

上海金融法院

金融民商事纠纷保全和先予执行指南

一、保全

(一) 保全的申请

1. 人民法院对于可能因当事人一方的行为或者其他原因，使判决难以执行或者造成当事人其他损害的案件，根据对方当事人的申请，可以裁定对其财产进行保全、责令其作出一定行为或者禁止其作出一定行为；当事人没有提出申请的，人民法院在必要时也可以裁定采取保全措施。

人民法院采取保全措施，可以责令申请人提供担保，申请人不提供担保的，裁定驳回申请。

2. 利害关系人因情况紧急，不立即申请保全将会使其合法权益受到难以弥补的损害的，可以在提起诉讼或者申请仲裁前向被保全财产所在地、被申请人住所地或者对案件有管辖权的人民法院申请采取保全措施。申请人应当提供担保，不提供担保的，裁定驳回申请。

申请人在人民法院采取保全措施后三十日内不依法提起诉讼或者申请仲裁的，人民法院应当解除保全。

3. 当事人、利害关系人申请财产保全，应当向人民法院提交申请书，并提供相关证据材料。

申请书应当载明下列事项：

- (1) 申请保全人与被保全人的身份、送达地址、联系方式；
- (2) 请求事项和所根据的事实与理由；
- (3) 请求保全数额或者争议标的；
- (4) 明确的被保全财产信息或者具体的被保全财产线索；
- (5) 为财产保全提供担保的财产信息或资信证明，或者不

需要提供担保的理由；

(6) 其他需要载明的事项。

法律文书生效后，进入执行程序前，债权人申请财产保全的，应当写明生效法律文书的制作机关、文号和主要内容，并附生效法律文书副本。

4.仲裁过程中，当事人申请财产保全的，应当通过仲裁机构向人民法院提交申请书及仲裁案件受理通知书等相关材料。人民法院裁定采取保全措施或者裁定驳回申请的，应当将裁定书送达当事人，并通知仲裁机构。

5.当事人、利害关系人申请财产保全，应当向人民法院提供明确的被保全财产信息或具体财产线索。

6.再审审查期间，债务人申请保全生效法律文书确定给付的财产的，人民法院不予受理。

再审审理期间，原生效法律文书中止执行，当事人申请财产保全的，人民法院应当受理。

(二) 保全的担保

1.利害关系人申请诉前保全的，应当提供担保。申请诉前财产保全的，应当提供相当于请求保全数额的担保；情况特殊的，人民法院可以酌情处理。申请诉前行为保全的，担保的数额由人民法院根据案件的具体情况决定。

在诉讼中，人民法院依申请或者依职权采取保全措施的，应当根据案件的具体情况，决定当事人是否应当提供担保以及担保的数额。

2.人民法院依照民事诉讼法相关规定责令申请保全人提供财产保全担保的，担保数额不超过请求保全数额的百分之三十；申请保全的财产系争议标的的，担保数额不超过争议标的价值的

百分之三十。

财产保全期间，申请保全人提供的担保不足以赔偿可能给被保全人造成的损失，人民法院可以责令其追加相应的担保；拒不追加的，可以裁定解除或者部分解除保全。

3.申请保全人或第三人为财产保全提供财产担保的，应当向人民法院出具担保书。担保书应当载明担保人、担保方式、担保范围、担保财产及其价值、担保责任承担等内容，并附相关证据材料。

第三人为财产保全提供保证担保的，应当向人民法院提交保证书。保证书应当载明保证人、保证方式、保证范围、保证责任承担等内容，并附相关证据材料。

对财产保全担保，人民法院经审查，认为违反民法典、公司法等有关法律禁止性规定的，应当责令申请保全人在指定期限内提供其他担保；逾期未提供的，裁定驳回申请。

4.保险人以其与申请保全人签订财产保全责任险合同的方式为财产保全提供担保的，应当向人民法院出具担保书。

担保书应当载明，因申请财产保全错误，由保险人赔偿被保全人因保全所遭受的损失等内容，并附相关证据材料。

5.金融监管部门批准设立的金融机构以独立保函形式为财产保全提供担保的，人民法院应当依法准许。

6.当事人在诉讼中申请财产保全，有下列情形之一的，人民法院可以不要求提供担保：

- (1) 人民检察院提起的公益诉讼涉及损害赔偿的；
- (2) 案件事实清楚、权利义务关系明确，发生保全错误可能性较小的；
- (3) 申请保全人为商业银行、保险公司等由金融监管部门

批准设立的具有独立偿付债务能力的金融机构及其分支机构的。

法律文书生效后,进入执行程序前,债权人申请财产保全的,人民法院可以不要要求提供担保。

二、先予执行

(一) 人民法院对因情况紧急需要先予执行的案件,根据当事人的申请,可以裁定先予执行。情况紧急包括以下情形:

- 1.需要立即停止侵害、排除妨碍的;
- 2.需要立即制止某项行为的;
- 3.追索恢复生产、经营急需的保险理赔费的;
- 4.需要立即返还社会保险金、社会救助资金的;
- 5.不立即返还款项,将严重影响权利人生活和生产经营的。

(二) 人民法院裁定先予执行的,应当符合下列条件:

- 1.当事人之间权利义务关系明确,不先予执行将严重影响申请人的生活或者生产经营的;
- 2.被申请人有履行能力。

人民法院可以责令申请人提供担保,申请人不提供担保的,驳回申请。申请人败诉的,应当赔偿被申请人因先予执行遭受的财产损失。

三、复议

当事人对保全或者先予执行的裁定不服的,可以自收到裁定书之日起五日内向作出裁定的人民法院申请复议一次。复议期间不停止裁定的执行。

人民法院应当在收到复议申请后十日内审查。裁定正确的,驳回当事人的申请;裁定不当的,变更或者撤销原裁定。

利害关系人对保全或者先予执行的裁定不服申请复议的,由作出裁定的人民法院依照民事诉讼法相关规定处理。

Guidelines for Preservation Measures and Preliminary Enforcement in Financial Civil and Commercial Disputes

I. Preservation Measures

1. Application

(1) Upon the application of a party, the People's Court may order preservation measures of property, compel specific actions, or prohibit certain actions where it determines that a judgment may be difficult to enforce or that the party's rights may be harmed due to the actions of the opposing party or other circumstances. The People's Court may also order preservation measures at its discretion as necessary.

The People's Court may require the applicant to provide a guarantee when adopts preservation measures. If the applicant fails to provide a guarantee, the application will be dismissed.

(2) Where interested parties face urgent circumstances and immediate preservation is necessary to prevent irreparable harm to their lawful rights, they may apply for preservation measures to the People's Court at the location of the property to be preserved, the domicile of the respondent, or the People's Court with jurisdiction over the case before initiating litigation or arbitration. The applicant must provide a guarantee; otherwise, the application will be dismissed.

If the applicant fails to lawfully initiate litigation or arbitration within 30 days after the People's Court adopts preservation measures,

the People's Court will lift the preservation.

(3) Parties or interested parties applying for property preservation shall submit a written application and relevant evidentiary materials to the People's Court.

The application shall include:

- a. The identities, service addresses, and contact details of the applicant and the respondent;
- b. The claims, factual basis, and legal grounds;
- c. The amount sought to be preserved or the subject matter of the dispute;
- d. Specific information or clues regarding the property to be preserved;
- e. Details of the guarantee provided (e.g., property information, credit certificates) or reasons for exemption from providing a guarantee;
- f. Other necessary information.

If a creditor applies for property preservation after a legal document has taken effect but before enforcement proceedings commence, the application must specify the issuing authority, document number, and key contents of the effective legal document, accompanied by a copy thereof.

(4) During arbitration proceedings, the parties applying for property preservation shall submit the application and arbitration case acceptance notice through the arbitration institution to the People's Court. Where the People's Court rules on the adoption of preservation measures or rules on the dismissal of the application,

the court's decision will be served to the the parties and the arbitration institution will be notified.

(5) When parties or interested parties apply for property preservation, clear information or clues regarding the property shall be provided.

(6) During retrial review, the People's Court will not accept applications for preservation of property specified in an effective legal document.

During retrial proceedings, where the enforcement of the original effective legal document is suspended, the People's Court will accept preservation applications.

2. Guarantee for Preservation

(1) Interested parties applying for pre-litigation preservation must provide a guarantee. For pre-litigation property preservation, the guarantee amount shall generally equal the preservation amount requested; the People's Court may adjust this based on special circumstances. For pre-litigation behavioral preservation, the guarantee amount shall be determined by the People's Court.

In ongoing litigation, the People's Court shall decide whether a guarantee is required and its amount based on the case specifics.

(2) Where the People's Court orders a guarantee under the Civil Procedure Law of the People's Republic of China, the guarantee amount shall not exceed 30% of the preservation amount requested. If the preserved property is the subject of the dispute, the guarantee shall not exceed 30% of the property's value.

If the guarantee provided is insufficient to cover potential losses to the respondent during preservation, the People's Court may order the

applicant to provide additional guarantee. Refusal to provide additional guarantee may result in partial or full lifting of the preservation.

(3) A written guarantee for property preservation provided by the applicant or a third party shall be submitted to the People's Court, specifying the guarantor, guarantee method, scope, property details, value, and liability. Supporting evidence must be attached.

If a third party provides a guarantee, a written guarantee with the above details and evidence shall be submitted.

If the guarantee violates mandatory provisions relating to the Civil Code, the Company Law, or other relevant laws, the People's Court will order the applicant to provide an alternative guarantee within a specified period. Failure to comply results in dismissal of the application.

(4) An insurer providing a guarantee via a preservation liability insurance contract shall submit a written guarantee to the People's Court, stating that the insurer will compensate the respondent for losses caused by erroneous preservation. Supporting evidence must be attached.

(5) Financial institutions approved by regulatory authorities may provide guarantees in the form of independent letters of credit, which the People's Court will accept.

(6) The People's Court may waive the guarantee requirement in the following circumstances:

- a. Public interest litigation filed by the People's Procuratorate;
- b. Cases with clear facts and law application, where the risk of

erroneous preservation is very low;

c. Applicants are financial institutions (e.g., commercial banks, insurers) and their branches approved by regulatory authorities with independent solvency.

Guarantees may also be waived for creditors applying for preservation after a legal document takes effect but before enforcement proceedings commence.

II. Preliminary Enforcement

1. The People's Court may order preliminary enforcement upon a party's application in urgent cases, including:

- (1) Immediate cessation of infringements or removal of obstructions;
- (2) Immediate prohibition of specific actions;
- (3) Recovery of urgently needed insurance claims to resume production or operations;
- (4) Immediate return of social insurance or relief funds;
- (5) Situations where delayed repayment would severely impact the applicant's livelihood or business operations.

2. Preliminary enforcement ruled by the People's Court shall meet the following conditions:

- (1) The rights and obligations between the parties are clear, and failure to enforce would severely affect the applicant's livelihood or business operations;
- (2) The respondent has the capacity to fulfill the obligations.

The People's Court may require the applicant to provide a guarantee. Failure to do so results in dismissal. If the applicant loses the case,

they shall compensate the respondent for losses caused by preliminary enforcement.

III. Reconsideration

Parties dissatisfied with rulings on preservation or preliminary enforcement may apply for reconsideration to the issuing People's Court within 5 days of receiving the ruling. Enforcement continues during reconsideration.

The People's Court will review the application within 10 days of receipt. If the ruling is correct, the application will be dismissed; if incorrect, the ruling will be amended or revoked.

Reconsideration applications from interested parties will be handled by the issuing People's Court in accordance with the Civil Procedure Law of the People's Republic of China.