion the period necessary for preparation. However, as there is not much difference between the necessary preparation for a motion of preservative relief and the necessary preparation to file a suit in principal case, if courts are granted total discretion, there is a possibility that only an extremely short period of time is provided to the creditor. Therefore, the lawmakers may have provided "at least two weeks" to guarantee the creditor a minimum preparation time.
3. In actual practice, not so long period of time is allowed for preparation, in consideration that there is not much difference in the preparation for petitioning preservative relief and for filing a suit in principal case. For example, it may be possible to provide "one year" in the statute, but it may be construed unreasonable.
   In the Osaka District Court, generally "19 days" are allowed. (14 days and 5 days for 1. (1. to file a suit in the principal case)and 2 (2. to submit a document proving the filing of a suit in the principal case) above, respectively. This information has been obtained through an interview with a judge of the said court.) According to the literature contributed by a judge of the Tokyo District Court, this court generally allows "one month".

30 Does the "rights or legal relations to preserve" in a ruling of preservative relief need to be the same as the "rights or legal relations to claim" in the suit?

1. Upon issuance of the order to file a suit in principal case (Article 557 I. Please refer to Q30 in this book), the creditor must file a suit in principal case and submit a document to prove it within a specific period of time. Otherwise, the ruling of preservative relief shall be canceled.

   There are also cases where the creditor needs to change the rights at the stage of filing a suit due to lack of time for thinking over the right to preserve or a change in circumstances after the ruling of preservative relief is issued.

   For example, A filed a motion for provisional disposition prohibiting transfer of possession against B, having the "right to demand return of land based on the termination of a lease contract" as the right to be preserved, and the motion was admitted. After due consideration, however, A found that the lease contract did not exist from the beginning, and thus desires to file the principal suit against B based on the "right to demand return of land based on ownership" as the right to claim.

   In these cases, the creditor shall file a suit in the principal case based on a "right to claim" different from the "right to preserve" in the ruling of preservative relief. Then, it becomes a question to what extent such difference is permitted in relation to the above order to file a suit in the principal case(whether the creditor can avoid cancellation of preservative relief by filing a suit in the principal case based on the latter "right to claim").

2. In Japan, it is construed that difference between the right to preserve and the right to claim is allowed within the scope where there is a "identity of claim" between the two rights. This is based on the same concept as that of the scope where amendment of the claim is allowed in the suit (Article 84).

   In concrete, it is interpreted that difference between the two rights is accepted while the following requirements are fulfilled:

   1. The interest of the former right and of the new right in social life is the same one;
   2. Case records related to the former right can be used to a considerable degree in relation to the new right.

31 After a ruling of preservative relief has been issued in relation to a dispute over land, the debtor files a motion for "cancellation of preservative relief due to the creditor's failure to file suit in the principal case" (Art. 557) and then the creditor files a motion for conciliation or decision to an administrative agent (such as the Cadastral Commission, etc.). In this case, is the creditor's motion deemed as a suit in the principal case?

1. The preservative relief procedure aims to tentatively protect the creditor's right in order to prevent the creditor from suffering damage before determination and realization of his/her right, on the premise that the creditor subsequently takes the necessary procedure to establish his/her right. Once a ruling of preservative relief has been issued, the debtor shall incur disadvantages such as being placed in a situation where his/her assets are placed under restraint. Therefore, Art. 557 grants the debtor a measure to seek cancellation of a ruling of preservative relief when the creditor fails, after obtaining such a ruling, to take the procedure to establish his/her right.

   Judging from the gist of the provisions of Art. 557, it is interpreted that the "suit in the principal case" does not necessarily mean a suit under the Code of Civil Procedure, and refers to a procedure through which the existence or non-existence of the right to be preserved is determined with conclusive and binding effect (cf. Art. 194).

2. With regard to this question, the answer may differ depending on the land dispute resolution system in Cambodia. (The author is unable to understand the details of the system. Examination from the following viewpoints is recommended in light of the actual situation in Cambodia).

   a In cases where the system obliges the creditor to file suit only after going through such procedure as conciliation or decision, etc. by the Cadastral Commission, etc., it can be interpreted that filing a motion for conciliation or decision is deemed as "filing of suit in the principal case" for the following two reasons: 1. The creditor's filing of a motion for conciliation, decision, etc. means that the creditor has undertaken the first step of the necessary procedure to determine his/her right; and 2. When the court has ordered the creditor to file suit within a certain period of time, such order may cause the creditor to fail to do so unless the procedure of conciliation, decision, etc. has completed before the elapse of such time limit.

   b In cases where the system enables the creditor to file suit without going through the above-mentioned conciliation or decision procedure, etc., it should be interpreted that filing of a motion for conciliation or decision may not be deemed as "filing of suit in the principal case", and the creditor must directly file suit before the court. This is because, in accordance with the above-mentioned gist of the provisions of Art. 557, the creditor should, as early as possible and forcibly, take the necessary procedure so as to relieve the debtor from an unstable situation at an early stage.

32 In cases where the debtor files a motion of objection to a ruling of preservative relief, shall the execution of preservative relief already ongoing be stayed?

The execution shall not be stayed automatically. Only when the debtor files a motion as prescribed in Art. 551(1) and the court renders a decision affirming the motion, the execution of preservative relief already under way shall be stayed or cancelled. For details, please refer to the note of the said Article.

33 In cases where a decision is made affirming a ruling of preservative relief against a motion of objection to such a ruling, and the debtor files a *Chomtoah* appeal against the decision, shall the execution of preservative relief already ongoing be stayed?

The execution shall not be stayed automatically. Only when the debtor files a motion as prescribed in Art. 551(1), which is applied *mutatis mutandis* under Art. 561(3), and the court renders a decision affirming the motion, the execution of preservative relief already under way shall be stayed or cancelled.

34 Please provide sample cases of "if the court deems this particularly necessary" in Art. 556, proviso.

1. When a decision to cancel a ruling of preservative relief has been issued in a trial on a motion of objection to such ruling, the decision comes into effect only upon becoming final and binding (Art. 556, main text). However, it is provided that the court may declare that the decision shall come into effect immediately if the court deems it particularly necessary (Art. 556, proviso).
2. In principle, a decision shall take effect immediately when notice thereof is given (Art. 213(1)). However, if the above-mentioned decision of cancellation takes effect immediately, the debtor may shortly dispose of the subject matter after taking the preservative relief execution cancellation procedure, leaving the creditor with no measure to recover the subject matter even upon revocation of the decision in a subsequent *Chomtoah* appeal.

   Therefore, in order to protect the creditor's interest, the main text of Art. 556 provides that the above-mentioned decision of cancellation shall not take effect immediately in principle, and the effect of the ruling of preservative relief continues until the decision of cancellation becomes final and binding.
3. In cases where the debtor's interest should be given priority even at the cost of the above-mentioned creditor's interest, it may be necessary to cause the decision of cancellation to come into effect immediately in order to release the debtor from the execution of preservative relief.

   Therefore, proviso of Art. 556 is provided, when the "court deems it particularly necessary", to cause a decision of cancellation to take effect immediately so that the debtor can be released from the execution of preservative relief. For the interpretation of "when the court deems it particularly necessary," the requirements for releasing the debtor from the execution of preservative relief as provided for in Art. 551 may serve as reference. That is, it can be construed that the court may deem it particularly necessary in many cases when: 1. clear circumstances constituting grounds for cancelling the ruling of preservative relief exist; and 2. there is an apprehension that execution of the ruling of preservative relief would cause irreparable damage to the debtor.

   Concretely, the following are examples of the case 1 above:

   - When the legal interpretation of the original ruling of preservative relief is obviously erroneous:
   - When it has been found that the documentary evidence based on which the original ruling of preservative relief has been issued is forged.

   The following are examples of the case 2 above:

   - When continuance of execution of preservative relief may cause the debtor to go into bankrupt.

- When continuance of execution of preservative relief may cause the debtor's life to collapse.

35 Are there any cases where it is possible to move for a ruling of preservative relief and for execution of the ruling through one written motion? For example, is it possible to request a ruling of provisional attachment against immovable and its execution by filing a single motion?

There is a dispute as follows:

When a ruling of provisional attachment against immovable has been issued, it is executed only through arrangement on the registration of attachment by the court clerk (Art. 567). Then, some people say that it is unnecessary to have the creditor file another motion for execution and it is possible to allow the creditor to file a motion for the ruling and for its execution at the same time.

In relation to this point, the following two opinions exist:

Ⅰ. Negative theory: Strictly under Art. 532(2); Art. 534(f); and Art. 349(2) applied *mutatis mutandis* under Art. 564, the "motion for execution of provisional attachment against immovable" should be filed separately from the "motion for a ruling of provisional attachment of against immovable"

<Problems and possible solutions>

1. The following lengthy procedure must be taken, which goes against the necessity of proceeding of preservative relief expeditiously:

"Service of the ruling"～"motion for execution" ～ "arrangement on registration of provisional attachment" ～ registration of provisional attachment"

→ It is possible to inform the creditor of the ruling by phone at the time of service thereof.

2. In cases where the ruling on preservative attachment has been served on the creditor and on the debtor around the same time (Art. 543), there is a risk that the debtor has ownership transfer registered before completion of the procedure: "motion for execution" ～ "arrangement on registration of provisional attachment" ～ "registration of provisional attachment".

→ In order to prevent this situation, it is possible to serve the ruling first on the creditor and tentatively suspend the service on the debtor until the registration of provisional attachment is completed.

Ⅱ. Affirmative theory: Through the "motion for a ruling of provisional attachment against immovable", a motion for its execution may also be filed in preparation for cases where the former petition is granted in the future.

<Problems and possible solutions>

1. The theory conflicts with the provisions of Art. 564, and Art. 349(2), which state that the motion for execution shall be accompanied by the authenticated copy of executable title of execution.

→In cases where all of the following requirements are met, it should be

construed that, in consideration of the necessity in procedural practice, a motion for execution may be filed through a motion for a ruling of provisional attachment.

(1) There is a high demand especially for expeditious execution and execution in secret.

(2) The institution in charge of issuing the ruling of preservative relief is also in charge of executing it.

(3) The content of execution of preservative relief is unambiguously clear.

2. Under the statutory provisions it is not clear in which types of preservative relief this operation is allowed.

→It shall be construed that this theory applies to cases that meet all of the requirements from (1) to (3) of 1. above, or in other words, "execution of preservative relief by way of registration or by way of service of a ruling on preservative relief on the third debtor or any *quasi*-third party". For example, this operation is allowed in the case of provisional disposition prohibiting disposition of immovable, provisional attachment against a claim, etc., as well as provisional attachment against immovable.

In the beginning, it may be better to choose the operation in I. above, in faithful accordance with the statutory provisions. However, given practical necessity, interpretation and operation of II above may be highly possible. (In Japan, statutory provisions make such interpretation as II possible.) In this case, attention must be paid to the instructions to be given at the reception of a motion for a ruling of preservative relief. That is, in cases where a motion that fulfills the requirements of (1) through (3) of II.1 above is filed, it should be instructed that a motion for execution of the ruling must also be filed, and it is useful to prepare a sample motion format in advance for motioners. The gist of the petition shall state as follows: "I hereby request adjudication which holds, "In order to secure the execution of the creditor's claim against the debtor as indicated in the attached description of a claim, the immovable owned by the debtor as indicated in the attached description of immovable shall provisionally be attached", and also request the execution of provisional attachment of the above-mentioned immovable".

36 Debtor's land was not registered, if court rendered preservative relief order, how does court do?

The procedure to execute the provisional attachment against immovable is stipulated in the Art. 567, 420 etc. If the land provisionally attached has not been registered yet, then the court clerk shall direct the registrar to register the land itself as well as the provisional attachment.

37(1) How is the execution of provisional attachment against an immovable property carried out?

(2) When an immovable property is provisionally attached, is the debtor forced to evacuate the property? Or, can the debtor lease the property?

(3) What is the effect of execution of immovable property provisional attachment?

1. Re: (1)

Execution of provisional attachment against an immovable property shall be carried out by means of registering the provisional attachment (Art. 567(1)). Specifically, the court clerk of the court that has issued the ruling of provisional attachment shall instruct the competent registry office to record the provisional attachment under such ruling (Art. 567(2) through (4); Art. 420).

2. Re: (2)

Different from provisional attachment against movables (cf. Art. 565), provisional attachment against an immovable property shall not be executed by means of possession of the property in question by a bailiff. The execution of provisional attachment shall not preclude the debtor from using in the normal manner and profiting from the immovable (Art. 569(4); Art. 421(3)).

Therefore, the debtor shall not be precluded from using the immovable in question by himself/herself, and does not need to evacuate it. Moreover, in cases where the debtor has been leasing the immovable property to others before execution of provisional attachment, its continued lease shall not conflict with the effect of provisional attachment.

On the other hand, newly leasing the immovable in question to others after the execution of provisional attachment shall not be considered as a use in the normal manner, and conflicts with the effect of provisional attachment, even though the lease contract between the debtor and the lessee is valid. However, in cases where the creditor wins the suit in the principal case afterwards and commences the execution procedure against the immovable property (Art. 417 and onwards), the above-mentioned lease contract shall be deemed invalid in the procedure. Therefore, the lessee may not counter the creditor, the purchaser, etc. of the property with his/her right of lease.

3. Re: (3)

The debtor shall be enjoined from disposing of the immovable in question by the registration of provisional attachment. That is, even if the debtor subsequently conducts such acts as transferring the immovable in question or having the immovable secured (the registration thereof shall be accepted), the debtor may not counter the creditor with the effect of such acts. Therefore, as explained above, when the creditor has commenced the execution procedure against an immovable property (Art. 417 and onwards), none of the debtor's such acts shall be deemed valid.

38 Why is provisional disposition prohibiting transfer of possession necessary? What is the effect of its execution?

1. The following model case is examined for an easy-to-understand explanation.

[Model Case]

A filed suit against B for delivery of an object, won the case and the judgment became final. However, at the time when A intends to file a motion for compulsory execution, C possesses the object in dispute. Can A carry out compulsory execution against C on the basis of the judgment in his/her favor?

2. In the model case, in cases where provisional disposition prohibiting transfer of possession has not been executed before filing of suit:

a If C received the object in dispute from B while the suit between A and B was pending:

In a suit claiming delivery of an object, even if the defendant has transferred the object in dispute to a third party during pendency of the case, the plaintiff may continue the suit against the defendant (Art. 88(2)). The effect of a judgment against the defendant extends to the successor of the defendant's rights or obligations (Art. 198(3)), and the plaintiff may carry out compulsory execution with the defendant's successor as the debtor in execution (Art. 351(1)(c)). In this case, the plaintiff shall be granted a special execution clause affixed to the judgment in his/her favor (Art. 356(2),(3)) in order to carry out compulsory execution with the said successor.

Thus, A may conduct compulsory execution with C through the above-mentioned procedure.

b If C received the object in dispute from B before the suit between A and B became pending.

As none of the provisions of Art. 88(2); Art. 198(3); Art. 351(1)(c), as provided in a. above, applies to this case, A may not carry out compulsory execution with C.

It is construed that the pendency of a suit begins upon service of the complaint on the defendant.

c If C started to possess the object in dispute without having any relations with B (simply an unlawful possessor, etc.)

As C does not fall under the category of B's successor, none of the provisions of Art. 198(3); Art. 351(1)(c), as provided in a. above, applies to this case, and A may not carry out compulsory execution with C. This applies regardless of when C started possession, before or after the suit between A and B became pending.

d In the case of a. above, if C has a right to assert against A:

For example, when C has acquired the object in dispute in good faith (main clause of Art. 193, Civil Code), or C falls under the category of "third party" as prescribed in the main clause of Art. 353(2), Civil Code, C may assert his/her right under the Civil Code to reject A's claim for delivery. Therefore, even if A has been granted a special execution clause to the judgment in his/her favor through the procedure explained in

a above, compulsory execution may ultimately be impossible upon C's filing of a suit of objection to the grant of such execution clause (Art. 364).

3. Provisional disposition prohibiting transfer of possession

Provisional disposition prohibiting transfer of possession is necessary in order to deal with such situations as 2 b, c, and d. above.

With regard to a motion for provisional disposition prohibiting transfer of possession, it is common practice that the court decides only upon hearing the creditor's opinion and without summoning the debtor (cf. Art. 539; Art. 114(1),(2)).

The execution method of provisional disposition prohibiting transfer of possession is provided for in Art. 571(1).

When the provisional disposition prohibiting transfer of possession has been executed, the creditor can effect compulsory execution by delivery of the object based on the title of execution of the principal action (Art. 571(2), main clause); provided that, this applies only to persons who took possession of the object with knowledge of the execution (Art. 571(2), proviso). A person who takes possession of the object in question after execution of the provisional disposition shall be presumed to have done so with knowledge of said execution (Art. 571(3)).

4. In the model case, in cases where provisional disposition prohibiting transfer of possession has been executed before filing of suit:

a If C received the object in dispute from B while the suit between A and B was pending (corresponds to the case of 2 a. above):

In this case, A may, without directly being subject to the effect of provisional disposition prohibiting transfer of possession, carry out compulsory execution through the procedure explained in 2 a. above. (With regard to the proof that can be made more easily at the time of being granted a special execution clause upon execution of the above-mentioned provisional disposition, please refer to 5 below.)

b If C received the object in dispute from B after provisional disposition prohibiting transfer of possession was executed and before the suit between A and B became pending (corresponds to the case of 2 b. above).

A may, based on Art. 571(2), main clause, and being granted a special execution clause affixed to the judgment in his/her favor against B, carry out compulsory execution with C. Although C may file a suit of objection to the grant of such execution clause, in order to win the case he/she needs to prove, being subject to the presumption as prescribed in Art. 571(3), that he/she had no knowledge of the execution of provisional disposition prohibiting transfer of possession (for example, the public notice on the provisional disposition has been lost at the time of commencement of possession).

c C started to possess the object in dispute after execution of provisional disposition

prohibiting transfer of possession, without having any relations with B (corresponds to the case of 2 c. above)

The fact that A can carry out compulsory execution with B and its procedure are the same as 4 b. above.

d the case of a. above, if C has a right to assert against A (corresponds to the case of 2 d. above):

Through the procedure described in 2 a. above, A may carry out compulsory execution with C. Same as 2 d. above, C may file a suit of objection, etc. to the grant of an execution clause, asserting his/her own right under the Civil Code. However, as being subject to the presumption as prescribed in Art. 571(3), it may be difficult for C to prove that he/she falls under the category of "third party" as provided for in each of the main clause of Art. 193 and of Art. 353(2), Civil Code.

5. Procedure for the granting of a special execution clause

A may be granted a special execution clause having C as the debtor in execution only when "it is clear that execution with a party other than a party noted in the title of execution (omitted) as the debtor in execution can be carried out, or if the creditor in execution provides documentary proof thereof" (Art. 356(3)).

In the case of 2 a. above, while A must prove that C falls under the category of "successor" as prescribed in Art. 198(3); Art. 351(1)(c), that is, C has succeeded possession from B, generally such proof is not easy.

On the other hand, in the case of 4 a. through 4 d. above (when provisional disposition prohibiting transfer of possession has been executed), it is sufficient for A, under Art. 571(2),(3), to prove that C commenced to possess the object in dispute after execution of the above provisional disposition. More specifically, A may, only by producing au authenticated copy of the ruling of provisional disposition and the execution protocol of provisional disposition, easily prove the fact that provisional disposition prohibiting transfer of possession has been executed and that C did not possess the object in dispute at the time of execution.

39 (1) How can “provisional attachment” of a movable be executed?
(2) In case the movable provisionally attached has been transferred and delivered to a third party, what countermeasure can be taken?

1. Re: (1)
   1) Execution method
      a. In cases where the debtor possesses the movable in question:
         A bailiff shall possess the movable. (Article 565(4), 385(1))
      b. In cases where a third party possesses the movable in question:
         a) When the third party voluntarily surrenders the movable, the bailiff shall possess it. (Article 565(4), 386I)
         b) When the third party refuses to surrender the movable, he/she cannot be forced to do it. There is no other way but the creditor provisionally attaches the debtor’s right to demand delivery of the movable.
   2) Custody of the subject provisionally attached
      In principle, the bailiff shall keep the subject. However, when it is deemed reasonable, the bailiff shall allow the debtor to keep and use the subject attached. In this case, a sign of attachment is necessary by sealing the subject, etc. (Articles 565IV, 385IV and V)
2. Re: (2)

The first instance court to which the bailiff belongs may, upon motion by the creditor in provisional attachment, order the third party to surrender the subject in question to the bailiff (Articles 565IV, 390I). The bailiff may recover the subject provisionally attached in the same manner as in the case of execution of delivery of a movable as stipulated in Article 525.

40 How can a ruling of provisional attachment of movables without specifying the subject matter thereof (Art. 546, proviso) be executed? In this case, are there any limitations to the subject matter of provisional attachment?

1 Re: a ruling of provisional attachment of movables without specifying its subject matter

It is provided that a ruling of provisional attachment must be issued specifying its subject matter (Art. 546, main text), but in the case of movables, as it may be difficult in some cases to specify the subject matter at the time of issuing a ruling, the ruling of provisional attachment may be issued without specifying its subject matter (Art. 546, proviso). In such cases, the main text of the ruling of provisional attachment shall state, without specifying the subject matter, that the movable owned by the debtor shall be provisionally attached.

2 Re: execution

Execution of provisional attachment against movables shall be carried out by means of a bailiff taking possession of the subject matter (Art. 565(1)), and with regard to its concrete method, provisions regarding execution against movables shall apply *mutatis mutandis* (Art. 565(4); Art. 384(2); Art. 385 through 392). That is, the motion for execution of provisional attachment of movables shall describe the location of the movables to be attached (Art. 384). Then, the bailiff to whom the motion has been submitted shall enter such location indicated in the motion and search for and select the movables to be provisionally attached among those owned by the debtor (Art. 385(1) through (3)).

3 Limitation to the designation of subject matter of provisional attachment

(1) The bailiff may execute provisional attachment against movables possessed by the debtor (Art. 385(1)), and does not need to investigate whether the movables in question fall under ownership of the debtor. However, in cases where it is clear from the appearance of the movables that they are owned by a third party, the bailiff should not execute provisional attachment against them (cf. a baggage with a tag).

(2) As provisional attachment aims to secure the future execution against movables, provisional attachment shall naturally not be executed against the movables which are prohibited to be attached under Art. 380.

(3) In cases where provisional attachment of the movables in question fall under "excessive attachment" or "attachment with no prospect of producing a surplus", provisional attachment of such movables shall not be executed (Art. 565(4); Art. 391,392).

41 How can provisional disposition ordering forbearance be executed? For example, how should provisional disposition prohibiting: 1. construction, and 2. noise, be executed?

1. Provisional disposition prohibiting construction (when an object is created subject to removal through an illegal act)

   In cases where construction is conducted in violation of this provisional disposition, the creditor may, based on the ruling of the provisional disposition as the title for execution, remove the constructed part by means of substituted execution under Article 527. It is unnecessary for the creditor to file a motion of provisional disposition again seeking removal of the constructed part.

2. Provisional disposition prohibiting noise (when no object is created subject to removal through an illegal act)

   When an act in violation of this provisional disposition is committed, the creditor may, based on the ruling of the provisional disposition as the title for execution, demand a payment of a certain amount of money deemed reasonable to ensure the suspension of such an act through indirect enforcement under Article 528.

3. Compulsory execution of these types of provisional disposition is not available unless the debtor commits an illegal act, and opinions with regards to its execution period are divided into the following: 1. Execution time limit does not apply (two weeks: Article 562, paragraph 2); and 2. Two weeks of execution time limit applies from when an illegal act is committed. In Japan, the 1st theory is prevailing.

42 In cases where a ruling of preservative relief has been cancelled after its execution (due to an objection to the ruling, cancellation of preservative relief, deposit of the release money of provisional attachment, etc.), what procedure shall be taken?

*In this explanation paper, "P court" means the court that has issued a ruling of preservative relief, and "E court" means the court handling the execution of preservative relief. They are different from each other in provision, but in reality, one judge often plays roles of both courts.

The cancellation procedure of execution of preservative relief varies in accordance with the differences in the execution procedure of the ruling of each type of preservative relief. The outline of each procedure is given below:

1 Re: provisional attachment of immovable properties

(1) Procedure for execution:

Ruling of provisional attachment of immovable properties by P court (Art. 545 and 546)

-> Instructions by E court for registration of attachment (Art. 567)

-> Registration of provisional attachment of immovable properties

(2) Cancellation procedure of execution of preservative relief

The debtor submits to E court the cancellation ruling of the ruling of provisional attachment of immovable properties (Art. 564; Art. 370(1)(a)).

-> Execution cancellation ruling by E court, notice thereof to both parties

-> Instructions by E court for registration of cancellation of the above registration

* A *Chomtoah* appeal may be filed against the execution cancellation ruling (Art. 564, Art. 345(1)(a)).

2 Re: provisional attachment of movables

(1) Procedure for execution:

Ruling of provisional attachment of movables by P court (Art. 545 and 546)

-> Possession of the object by a bailiff (Art. 565)

(2) Cancellation procedure of execution of preservative relief

The debtor submits to the bailiff the cancellation ruling of the ruling of provisional attachment of movables (Art. 564; Art. 370(1)(a)).

-> Execution cancellation disposition by the bailiff ("ruling" is a decision which only the court is entitled to make, so bailiff can just make "disposition"). Specifically;

- In cases where the bailiff stores the object:

Notice of cancellation of provisional attachment shall be given to the debtor and the object shall be delivered to the debtor at the place of custody;

- In cases where the debtor stores the object:

Notice of cancellation of provisional attachment to the debtor shall be sufficient.

- In cases where the creditor stores the object:

The debtor may recover the object from the creditor by obtaining a ruling ordering restoration of the status quo of the object (Art. 555).

* An objection may be filed against the execution cancellation disposition, and a *Chomtoah* appeal may be filed against a ruling dismissing such objection (Art. 564; Art. 344(2); Art. 345(1)(c)).

3 Re: provisional attachment of a claim

(1) Procedure for execution:

Ruling of provisional attachment of a claim by P court (Art. 545 and 546)

-> Service of the ruling by E court to the debtor and the third party debtor (Art. 403(7), (8))

(2) Cancellation procedure of execution of preservative relief

The debtor submits to E court the cancellation ruling of the ruling of provisional attachment of a claim (Art. 564; Art. 370(1),(a)).

-> E court issues a cancellation ruling of execution, and gives notice of the ruling to both the creditor and the debtor, as well as notice of the ruling and of the provisional attachment losing effect to the third party debtor.

*A *Chomtoah* appeal may be filed against the execution cancellation ruling (Art. 564; Art. 345(1)(a)).

4 Re: provisional disposition prohibiting disposition of immovable properties

(1) Procedure for execution:

Ruling of provisional disposition prohibiting disposition by P court

-> Instructions by E court for registration

-> Registration of provisional disposition prohibiting disposition

(2) Cancellation procedure of execution of preservative relief

The debtor submits to E court the cancellation ruling of the ruling of provisional disposition prohibiting disposition (Art. 564; Art. 370(1)(a)).

-> Execution cancellation ruling by E court, notice thereof to both parties

-> Instructions by E court to delete the above-mentioned registration of provisional disposition

* A *Chomtoah* appeal may be filed against the execution cancellation ruling (Art. 564; Art. 345(1)(a)).

5 Re: provisional disposition prohibiting transfer of possession

(1) Procedure for execution:

Ruling of provisional disposition prohibiting transfer of possession by P court

-> Possession of the object and public notice thereof by a bailiff (Art. 571).

(2) Cancellation procedure of execution of preservative relief

The debtor submits to the bailiff the cancellation ruling of the ruling of provisional disposition prohibiting transfer of possession.

-> Cancellation of execution by the bailiff. Specifically;

- In cases where the bailiff stores the object:

  Notice of cancellation of execution of provisional disposition shall be given to the debtor and the object shall be delivered to the debtor.

- In cases where the debtor stores the object:

  Notice of cancellation of execution of provisional disposition shall be given to the debtor.

- In cases where the creditor stores the object:

  The debtor may recover the object from the creditor by obtaining a ruling ordering restoration of the status quo of the object (Art. 555).

6 Re: provisional disposition ordering provisional payment of money and delivery

(1) Procedure for execution:

Provisional disposition of provisional payment of money shall be executed under the procedure of execution of claim having the object of monetary payment (hereinafter, it is referred as "execution against money"). Execution against immovable or a claim shall be conducted by E court (Art. 402 and 418), and execution against movables shall be conducted by a bailiff (Art. 384).

Execution of provisional disposition of delivery shall be conducted by a bailiff through the delivery execution procedure (Art. 524 and 525).

(2) Cancellation procedure of execution of preservative relief

In both types of preservative relief, when the execution procedure has completed (for example, when delivery has completed), the procedure shall not be the object of cancellation of execution anymore. In such a case, the debtor may recover the paid money or the object from the creditor by obtaining a ruling ordering restoration of the status quo of the object (Art. 555).

When the execution procedure is ongoing, the execution cancellation procedure shall be taken under Art. 564 and Art. 370(1)(a).

7 Re: provisional disposition prohibiting construction, etc.

(1) Procedure for execution (cf. Q42)

Although P court serves the ruling of provisional disposition prohibiting construction on the debtor, as it orders forbearance to act, execution of the preservative relief is impossible unless any violation act has been committed.

In cases where a violation act has been committed, that is, construction has been

done, the creditor may file a motion for substituted execution claiming elimination of the constructed part and obtain the ruling prescribed by Art. 527(1) (and may obtain the ruling prescribed in 527(4) as well). In cases where the above-mentioned measures are not sufficient to obstruct continuance of the construction, it may be possible to take the indirect compulsory enforcement method. In this case, the provisional disposition shall be effected through the execution procedure against money by obtaining the ruling prescribed in Art. 528(1).

(2) Cancellation procedure of execution of preservative relief

a In cases where no execution has been conducted other than service of provisional disposition prohibiting construction on the debtor:

As the preservative relief execution procedure has not yet started, there is no room for cancellation of execution.

b In cases where substituted execution has been conducted:

- If substituted execution has already completed, the preservative relief shall not be an object of cancellation of its execution, and the debtor has no other choice but claim damages to the creditor (cf. Q18).
- If substituted execution is ongoing:

When the debtor submits to E court the cancellation ruling of provisional disposition prohibiting construction, E court shall issue a cancellation ruling of the ruling prescribed in Art. 527(1) (and of the ruling prescribed in Art. 527(4) as well if it has also been issued), and give notice thereof to both parties (Art. 564; Art. 370(1)).

c. In cases where the indirect compulsory enforcement procedure has been taken:

When the debtor submits to E court the cancellation ruling of provisional disposition prohibiting construction, E court shall issue a cancellation ruling of the ruling prescribed in Art. 528(1) and give notice thereof to both parties.

If execution against money is underway based on the ruling prescribed in Art. 528(1), the debtor submits the above-mentioned cancellation ruling of provisional disposition and E court shall take the cancellation procedure of execution against money.

43 After a ruling of provisional attachment has been issued regarding the subject matter, a third party X has appeared claiming his/her ownership of the subject. What measure can X take to exclude the effect of the provisional attachment?

X may file a third party objection suit against the creditor (Articles 564 and 365). The preservative relief procedure is divided into the 1st stage where preservative relief ruling is issued, and the 2nd stage where the ruling of preservative relief is executed. X may suffer damage only when the ruling is executed at the 2nd stage, as at the 1st stage the ruling is effective only between the creditor and debtor. Therefore, only the provision of an objection procedure against execution of the ruling at the 2nd stage is sufficient for X.

Time wise, X may file a third party objection suit before execution of preservative relief when the subject matter is specified in the ruling of preservative relief. When doing so, X may seek a adjudication of stay of execution(564, 367).

If X's claim is admitted, the main and conclusive text of judgment shall state as follows: "The court hereby does not allow the execution of preservative relief on (the subject matter) under the ruling of preservative relief." When this judgment is submitted to the execution court, execution shall be stayed and already executed disposition shall be canceled(564, 370(1)(b)).

44 Please explain, when money for release was deposited how do we think about the stay of execution?

Art. 569(1) said that "When the debtor has deposited with the court the amount prescribed in Art. 547, the court shall cancel the execution of the provisional attachment". In other word, Art. 569 does not mention the stay of execution.

The reason why Art. 569(1) refer only to cancellation of execution and doesn't refer to the stay of execution is that the stay of execution is not necessary in this situation.

Where the motion for execution is filed after the ruling to cancel the execution based on Art. 569(1), the court shall dismiss the motion for execution. Where the motion for execution has been filed before the ruling to cancel the execution based on Art. 569(1) (i.e. where the execution has already been commenced before the ruling to cancel the execution), the court shall cancel the execution that has already been carried out. Therefore the ruling to cancel the execution is enough for the creditor and the ruling to stay the execution is not necessary for the creditor.

The other reason is that the ruling to stay the execution might be inconvenient in this situation. If the court issues the ruling to stay execution but the creditor submits the authenticated copy of the ruling to execution organ pursuant to Art. 370(1) (g) after the commencement of the execution, the creditor may not seek the cancellation of execution by this ruling to stay the execution and the creditor has to get another ruling, ruling to cancel the execution in order to cancel the execution which has already been carried out.

In conclusion, when money for release is deposited, the ruling that court shall issue is not the ruling to stay execution but the ruling to cancel the execution.

Type of Preservative Relief

type of preservatiive relief	type of preservative relief	right to be preserved (541(1)(c))	necessity of preservative relief (541(1)(d))
provisional attachment (531(i))	provisional attachment against immovable	claims demanding the payment of money (545(1))	there is an apprehension that execution will become impossible or extremely difficult (545(1))
	provisional attachment against movable		
	provisional attachment against claim		
provisional disposition of subject matter of dispute (531(ii))	provisional disposition prohibiting the transfer of possession	claims demanding the delivery of the subject matter of dispute	there is an apprehension that execution will become impossible or extremely difficult by reason of alteration of said subject matter (548(1))
provisional disposition establishing a provisional status (531(iii))	provisional disposition establishing a provisional status	right or legal relation in dispute	it is deemed necessary in order to avoid significant damage or imminent risk to the creditor in relation to the right in dispute (548(2))

Type of Preservative Relief

type of preservatiive relief	method to issue the ruling		method to exeute the ruling	effect of execution	relation to the compulsory execution
provisional attachment (531(i))	the court shall stipulate the monetary amount for release of provisional attachment (547)		by means of registering the provisional attachment (567(1))	disposition of property against provisional attachment shall be invalid in relation to the compulsory execution procedure	the provisional attachment is switched to the attachment upon motion for compulsory execution.
		the court does not need to specify the subject matter (546)	the location of movable shall be noted in the form of motion (565(4), 384(2)) by means of the bailiff taking possession of the subject matter (565(1))	disposition of property against provisional attachment shall be invalid in relation to the compulsory execution procedure	
			by means of a ruling by the court of execution of preservative relief enjoining the third party debtor from paying the debtor (566(1))	disposition of property against provisional attachment shall be invalid in relation to the compulsory execution procedure	
provisional disposition of subject matter of dispute (531(ii))	ruling contains the order to prohibit thetransfer of possession of object, order to relinquish the possession and deliver the object to the bailiff, order that the bailiff shall have custody over the object and order that the bailiff shall give a public notice of said facts. (571(1))		by means of the bailiff taking possession of the subject matter and so on (571)	transfer of possession against provisional disposition shall be invalid in relation to the compulsory execution procedure so that the debtor in execution shall be fixed (571)	the compulsory execution may be carried out against the party other than a party noted in the title of execution with special execution clause (564, 356(2))
provisional disposition establishing a provisional status (531(iii))	the ruling may not be issued without holding either oral argument or examination which the debtor is able to attend (548(4)) exception ;548(4) proviso		by same means as that of compulsory execution based on the principal case jugdment	establish a provisional status, condition or right and the creditor can get tentative satisfaction	You don't need to carry out compulsory execution which has already been carried out in the execution of provisional disposition.

Security Amount for Release of Provisional Attachment

	purpose	Who deposit	what type of cases	mandatory of discretionary ?	amount to be deposited
security (542)	in order to secure compensation for the damage to the debtor by the error of preservative relief ruling see the last box in this row	the creditor	all (provisional attachment, provisionall disposition of subject matter in disput or provisional disposition establishing provisional status)	discretionary a ruling may be made **with or without** requiring the provision of security （542)	the court should estimate the amount of damage. The following matters should be taken into account –type and amount of the right to be preserved –type of preservative relief –type and amount of objective of preservative relief –occupation and economic situation of debtor –degree of preliminary showing
amount for release of provisional attachment (547)	in order to get the property to be released from the provisional attachment substitute for the property to be attached	the debtor	provisonal attachment case only	mandatory the court **shall** stipulate the monetary amount in the ruling(547)	amount of property provisionally attached or amount of claim to be preserved

Security Amount for Release of Provisional Attachment

	time to order	security to be deposited	which court the security shall be deposited with	effect of deposit	the case where the **dipositor** may claim the **taking back** of the security	the case where the **dipositary** may claim the **giving back** of the security
security (542)	the court may order the deposit of security before issuance of ruling of preservative relief or in the ruling of preservative relief (as a condition to execute the ruling)	money or valuable security (536)	the court that orders the deposit of security or preservative relief execution court (536)	the court shall issue and execute the ruling	grounds for the provision of security have disappeared (73(2)) ex) the creditor won the principal case the creditor obtain the consent of debtor (73(3)) the debtor fails to exercise the right within 2 weeks (73(4))	where the debtor suffers from damage caused by the erroneous ruling, the debtor may file a suit demanding the compansation for the damage against creditor. And when the debtor wins the case and the judgment has become final, the debtor may get satisfaction from the security in preference to other person pursuant to Art.72 of CCP.
amount for release of provisional attachment (547)	in the ruling of provisional attachment	money (547)	the court that issued the ruling of provisional attachment or the court of execution of preservative relief (547(2))	the court shall cancell the execution of the provisional attachment (569(1))	the creditor withdraws the motion for ruling of provisional attachment or motion for execution the ruling of provisional attachment is cancelled upon objection (550), motion for cancellation (557, 558, 559) or Chomtoah appeal (561).	where the creditor wins the principal case and the judgment has become final, the creditor may attach the claim for refund of deposited money based on the final judgmnt, i.e. title of execution (350, 402). In other words, the creditor gets satisfaction by means of execution agaist claim (402).

Objection, Chomtoah Appeal etc.

	subject matter	who files a motion	reason to file motion
objection to preservative relief (550)	the preservative relief ruling ×the ruling to dismiss the motion for preservative relief	debtor	ruling of preservative relief is not right
Chomtoah appeal against decision to dismiss (544)	the ruling to dismiss the motion for preservative relief (544)	creditor	ruling is not right
cancellation of preservative relief (557, 558, 559)	the preservative relief ruling ×the ruling to dismiss the motion for preservative relief	debtor	ruling itself is right but circumstances changes after the ruling
Chomtoah appeal (561)	the ruling concerning a motion of objection or motion to cancel a ruling, etc(561)	creditor or debtor	ruling is not right

Objection, Chomtoah Appeal etc.

	court to handle the case	procedure	May the parties file a motion of objection or Chomtoah appeal against ruling again ?
objection to preservative relief (550)	the court which isssued the original ruling (550)	the court shall hold oral arguments or examination at which both parties are entitled to be present (552) the court shall determine the date to conlude the case with a grace period (553)	Yes(561(1)(a)) exception: ruling on a motion of objection granted by a Chomtoah appeal court(561(1) proviso)
Chomtoah appeal against decision to dismiss (544)	Chomtoah appeal court	same as the procedure in which the original ruling has been issued (304(1), 273) examining the party (114(2)) discretionary POA (535(1), 114(1)proviso)	No (259(3)) but some exeption ; see the chart
cancellation of preservative relief (557, 558, 559)	the court which isssued the original ruling (557, 558, 559) or the court hearing the principal case (558, 559)	the court shall hold oral arguments or examination at which both parties are entitled to be present (560, 552) the court shall determine the date to conlude the case with a grace period (560, 553)	Yes(561(1)(a))
Chomtoah appeal (561)	Chomtoah appeal court	the court shall hold oral arguments or examination at which both parties are entitled to be present (561(3), 552) the court shall determine the date to conlude the case with a grace period (561(3), 553)	No (259(3)) but some exeption ; see the chart

Flowchart of Objection against Preservative Relief

in case the objection is filed with the first instance court
excluding the cancellation of ruling of preservative relief(557–560)