PART I

Preliminary Chapters

1

Introduction

1
The European Account Preservation Order (EAPO) that was established by Regulation 655/2014[1] is a European uniform procedure which enables creditors to protect the future enforcement of their claims by preventing their debtor from withdrawing or transferring funds held in bank accounts. It is only the third uniform procedure established in the European Union (EU), after the European Order for Payment[2] and the Small Claims Procedure.[3] Other EU regulations adopted were essentially aimed at improving the coordination of the national procedures of the Member States, for instance by establishing uniform rules of jurisdiction and choice of law and simplifying the recognition of judgments as between Member States.[4]

2
The primary goal of this book is to provide an exhaustive, article per article, commentary of the EAPO Regulation. In addition, a brief introductory survey of the Regulation is offered in Chapter 2, and Chapters 3–5 study separately three important topics: the territorial scope of the Regulation, the meaning of the exclusion of arbitration and whether the rights of the defendant are sufficiently protected under the Regulation. First, this introduction explains the origin of the Regulation, which lies to a large extent in the restrictive interpretation

[1] Regulation 655/2014 establishing a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters.
[2] Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006), p. 1–32.
[3] Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007), p. 1–22.
[4] The most important being the Brussels Ibis Regulation: see next note.

of the general European law of jurisdiction, and surveys the legislative history of the instrument.

I The Origin: The Interpretation of the Brussels Convention

3
Since the adoption of the Brussels Convention in 1968,[5] the enforcement of judgments in civil and commercial matters between the Member States has been simplified to such an extent that judgments are virtually never denied enforcement under the European regime.[6] The scope of the European law of judgments was very broad, and the European Court of Justice held at an early stage that it contained provisional, including protective, measures.[7] In principle, therefore, protective measures ordered in one Member State could be declared enforceable in other Member States. The European law of judgments could thus have accommodated and contributed to the development of cross-border protective measures.

4
The same Brussels instruments have also regulated the jurisdiction of the courts of the Member States. Although they included a special provision on the jurisdiction to grant provisional, including protective, measures, these instruments were long silent on the power of courts to issue protective measures with extraterritorial effect. Such power was confirmed by the European Court of Justice in 1998 in the *Van Uden* decision,[8] which held that the courts of the Member States that have jurisdiction on the merits of the case under the European law of jurisdiction also have jurisdiction to issue protective measures, with no territorial limitation. Thus, the European law of jurisdiction could also have

[5] The Convention was later replaced first by EU Regulation 44/2001 (the Brussels I Regulation) and then by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1–32) (the 'Brussels Ibis Regulation'), which is currently in force.

[6] Empirical studies have shown that more than less than 10 per cent of judgments are denied enforcement: see Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009) 174 final, § 3.1.

[7] Case C-120/79, *Louise de Cavel v Jacques de Cavel*, ECLI:EU:C:1980:70.

[8] Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* ECLI:EU:C:1998:543.

accommodated and contributed to the development of cross-border protective measures.

5
However, in 1980, the European Court of Justice laid down a limitation on the enforcement of foreign protective measures which dramatically reduced the efficacy of cross-border protective measures in the European Union and essentially excluded any development of such remedies under the general European regime. In *Denilauler*, the Court ruled that 'judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service'[9] fall outside of the scope of the part of the Brussels Convention governing recognition and enforcement of foreign judgments (Title III) and may not benefit from the simplified enforcement procedure of the Convention (although they may be enforced under national law). While some provisional measures can usefully be granted *inter partes*, it is typically the case that protective measures aiming at freezing assets are only useful if issued *ex parte* (i.e. unilaterally, without summoning the respondent) and implemented immediately.

6
The European Commission has been fully aware of the dramatic impact of this limitation, and attempted to abolish it. In its 2010 Proposal for a Brussels I Regulation Recast, the Commission advocated extending the enforcement regime of the Brussels Regulation to provisional and protective measures granted *ex parte*, and recommended replacing prior service by a right of the defendant to challenge the measure subsequently.[10] The attempt failed, and the *Denilauler* exception was indeed codified in the Brussels Ibis Regulation.[11]

7
Contrary to its predecessors, the Brussels Ibis Regulation expressly regulates cross-border provisional, including protective, measures. First, Art. 2(a) provides that judgments which may benefit from the simplified European regime of recognition and enforcement include

[9] Case 125/79 *B. Denilauler* v. *SNC Couchert Frères*, (1980) ECR 1553, at para. 18.
[10] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2013/0554 final, Art. 2(a).
[11] Brussels Ibis Regulation, Art. 2(a) and Art. 42(2)(c).

'provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter'. This is a codification of the *De Cavel* decision.[12] Art. 2(a) then continues: 'It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.' This is the codification of the *Denilauler* exception. Finally, Art. 42(2)(b) requires that the party seeking to enforce a foreign provisional, including protective, measure in another Member State provide to the competent enforcement authority a certificate that the issuing court had jurisdiction as to the substance of the matter, which is a codification of the *Van Uden* case.[13]

8

While *Denilauler* had significantly limited the possibility to enforce *ex parte* protective measures in other Member States, it had not necessarily excluded it. A way to bypass the rule in *Denilauler* and now Art. 42(2)(c) of the Brussels Ibis Regulation is to proceed in two steps. A first judgment ordering a protective measure with immediate effect is rendered, with no particular hope of enforcing it in another Member State. The defendant is then served not only with the first judgment, but also with a document summoning him to appear in a hearing aiming at confirming it. A second judgment confirming the first is then made, which, taken in isolation from the first, meets the *Denilauler* requirement. A number of English freezing orders issued after such an *inter partes* hearing have been enforced in other Member States.[14] Some English scholars argue that the second step of the procedure cures the order from its initial defect,[15] as a consequence of the shift from prior service to a right of the defendant to challenge the judgment operated by the Brussels I Regulation.[16] If this shift was ever relevant in the context of provisional, including protective, measures, it has been cancelled by Art. 42(2)(c) of the Brussels Ibis Regulation.

[12] See above, no. 3.
[13] Art. 42(2)(c) lays down an additional requirement implementing the *Denilauler* exception.
[14] See, e.g. in France, French *Cour de cassation*, Civ. 1ère, 30 June 2004, *Stolzenberg*, case no. 01–03248 & 01–15452.
[15] A. Briggs & P. Rees, *Civil Jurisdiction and Judgments* (Taylor & Francis 2009) no. 6.21.
[16] Case 420/07 *M. Apostolides v. D.C. and L.E. Orams*, (2009) ECR I-3571, at paras. 75–78.

9
If the general European law of jurisdiction and judgments had developed otherwise, the need for the establishment of a European protective remedy would certainly have been less strong. It seems, however, that other factors hindered the development of the practice of extraterritorial protective measures in many Member States, the United Kingdom being the only significant exception. The first is the belief that principles of public international law demand that enforcement law remain territorial. The second is the complexity of the field of enforcement law, and the important divergences existing between the laws of the Member States. It might have been too much to expect the courts of Member States to adapt and coordinate their laws in order to ensure recognition of foreign protective measures without any guidance. While the EAPO Regulation establishes a uniform remedy, it also relies to a large extent on the national laws of the Member States and thus, in effect, offers the necessary guidance for coordinating their national laws.

II Legislative History

10
The idea of establishing a European attachment procedure arose at the end of the 1990s. It was discussed in a conference in Lisbon in 1998 by Belgian and French scholars.[17] At the same time, the European Commission initiated the process of reflecting on a possible intervention in enforcement law in its 1998 Communication 'Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union'.[18] The Communication insisted that the multidisciplinary nature of the field, plus the traditional principle of territoriality as it pertains to seizure, made it necessary to take a cautious and very gradual approach to the subject. It proposed to confine reflection initially to the problem of banking seizures.

11
Two years later, the Programme on Mutual Recognition called upon the Commission to improve attachment measures concerning banks.[19]

[17] G. de Leval (in collaboration with F. Georges), 'La saisie-arrêt bancaire dans l'Union européenne', in M. T. Caupain and G. de Leval (eds.) *L'efficacité de la justice civile en Europe* (Larcier, 2000), p. 434 s., p. 185 s., spéc. n° 24, p. 203. R. Perrot, ibid., p. 434 s.
[18] Commission Communication to the Council and the European Parliament, JO C 33, 31.1.1998, p. 3.
[19] Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters, OJ C 12, 15.1.2001, p. 1, 5.

In 2002, the Commission issued an invitation to tender for a study on making more efficient the enforcement of judicial decisions within the European Union. The study's report analyzed the situation in the then 15 Member States and proposed several measures to improve the enforcement of judicial decisions in the European Union, notably the creation of a European order for the attachment of bank accounts, a European protective order to the same effect and a number of measures enhancing the transparency of the debtor's assets.[20]

12
In October 2006, the European Commission issued a 'Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: The Attachment of Bank Accounts' and launched a consultation on the need for a uniform European procedure for the preservation of bank accounts and the possible features of such a procedure, on which a total of 68 responses were received.

13
In the Stockholm Programme of December 2009,[21] which sets freedom, security and justice priorities for 2010 to 2014, the European Council invited the Commission to assess the need for, and the feasibility of, providing for certain provisional, including protective, measures at the European Union level, to prevent, for example, the disappearance of assets before the enforcement of a claim, and to put forward appropriate proposals for improving the efficiency of enforcement of judgments in the Union regarding bank accounts and debtors' assets.

14
In February 2011, the European Commission established an expert group to assist in the preparation of a preliminary draft of a regulation for the freezing of bank accounts in the European Union. The Commission would then publish in July 2011 a Proposal for a Regulation Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters.[22]

[20] B. Hess, *Study No. JAI/A3/2002/02 on Making More Efficient the Enforcement of Judicial Decisions within the European Union: Transparency of a Debtor's Assets – Attachment of Bank Accounts – Provisional Enforcement and Protective Measures* (2003). The final report is available at http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.
[21] OJ C 115, 4.5.2010, p. 1. [22] COM/2011/0445 final. See Annex 2 of this book.

15
The proposal of the Commission was the starting point of the European legislative process. The European Data Protection Supervisor first issued an opinion on the proposal in October 2011.[23] The European Economic and Social Committee then issued its own opinion in April 2012.[24] Finally, the European Parliament issued a report on the proposal on 20 June 2013, which included a draft legislative resolution of the Parliament, an explanatory statement and an opinion of the Committee on economic and monetary affairs.[25]

16
Regulation 655/2014 establishing a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters was eventually adopted on 15 May 2014.

[23] *Opinion of the European Data Protection Supervisor on a 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* (OJ C 373, 21.12.2011, p. 4–7).
[24] *Opinion on the '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'* (OJ C 191, 29.6.2012, p. 57).
[25] *Report on the Proposal for a Regulation Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters*, A7-0227/2013.