

The European Account Preservation Order's first anniversary – a reason to celebrate?

Jolien Kruit and Lisanne van Baren

January 2018

Since 18 January 2017, the courts of EU-member states – with the exception of the United Kingdom and Denmark - are allowed to order that funds held in all bank accounts located in the EU are preserved. The preservative measure's first anniversary is soon approaching. The question may be asked whether there is reason to celebrate indeed. In discussing this question, a comparison is made with the Dutch national arrest procedure.

Background

In many cases, it takes a considerable period of time and a serious amount of legal costs to obtain a judgment or arbitral award. It is generally only worthwhile to make these investments and to legally pursue a claim when there is reasonable certainty that there are assets available to secure the enforcement of a judgment or arbitral award after the same has been obtained. Most national systems of the European Member States provide measures to prevent inter alia the disappearance of assets, for example, by allowing conservatory attachments, arrests and freezing orders. These measures, however, vary substantially in content, extent and mode of application, whereas their scope is often limited to a particular jurisdiction. In order to overcome these difficulties, the European Commission deemed it useful to establish an additional, European instrument to preserve bank accounts in cross border debt recovery in civil and commercial matters. The procedure for this European Account Preservation Order ("EAPO") is set out in EC-Regulation 655/2014 (hereafter: the "EAPO-Regulation"), which is binding and directly applicable in all European member states with the exception of the United Kingdom and Denmark.

Outline EAPO procedure

The EAPO-Regulation introduces the possibility to preserve various bank accounts in several jurisdictions at the same time. A so called 'Preservation Order' can be obtained both prior to legal proceedings, during such proceedings and after a judgment has been obtained. It should be noted though that only the court with international jurisdiction on the merits is entitled to grant the same and only in cross border cases.¹

A request for a Preservation Order is to be made on the provided standard form. The order is given on an ex parte basis, which means that it is given without hearing the party whose bank accounts are to be preserved (*the debtor*). This should ensure the element of surprise and prevent that bank accounts are emptied before preservation can take place. In view of the order's ex parte character, several requirements have to be met in order to obtain the court's permission. To begin with, the applicant for the order (*the creditor*) must satisfy the court that there is a likelihood for its claim to succeed on substance. That this very stringent test is intended indeed can be derived from the provision's history.² In addition, the creditor must show in its application that the claim is in urgent need of judicial protection and that a real risk of enforcement difficulties exists if the order is not granted. Furthermore, if an application is made prior to legal proceedings on the merits being initiated, the claim should be followed up in court within a specified period of time.³ Moreover, when no judgment is available yet, security has to be put up by the creditor for damage caused by

¹ Cross border cases are defined in art. 3 of the EAPO-Regulation as cases in which the bank accounts that are to be preserved are not maintained in the Member State of the court seised or in which the creditor is domiciled.

² This is considered and set out in some detail by the Court of Appeal of 's-Hertogenbosch in its decision of 29 August 2017 (ECLI:NL:GHSHE:2017:3764).

³ Proceedings are to be initiated and proof thereof is to be shown to the court within 30 days since the application for the preservation order was lodged or within 14 days of the issue of the order, whichever is the later date (art. 10 EAPO-Regulation).

the preservation order. When a judgment has already been obtained, the court can still oblige the applicant to provide security. The Regulation also provides for liability of the creditor where damage caused by the order is the result of the creditor's fault.

The Regulation also provides for the option to make a request for information on one's debtors bank accounts. Such request will only be granted when the requirements set to obtain an order have been met.

It is expressly set out in the Recitals of the EAPO-Regulation that national preservation facilities can still be used, whether or not in addition to the preservation order.

Outline Dutch arrest procedure

The Dutch Code provides for a national preservative measure. As a matter of Dutch national law, if security for a claim is not provided voluntarily by a debtor, security may be obtained by the creditor by making an arrest/conservatory attachment (in Dutch: *beslag*) on the assets of his debtor. If the applicant has an arguable case regarding the merits of its claim, the Court is likely to grant leave for an arrest on an ex parte basis.

There is no general obligation for the applicant for an arrest to provide (counter)security for damage caused by the arrest. The Court is allowed to require that security is provided by the applicant, but in practice such requirement is hardly ever made.

The party on whose behalf an arrest is made is liable for damage suffered by the party whose assets have been attached, if the arrest proves wrongful. Pursuant to the case law of the Dutch Supreme Court, an arrest may be wrongful when the claim on the merits fails or when the arrested property turns out not to belong to the debtor after all.

Evaluation

Upon its introduction, the EAPO was marketed by the European Commission as a crucial weapon in debt recovery proceedings.⁴ Nevertheless, in the Netherlands, the EAPO does not appear to have gained great popularity. There is hardly any published case law. This might be the result of the fact that mere applications are not published, that there is little cause for discussion⁵ and/or that the Regulation has only been implemented last year. It cannot be excluded, however, and it even seems more likely, that the absence of case law is caused by the fact that the national Dutch facility to make arrests/conservatory attachments is considerably more feasible for a party looking to preserve assets. Although a Dutch preservative measure may not extend to bank accounts in other European countries⁶, it does set a much lower threshold on the creditor to prove its claim. The Dutch arrest instrument does not require either that security is provided before leave is granted for taking preservative action. Moreover, the EAPO-Regulation's liability provision is more extensive and may more easily result in the creditor's liability. In theory, the EAPO and a national instrument can be used in concert, but this will result in additional costs and potential restrictions as the creditor is obliged to advise the court of applications made for equivalent national orders in its application for an EAPO.

The conclusion appears to be that the EAPO may well be an instrument that serves an important purpose in other European Member States.⁷ However, if one merely looks at its application in the Netherlands, there seems little reason for a big birthday party.

⁴ http://ec.europa.eu/justice/civil/commercial/freeze-accounts/index_en.htm

⁵ In the published case law, the main point of discussion was whether the court granting the EAPO had jurisdiction on the merits. Dutch Court of Appeal of 's-Hertogenbosch 29 August 2017, ECLI:NL:GHSHE:2017:3764. Also German Court of Appeal 10 April 2017, ECLI:DE:OLGHAM:2017:0410.32SA28.17.00.

⁶ Dutch Courts have recently been willing to grant leave for arrests on vessels which are located in other EU Member States, when the court has jurisdiction on the merits of the dispute between the parties. It is doubtful whether they would also be willing to grant leave for attachments of bank accounts in other jurisdictions.

⁷ In Belgium, the government does not appear to have taken the required implementation measures yet.