

# **Introduction On The Provisional Attachment Order And The Evidence Preservation Order In Taiwan**

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## **I. Introduction**

In Taiwan, a civil law country, there are various interim measures provided under the Taiwan Code of Civil Procedure (“TCCP”)<sup>2</sup>, the pivotal legislation governing procedures applicable to civil actions and relevant proceedings. This article will introduce two of them – the provisional attachment order, and the evidence preservation order.

The provisional attachment order in Taiwan has a very similar purpose to the Mareva injunctions (or freezing orders) – to prevent a defendant/debtor from dissipating assets with the purpose to frustrate the future enforcement of final judgment of a civil action. In Taiwan, since only a final judgement that is no long appealable can be applied for compulsory enforcement, and the time needed for a civil lawsuit to proceed from pleadings stage to final judgment can range from less than one year to as long as several years, by the time the plaintiff finally obtains a final judgment and successfully secures an execution order, the defendant may have already been insolvent or without any asset/property to be liquidated. There can be more hardships where the civil action is filed by a foreign plaintiff against a local defendant, as the procedural progress can be further delayed by the lengthy service of process, need for translation back and forth, etc., which gives sufficient time for the defendant to dispose of or hide assets beyond the point of recovery when the plaintiff is finally rendered an enforceable judgment. Therefore, it is necessary that the plaintiff is able to attach the defendant’s assets and properties before the defendant is aware of the initiation of the civil litigation, so as to avoid the outcome that there is no asset/property to be liquidated to satisfy the claims as granted in the judgment. In this regard, the provisional attachment order provides the plaintiff/creditor with a very useful interim measure to realize the ultimate purpose of filing a civil action – seeking monetary compensation from liquidating the defendant/debtors assets and properties. This article will discuss in detail the procedural steps as well as the elements for

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<sup>2</sup> The full text of relevant articles of TCCP discussed herein can be found in Appendix 1 hereto.

grating a provisional attachment order.

As to the evidence preservation order, since there is no discovery system (like the one in the U.S.) under TCCP, it can be very challenging for the plaintiff to locate and produce evidence. Basically, the plaintiff would need to investigate, collect, and produce all the evidence required to support the case. What further complicates the situations is where the evidence can be easily destroyed or concealed, such as paper documents, data storage devices such as portable disks or CDs/DVDs, etc. To address such difficulty, TCCP provides for the evidence preservation order that allows a party to petition the court to locate and investigate relevant evidence, which can be applied for even before the start of the civil action. This article will briefly touch upon this topic to give a general idea of this interim measure.

## **II. Filing An Application For An Provisional Attachment Order**

It should first be noted that a provisional attachment order is only intended to attach the defendant's assets/properties to secure the future compulsory enforcement of a final judgement on monetary claims (such as unpaid salaries), or claims that can be converted into monetary claims (such as damage claims for physical injury)<sup>3</sup>. For non-monetary claims (such as prohibiting someone from disseminating defamatory information about the plaintiff), the plaintiff should petition the court to issue a "provisional injunction order" to serve such purpose. In practice, it is a lot more difficult to obtain a provisional injunction order from the court than to obtain a provisional attachment order, since the provisional injunction order, once issued, in effect will satisfy the plaintiff's claim before the court has even reviewed the merits of the case or rendered a judgment thereto. Thus, the order must be granted in a very cautious manner in order to minimize the damages to the defendant that can be caused by such an order.

To obtain a provisional attachment order, the petitioner (i.e. plaintiff) should prepare an application brief to be filed with a district court having jurisdiction over the respondent's (i.e. defendant) domicile (in the case of a natural person) or registered place of business (in the case of a legal entity). Alternatively, the application can be filed with the district court having jurisdiction over the geographical region where the assets/properties to be attached are located in. The application is to be made on an *ex parte* basis. Pursuant to TCCP, the application brief must clearly state, among other information, the following basic facts: (1) the

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<sup>3</sup> See Art. 522 of TCCP in Appendix 1 hereto.

parties and their legal representatives, if applicable; (2) the subject claim and the facts underlying the claim; (3) the ground(s) for provisional attachment; and (4) the court having jurisdiction over the application<sup>4</sup>. Failing to state the above facts may result in the premature dismissal of the application by the court. The application should be accompanied by a filing fee of NT\$1,000 (approx. US\$32) payable to the court, which is minimal compared to the court fee of approximately 1~1.5% of the monetary claim amount for filing a civil action in Taiwan.

### **III. Elements For Granting A Provisional Attachment Order**

When receiving an application for provisional attachment order, the court's review will primarily focus on the two principle facts stated in the application brief: the subject claim (and the underlying facts giving rise to the claim), and the ground(s) for provisional attachment, which in practice is commonly referred to as “the necessity of preservation.”

#### **i. The Subject Claim**

It is quite straightforward as to the subject claim and the underlying facts giving rise to the claim. This is basically the same claim and same facts the petitioner will argue in the later civil action. The court would only take a cursory review on this element and, according to TCCP, the court should not render any decision on the merits of the dispute because this is the job for the court trying the subsequent civil litigation. As long as the petitioner has met the required level of proof (as elaborated later in this article) on this element, the court would simply find the petitioner's subject claim to be true (merely for purpose of deciding whether a provisional attachment order should be granted) and proceed to review the next element – the necessity of preservation.

#### **ii. The Necessity Of Preservation**

Regarding the ground(s) for provisional attachment, or the “the necessity of preservation,” in practice this element is subject to rigorous disputes in provisional attachment cases, and the courts have rendered contradictory rulings in this respect. According to Art. 523 of TCCP, the “the necessity of preservation” shall mean “...*impossibility or extreme difficulty* to satisfy the claim by compulsory execution in the future.” The Taiwan Supreme Court (hereinafter the “Supreme Court”) has in

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<sup>4</sup> See Art. 525 of TCCP in Appendix 1 hereto.

many cases expressed its opinions on the substance of this requirement, and these opinions can be roughly divided into two major approaches: the relaxed approach, and the stringent approach.

The relaxed approach only requires the petitioner to produce evidence capable of preliminarily showing (which will be explained in detail later in this article) that there is a drastic difference/gap between the claim amount and the respondent's assets/properties. For example, in a 2016 ruling of the Supreme Court (*Tsui Kao Fa Yuen 105 Nien Tu T'ai Con Tzu Ti 106 Hao Tsai Ding* [Supreme Court 2016 Tai-Appeal Ruling No.106]), the Supreme Court held that because the damage amount claimed by the petitioner is approximately NT\$ 160 million, and the respondent company has published in 2014 that its accumulated loss has reached one half of its paid-in capital, that the respondent still has outstanding loans of approximately NT\$ 550 million, and that in its financial report for year 2014-2015 a deficit not yet compensated in the amount of approximately NT\$ 700 million was reported, the respondent company is on the verge of insolvency, or there is a drastic gap between its assets and the petitioner's claim amount, and ruled that the lower court's granting a provisional attachment order is consistent with the laws.

On the other hand, the stringent approach requires that the petitioner has to produce evidence capable of preliminarily showing that the respondent intends to or is dissipating assets, such as conducting wasteful disposition of assets, increasing encumbrances on assets, or other similar disadvantageous dispositions over the assets that could soon result in the respondent's insolvency, or the respondent is trying to move to a distant place to conceal its whereabouts (for example, *Tsui Kao Fa Yuen 106 Nien Tu T'ai Con Tzu Ti 917 Hao Tsai Ding* [Supreme Court 2017 Tai-Appeal Ruling No.917]). This requirement is apparently harder to satisfy than the above approach and more unfavorable to the petitioner, as it could have already been too late for the petitioner to attach the respondent's assets if the timing has come to the point that the petitioner has become aware that the respondent is dissipating assets or has planned or is about to run away.

The Supreme Court's decisions published in the last five years have been quite divided on this issue, and there is yet a majority opinion that can serve as a guiding principle. As a result, any one case can go either way given such situation.

#### **IV. Level Of Proof Required For Granting A Provisional Attachment Order**

Art. 526 of TCCP requires the petitioner of a provisional attachment order to establish “a *preliminary showing* of the claim and the ground for the provisional attachment.” That is, the petitioner must produce evidence sufficient to preliminarily show the above mentioned two principle elements for granting a provisional attachment order.

Under Taiwan laws, the concept of “preliminary showing” is as opposed to the concept of “proving” something is true or untrue, and the required level of proof for “preliminary showing” is lower than that of “proving.” The Supreme Court in cases has explained that a preliminary showing shall mean the evidence produced by the producing party is capable of creating a weak, roughly-so mental impression on the judge. *Tsui Kao Fa Yuen 104 Nien Tu T'ai Con Tzu Ti 712 Hao Tsai Ding* [Supreme Court 2015 Tai-Appeal Ruling No.712].

To establish a preliminary showing of the element of subject claim may not be particularly difficult in a provisional attachment case. In practice, as long as the petitioner can provide the court with some relevant evidence, such as copies of agreements, communications between the parties concerning a damage dispute, etc., and state a claim based on such evidence which would appear generally reasonable from an ordinary person’s view, the court would mostly find that the preliminary showing of this element is met.

On the other hand, it can take lots of efforts in successfully establishing preliminary showing of the element “necessity of preservation” in a provisional attachment case. One reason is that, in those cases the court adopts the aforementioned stringent approach for this element, the evidence needed to show that the respondent intends to or is dissipating assets may be very difficult to collect because the petitioner would have no idea as to the activities of the respondent, unless the respondent voluntarily or accidentally discloses to the petitioner, which is seldom the case. That said, for those cases that the court adopts the more relaxed approach for this element, establishing preliminary showing can be achieved by producing public information such as the respondent’s company registration information (which includes its paid-in capital information), financial reports, press releases or news reports, etc. to demonstrate the drastic gap between the claim amount and the respondent’s assets and properties.

Moreover, TCCP also provides for a chance for the petitioner to post a security bond, subject to the court's discretion, where the court finds that the evidence produced is insufficient to establish the required preliminary showing<sup>5</sup>. In practice, the court would normally set the required security bond at 1/3 of the claim amount. It should be noted that under TCCP the court has the authority to request the said security bond to be posted even in the case where the court finds that the petitioner has successfully established the preliminary showing, which is purported to compensate the potential damages the respondent may suffer due to the enforcement of the provisional attachment.

A small caveat to be added to the above is that, TCCP provides for a *per se* reason for the court to find that there exists "necessity of preservation." Namely, according to Para. 2, Art. 523 of TCCP, it is provided that "In cases where the compulsory execution must be performed in a foreign country, extreme difficulty shall be deemed to be shown." In practice this can be utilized by a foreign entity seeking provisional attachment in Taiwan against another foreign entity's local assets, since the petitioner will need to proceed with compulsory execution "in a foreign country" (i.e. the home country of the respondent) due to insufficient local assets to satisfy the full amount of claim, if and once it has obtained a final judgement or arbitration award in an appropriate foreign jurisdiction regarding the dispute.

## **V. Subsequent Procedural Steps After A Provisional Attachment Order Has Been Granted**

If the petitioner manages to overcome all the above mentioned hassles and successfully obtains a provisional attachment order from the court, the petitioner can then base on the order to file a request with the local tax authorities to examine the financial information of the respondent, which is originally not available to the petitioner when first applying for the provisional order. Such financial information may render more details on the assets and properties of respondent that are to be attached pursuant to the order. However, the financial information would still be limited to those that have been disclosed or reported by the respondent to the tax authority.

The provisional attachment order must be enforced within thirty days upon rendering. *Compulsory Enforcement Act of Taiwan*, Article 132, Paragraph 3. The petitioner may further decide whether to enforce the order if the information from the

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<sup>5</sup> See Art. 526 of TCCP in Appendix 1 hereto.

tax authority shows that the respondent's assets and properties are not quite worth the efforts to proceed with the enforcement. If so, the petitioner may decide to let the order expire, which is without prejudice and the petitioner may file another application for provisional attachment later once the petitioner learns other financial information of the respondent. On the other hand, the respondent may petition the court to order the petitioner to initiate a civil action within a specific period, and the petitioner's failing to comply would result in the vacation of the attachment order. For a foreign party, it is sufficient for it to submit with the court a proper proof that an action has been filed in the relevant foreign jurisdiction. Lastly, the respondent may also post a bond of 100% of the amount of the attachment order so as to petition the court to release the attached assets.

## **VI. Brief Introduction On The Evidence Preservation Order**

Taiwan does not have a system facilitating an extensive production of evidence as the U.S. discovery procedure. Also, in a civil litigation, since the plaintiff shall bear the burden of proof to support the claim, basically the plaintiff has to investigate, collect, and produce all the evidence required to support the case. That said, TCCP provides for the evidence preservation order, which works somewhat similar to a discovery and is often utilized by the plaintiff to explore and obtain basic evidence from the opposing party. A motion for the court to issue an evidence preservation order can be filed even before the start of the corresponding civil action. Further, in order to prevent the opposing party from spoliating the evidence, the motion is filed and the court basically would review the motion *ex parte*.

In practice, the order is particularly useful for plaintiffs filing IP related actions because the evidence critical to prove IP infringements as well as the damages resulting therefrom, such as pirated CDs/DVDs, counterfeit goods, devices infringing upon others' patents, etc., can be easily destroyed or concealed. Also, the approval rate by the IP court on such a motion mostly hovers around 30% to 40%, which makes much sense for the IP infringement victim to utilize this procedure to secure evidence.

In a real case, the IP court upon receiving such a motion will hold a one-party hearing on the movant to understand the basic facts and the grounds for the preservation. The IP court may even discuss with the movant as to the method the evidence is to be preserved. After the IP court grants such a motion, the court in most situations would decide to conduct an investigation on-site of the opposing party's premises to look for and preserve the evidence. The investigation would

work like a dawn raid because, clearly, the court would not give any advance notice to the opposing party, thus the party would only learn of the investigation upon the occurrence thereof. However, there is a recent trend in various court cases that the IP court would choose to issue an order demanding the opposing party to voluntarily produce the relevant materials/documents as specified in the order within a prescribed time period. According to Art. 345 and 282-1 of TCCP, a party failing to comply with the order may face adverse consequences including that the court may find the movant's argument in the subsequent proceedings on the merits to be true, or find the facts to be proved by such evidence to be true.

## **VII. Conclusion**

In Taiwan, the provisional attachment order is commonly utilized by the plaintiff/petitioner due to the relatively high rate of successfully obtaining such an order from the court than petitioning for a provisional injunction order, as well as because that the required level of proof – “preliminary showing” – is not so hard to meet as compared to the level of “proving” a fact is true. Also, since the petitioner can post a security bond, subject to the court's discretion, where the court finds that the evidence produced is insufficient to establish the required preliminary showing, this further increases the chance of success of the petitioner in seeking a provisional attachment order. As to the evidence preservation order, while it is not as extensive or effective as the U.S. discovery system in terms of the scope of evidence collection/production, it can serve as a basic but useful interim measure for the plaintiff to preserve critical evidentiary objects or documents in cases where the evidence can be easily destroyed or concealed, such as in those IP infringing cases.



## **Appendix 1 – Relevant articles of the Taiwan Code of Civil Procedure**

### **Article 282- 1**

Where a party intentionally destroys or hides a piece of evidence, or makes it difficult to use, for the purpose of obstructing the use of such evidence by the opposing party, the court may, in its discretion, take as the truth the opposing party's allegation with regard to such evidence or the disputed fact to be proved by such evidence.

In the case provided in the preceding paragraph, the parties shall be accorded an opportunity to present their arguments.

### **Article 345**

Where a party disobeys an order to produce documents without giving a justifiable reason, the court may, in its discretion, take as the truth the opposing party's allegation with regard to such document or the fact to be proved by such document.

In the case provided in the preceding paragraph, the parties shall be accorded an opportunity to present their arguments.

### **Article 368**

Where it is likely that evidence may be destroyed or its use in court may be difficult, or with the consent of the opposing party, the party may move the court for perpetuation of such evidence; where necessary, the party who has legal interests in ascertaining the status quo of a matter or object may move for expert testimony, inspection or perpetuation of documentary evidence.

The perpetuation of evidence provided in the preceding paragraph shall be governed by the provisions of this Section relating to evidence-taking.

### **Article 369**

Where the action has been initiated, the motion for perpetuation of evidence shall be made in the court in which the case is pending; where the action has not been initiated, such motion shall be made in the district court at the place either where the person to be examined domiciles/resides or where the tangible evidence is located.

In urgent cases, a motion for perpetuation of evidence may be made, even if the action has been initiated, in the district court provided in the preceding paragraph.

### **Article 370**

A motion for perpetuation of evidence shall specify the following matters:

1. The identity of the opposing party or the reason if the opposing party cannot be identified;

- 2.The evidence to be perpetuated;
- 3.The disputed fact to be proved by such evidence; and
- 4.The reason why the evidence must be perpetuated.

A preliminary showing shall be made with regard to the reasons provided in the first to the fourth subparagraphs inclusive of the preceding paragraph.

#### **Article 371**

The court where the motion for perpetuation of evidence was filed shall rule on the motion.

A ruling granting the perpetuation of evidence shall specify the evidence and any disputed fact to be proved by such evidence.

An appeal may be taken from a ruling denying the motion for the perpetuation of evidence; a ruling granting the perpetuation of evidence is not reviewable.

#### **Article 372**

Where the court considers it necessary, the court may, on its own initiative, render a ruling to perpetuate evidence pending an action.

#### **Article 373**

The date designated for taking evidence shall be notified to the movant; except in cases of urgency or the existence of circumstances which will obstruct the perpetuation of evidence, the opposing party shall also be notified by being served with the motion pleading or transcript and the ruling prior to the designated date.

Parties who appear on the date provided in the preceding paragraph may be ordered to state their opinions.

#### **Article 374**

Where the opposing party either is unknown or cannot be notified prior to the date designated for taking evidence, the court may appoint a special representative for such party for purposes of protecting his/her rights with regard to the evidence-taking.

The provisions of the third paragraph to the fifth paragraph inclusive of Article 51 shall apply mutatis mutandis to the special representative provided in the preceding paragraph.

#### **Article 375**

The evidence-taking transcript shall be kept by the court which orders the perpetuation of evidence. Notwithstanding, where the action has been initiated in another court, the transcript should be forwarded to such court.

**Article 375- 1**

Where a party, in the oral-argument sessions, moves for the reexamination of a witness who has been examined in the perpetuation of evidence proceeding, the court shall examine such witness, except where the court considers it unnecessary.

**Article 376**

Except as otherwise provided, the expenses for preserving evidence shall be included in the litigation expenses, and the responsibility for those expenses shall be decided accordingly.

**Article 376- 1**

Before an action is initiated, when both parties appear on the date designated for the perpetuation of evidence and reach an agreement with regard to the claim, the facts, the evidence or other matters, then the court shall make a note of such agreement in the transcript.

Where the agreement provided in the preceding paragraph is reached with regard to the claim, the court shall also make a note in the transcript of the agreed legal responsibility and the circumstances under which the dispute arose. Where a party shall tender a specific performance according to the agreement, the transcript may serve as a writ of execution.

Where an agreement has been reached, the authenticated copy of the transcript shall be served upon parties within ten days.

The provisions of Articles 212 to 219 inclusive shall apply mutatis mutandis to the transcript provided in the preceding paragraph.

**Article 376- 2**

Where the action is not initiated after a thirty-day period has lapsed from the day following the conclusion of the perpetuation of evidence proceeding, the court may, on motion by an interested person, release the document or object retained for purposes of its perpetuation or take other appropriate measures.

Where the action is not initiated within the period provided in the preceding paragraph, the court may, on motion by an interested person, order the movant to bear the expenses for the proceeding.

An appeal may be taken from the ruling provided in the two preceding paragraphs.

**Article 522**

A creditor may apply for provisional attachment with regard to monetary claims or

claims exchangeable for monetary claims for purposes of securing the satisfaction of a compulsory execution.

The application provided in the preceding paragraph may be made with regard to claims subject to a condition or time.

**Article 523**

No provisional attachment is to be granted unless there is a showing of the impossibility or extreme difficulty to satisfy the claim by compulsory execution in the future.

In cases where the compulsory execution must be performed in a foreign country, extreme difficulty shall be deemed to be shown.

**Article 524**

The court having jurisdiction over the principal case, or the court at the place where the object of the provisional attachment is located, has jurisdiction over the application for provisional attachment.

The court having jurisdiction over the principal case shall be the court of first instance in which the action is pending or to be pending. Notwithstanding, where the action is pending in a court of second instance, that court of second instance is deemed to be the court having jurisdiction over the principal case.

Where the object of the provisional attachment is a creditor's right, or a proprietary right which must be registered, the place where the object of the provisional attachment is located shall be the place where the debtor domiciles or the object of security therefor is located or registered.

**Article 525**

An application for provisional attachment shall specify the following matters:

1. The parties and their statutory agents;
2. The claim and the transactions or occurrences giving rise to such claim;
3. The ground for the provisional attachment; and
4. The court.

In cases where the claim is not represented by a fixed dollar amount, the value thereof shall be indicated.

In cases where the court at the place where the object of the provisional attachment is located exercises jurisdiction over the application, that object of provisional attachment and the place where it is located must be indicated.

**Article 526**

A preliminary showing of the claim and the ground for the provisional attachment must be made.

In cases of insufficiency in the preliminary showing provided in the preceding paragraph, where the creditor has represented willingness to provide a security or where it is deemed appropriate by the court, the court may assess an amount for the security and issue a ruling for a provisional attachment upon the creditor's provision of such security.

The court may still order the creditor to provide a security for the provisional attachment sought despite the fact that the preliminary showing of the claim and the ground for the provisional attachment has been made by the creditor.

Where a husband or a wife petitions for a provisional attachment, based on the right to claim for distribution of the remainder of a husband and wife's property, the dollar amount ordered by the court for security, as described in the preceding paragraph, shall not be more than one tenth of the petitioned amount.

#### **Article 527**

A provisional attachment ruling shall provide that the debtor may be exempt from or move for revocation of the ruling by providing the court-assessed countersecurity or by lodging the amount claimed.

#### **Article 528**

An appeal may be taken from the ruling made with regard to the application for provisional attachment.

The superior court shall, before issuing the ruling, accord the creditor and the debtor an opportunity to be heard.

Where the appeal is considered meritorious, the superior court shall promptly rule on the claim asserted in that appeal.

No appeal taken from a ruling granting provisional attachment operates to affect the performed execution of the provisional attachment until a ruling denying the application for such provisional attachment is issued and becomes final and binding.

#### **Article 529**

In cases where the principal action is yet to be initiated, the court issuing the provisional attachment ruling shall, on the debtor's motion, order the creditor to initiate the action within a designated period of time.

Each of the following acts shall operate as the initiation of the action provided in the preceding paragraph:

1. Applying for issuance of a payment order in accordance with the demand

proceeding;

2. Applying for mediation in accordance with the provisions of this Code;
3. Making the demand provided in the second paragraph of Article 395;
4. Instituting an arbitration proceeding in accordance with the applicable laws;
5. Performing other preliminary proceeding which is required by the applicable laws to be performed prior to the initiation of an action;
6. Where an application for provisional attachment is based on the right to claim for distribution of the remainder of a husband and wife's property and having applied for declaration of the separation of property regime in accordance with the provision of Article 1010 of the Civil Code.

In cases provided in the sixth subparagraph of the preceding paragraph, the creditor shall, within ten days from the day when the ruling declaring the separation of property regime becomes final and binding, initiate an action to claim for distribution of the remainder of husband and wife's property.

Where the creditor has failed either to initiate the action within the designated period of time provided in the first paragraph or to comply with the provision of the preceding paragraph, the debtor may move for revocation of the provisional attachment ruling to the court issuing such ruling.

#### **Article 530**

The debtor may move for revocation of the provisional attachment ruling where the grounds for provisional attachment has vanished, or the judgment finding the creditor to be the defeated party in the principal action has become final and binding, or the circumstances requiring a ruling for provisional attachment have changed..

The provisions of the third and the fourth paragraphs of Article 528 shall apply *mutatis mutandis* to the revocation of the provisional attachment ruling provided in the preceding paragraph.

The creditor may move for revocation of the provisional attachment ruling.

The motions provided in the first paragraph and the preceding paragraph shall be made to the court ordering the provisional attachment or, where the principal action has been initiated, the court in which such principal action is pending.

#### **Article 531**

Where a provisional attachment ruling is revoked either by reason of being improper *ab initio* or by reason of the provisions of the fourth paragraph of Article 529 or the third paragraph of Article 530, the creditor shall compensate the debtor for any losses incurred from the provisional attachment or the provision of a countersecurity.

Where an action has been initiated with regard to the claim secured by the provisional

attachment, the court of first instance shall, on the debtor's motion made before the conclusion of the oral argument, order the creditor to make the compensation provided in the preceding paragraph in the judgment on the principal case. The court shall inform the debtor of the availability of such motion if he/she has not done so.