Civil Justice

Volume 33 Issue 1 2014

QUARTERLY

Editor: A.A.S. Zuckerman

SWEET & MAXWELL

A European-wide Preservation Order: How the Common Law Practice Can Contribute

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Common law; EU law; Overseas freezing orders

Introduction

Background

"Milking a dry udder gets you nothing but kicked off the milking stool," as an old saying goes. Having this in mind, a claimant would not normally bring proceedings unless he or she is confident that the defendant has sufficient funds for satisfying a judgment.[1] Modem technological developments, such as the possibility to transfer funds between bank accounts rapidly, allow defendants to dispose of their assets very easily. Consequently, claimants run a risk that by the time they attempt to enforce a favourable judgment-which they fought very hard to obtain-the defendant will be left with no assets to satisfy it and thus the claimants' investment in litigation will have been worthless.[2] To overcome this problem, judges and legislators came up with a type of order whereby a litigant may apply-usually ex parte-for his or her opponent's assets to be preserved until the end of the proceedings. The name and nature of these "preservation orders" varies between the different legal systems, but they are most commonly known as freezing or attachment orders.

How can a litigant obtain a cross-border preservation order within the EU?

Not infrequently, a litigant may wish to block his or her opponent's assets located in another country. This may happen because the latter has insufficient assets in the state whose courts are competent for deciding the case on its merits. However, the extraterritorial effects of preservation orders lead to concerns about court sovereignty and other national policies,[3] making the law surrounding them extremely complicated.

Within the EU, in order to block a party's assets in another Member State, a litigant has mainly two options: first, he or she may apply to the courts of the state which have jurisdiction on the case, for a provisional measure under the Brussels

[1] *Zuckerman on* Civil *Procedure: Principles of Practice,* 2nd edn (2006), para.9.139.
[2] *Zuckerman on Civil Procedure* (2006), para.9.139.
[3] 0 .G. Chase et al., *Civil Litigation in Comparative Context* (Thompson West, 2007), p.317.

I Regulation[4] to preserve the other party's assets in the foreign jurisdiction and then attempt to enforce it in the foreign jurisdiction. This is mainly possible in the common law jurisdictions of the EU,[5] by issuing a worldwide freezing order (WF0).[6] Under art.32 of the Brussels I Regulation, a judgment that is enforceable in the Member State in which it was granted can be enforced in another Member State as per art.38. "Judgments" as defined by art.32 include provisional measures and thus preservation orders. First it will be automatically recognised in the foreign state, as art.33 stipulates, and then, according to art.38, it has to be declared enforceable there. However, in *Denilauler v SNC Couchet Freres* the European Court of Justice held that judgments can be recognised and enforced in another Member State only if they have been the subject of "an inquiry in adversary proceedings" in the Member State of origin, i.e. were not granted ex parte.[7] The main arguments for the exclusion of ex parte orders are their drastic effects, the protection of the respondent who does not know that proceedings have been instituted against him or her abroad, and the effect of these orders on third parties. It follows that preservation orders cannot be recognised and enforced outside the jurisdiction unless they were obtained after notice had been given to the respondent or the respondent had the opportunity to contest the order subsequently. This restrictive position undermines the efficient protection of parties who apply for preservation orders, because they are deprived of the essential "surprise effect" of these orders.[8]

On December 12, 2012 a recast version of the Brussels I Regulation[9] was published. The revised instrument will apply from January 10, 2015. The most significant change relevant to the context of preservation orders is that a judgment will now be immediately declared enforceable in another Member State, since the requirement of declaring its enforceability *(exequatur)* is abolished. The definition of "judgment", now in art.2(a), also includes provisional measures, and thus preservation orders. However, it does not include orders that were granted without notice to the respondent unless the judgment containing the order is served on the respondent prior to enforcement. Thus, the problem with ex parte preservation orders remains.

[4] Regulation 44/200 I on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ Ll2/l. The only EU State to which the Brussels I Regulation does not apply is Denmark. On October 19, 2005, however, the EU concluded an agreement with Denmark that extended the provisions ofthe Regulation to that country. The agreement was approved on behalf of the EU on April27, 2006 by Decision 2006/325/EC concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] OJ Ll20/22, and it entered into force on July I, 2007.

[5] England and Wales, Northern Ireland, Republic of Ireland, and Cyprus.

[6] B. Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (Heidelberg: 2004), Study No. *JAil* A3/2002/02, p.135 (2004). However, in order not to infringe any foreign jurisdiction or affect any third parties holding assets abroad, various cases have imposed a number of conditions to be satisfied before a party is allowed to enforce a WFO in a foreign jurisdiction. See, e.g. in England and Wales the *Babanaft* proviso, first explained in *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch. 65 CA (Civ Div), and then in *Babanaft International Co SA v Bassatne* [1990] Ch. 13 CA (Civ Div); the *Baltic* proviso explained in *Baltic Shipping Co v Trans/ink Shipping Ltd* [1995]1 Lloyd's Rep 673 QBD; the *Dadourian* guidelines set out in *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399; [2006]1 W.L.R. 2499, etc. See also *Zuckerman on Civil Procedure* (2006), paras 9.163-9.171.

[7] *Denilauler v SNC Couchet Freres* (125179) [1980] E.C.R. 1553; [1981]1 C.M.L.R. 62 ECJ.

[8] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.138.

[9] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

Secondly, the claimant may pursue a preservation order directly in the state where the assets are situated under the foreign procedural law. This is possible under the Brussels I Regulation. Article 31 provides that an application for provisional measures-which include preservation orders-may be made to the courts of a Member State of the EU under the national law of that state, even if the courts of another state have jurisdiction as to the substance of the matter. However, recourse to different jurisdictions entails delays, and the respondent might be alerted that a preservation order is sought against him or her and thus transfer assets out of the reach of the applicant.[10]

Why are litigants less inclined to seek preservation orders in cross-border disputes?

Having in mind what has been said in the previous section, litigants within the EU are less inclined to seek a preservation order in a cross-border dispute than in a domestic one. The abovementioned limitation to orders granted ex parte and the considerable delays when applying for an order directly in another state are not the only reasons for this. In addition, the conditions required under national laws for obtaining and enforcing preservation orders vary throughout the EU. For example, in all Member States the applicant must prove the existence of a claim on the merits. Nonetheless, the standard of proof varies: in Belgium, the applicant must only provide sufficient evidence to establish that the claim exists, in Portugal and Spain a prima facie standard applies, while in England and Wales the applicant must present a "good arguable case".[11]

Furthermore, in some Member States, such as Italy, Germany, and France, it is difficult for a party to obtain information about the whereabouts of his or her opponent's assets if he or she does not have that information.[12] The reason for this lack of transparency is that the central registers containing the relevant information are inadequate. In some states, such as Austria and Germany, the applicant needs to specify the assets targeted for seizure in order to apply for a preservation order.[13] Consequently, the applicant has to turn to private investigation agencies in order to find out information about the respondent's assets. These services are not only costly, but they do not offer a guarantee of success.[14]

The differences between the national enforcement systems are equally deterring for litigants. Apart from the variations on the speed of enforcement, another key difference relates to the competent authorities. In some states, such as France, Belgium, and the Netherlands, enforcement is carried out by bailiffs acting outside the court system. In other states, such as Austria and Spain, this is done by the court, while in Sweden and Finland, by a central administrative agency. [15] An

10 Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l38.
11 Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l29.
12 Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.23.
13 Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l32.
14 *Commission impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council creating a European account preservation order to facilitate cross-border debt recovery in civil and commercial matters* SEC(2011) 937 final, p.l6.
15 M. Andenas et al., *Enforcement Agency Practice in Europe* (London: British Institute of International and Comparative Law, 2005), p.31.

applicant coming from a state with one system of enforcement will have difficulties finding out whom he or she has to address in order to enforce a judgment in another state. Differences also exist as to who is responsible for serving the order on the bank, how much time the bank has to implement the order, and how long the order remains in force. [16]

Finally, the costs of obtaining and enforcing a preservation order in a cross-border dispute are higher than in domestic cases. If a preservation order must be obtained in a Member State other than the one having jurisdiction on the merits, the applicant will need a lawyer licensed to practise in the foreign jurisdiction for representation. [17] Of course, the applicant will, at some point, need the lawyer in the foreign jurisdiction for the subsequent substantive proceedings and/or the enforcement of the judgment on the merits. However, extra costs so early in the litigation process are a disincentive for the litigant to apply for a preservation order in a foreign country.

These factors, identified long ago, have prompted the EU legislators to take action in the area of preservation orders in cross-border disputes. But which is the optimal way forward?

Preservation orders and harmonisation of European civil procedure in general

Harmonisation of European civil procedure

For the purpose of determining how the EU should intervene in the area of preservation orders in cross-border cases, it is useful to step back and consider the big picture: that is, the harmonisation of European procedural law in general. One commentator vividly and humorously said that:

> "[O]nce upon a time, procedural law in all its peculiarity stayed home in the scullery, while public and even private law went off to attend the European integration ball."[18]

Indeed, for many years, civil procedure rules were seen as entirely domestic and inappropriate for the European stage. During the 1980s, the European Court of Justice started shifting away from this approach. Parallel to judicial developments, European-wide procedural principles also emerged from the "right to fair trial" protected by art.6 of the European Convention on Human Rights (ECHR) as well as by instruments regulating substantive law issues.[19]

The biggest step, however, towards action at EU level in the area of civil procedure was taken with the creation of a policy area named "judicial cooperation

[16] *Commission impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council creating a European account preservation order to facilitate cross-border debt recovery in civil and commercial matters* SEC(2011) 937 final, p.l8.
[17] *Commission impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council creating a European account preservation order to facilitate cross-border debt recovery in civil and commercial matters* SEC(20 II) 937 final, p.l7.
[18] H. Hartnell, "A Cinderella Story: 'Judicial Cooperation in Civil Matters' Meets the Prince [Review Essay on Storskrubb, Civil Procedure and EU Law: A Policy Area Uncovered (Oxford University Press, 2008)]" (2010) 29 *Yearbook of European Law* 483, 483.
[19] Hartnell, "A Cinderella Story: 'Judicial Cooperation in Civil Matters' Meets the Prince" (2010) 29 *Yearbook of European Law* 483, 484.

in civil matters", adopted by the Treaty of Amsterdam in 1999.[20]Article 81(1) of the Treaty on the Functioning of the European Union (TFEU) provides that the EU shall develop judicial co-operation in civil matters having cross-border implications and that such co-operation may include the adoption of measures for the approximation of the laws and regulations of the Member States. Storskrubb says that the term "European Civil Procedure" is the most appropriate to describe this policy area. In essence, a new body of procedural statutory law exists which is available only in cross-border disputes and coexists with national procedures. But why is harmonisation of procedural rules within the EU important at all? Technological advancements and the relative freedom of transnational trade entail ramifications for transnational litigation.[21] Indeed, in the Internal Market,[22] the differences between the national procedural systems hinder the free movement of goods, persons and services. It is interesting that over half of European citizens (56 per cent) said that access to civil justice in another Member State is "difficult", compared to only 14 per cent who believe that access is "easy".[23] What makes a legal system hospitable to foreign litigants and lawyers is, to a great extent, its rules of procedure, and not its substantive law. That is why, for example, a lawyer from the Republic of Ireland would feel comfortable litigating in England and Wales, or a Greek lawyer appearing before a court in Germany or Austria: because the procedural rules of these jurisdictions are very similar. Therefore, it is essential that cross-border transactions are secured by well operating procedural laws.[24] To this end, art.81 (2) TFEU stipulates that in developing judicial co-operation in civil matters having cross-border implications, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures aimed at specific directions mentioned in the provision, particularly when necessary for the proper functioning of the Internal Market.

Harmonising European civil procedure rules is obviously desirable. But to what extent? Was Bingham L.J. right to say that "procedural idiosyncrasy is not (like national costume or regional cuisine) to be nurtured for its own sake"?[25] In the opinion of the author, the approximation of current rules, [26] or the introduction of unified procedures while eliminating the existing ones, is not always prudent. For example, it would be unwise to modify the available preservation orders that exist throughout the EU, or create a new procedure and eliminate the existing ones. In an analysis of the Principles of Transnational Civil Procedure, a joint project of the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT), the commentators noted that procedures are closely connected to local culture and history, and replacing them with an entirely different procedure in one bold stroke would be both unsound and politically unfeasible.[27]

[20] E. Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford: OUP, 2008), p.4.
[21] Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (2008), p.l.
[22] The EU's Internal Market (or Single Market) seeks to guarantee the free movement of goods, capital, services and people--the EU's "four freedoms"-within the 27 Member States.
[23] Centre for *Strategy and Evaluation Services* (CSES), Study for an Impact Assessment on a Draft Legislative Proposal on the Attachment of Bank Accounts (2011), p.29 ..
[24] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l5.
[25] *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)* (1992] Q.B. 502 CA (Civ Div).
[26] For example, the proposal by the working group chaired by Professor Marcel Storme from Ghent (Belgium). See C. H. van Rhee, "Harmonisation of Civil Procedure: An Historical and Comparative Perspective" in X. E. Kramer and C.H. van Rhee (eds), *Civil Litigation in a Globalising World* (The Hague: TMC Asser Press, 2012), ch.3.
[27] G. Walter and S.P. Baumgartner, "Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard and Taruffo Project" (1998) 33 Tex. Int'l L.J. 463,471.

Moreover, it is often argued that rather than bringing about a unified procedure in order to reduce the uncertainty and anxiety involved in litigating abroad, the harmonised rule results in an increase in uncertainty and anxiety.[28] This may occur when there is only a small number of transnational disputes, and lawyers are forced to cope with the unknown harmonised procedure only rarely.

Taking these ideas into consideration, the proper way to move forward with the harmonisation of procedural rules within the EU is to identify several types of situations in which a European-wide instrument will be beneficial to transactions and create unified instruments; these instruments should be available only in cross-border disputes, and existing national rules should remain in place for domestic cases. This logic is in line with the principle of subsidiarity, which stems from art.5 of the Treaty on European Union (TEU), whereby the EU may only act (i.e. make laws) where the action of individual countries is insufficient. The need to remedy specific procedural situations has already resulted in European legislation in many instances, such as instruments regulating jurisdiction, recognition and enforcement of judgments, insolvency proceedings, taking evidence, uncontested claims, orders for payment, small claims, service of judicial and extrajudicial documents, legal aid, and mediation. [29]

The optimum, however, would be to allow the use of these instruments in domestic cases as well, in parallel with the domestic procedures. This way, a lawyer would be able to benefit from the features of the European instrument whenever this was more suitable in a case than the domestic one, and at the same time, gain more familiarity with it. This could be done by a broad interpretation of art.81(2)(f) TFEU, which provides for the elimination of obstacles to the proper functioning of civil proceedings by promoting the compatibility of the rules on civil procedure applicable in Member States. [30] Arguably this would violate the principle of subsidiarity. However, as van Rhee puts it, the differences in civil procedural law between Member States can only be removed by EU action, and not by action at the respective nationallevels.[31]

Harmonisation of preservation orders

Preservation orders constitute another situation with ramifications for the Single Market, and thus have to be regulated on a European level. The Commission has already noted this need in its 1998 Communication, "Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union".32 ln view of the diversity of the Member States' legislation and the complexity of the subject, the Commission proposed to confine reflection initially to the problem of bank accounts. The Council endorsed this approach in its 2000 Program of Mutual

[28] Walter and Baumgartner, "Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard and Taruffo Project" (1998) 33 Tex. Int'l L.J. 463,468.
[29] van Rhee, "Harmonisation of Civil Procedure: An Historical and Comparative Perspective" in *Civil Litigation in a G/obalising World* (2012), ch.3.
[30] van Rhee, "Harmonisation of Civil Procedure: An Historical and Comparative Perspective" in *Civil Litigation in a Globalising World* (2012), ch.3.
[31] van Rhee, "Harmonisation of Civil Procedure: An Historical and Comparative Perspective" in *Civil Litigation in a Globa/ising World* (2012), ch.3.
[32] *Commission Communication to the Council and the European Parliament Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union,* COM(l997) 0609 final.

Recognition.[33] Indeed, in practice, claimants regard bank accounts as priority targets for preservation orders because of their high net value. At the same time, the preservation of a bank account is a sensitive matter for the respondent because the funds in bank accounts are often essential to ensure the livelihood of private persons and are of vital importance for businesses. Moreover, the extraterritorial preservation of a bank account seems to involve fewer sovereignty concerns than the preservation of other tangible assets in a foreign state, such as land or buildings. The Commission conducted various studies and consultations with experts and other key players. In 2006 it adopted a Green Paper on improving the efficiency of the enforcement of judgments in the EU through the attachment of bank accounts.[34] In 2008, it adopted another Green Paper related to the enforcement of judgments, on the Transparency of Debtors' Assets.[35] Finally, after examining and rejecting other options, such as the effect of the revision of the Brussels I Regulation in this area if the status quo was preserved, or the harmonisation of national rules for the preservation of bank accounts, the Commission decided in 2011 to propose the so-called European Account Preservation Order (EAPO). The EAPO is intended to become a self-standing European-wide preservation order that will exist alongside the national equivalent instruments. The Commission's proposal has now entered the EU's legislative procedures involving the Council of the EU, the European Parliament, and the Commission.[36]

The necessary features of a European-wide instrument

Outline

The proposed instrument enables the applicant to obtain an EAPO preventing the withdrawal or transfer of funds held by the respondent in a bank account within the EU (proposed art.1). The regime applies to all pecuniary claims in all cross-border civil and commercial matters including matters of matrimonial property or succession but not in arbitration and insolvency (proposed art.2). A claim means an existing claim for payment of a sum of money (proposed art.4).

[33] *Council Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters* (2001] OJ C 1211.
[34] *Commission Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts* SEC(2006) 1341.
[35] *Commission Green Paper on Effective Enforcement of Judgments in the European Union: The Transparency of Debtors' Assets* COM(2008) 128 final.
[36] Title V of Pt.3 TFEU (Area of Freedom Security and Justice). This proposal is not applicable to Denmark. It is also not applicable to the United Kingdom and Ireland, unless those two countries decide otherwise. On October 31, 2011 the UK government, although it initially welcomed the Commission's proposal (Ministry of Justice, *Impact Assessment on Proposed EU Regulation Creating a European Account Preservation Order to Facilitate Cross-border Debt Recovery in Civil and Commercial Matters* (2011), MOJI09, p.8 (UK)), it announced by way of a written Ministerial Statement to the House of Commons its decision not to opt in to the proposed Regulation because the Government's recent consultation revealed significant problems, including a concern that there was a lack of adequate safeguards for defendants. However, it stated that it will participate in the forthcoming negotiations with a view to opting in in the future *(Hansard*, HC col.28WS (October 31, 2011) (UK)). In February 2013 the European Scrutiny Committee of the UK Parliament examined a letter by the Ministry of Justice regarding the EAPO and stated that "several developments have gone the UK's way", but there are still "significant concerns" about various issues of the proposal. Ireland, on the other hand, announced its participation. The other Member States will be bound automatically if the Commission's proposal passes into law. On June 20, 2013 the European Parliament Committee on Legal Affairs adopted a report, which sets out a series of proposed amendments to the draft Regulation on EAPOs. The European Parliament's views on this legislation are important, because it is to be made under the ordinary legislative procedure, meaning that the European Parliament gets to vote on the proposed legislation.

The idea of the proposed Regulation is based on garnishment proceedings. In all Member States, garnishment is the most important form of monetary enforcement.[37] The judgment creditor must present an enforceable instrument when applying for garnishment. At the first stage, the garnishee-usually a bank-is informed about the attachment of the judgment debtor's bank account and the enforcement organ prohibits any payment by the garnishee to the judgment debtor. In the second stage the judgment creditor gets an enforceable title against the garnishee. The structure of garnishment proceedings favours the enforcement of provisional measures (seizure of assets)[38] as well as provisional enforceability while the judgment is still appealable. [39] The Commission's proposal distinguishes two different types ofEAPO: s.l of the proposed Regulation provides for the issue of an EAPO (a) prior to or during the progress of proceedings in an EU Member State court or (b) once a judgment has been obtained but which has not yet been declared enforceable in the Member State of enforcement ("s.l EAPO"). Under s.2, an EAPO is available when a judgment is enforceable in the Member State of enforcement[40] ("s.2 EAPO") (proposed art.S). At the time of the Commission's Green Papers there was uncertainty about whether any attachment procedure would be provisional in nature only or might be extended to allow a mechanism for garnishment. The proposal, however, was finally restricted to provisional measures.[41]

A s.l EAPO is available in the Member State where proceedings on the substance of the matter have to be brought, as determined by European instruments or national law (proposed art.6). A s.l order is also available in the Member State where the bank account is located, but in this case it cannot be recognised and enforceable in other Member States (proposed art.23). A s.2 EAPO is available in the Member State from where the judgment was obtained (proposed art.l4). A s.2 order, too, is available in the Member State where the bank account is located, but it will not be recognised and enforceable in other Member States (proposed art.23).

The EAPO and the Common Law Practice

A new pan-European instrument such as the EAPO gives the opportunity to Member States to contribute elements from their domestic practices and thus create a new, effective device that will smoothly pass into the national legal systems and adequately protect the rights of both the applicant and the respondent.

All Member States around the EU have in place provisional measures securing future enforcement. All jurisdictions, with the exception of the common law jurisdictions, provide for attachment orders whereby the applicant may apply for an order attaching the respondent's assets. As a rule, these orders operate in rem.

[37] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.60.
[38] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.ll8.
[39] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.I04.
[40] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.76.
[41] Ministry of Justice, *Impact Assessment on Proposed EU Regulation Creating a European Account Preservation Order to Facilitate Cross-border Debt Recovery in Civil and Commercial Matters* (2011), p.5.

Accordingly, the account or targeted asset is directly frozen and any operation of the asset is deemed to be invalid against the applicant.[42]

In the common law jurisdictions of the EU preservation orders do not operate in rem but are injunctions in personam. It must be said that in rem attachment orders, the so-called writ of attachments, do exist in the common law jurisdictions as wel1.[43] However, they are far less popular. Foreign attachment, as it was called, became obsolete in English law by the late nineteenth century. [44] As Professor Adrian Zuckerman indicates, it is not wholly successful as a measure against evasion of judgment because inter alia it is too intrusive of defendants' rights.[45] Nowadays, the primary device to freeze a party's assets in the common law jurisdictions of the EU is the so-called freezing (or *Mareva)* injunction. [46] With that order, which operates in personam, the respondent is ordered not to remove his or her assets from the jurisdiction or to refrain from dealing with those assets. However, removing or dealing with the assets remains legally possible because the assets remain the respondent's property. If the respondent or any third parties do not comply with the order they will be sanctioned by the court, which may impose penalties for contempt, such as fine, or imprisonment, or sequestration of assets.[47]

In *Z Ltd v A-T*[48] Lord Denning M.R. suggested that the *Mareva* injunction operated in rem just as the arrest of a ship does, and like the old process of foreign attachment in England and in the United States, and the *"Arrest"* (Germany) or *"saisie-conservatoire"* (France) of civil law countries, it had the effect of attaching any assets of the defendant within the jurisdiction. Nevertheless, the current general consensus expressed by Kerr L.J. in *Babanaft International Co SA v Bassatne4*[9] is that *Mareva* injunctions are orders made in personam against respondents, but they also have an effect on third parties. The reason for the effect on third parties is the principle that a person who, knowing of an injunction, aids and abets the party enjoined in committing a breach of it, is guilty, not of a breach of the injunction, but of a contempt of court tending to obstruct the course of justice. [50] At first glance, the EAPO resembles more closely civilian attachment orders rather than common law freezing injunctions. Since in more countries of the EU in rem attachment orders are more popular, it makes sense for the new remedy to be closer to an in rem order. This, however, does not mean that it cannot be influenced by the common law orders, which have been operating successfully

[42] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l20.
[43] In fact, the first recorded Act in England on the subject of attachment was that of May 16, 1699. This Act recognised and confirmed writs of attachment issued before that time. See J.J. McEvoy and J.M. Dine, "Are Mareva injunctions becoming attachment orders?" {1989) 8 C.J.Q. 236, 236.
[44] L. Collins, "The territorial reach of Mareva injunctions" {1989) I 05 L.Q.R. 262, 266.
[45] A.A.S. Zuckerman, "Mareva Injunctions and security for judgment in a framework of interlocutory remedies" {1993) I 09 L.Q.R. 432, 453.
[46] The earliest cases granting *Mareva* relief in England were *Nippon Yusen Kaisha v Karageorgis* [1975] I W.L.R. I 093 CA, and the eponymous case *Mareva Campania Naviera SA v International Bulkcarriers SA* [1980]1 All E.R. 213; [1975]2 Lloyd's Rep. 509 CA (Civ Div). In English law, the order is now available under CPR r.25.1{l)(f) which changed its name to "freezing injunction". Freezing orders are also available in the other common law jurisdictions of the EU: the Republic oflreland, Northern Ireland, and Cyprus.
[47] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l21.
[48] *Z Ltd v A-Z* [1982] Q.B. 558; [1982]2 W.L.R. 288 CA at 573.
[49] *Babanajl International Co SA v Bassatne* [1990] Ch. 13 at 25.
[50] L. Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994), p.l93.

for many decades. After all, the common law approach, viewed from a comparative perspective, is not exceptional. Continental jurisdictions also combine in rem and in personam remedies: in France, an attachment order *(saisie conservatoire)* is often combined with a penalty *(astreinte).* Moreover, Scottish law provides for provisional remedies for the blocking of assets which operate in rem (arrestment) and for others operating in personam (interim interdict)[51] Also, the different structure of provisional measures has not been an obstacle for their recognition and enforcement. For example, the English freezing injunction has been recognized in France, Germany, and Switzerland. This shows the mutual trust or the willingness to accept a different but similar solution that has developed in the different European courts.

Moreover, in the author's opinion, an order that is not completely alien to the common law tradition will better attract the United Kingdom to be a part of this proposal. Litigants in England and Wales, and Northern Ireland-in contrast with Scotland, the third jurisdiction of the United Kingdom, which follows a different practice-are accustomed to seeing certain measures accompanying this type of order which are absent from the current proposal. [52] It will also be a step forward for potential future treaties with common law jurisdictions outside the EU. In most common law countries around the world, such as Australia and Canada, in personam freezing orders are far more popular than in rem attachment orders. [53]

In the other main common law jurisdiction, the United States, however, the primary remedy against asset dissipation has traditionally been an in rem order. The American attachment is one of the statutory pre-judgment remedies that have existed since the colonial period. 54 Nonetheless, some state courts have issued in personam freezing orders. The viability of asset-freezing orders was the subject of the US Supreme Court opinion in *Grupo Mexicano de Desarrollo v Alliance Bond Fund, Inc* 527 U.S. 308 (1999). [55] In a 5--4 opinion authored by Scalia J., the Court noted that an asset-freezing procedure was a valuable procedural tool but concluded that federal courts lacked the jurisdiction to issue such orders because they were not part of the common law at the time the federal court system was created. Scalia J. remarked that the decision whether federal courts should have the power to issue asset-freezing orders should be left up to the legislature. Although this case involved the jurisdiction of federal courts, it caused confusion in the state court system. In order to remedy this lack of uniformity on asset-freezing orders, the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted in 2012 the "Uniform Asset Freezing Orders Act", which will be introduced to the state legislatures.

Turning back to the discussion of the European Commission's proposal, in order to obtain a s.l EAPO an applicant must show that his or her claim is well founded. Moreover, an applicant for both types of EAPO must show that subsequent enforcement of a judgment is likely to be impeded or made substantially more

[51] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.J21.
[52] J. Kean, "Continental-wide recovery-the European Account Preservation Order" [2011112] F.I. 8.
[53] T.M. Warner, "The evolution of the Mareva principle in Canada" (1994) 9 J.I.B.L. 222; D. Ong, "Unsatisfactory aspects of the Mareva Order and the Anton PiiJer Order" (2005) 17 Bond L. Rev. 5.
[54] M. Tamaruya, "The Anglo-American perspective on freezing injunctions" (2010) 29 C.J.Q. 350. See also, *Ownbey v Morgan* 256 U.S. 94, 104 (I 921).
[55] *Grupo Mexicano de Desarrollo v Alliance Bond Fund* 527 U.S. 308 (1999).

difficult without such an order, including because there is the real risk that the defendant might remove, dispose of, or conceal assets held in the bank account or accounts to be preserved (proposed art. 7). The court has no discretion whether or not to issue an EAP0.[56] If the requirements for issue are met, the court "shall issue an EAPO" (proposed art.21(1)). In England and Wales, the jurisdiction to grant freezing injunctions derives from the Senior Courts Act 1981 s.37(1). Because injunctions are granted where it is just and convenient, the court retains discretion to refuse relief, and has power to stretch the usual rules in the interests of justice.[57]

It is possible to believe that there is a high risk that EAPOs will be granted light-heartedly as the proposal is currently drafted. It must be remembered that the grant of such an order could cause significant damage to the respondent. A remedy which is regarded as exceptional must not be left to become mainstream and daily practice, and this could be achieved only by leaving to the judges' discretion the decision to grant or refuse an order. [58]

With a view to preserving the "surprise effect" of the EAPO, an order is granted without prior hearing of the debtor (proposed arts 10, 14(4)). In English law, however, adequate safeguards must protect the interests of the party whose right to be heard has been limited. The applicant has a duty of full and frank disclosure and must give an undertaking in damages to compensate the absent party for any undue harm caused by the without notice proceedings. This is not the case with an EAPO.

In neither type of EAPO does the claimant seem to have a duty of full and frank disclosure of all material information. In the case of a s.1 EAPO, proposed art. 7 only requires an applicant to "submit relevant facts, reasonably corroborated by evidence" to show that the pre-conditions are met. The proposed Regulation provides that additional evidence in the form of written statements of witnesses or experts, or oral testimony may be admitted when the court deems it necessary (proposed art.11). Moreover, the applicant for an EAPO can put his or her arguments to the court in order to obtain an EAPO with no consequences for failing to give the court the full picture.[59] In English law, the obvious sanction for non-disclosure is the discharge of the order, even though it is argued that if there are good reasons for maintaining an order, discharge might constitute a disproportionate sanction.[60] The court, however, has other measures at its disposal for non-disclosure, such as ordering the applicant to pay the respondent compensation under the undertaking in damages or committing the applicant for contempt of court. [61]

[56] E. Lew, "Speedy cross-border debt recovery? The new Europe-wide freezing order" (2011) Butterworths J. of Int'l Banking and Fin. L. 699, 70!.
[57] *Blackstone s Civil Practice 2013: The Commentary* (2013), para.38.4.
[58] Linklaters, "The European Account Preservation Order-The Future of Freezing Injunctions" (20 II) available at: *http:!lwww.linklaters.com/pdfs/mkt/london/European_Account_Preservation_Order_Jreezing_injunctions_Newslet .pdf[* Accessed November 17, 2013]. The reactions of English law firms to the EAPO proposal were extremely negative. They expressed their concerns through commentaries with robust arguments against the proposal and they contributed to the public consultation on the draft Regulation organised by the UK government in 20 II which resulted in the United Kingdom's opt-out *(Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery* in *civil and commercial matters-How should the UK approach the Commissions proposal?* CP 14/2011).
Clifford Chance, "European Asset Protection Orders: the good, the bad and the costly", *http://www.c/ijforrichance . com/pub/icationviews/publications/2011/OB/european_assetprotectionorriersthegoodth.html* [Accessed November 17, 2013].
[60] *Zuckerman on Civil Procedure* (2006), para.9.136.
[61] *Zuckerman on Civil Procedure* (2006), para.9.!38

The court may require the provision of a security deposit to compensate damages arising from an unjustified EAPO or any other equivalent assurance under national law (proposed art.l2). Where the law of a Member State does not provide for a statutory liability of the applicant, the Regulation does not preclude the recourse to measures with equivalent effect (proposed recitall5). However, not only is the provision of security possible for a s.l EAPO only, it is not automatic. Under English law, the practice of requiring an undertaking in damages was well established by the mid-nineteenth century. The imposition of such a responsibility is an elementary requirement of fairness because an applicant who obtains an order gains protection for rights that he or she has yet to prove. [62] While it is possible to obtain a freezing injunction without an undertaking, it is the exception and not the norm. The present drafting of the EAPO suggests that security may be required and will not be the norm.[63] Being such an important aspect, the EAPO should require security as a condition to grant an order, at least for s.l EAPOs.

An applicant for an EAPO must provide the details of the respondent and the bank that has the account which the applicant wants to freeze (proposed art.l6). If the applicant does not know the exact details he or she may request to obtain the necessary information from the competent authority of the Member State of enforcement, either by obliging all banks in its territory to disclose whether the defendant holds an account with them or by giving access to registers where that information is held by public authorities or administrations (proposed art.l7). By asking banks to disclose whether a respondent holds an account with them, the Regulation will expose them to costly fishing expeditions by litigants trying to find out where their opponent holds his or her bank accounts. In English law the court has jurisdiction under CPR r.25.1 (1)(g) to direct a party to provide information about relevant property or assets, which are or may be the subject of an application for a freezing injunction. If the respondent does not comply with this order, he or she may be held in contempt.

As soon as the EAPO is issued, the draft Regulation provides that it must be served on a bank (proposed art.24). The respondent is served with the EAPO after service on the bank has been effected and the bank has issued a declaration under proposed art.27 (proposed art.25). Upon being served with an EAPO the bank must ensure that the amount specified therein remains in the relevant account. From the wording of proposed art.26, it emerges that neither the defendant nor the bank are permitted to use the money in the account. Any excess amount remains at the disposal of the defendant (proposed art.26). The proposed Regulation allows amounts that are necessary for the livelihood of the defendant and his or her family, or the existence of a business to be exempt from enforcement (proposed art.32). This is conditional upon what the law of the Member State of enforcement allows. The EAPO should not leave this sensitive issue up to the law of the Member States. In the common law practice, it remains legally possible for a respondent served with a freezing order to use the frozen funds for any reason after asking leave from the court. [64] This may be a useful function in cases where the respondent is in need

[62] *Zuckerman on Civil Procedure* (2006), para.9.95.
[63] A. Sheeley, "One small step for the UK ... " (2011) 161 N.L.J. 1700.
[64] *Zuckerman on Civil Procedure* (2006), para.9.176.

of funds for vital purposes not mentioned in the proposed Regulation, such as legal assistance. [65]

Issues of the bank's liability for any failure to comply with these obligations are to be left to relevant national law (proposed art.27). In most Member States, e.g. Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, and Sweden, the bank incurs a liability in tort if it does not comply with the order. In English law, banks which do not comply with a freezing order are guilty of contempt of court tending to obstruct the course of justice. Moreover, in *Customs & Excise Commissioners v Barclays Bank Plc*[66] the House of Lords held that a bank, if notified of a freezing injunction affecting an account held by one of the bank's customers, is liable to compensate the applicant for loss suffered, but only when it knowingly allowed dissipation of assets. Their Lordships said that the bank owed no duty to the applicant to take reasonable care to comply with the terms of the injunction and to ensure that no payments were made out of the account. Thus, the bank, or any other person notified of a freezing injunction, is not liable in negligence. Notification imposes a duty on the bank to respect the order of the court, but it does not of itself generate a duty of care to the applicant; this would be a very heavy burden to impose on banks. Therefore, the proposed instrument should specify that banks are liable to compensate the respondent if they intentionally do not comply with an EAPO, but that they are not liable in negligence.

Proposed art.33 states that an EAPO gives the same rank as an instrument with equivalent effect under the law of the Member State where the bank account is located. Therefore the effect of an EAPO will differ throughout the EU. In some Member States, such as Germany and Portugal, an instrument with equivalent effect confers the applicant a lien and grants him or her priority even over competing creditors.[67] In England and Wales, a freezing injunction does not create any rights in rem and leaves issues of priority among creditors unaffected.[68] As Zuckerman says, the continental attachment procedure stimulates litigation and hastens insolvency, because as soon as one creditor has obtained attachment, others will tend to rush in to protect their positions."[69] It also forces third parties with claims of rights over the attached goods to take legal action. Therefore it is prudent for the proposal to clarify that an EAPO does not give the applicant any property rights on the bank account.

The proposed Regulation gives the respondent various remedies against an EAPO. A respondent may challenge a s.l EAPO by applying for a review of the decision that granted it, in the Member State where it was granted, on the grounds that it fell outside the scope of the proposed Regulation, the court that granted the EAPO had no jurisdiction to do so, the criteria for granting an EAPO were not met, or the claimant did not start substantive proceedings within 30 days as

[65] Allen & Overy, *New draft European Regulation on the Freezing of Bank Accounts* (2011), p.5.
[66] *Customs & Excise Commissioners vBarclays Bank Pic* [2006] UKHL 28; [2007]1 A. C. 181.
[67] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l3l.
[68] Hess, "On making more efficient the enforcement of judicial decisions within the European Union" (2004), p.l3l.
[69] A.A.S. Zuckerman, "Mareva Injunctions and Security for Judgment in a Framework oflnterlocutory Remedies" (!993) I 09 L.Q.R. 432, 453.

proposed art.13 dictates (proposed art.34). The latter challenge may also be made in the Member State of enforcement (proposed art.35).

The respondent in both types of EAPO may also request from the court in the Member State where the bank account is located that the enforcement of the order should be limited or terminated, on the grounds that certain amounts in the account are exempt from enforcement under the law of that Member State, or that the enforcement should be terminated on the grounds that a judgment has been issued in the Member State of enforcement dismissing the claim related to the EAPO. A s.2 EAPO could also be set aside by a court in the Member State where the bank account is located on the grounds that the relevant judgment for which the EAPO was issued has been set aside or its enforceability has been suspended (proposed art.35). It is argued that the affected party should be given more protection by being allowed to challenge an order in the Member State of his or her domicile. As the Regulation is currently drafted, the application for review can be made to the court of the affected party's domicile only when the affected party is a consumer, an employee, or insured (proposed art.36). Allowing defendants to go to a court more local to them will at least decrease their legal fees.

Conclusion

The European Commission decided not to harmonise the existing preservation orders of the different states and opted for a new procedural device. In the author's view, this new device ought to incorporate elements from both practices available around the EU, the in rem attachment order, as well as the in personam freezing order. Adding features from the common law practice will have two main benefits: first, it will produce a better outcome in an otherwise very complicated area of law, since the new procedure will combine the advantages and eliminate the disadvantages of both types of orders. Secondly, it will create trust between jurists and litigants in the different legal systems, prompting them to accept different solutions for the same problem. This has been explained by Zweigert and Kotz, who spoke about a *praesumptio similitudinis,* i.e. a presumption of similarity, which posits that the real-life problems in different legal systems are similar, and that the results from the -different legal institutions employed to regulate these real-life problems are also similar.[70] Lord Woolf described the new English Civil Procedure Rules as positioned mid-Channel, meaning that they were heavily influenced by the practices in jurisdictions on the mainland ofEurope.[71] The EAPO is one of the instances where the continental jurisdictions should cover the other half of the distance.

[70] K. Zweigert and H. K6tz, *An Introduction to Comparative Law,* 3rd edn (Oxford: OUP, 1998), p.40.
[71] Lord Woolf, "The Tides of Change" in Basil Markesinis ed., *The British Contribution to the Europe of the Twenty-First Century* (Oxford: Hart, 2002), British Academy Centenary Lectures, pp.l, 10.