Boundaries of European Private International Law

Les frontières du droit international privé européen

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EUROPEAN ACCOUNT PRESERVATION ORDER: WHAT DOES THE COMMON LAW TRADITION HAVE TO SAY?

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Abstract
The European Account Preservation Order ("EAPO") is the new promising instrument of the developing European procedural law. It is suggested that European legislators must aim at eliminating the uncertainties created by the different procedural rules across the European Union. This can be achieved on the basis of mutual trust, which materialises when solutions from all different legal families—those that admittedly function better—are recruited. The EAPO is a good opportunity to consider options from the common law tradition.

Résumé
L'Ordonnance Européenne de Saisie Conservatoire des Comptes Bancaires est le dernier et prometteur instrument d'un droit européen de la procédure qui ne cesse de se développer. On soutiendra que les législateurs européens doivent essayer d'éliminer les incertitudes créées par les différentes règles de procédure existantes dans le territoire de l'Union. Ceci peut être atteint sur la base de la confiance mutuelle qui se matérialise quand on sélectionne les solutions qui fonctionnent le mieux dans les différentes familles juridiques présentes. L'Ordonnance Européenne de Saisie Conservatoire des Comptes Bancaires constitue une bonne opportunité pour discuter les options tirées de la *common law*.

Resumen
La Orden Europea de Retención de Cuentas es el nuevo y prometedor instrumento de un Derecho procesal europeo en curso de desarrollo. Los legisladores europeos deben intentar eliminar las incertidumbres creadas por las diferentes reglas de procedimiento que existen a lo largo del territorio de la Unión. Esto puede conseguirse sobre la base de la confianza mutua, que se materializa cando se eligen las soluciones que funcionan mejor de entre las existentes en la totalidad de familias jurídicas. La Orden Europea de Retención de Cuentas constituye una buena oportunidad para considerar las opciones que ofrece la tradición del *common law*.

Keywords
European Account Preservation Order – Common law – Freezing order – Attachment order

EAPO could become a rather commonly used term in legal jargon vocabularies in the

future. It is an acronym standing for "European Account Preservation Order"[1].

The EAPO was first introduced in 2011 when the European Commission proposed a relevant regulation[2]. Before the EAPO was introduced, a claimant was relying on the national laws of each EU Member State to obtain an extra-territorial asset preservation order, either by seeking to enforce a judgment abroad—as in the case of the Worldwide Freezing Order ("WFO")[3] —or by going directly to the courts of that Member State. An EAPO, however, upon proof that parties are likely to thwart the enforcement of a future judgment against them, allows a claimant to obtain a single order preserving the defendant's bank account; this order must then be enforced by banks throughout the EU. The EAPO is a self-standing EU-wide procedure that exists alongside the national equivalent instruments.

The Commission's proposal entered the EU's ordinary legislative procedure involving the Council of the EU, the European Parliament, and the Commission. In late 2013 the Council presented a revised text, which was later endorsed by the Parliament[4]. The text of the EAPO Regulation ("Regulation") was finalised in May 2014 and it was published in the Official Journal of the European Union ("EU") on June 27 2014.[5] The Regulation entered into force 20 days after its publication in the Official Journal and shall apply from 18 January 2017. The Regulation applies automatically to all Member States except Denmark. The United Kingdom ("UK") and Ireland had an option whether to opt in. Although Ireland announced its participation, the UK decided to opt out. The UK's decision was based on a Government's consultation, which revealed significant problems regarding the EAPO, including a concern that there was a lack of adequate safeguards for defendants[6].

Three points will be addressed in this paper:

First the place of the Regulation, as well as the place of every European instrument that regulates procedural matters, in the national, international, and European legal order will be examined.

Secondly, the options that were available in drafting the EAPO Regulation will be discussed.

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[1] Asset preservation orders are measures of provisional and protective nature whose function is to preserve assets of the defendant, in order to secure future enforcement of a judgment, when the defendant may attempt to hide those assets from the court.

[2] COMMISSION, *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* COM (2011) 0445 final, COD (2011) 0204.

[3] However, the Court of Justice of the EU held in the Case C-125/79 *Denilauler v Couchet Frères* [1980] *ECR 1553*, that judgments cannot be recognized and enforced in another Member State when they are granted without notice to the other party.

[4] COUNCIL OF THE EU, *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 – General Approach* 16991/13 ADD 1.

[5] PARLIAMENT AND COUNCIL OF THE EU, *Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.*

[6] MINISTRY OF JUSTICE, *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 Commission's proposal?* CP (2011) 14. See also MINISTRY OF JUSTICE, *Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters – Response to Consultation* CP(R) (2012) 1.

Finally, it will be suggested that there are various features of the common law tradition that could have added a greater degree of fairness and efficiency to the EAPO Regulation.

I. – PLACE OF THE REGULATION IN THE NATIONAL, INTERNATIONAL, AND EUROPEAN LEGAL ORDER

In order to determine the systematic position and thus the purpose of the EAPO Regulation, it is useful to step back, and consider the big picture: that is, the civil procedure rules within the context of the European private international law.

For many years civil procedure rules were seen as entirely domestic and inappropriate for the European stage. During the 1980s the Court of Justice of the EU started shifting away from this approach. Parallel to judicial developments, European-wide procedural principles also emerged from the "right to fair trial", protected by Article 6 of the European Convention on Human Rights ("ECHR"), as well as by instruments regulating substantive law issues[7]. The milestone, however, towards action at EU level in the area of Civil Procedure has been the development of a policy area named "judicial cooperation in civil matters", adopted by the Treaty of Amsterdam in 1999[8]. Article 81(1) of the Treaty on the Functioning of the European Union ("TFEU") provides that the Union shall develop judicial cooperation in civil matters having cross-border implications and that such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. This has manifested in numerous European legislations, such as those regulating jurisdiction, recognition and enforcement of judgments; insolvency proceedings; taking of evidence; uncontested claims; orders for payment; small claims; service of judicial and extrajudicial documents; legal aid; and mediation.[9] Consequently, a body of European procedural rules is being created during the last three decades.

The differences between the national procedural systems have always been an obstacle in the free movement of goods, persons, and services in the Internal Market[10]. It is interesting that in a survey conducted by the Centre for Strategy and Evaluation Services on behalf of the European Commission, 55.8% of business respondents and 51.4% of consumer organisations reported that the risk of litigation arising from a dispute has had an effect on their attitude to cross-border trade.[11] Moreover, in a Special Eurobarometer in 2011 over half of the interviewees (56%) said that access to civil justice in another Member State is "difficult" compared to only 14% who believed that access is "easy"[12]. Consistency of procedural rules is also needed, so that citizens or businesses of one Member State do not obtain an economic advantage over those in another as a result of different rules of judicial procedure. Therefore, it is essential that cross-border

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[7] Helen HARTNELL, *A Cinderella Story: 'Judicial Cooperation in Civil Matters' Meets the Prince [Review Essay on Storskrubb, Civil Procedure and EU L: A Policy Area Uncovered (OUP 2008)]*, (29 YB of Eur L 2010) 483, 484.
[8] Eva STORSKRUBB, *Civil Procedure and EU Law: A Policy Area Uncovered* (OUP 2008).
[9] C.H. VAN RHEE, Harmonisation of Civil Procedure: An Historical and Comparative Perspective (2012) in C.H. VAN RHEE & X.E. KRAMER (eds.) *Civil Litigation in a Globalising World, The Hague* (T.M.C. Asser Press/Springer 2011) 11.
[10] The EU's Internal Market (sometimes known as the Single Market) seeks to guarantee the free movement of goods, capital, services, and people—the EU's "four freedoms"—within the 28 Member States.
[11] CENTRE FOR STRATEGY & EVALUATION SERVICES, *Study for an Impact Assessment on a Draft Legislative Proposal on the Attachment of Bank Accounts*, (2011) 28.
[12] COMMISSION, *Special Eurobarometer 351 Civil Justice* (2010) 9.

transactions are secured by well-operating procedural laws[13]. This is in line with Article 81(2) of the TFEU, which stipulates that in developing judicial cooperation in civil matters having cross-border implications, the European Parliament and the Council should adopt measures for the proper functioning of the Internal Market.

The introduction of new procedures, such as the EAPO, is a very daunting task. In a union of 28 Member States, 24 different languages, and 30 different legal systems—including the three systems of the United Kingdom—there is a variety of legal traditions and procedural rules. The legal systems of the EU Member States span to as many as four different legal families. These families are the Romanistic, an example of which is French law; the Germanic, an example of which is German law; the Nordic, an example of which is Swedish law; and the Common Law family, an example of which is English law[14]. Member States' national procedural regimes differ greatly and the differences can be fundamental[15].

The reconciliation of all these diverse legal cultures and the internal legal cohesion across the EU vis-à-vis procedural rules can only be achieved on the basis of mutual trust among judges, academics, legal professionals, and citizens. Mutual trust, as emphasised by the European Commission in its Action Plan on the Stockholm Programme, requires minimum standards, a reinforced understanding of the different legal traditions and methods[16], and of course, compromises.

II. – AVAILABLE OPTIONS FOR THE EAPO

When looking into the available options for drafting the EAPO, the different solutions provided by the legal systems throughout the EU had to be examined. All Member States have in place provisional measures securing future enforcement. All jurisdictions, with the exception of the common law jurisdictions—England and Wales, Northern Ireland, Ireland, and Cyprus—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*. This means that the account or targeted asset is directly frozen and any operation of the asset is deemed to be invalid against the applicant[17].

In the common law jurisdictions of the EU preservation orders do not operate *in rem*, but are injunctions *in personam*. *In rem* attachment orders, the so-called writ of attachments, do exist in the common law jurisdictions as well[18], however, they are far less popular. Foreign attachment,

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[13] Burkhard HESS, *Making More Efficient the Enforcement of Judicial Decisions Within the EU* (Study No JAI/A3/2002/02, 2004) 15.

[14] According to the distinction of Konrad ZWEIGERT AND Hein KÖTZ, *An Introduction to Comparative Law* (OUP 1998) 73, based on the distinction of Pierre ARMINJON, Baron Boris NOLDE, Martin WOLFF (eds), *Traité de droit comparé*, tome I, (LGDJ, 1950) 47.

[15] Zampia VERNADAKI, *Civil Procedure Harmonization in the EU: Unraveling the Policy Considerations*, (J. of Contemporary Eur Research, 2013) vol 9 (2) 297, 303.

[16] COMMISSION, *Action Plan Implementing the Stockholm Programme, Delivering an area of freedom, security and justice for Europe's citizens* (Communication) COM (2010) 0171 final, para 4.

[17] Burkhard HESS, *Making More Efficient the Enforcement of Judicial Decisions Within the EU* (Study No. JAI/A3/2002/02, 2004) 120.

[18] 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* John J. MCEVOY & Janet M. DINE, *Are Mareva injunctions becoming attachment orders?* (1989) 8 CJQ 236.

as it was known, became obsolete in English law by the late nineteenth century[19]. 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[20]. With that order the respondents are ordered not to remove their assets from the jurisdiction or to refrain from dealing with their assets. If a 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[21].

At first glance, the recently introduced EAPO resembles more closely to *in rem* attachment orders rather than to common law freezing orders. Since *in rem* attachment orders are the relevant remedy in most EU countries, it could be argued that the new remedy should be closer to an *in rem* order. Indeed, in paragraph 3 of the Explanatory Memorandum provided by the European Commission in its proposal for the EAPO, it was said:

"In line with the legal traditions of the large majority of Member States, the European order will have an *in rem* effect, i.e. be directed against specific accounts and not at the debtor personally".

Nonetheless, it is argued that this approach is incorrect. As it will be suggested, the guiding principle of European legislators in drafting procedural instruments should be the functionality and fairness of the instrument and not the solution provided by the majority of Member States.

III. – COMMON LAW CHARACTERISTICS MISSING FROM THE EAPO REGULATION

A philosopher once said: "Use only that which works, and take it from any place you can find it"[22]. It is argued that the common law freezing order is a very sophisticated instrument, which achieves fairness, efficiency, and equal protection to claimants, defendants, and third parties. It has been developed by jurists throughout the years through much consultation and consideration. Nonetheless, there are at least three elements that are inherent in the tradition and practice of common law freezing orders, which are absent from the EAPO Regulation and thus deprive it from being fully functional and fair.

First, the court has no discretion whether or not to issue an EAPO[23]. As Article 7 of the Regulation dictates, if the conditions to grant an EAPO are met, the court shall issue the EAPO. In the common law, injunctions are granted where it is "just and convenient" and, therefore, the court retains discretion to refuse relief and has power to stretch the usual rules in the interests of

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[19] Lawrence COLLINS, *The Territorial reach of Mareva Injunctions* (1989) 105 LQR 262, 266.

[20] The earliest cases granting freezing orders in England were *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 WLR 1093 (CA), and the eponymous case *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 (CA). In English law, the order is now available under the Civil Procedure Rules ("CPR") 25.1(1)(f) which changed its name to "freezing injunction". Freezing orders are now available in the other common law jurisdictions of the EU as well.

[21] Burkhard HESS, *Making More Efficient the Enforcement of Judicial Decisions Within the EU* (Study No. JAI/A3/2002/02, 2004) 121.

[22] Bruce THOMAS, *Bruce Lee Fighting Spirit: A Biography* (Frog Ltd, 1994) 44.

[23] Emily LEW, *Speedy Cross-border Debt Recovery? The New Europe-wide Freezing Order*, (2011) Butterworths J of Intl Banking and Financial L 699, 701.

justice[24]. The grant of an asset preservation order could cause significant damage to the respondent. A remedy that is regarded as exceptional must not be left to become mainstream and daily practice[25]. This could be achieved only by leaving to the judges' discretion the final decision to grant or refuse an order.

Secondly, as indicated in Article 8 of the Regulation, an applicant for an EAPO must provide the details of the respondent and the bank where the account to be frozen is located. If the applicant does not know the exact details he or she may request from the competent authority of the Member State of enforcement to obtain the necessary information (Article 14). That authority will use methods such as obliging all banks in its territory to disclose whether the defendant holds an account with them or accessing registers where that information is held by public authorities or administrations. These methods, however, are only available when the applicant has already obtained an enforceable judgment. Moreover, they are likely to be costly and burdensome for banks and authorities. The different mechanisms between Member States will also be a cause of inefficiency. The corresponding practice in the common law is that the court has jurisdiction 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.

Finally, the EAPO has the same rank as an instrument with equivalent effect under the law of the Member State of enforcement (Article 32). In some Member States, such as Germany and Portugal, an instrument with equivalent effect confers applicants a lien, and grants them priority even over competing creditors[26]. In the common law, a freezing order does not create any rights *in rem* and leaves issues of priority among creditors unaffected[27]. It only prevents the debtor to dissipate his or her assets under the threat of contempt of court. As Professor Adrian Zuckerman indicates, the continental attachment procedure stimulates litigation and hastens bankruptcy, because as soon as one creditor has obtained attachment, others will tend to rush in to protect their positions[28]. It also forces third parties with claims of rights over the attached goods to take legal action.

The common law approach in the area of asset-preservation orders, 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 inderdict*)[29]. Also, the different structure of provisional measures has not been an obstacle for

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[24] See THE RT HON LORD JUSTICE MAURICE KAY, Stuart SIME, Derek FRENCH (eds), *Blackstone's Civil Practice: 2014* (OUP, 2014) 38.4.

[25] LINKLATERS, *The European Account Preservation Order — The Future of Freezing Injunctions* (26 August 2011) <http://www.linklaters.com/pdfs/mkt/london/European_Account_Preservation_Order_freezing_injunctions_Newslet.pdf> accessed 18 March 2014.

[26] Burkhard HESS, *Making More Efficient the Enforcement of Judicial Decisions Within the EU* (Study No JAI/A3/2002/02, 2004) 131.

[27] Burkhard HESS, *Making More Efficient the Enforcement of Judicial Decisions Within the EU* (Study No JAI/A3/2002/02, 2004) 131.

[28] A.A.S. ZUCKERMAN, *Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies* (1993) 109 LQR 432, 453. See also RHONDA WASSERMAN, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgment*' (1992) 67 Washington L R 257, 282.

[29] Burkhard HESS, *Making More Efficient the Enforcement of Judicial Decisions Within the EU* (Study No JAI/A3/2002/02, 2004) 121.

their recognition and enforcement by the courts in the different Member States. For example, the English freezing injunction has been recognised in France and Germany. As Professor Burkhard Hess indicates, this shows that in practice, mutual trust or the willingness to accept a different but functionally similar solution of a foreign jurisdiction has become a reality in the case law of the different Member States[30].

Apart from the functional aspect, an order that is not completely alien to the common law tradition will have further benefits. First, it will attract the UK to be a part of the EAPO Regulation. Litigants in England and Wales, and Northern Ireland—in contrast with Scotland which follows a different practice—are accustomed to seeing certain measures accompanying this type of orders, which are absent from the instrument as it is was adopted[31]. As Jean Monnet observed, "The British are at their best if you firmly offer to work with them on an equal footing"[32]. It will also be a step forward for potential future treaties with common law jurisdictions outside the EU with a common law tradition, such as Australia and Canada, as well as the United States, where the Uniform Law Commission drafted in 2012 the "Uniform Asset Freezing Orders Act", soon to be introduced to the state legislatures.

If the UK does not opt in in the future, the WFO will probably keep being widely used. Any legislative competition between the WFO and the EAPO will lead to forum shopping and further legal uncertainty and therefore it must be avoided. The EAPO and European procedural legislation in general must be drafted by consensus, in the sense of accepting solutions that can be supported by every Member State, even if not the most favourable for each individual Member State. Otherwise, the objective of reinforcing cross-border transactions with effective procedural rules will only remain a theory.

Without necessarily having a vision for total uniformity, European procedural law must focus on reducing the divergence between the different legal systems. The finalised text of the EAPO Regulation was a move in the right direction compared to the initial proposal. Specifically, in the revised text, the duty of full and frank disclosure—an element which is central to the common law tradition—seems to have been incorporated as an additional condition to be satisfied by the applicant in obtaining an EAPO. However, other elements of the common law approach mentioned above, such as the *in personam* nature of the order, the judge's discretion in granting it, and the disclosure order accompanying it, should also have been considered. This can now be done on the basis of the review clause included in Article 53 of the Regulation.

The fundamental differences in the legal cultures across the EU will disappear only with co-operation rather than confrontation. Lord Wolf 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 of Europe[33]. The EAPO is one of the instances where the continental jurisdictions should cover the other half of the distance.

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[30] Burkhard HESS (Study No JAI/A3/2002/02, 2004) 138.
[31] Joseph KEAN, *Continental-wide Recovery – the European Account Preservation Order* (The Barrister, 2011) 13.
[32] Jean MONNET, *Memoirs* (Doubleday & Co, 1978) 308.
[33] LORD WOOLF in Basil MARKESINIS (ed), *The British Contribution to the Europe of the Twenty-First Century: The British Academy Centenary Lectures* (Hart Publishing, 2002) 11.