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Arbitration and European Account Preservation Order

Antonio Leandro (University of Bari Aldo Moro) · Monday, April 4th, 2016

European institutions have established the European Account Preservation Order procedure ("EAPO") to facilitate the cross-border debt recovery through the attachment of bank accounts (see here the Regulation (EU) No. 655/2014, which will apply from 18 January 2017, except for Denmark and the United Kingdom).

The EAPO in particular provides creditors with a measure alternative to national bank freezing orders for preventing the disputed claim from being harmed by the transfer or withdrawal of account's funds during either the proceedings on the merits or the enforcement of an earlier judgment.

A possible interesting question for this blog's readers is whether an EAPO may support a claim disputed in arbitration.

Favorable arguments stemming from the equivalence between an EAPO and national provisional measures

The Regulation No. 655/2014 expressly excludes arbitration from its scope (Article 2(2)(e)).
In doing so, the EAPO Regulation matches the exclusion of arbitration in the Brussels I Regulation (recast) (see Article 1 (2) (d) and Recital 12).

This clearly means that: a) arbitral tribunals may not make use of an EAPO; b) the EAPO may not support judicial ancillary proceedings relating to arbitration, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition, or enforcement of an award.

However, it is well known that certain national systems allow courts to grant provisional measures in support of arbitrated claims.

Besides, the European Court of Justice held in *Van Uden* (1998) that

> "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the [earlier Brussels Convention] is thus determined not

> by their own nature but by the nature of the rights which they serve to protect" (para. 33).

As a result, where "the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the [earlier the Brussels Convention] is applicable and Article 24 thereof [Article 35 of the Brussels Regulation (recast)] may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators" (para. 34).

Consequently, assuming that the Brussels I Regulation (recast) and the EAPO Regulation are intermingled with each other within the EU civil procedural law system, the courts of Member States that are entitled under national law to provide protective measures *pro* arbitrated claims might likewise grant the EAPO as a measure equivalent/alternative thereto.

Contrary arguments arising out of Regulation No. 655/2014

Problems arise, though, from the jurisdictional grounds on which the EAPO may be granted. Article 6 (1) and (3) of the Regulation No. 655/2014, in fact, refers to 'courts' having jurisdiction on the merits or to 'courts' which have pronounced the judgment whose enforcement the EAPO should support.

Undoubtedly an EAPO following the judgment (Article 6 (3)) may not secure a claim ascertained in the award. The expressed reference to the *court* that has pronounced the judgment, coupled with the arbitration exclusion, make it impossible to request an EAPO for sustaining the enforcement of an award. Thus a party should apply for national provisional measures in the requested State.

A possible arbitration-friendly interpretation in case of *ante/in causam* EAPO

Should the EAPO be requested before or during the proceedings, the Regulation No. 655/2014 compels the creditor to apply before the court (supposedly) having jurisdiction "to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable" (Article 6 (1)).

On the other hand, no EAPO rule requires to commence the proceedings before the court supposedly having jurisdiction on the merits or, more generally, before a judicial body. Nor does it necessarily refer only to judicial pending proceedings.

The reference to the "relevant rules of jurisdiction applicable" could not be limited to national/European *grounds* of jurisdiction, for also including rules designed for a court to shape the interplay between judicial and arbitral jurisdiction even with respect to its support of arbitrated claims.

The only condition to be met is that proceedings on the substance are commenced or pending in a Member State (Article 5 (a)), which implies that arbitration must have a seat in that State.

It is true that the EAPO differs from the *Van Uden* framework, as the competence for the former lies with the court of the 'merits', while the ECJ's judgment was concerned with the 'exorbitant' jurisdiction of the Brussels I Regulation (Article 35), activated in support of an arbitrated claim.

But not less true it seems that if an ‘exorbitant’ court may grant provisional measures paralleling an arbitral tribunal, then such measures may be granted by a court which lacks jurisdiction *only* due to an arbitration agreement. Even more if such court were to pertain to the Member State of the targeted bank account (provided that the creditor is domiciled in a different Member State: see Article 3 of the Regulation No. 655/2014 as to the applicability of the EAPO procedure to cross-border cases only).

Eventually a distinction may be proposed between a “court” having jurisdiction on the merits (and, accordingly, for granting the EAPO) and a “court” which would have had jurisdiction on the merits, absent a valid arbitration agreement, which may nonetheless grant an EAPO.

No *ante*-arbitration EAPO

Even though no clear-cut obstacle arises in matters of jurisdiction, the Regulation No. 655/2014 makes the use of an *ante*-arbitration EAPO impossible due to the rules governing the relationship between the preventive measure and the initiation of the proceedings.

Both time-limits for commencing the proceeding on the substance and the facts which presumptively demonstrate the initiation of proceedings (Article 10) are tailored for courts, and even a more friendly interpretation thereof could hardly fit arbitral proceedings.

Conclusion

The EAPO probably will represent the more invasive European device in civil procedural law for the majority of Member States, which have so far retained great control on the requirements for granting and enforcing protective measures in their territory.

Similarly to the Brussels I Regulation, the EAPO Regulation does not apply to arbitration, nor may it secure the enforcement of an award, but the EAPO may be granted parallel with a pending arbitration in so far as the seized court may grant equivalent national measures.

A more far-reaching protection of arbitrated claims waits for the EU to perceive judicial and arbitration proceedings as really equivalent one to another when forging measures aimed to simplify cross-border commercial disputes and debt recovery.

This entry was posted on Monday, April 4th, 2016 at 5:00 am and is filed under Arbitration, Domestic Courts, Europe, European Law, European Union
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