Replies to Green Papers regarding Matrimonial Property and the Attachment of Bank Accounts

As stated on the website of the European Judicial Network, the replies received with regard to the **Green Paper** on conflict of laws in matters concerning **matrimonial property regimes**, including the question of jurisdiction and mutual recognition (COM(2006) 400 final) are now available at the EJN's website.

See with regard to the Green Paper on matrimonial property also our previous posts which can be found here, here and here.

Further, also the replies which have been received with regard to the **Green Paper** improving the efficiency of the enforcement of judgments in the European Union: The **attachment of bank accounts** (COM(2006) 618 final) are available at the EJN's website as well.

You can find further information on the Green Paper on the attachment of bank accounts on our related site.

EP on the Green Paper on the Attachment of Bank Accounts

The European Parliament issued 08/10/2007 its tabled non-legislative report on the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts (2007/2026(INI)). The report can be read here and here. See our previous posts here, here and here.

Comments on the Commission's Green Paper on the Attachment of Bank Accounts

The European Commission (DG Freedom, Security and Justice) has published on its website the whole set of contributions (more than 60 papers) received in response to the public consultation launched by the **"Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts"** (COM(2006) 618 final), released in October 2006 (see our previous posts here, presenting the Green Paper and related documents, and here, on the comments by the Max Planck Working Group).

Contributors include the European Central Bank, governments of the Member States and other national authorities, academics and private parties (banking associations, non-governmental organizations, bar associations, law firms, etc.).

MPI Comments on the Green Paper on the Attachment of Bank Accounts

The Max Planck Working Group has – besides the comments on Rome I (see our older post) – also elaborated "Comments on the European Commission's Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: The Attachment of Bank Accounts".

The comments can be found on the MPI's website and will be published in the

European Company and Financial Law Review (issue 2, 2007) in due course.

The Commission’s Green Paper (COM(2006) 618 final) can be found here.

EU Commission Green Paper: Improving the efficiency of the enforcement of judgments in the EU: the attachment of bank accounts

On 24 October 2006, the European Commission adopted a Green Paper on **"Improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts"** (COM(2006) 618 final). The European Commission's newsroom website states:

> *The problems of cross-border debt recovery is an obstacle to the free circulation of payment orders within the European Union and an impediment for the proper functioning of the Internal Market.*
>
> *By now, debtors are able to move their monies almost instantaneously, out of accounts known to their creditors into other accounts in the same or another Member State. At the contrary, creditors are not able to block these monies with the same swiftness and when seeking to enforce an order in another Member State they are confronted with legal, procedural and language obstacles which entail additional costs and delays. Above all, under existing Community instruments, it is not possible to obtain a bank attachment of one's debtor’s bank account(s) which can be enforced throughout the European Union. Aware of the difficulties of cross-border debt recovery, the EU Commission has decided to concentrate in a first step the public Consultation on protective measures improving the attachment of bank accounts.*

The Commission go on to state the need for consistency in the attachment of bank accounts thus:

> *Enforcement law has often been termed the "Achilles' heel" of the European Civil Judicial Area. While a number of Community instruments provide for the jurisdictional competence of the courts and the procedure to have judgments recognised and declared enforceable as well as mechanisms for co-operation of courts in civil procedures, no legislative proposal has yet been made for actual measures of enforcement. To date, execution on a court order after it has been declared enforceable in another Member State remains entirely a matter of national law.*
>
> *Current fragmentation of national rules on enforcement severely hampers cross-border debt collection. While debtors are today able to move their monies, almost instantaneously, out of accounts known to their creditors into other accounts in the same or another Member State creditors are not able to block these monies with the same swiftness thereby risking that their claims remain unpaid. Under existing Community instruments, it is not possible to obtain a bank attachment which can be enforced throughout the European Union.*
>
> *A consistency of approach amongst the Member States as regards the attachment of bank accounts would remedy to this situation and might also help to avoid potentially discriminatory effects where remedies in different Member States create disparity in outcomes quite apart from the potential, and probably actual, affects on the functioning of the Internal Market.*

In addition, a "Green Paper on how to improve the transparency of the debtor's assets will follow by the end of 2007." It would appear that the drive towards a unified set of procedural rules, with the European Payment Procedure Order and the European Small Claims Procedure also at full steam ahead, shows no sign of slowing.

Documents (PDF):

- COM (2006) 618: Improving the efficiency of the enforcement of

judgements in the European Union: the attachment of bank accounts
- SEC (2006) 1341: Commission staff working document annex to the green paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts
- IP/06/1460: Improving the efficiency of the enforceability of cross-boarder debt collection
- MEMO/06/398: Green Paper on improving the efficiency of the enforceability of cross-boarder debt collection

Responses to the Green Paper must be submitted no later than **31 March 2007**.

Hat-tip to *Andrew Dickinson* for the link.

ERA conference "Freezing Bank Accounts Across Europe (and Beyond)": compte-rendu

*This report has been prepared by **Martina Mantovan**i, research fellow at the MPI Luxembourg.*

On 1st and 2nd December 2016, the Academy of European Law (ERA) hosted, in Trier, the conference "***Freezing Bank Accounts Across Europe (and Beyond)"***, bringing together a wide range of academics and practitioners to discuss the new scenarios opened by the prospective implementation of the new European Account Preservation Order, which will apply from 18 January 2017.

This post provides an overview of the presentations and of the discussions on the issues raised.

LOOKING ACROSS EU BORDERS

Freezing of assets (by foreign parties) in Swiss banks – Prof. Dr. Daniel Staehelin provided valuable insights on the current situation in Switzerland. With its 276 banks, this country is still one the largest managers of offshore wealth, thus being an appealing target in the eyes of foreign creditors who seek to recover their monetary claims. Special attention was given to the procedural requirements for obtaining a Swiss freezing order and to the possible difficulties arising from the interaction with the bank secrecy regime. Pursuant to the 1889 Debt Enforcement and Bankruptcy Act, in fact, the claimant shall prove, *inter alia*, that the debtor is the client of a specific bank. In this respect, it is worth stressing that the relative weakening of the bank secrecy regime, brought along by the Treaties concluded by Switzerland over the last few years, solely concerns the requests coming from authorities of the contracting States for tax recovery claims. Conversely, in civil and commercial matters, banks can – and generally will – still invoke the professional secret against requests coming from private persons engaged in debt collection activities.

THE EUROPEAN ACCOUNT PRESERVATION ORDER (EAPO)

Scope and procedure for obtaining an EAPO, including jurisdiction and service of documents – In this second presentation, Prof. Pietro Franzina led us through the procedural steps set forth by the EAPO Regulation for the granting of a European freezing order. These latter play, in fact, a pivotal role in the overall architecture of the EAPO Regulation, as its "added value" vis-à-vis other European instruments (namely, the Brussels I bis and the Maintenance Regulations) lies precisely in the harmonized procedural framework established therein. In addition to some common rules on jurisdiction and on the substantive requirements for issuing a account preservation order, the Regulation sets forth specific rules governing enforcement by national courts and enforcement authorities. The remedies available to the debtor and the appellate stage of the proceedings are, as well, specifically considered by the Regulation. The underlying intent is to sidestep – at least in theory – most of the practical difficulties arising out of the interaction with domestic procedural regimes, which are thus relegated to a minor gap-filling role.

Practical issues for banks operating in the Member States – The presentation by Sarah Garvey and Joseph Delhaye identified four major operational issues for the bank required to implement the order. At the outset, the identification of the assets which can be preserved through an EAPO may prove

particularly challenging in the case of joint and nominee accounts. Since, pursuant to Article 30, these accounts may be preserved only to the extent permitted under the law of the Member State of enforcement, there will be significant discrepancies in the practices followed in the several Member States. Another operational difficulty arising out of the interplay between uniform and domestic regulation consists in the determination of the exempted amounts and of the legal regime governing the bank's potential liability. Pursuant to, respectively, Article 31 and Article 26 of the EAPO Regulation, both shall in fact be determined under the national law of the Member State of enforcement. Again, these provisions will generate significant divergences from State to State. Last but not least, completing the form provided for by Annex IV may raise practical issues which find no express answer in the Regulation (eg. the treatment of pledged accounts, finding a balance between the ex-parte nature of the order and the duty of care and prompt information generally owed by banks to their clients). In light of the above, the banks of the participating States will likely be unable to develop a uniform approach to the EAPO.

What are the risks for claimants? – The position of the claimant vis-à-vis the EAPO has been analysed by Philippe-Emmanuel Partsch and Clara Mara-Marhuenda, who identified four major risks arising in connection with an EAPO application. Firstly, the claimant has to take into account the possibility of having to provide a security, if the court considers it appropriate in the circumstances of the case. Secondly, he may be held liable for any damage caused to the debtor by the Preservation Order due to his fault. Although, generally speaking, the burden of proof shall lie with the debtor, the claimant might have to actively prove the lack of fault on his part in order to reverse the presumption set out by Article 13 (2) of the EAPO Regulation. The third risk is connected with the ranking of the EAPO: as it has the same rank as an "equivalent national order" of the State of enforcement, other domestic measure may hypothetically have priority over the European freezing order, if so provided by national law. Finally, the claimant shall consider that the defendant may challenge the EAPO (Article 33), or oppose to its enforcement (Article 34). If the defendant is successful, the EAPO can be, respectively, revoked (or modified) and terminated (or limited).

WORKSHOP: Freezing monies in bank accounts across Europe – During this workshop, participants were confronted with a comprehensive "freezing of bank account scenario" devised by Prof. Gilles Cuniberti. The analysis of the case

brought to light many uncertainties relating to the practical functioning of the EAPO Regulation. The proper interpretation of some concepts used – but not defined – by the Regulation, the interplay with the Service Regulation, compliance with the time-frame set forth by the EU legislator, the standard of due diligence required of the bank were perceived by the participants as the most problematic aspects of the EAPO Regulation.

ROUND TABLE (*Partsch, Delhaye, Raffelsieper, Weil*): Maintaining surprise vs protecting the debtor – As of January 2017, the EAPO Regulation will provide creditors with the possibility of obtaining an ex parte freezing order easily enforceable throughout the EU. This measure evidently purports to overcome the practical limitations arising out of the case *Denilauer,* where the ECJ held that the respect of the rights of the defence necessarily implies the prior hearing of the defendant. In this round-table, the speakers and participants brought attention to the downside of this case-law, insofar as it undermines the *effectiveness* of the protection of creditors' interests. The discussion focused on the system of procedural safeguards set in place by the EAPO Regulation. The speakers agreed on the fact that the Regulation provides for an adequate balance between the interests all the parties involved, while limiting, at the same time, the risk of procedural abuses.

WORLDWIDE FREEZING ORDERS

US freezing orders in practice: a primer – In his presentation, Brandon O'Neil provided some useful insights on the system (or, rather, on the lack thereof) governing the attachment of assets in the US. The lack of a uniform Federal approach to the matter results into a piecemeal legal framework, where attachment of assets is generally seen as an extraordinary remedy whose legal regime differs from State to State. Although several "Model laws" have been proposed over the years, the State legislatures have been strenuously reluctant to give up their restrictive and specific national regimes. As a result, obtaining a freezing order in the US may require the filing of multiple actions in several States. The speaker provided for positive examples of this legal diversification, by giving a brief account of some "domestic peculiarities" – ie Columbia's ex parte procedure, Delaware's business-friendly regime and Florida's standard of the "fraudulent intents". In the second part of the presentation, Mr. O'Neil focused on the standards and procedure set forth by the law of the State of New York.

English freezing orders: the weapon of choice for claimants? – Ms. Sarah Garvey described the substantive and procedural requirements for the granting of English freezing orders, also known as Mareva injunctions. The speaker especially focused on the duty of full and frank disclosure owed by the applicant's solicitors, which factually ensures the adequate protection of the defendant's interests within the framework of an ex parte procedure. Some relatively recent trends of the English practice were as well investigated, such as the possibility of combining freezing injunctions with "search orders", in order to identify and freeze the relevant assets in one go. According to Ms. Garvey, English freezing injunctions may be an appealing alternative to the EAPO. They present, in fact, considerable "competitive advantages" over the European Instrument, namely: (i) their broader scope as to the kinds of assets covered by the measure; (ii) their potential worldwide reach; (iii) the swift and informal nature of the procedure (iv) the tough sanctions for non-compliance with the order.

ROUND TABLE (Hess, Franzina, Garvey, O'Neil): EAPO vs freezing orders – Which path to take? The discussion focused on the legal treatment reserved by the EAPO Regulation to the domiciliaries of non- Participating Member States, who cannot avail themselves of an EAPO but may nevertheless be affected by such a measure if their bank account is held in a Participating State. The concern has been voiced that the exercised of a legal prerogative of some Member States (the right of opting in/opting out) *de facto* results, in this case, in a discriminatory treatment of their domiciliaries, in particular when these latter apply for an EAPO as maintenance creditors. The speakers expressed diverging opinion on this point.

The concluding remarks were made by Prof. Gilles Cuniberti, who expressed cautious optimism as to the prospects of success of this new European instrument.

International Reach of French

Attachments

Can attachments reach foreign bank accounts? For the French, the answer had always been clearly negative, until the French supreme court for private matters (*Cour de cassation*) held in a judgment of 14 February 2008 that a French attachment could reach a bank account in Monte Carlo.

In this case, a creditor had carried out an attachment on the bank account of its debtor, Société Exsymol. The account had been opened at the Monte Carlo branch of French bank BNP Paribas, but the creditor chose to carry out the attachment in Paris. The issue arose as to whether the attachment had reached the Monte Carlo account. The *Cour de cassation* held that it had.

French *saisies attribution*

The attachment was a *saisie attribution*. It is only available to creditors who have enforcement titles such as judgments or arbitral awards declared enforceable. Such attachments purport to transfer the property of the monies from the debtor to the creditor. They thus clearly belong to the enforcement of decisions. They are no freezing orders.

It should also be underlined that they are available to judgment creditors without any judicial intervention or even leave. Any French judgment creditor may directly hire an enforcement officer (*huissier de justice*) who will carry out the attachment on his behalf.

Scope of the rule

The Court insisted that the French *saisie* had reached the foreign account because it was held by a branch of the bank. It is ruled that the rationale of the solution is that *saisies* reach all assets owned by the corporate entity, irrespective of their location. It seems clear thus, that they would not reach assets held by a foreign subsidiary of the bank. But it also seems to follow that whether the bank had its headquarters in France is irrelevant.

Was European law relevant?

The judgment does not mention the Brussels I Regulation. Was it indeed irrelevant? I think so. I would argue that the regulation governs the jurisdiction of courts, not the power (jurisdiction?) of other state bodies such as enforcement officers to act internationally.

Additionally, Monte Carlo does not belong to the European Union. In enforcement matters, wouldn't the regulation apply only to the enforcement on the territories of member states? Would the enforcement here be the action of the French *huissier* in Paris or the transfer of ownership of the assets, thus taking place outside of the EU?

Is enforcement strictly territorial?

BNP Paribas is The bank for a Changing World. Changing it is indeed! In French legal circles, enforcement had always been regarded as strictly territorial. It was argued that it would be an infringment of the sovereignty of the foreign state to carry out enforcement on assets situated on its territory. It seems that the *Cour de cassation* is not convinced anymore.

All comments welcome! I would also love to hear from similar experiences in other jurisdictions.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2021: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

A. Dickinson: **Realignment of the Planets – Brexit and European Private International Law**

At 11pm (GMT) on 31 December 2020, the United Kingdom moved out of its orbit of the European Union's legal system, with the end of the transition period in its Withdrawal Agreement and the conclusion of the new Trade and Cooperation Agreement. This article examines the impact of this realignment on private international law, for civil and commercial matters, within the legal systems of the UK, the EU and third countries with whom the UK and the EU had established relationships before their separation. It approaches that subject from three perspectives. First, in describing the rules that will now be applied by UK courts to situations connected to the remaining EU Member States. Secondly, by examining more briefly the significance for the EU and its Member States of the change in the UK's status from Member State to third country. Thirdly, by considering the impact on the UK's and the EU's relationships with third countries, with particular reference to the 2007 Lugano Convention and Hague Choice of Court Convention. The principal focus will be on questions of jurisdiction, the recognition and enforcement of judgments and choice of law for contract and tort.

S. Zwirlein-Forschner: **Road Tolls in Conflict of Laws and International Jurisdiction – a Cross-Border Journey between the European Regulations**

Charging tolls for road use has recently undergone a renaissance in Europe – mainly for reasons of equivalence and climate protection. The payment of such road tolls can be organized either under public or under private law. If a person resident in Germany refuses to pay a toll which is subject to foreign private law, the toll creditor can sue the debtor for payment at its general place of jurisdiction in Germany. From the perspective of international private law, such claim for payment of a foreign toll raises a number of complex problems to be examined in this article.

T. Pfeiffer: **Effects of adoption and succession laws in US-German cases – the example of Texas**

The article discusses how adoption and succession laws are intertwined in cases of adoptions of German children by US-parents in post WW2-cases, when Germany still had a contract based system of adoptions. Addressing the laws of Texas as an example, the author demonstrates that, so far, the legal effects of these adoptions have not been analysed completely in the available case law and legal writing. In particular, the article sets forth that, in relation to adoption contracts, Texan conflicts law (like the law of other US States) refers to the law of the adoption state so that the doctrine of a so-called hidden renvoi is irrelevant. Furthermore, in this respect, the renvoi is a partial one only in these cases: Under Texan conflicts law, the reference to the laws of the adoption state is relevant only for the status of being adopted, not for the effects of adoption, e.g. the question to whom the adopted is related; the latter issue is governed by the law of the domicile of the child, which is identical to the adoptive parents' domicile, at least if this is also the adoptive family's domicile after the adoption.

Furthermore, the author discusses matters of succession and argues: According to the ECJ's Mahnkopf decision, a right of inheritance of the adopted child in relation to the biological parents under the laws applicable to the effects of the adoption, as provided for in Texas, has to be characterised as a succession rule, at least if that law provides for a mere right of inheritance, whereas all legal family relations to the biological family are cut off. As a consequence, such a "nude" inheritance right cannot suffice as a basis of succession under German succession laws. Even if one saw that differently, Texan succession conflicts law, for the purpose of succession, would refer to the law of the domicile of the deceased for movables and to the law of the situs for real property. Additionally, even if the Texas right of inheritance in relation to the biological parents constituted a family relationship, this cannot serve as a basis for a compulsory share right.

W. Voß: **Qualifying Direct Legal Claims and culpa in contrahendo under European Civil Procedure Law**

Legal institutions at the interface between contract and tort, such as the culpa in contrahendo or direct claims arising out of contractual chains, typically elude a clear, uniform classification even within the liability system of substantive national law. Even more so, qualifying them adequately and predictably under European civil procedure law poses a challenge that the European Court of

Justice (ECJ) has not yet resolved across the board. In two preliminary rulings, the ECJ now had the opportunity to sharpen the borderline between contractual and noncontractual disputes in the system of jurisdiction under the Brussels I bis Regulation, thus defining the scope of jurisdiction of the place of performance of a contractual obligation and, at the same time, of jurisdiction over consumer contracts. However, instead of ensuring legal clarity in this respect, the two decisions rendered by the ECJ further fragment the autonomous concept of contract under international civil procedural law.

C. Thomale: International jurisdiction for rights in rem in immovable property: co-ownership agreements

The CJEU decision reviewed in this case note, in its essence, concerns the scope of the international jurisdictional venue for immovable property under Art. 24 No. 1 Brussels Ia-Regulation with regard to co-ownership agreements. The note lays out the reasons given by the court. It then moves on to apply these reasons to the Austrian facts, from which the preliminary ruling originated. Finally, some rational weaknesses of the Court's reasoning are pointed out while sketching out a new approach to determining the fundamental purpose of Art. 24 No. 1 Brussels Ia-Regulation.

F. Rieländer: Solving the riddle of "limping" legal parentage: "Pater est" presumption vs. Acknowledgment of paternity before birth

In its judgment of 5/5/2020, the Kammergericht Berlin (Higher Regional Court of Berlin) addressed one of the main outstanding issues of German private international law of filiation. When children are born out of wedlock, but within close temporal relation to a divorce, the competing connecting factors provided for in Art. 19 (1) EGBGB (Introductory Act to the German Civil Code) are apt to create mutually inconsistent results in respect of the allocation of legal parentage. While it is firmly established that parenthood of the (former) husband, assigned at the time of birth by force of law, takes priority over any subsequently established filiation by a voluntary act of recognition, the Kammergericht held that where legal parentage is simultaneously allocated to the husband by one of the alternatively applicable laws and to a third person by way of recognition of

paternity before birth according to a competing law, the (domestic) law of the state of the child's habitual residence takes precedence. Though the judgment is well argued, it remains to be seen whether the controversial line of reasoning submitted by the Kammergericht will stand up to a review by the Bundesgerichtshof (German Federal Court of Justice). Nonetheless, the decision arguably ought to be upheld in any event. In circumstances such as those in the instant case, where divorce proceedings had commenced, recognition of legal parentage by a third person with the consent of the child's mother and her husband is to be treated as a contestation of paternity for the purposes of Art. 20 EGBGB. Thus, according to domestic law, which was applicable to the contestation of paternity since the child's habitual residence was situated in Germany, any possible legal ties between the child and the foreign husband of its mother were eliminated by a recognition of parentage by a German citizen despite suspicions of misuse. All in all, the judgment demonstrates once again the need for a comprehensive reform of German private international law of filiation.

Mark Makowsky: **The attribution of a specific asset to the heir in the European Succession Certificate**

According to Art. 63 (2) lit. b and Art. 68 lit. l of the European Succession Regulation, the European Certificate of Succession (ECS) may be used to demonstrate the attribution of a specific asset to the heir and shall contain, if applicable, the list of assets for any given heir. In the case at hand the ECS, which was issued by the Austrian probate court and submitted to the German land registry, assigned land plot situated in Germany solely to one of the co-heirs. The Higher Regional Court of Munich found, that the ECS lacked the presumption of accuracy, because the applicable Austrian inheritance law provides for universal succession and does not stipulate an immediate separation and allocation of the estate. Contrary to the court's reasoning, however, Austrian inheritance law does allow singular succession of a co-heir, if (1) the co-heirs agree on the distribution of the estate before the probate court orders the devolution of property and (2) the court's devolution order refers to this agreement. The presumption of accuracy of the ECS with respect to the attribution of specific assets is therefore not excluded by legal reasons. In the specific case, however, the entry in the land register was not based on the ECS, but on the devolution order of the Austrian probate court, which does not include a reference to a previous agreement of the

co-heirs on the distribution of the estate. As a consequence, the devolution order proves that the land plot has become joint property of the community of heirs and that the ECS is therefore inaccurate.

R. Hüßtege: **Internet research versus expert opinion**

German courts have to determine the applicable foreign law by virtue of their authority. The sources of knowledge they rely on are based on their discretionary powers. In most cases, however, their own internet research will not be sufficient to meet the high demands that discretion demands. As a general rule, courts will therefore continue to have to seek expert opinions from a national or foreign scientific institute in order to take sufficient account of legal practice abroad.

A.R. Markus: **Cross-Border Attachment of Bank Accounts in Switzerland and the European Account Preservation Order**

On 18 January 2017 the Regulation on European Account Preservation Order (EAPO Regulation) came into force. It allows the creditor to place a security in a bank account so that enforcement can be carried out from an existing title or a title yet to be created. The provisions of the abovementioned Regulation stand beside existing national provisions with a similar purpose. As a non-EU member state, Switzerland does not fall within the scope of application of the EAPO Regulation and the provisional distraint of bank accounts is thus exclusively governed by national law. The present article illustrates in detail the attachment procedure under the Swiss Debt Enforcement and Bankruptcy Law. Comparative reference is made to the provisions of the EAPO Regulation. Finally, the recognition and enforcement of foreign interim measures, which is often crucial in cross-border cases, will be addressed. The article shows that there are considerable differences between the instruments provided by the Swiss law and those provided by the EU law.

J. Ungerer: **English public policy against foreign limitation periods**

Significantly different from the EU conflict-of-laws regime of the Rome I and II

Regulations, the British autonomous regime provides for a special public policy exception in the Foreign Limitation Periods Act 1984, whose design and application are critically examined in this paper. When English courts employ this Act, which could become particularly relevant after the Brexit transition period, the public policy exception not only has a lower threshold and lets undue hardship suffice, it also leads to the applicability of English limitation law and thereby splits the governing law. The paper analyses the relevant case law and reviews the recent example of Roberts v Soldiers [2020] EWHC 994, in which the three-years limitation period of the applicable German law was found to cause undue hardship.

E. Jayme: **Forced sales of art works belonging to the Jewish art dealer René Gimpel in France during the Nazi-period of German occupation – The Court of Appeal of Paris (Sept. 30, 2020) orders the restitution of three paintings by André Derain from French public museums to the heirs of René Gimpel**

The heirs of the famous French art dealer René Gimpel brought an action in France asking for the restitution of three paintings by André Derain from French public museums. René Gimpel was of Jewish origin and lost his art works – by forced sales or by expropriation – during the German occupation of France; he died in a concentration camp. The court based its decision in favor of the plaintiffs on the "Ordonnance n. 45-770 du 21 avril 1945" which followed the London Inter-Allied Declaration of Dispossession Committed in Territories Under Enemy Occupation Control (January 5th 1943).

M. Wietzorek: **First Experience with the Monegasque Law on Private International Law of 2017**

This essay presents the Monegasque Law concerning Private International Law of 2017, including a selection of related court decisions already handed down by the Monegasque courts. Followed by a note on the application of Monegasque law in a decision of the Regional Court of Munich I of December 2019, it ends with a short summary.

First impressions from Kirchberg on the EAPO Regulation – Opinion of AG Szpunar in Case C-555/18

Written by Carlos Santaló Goris

Carlos Santaló Goris is a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg. He offers a summary and an analysis of AG Spuznar's Opinion on the Case C-555/18, K.H.K. v. B.A.C., E.E.K.

I. Introduction

Less than three years after Regulation 655/2014 establishing a European Account Preservation Order ("the EAPO Regulation") entered into force, the Court of Justice of the European Union ("CJEU") released its first Opinion on this instrument. This regulation established a uniform provisional measure at the European level, which permits creditors the attachment of bank accounts in cross-border pecuniary claims. In many senses, the EAPO regulation represents a huge step forward, particularly in comparison to the *ex-ante* scenario regarding civil provisional measures in the Area of Freedom, Security and Justice. It is no accident that in the first line of the Opinion, AG Szpunar refers to the landmark case *Denilauler.* Besides the concrete assessment of the preliminary reference, he found a chance in this case to broadly analyse the EAPO Regulation as such, contextualizing it within the general framework of the Brussels system.

II. Facts of case

The main facts of this case were substantiated before the First Instance Court of Sofia (Bulgaria). Upon the request of a creditor, this court granted a national order for payment against two debtors. The order for payment was sent to the debtors' domicile as it appeared in the national population register. Since the notification was returned without an acknowledgment of receipt, the debtors

were also informed by the posting of a public notice on the door of their "official" domicile. They did not respond to this notification either. In accordance with Bulgarian law, in such occasions, if the creditor does not initiate declaratory proceedings on the substance of the case to ascertain the existence of a debt, any order for payment would be annulled *o*. In the present case, before proceeding in that manner, the creditor requested an European Account Preservation Order ("EAPO") before the First Instance Court of Sofia, to freeze the debtors' bank accounts in Sweden. This court informed the creditor that he must initiate declaratory proceedings in order to avoid the nullification of the payment order. In the court's view, since the order for payment was not yet enforceable, it could not be considered an authentic instrument. Therefore, based on Article 5(1) of the EAPO, the creditor had to initiate the declaratory proceedings on which he would rely on when applying for the EAPO. Conversely, the President of Second Civil Section of the same court considered that the non-enforceable order for payment was an authentic instrument pursuant to Article 4(10), and thus there was no need for separate proceedings. These different understandings of the regulation led the First Instance Court of Sofia to refer the following questions to the CJEU:

1. *Is a payment order for a monetary claim under Article 410 of the Grazhdanski protsesualen kodeks (Bulgarian Civil Procedure Code; GPK) which has not yet acquired the force of res judicata an authentic instrument within the meaning of Article 4(10) of Regulation (EU) No 655/2014 1 of the European Parliament and of the Council of 15 May 2014?*

2. *If a payment order under Article 410 GPK is not an authentic instrument, must separate proceedings in accordance with Article 5(a) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 be initiated by application outside the proceedings under Article 410 GPK?*

3. *If a payment order under Article 410 GPK is an authentic instrument, must the court issue its decision within the period laid down in Article 18(1) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 if a provision of national law states that periods are suspended during judicial vacations?*

III. "Fitting in" in the autonomous concept of authentic instrument

Firstly, AG Szpunar examined if the payment order fell within the autonomous concept of 'authentic instrument'. Article 4(10) of the EAPO Regulation establish three prerequisites that a document has to satisfy in order to be considered an authentic instrument: (1) it has to be an authentic instrument in a Member State; (2) the authenticity relates to the signature and the content of the instrument; (3) the authenticity has been established by a public authority or other authority empowered for that purpose.

The AG stated that, whereas the first and the third prerequisites were duly satisfied, the second condition, concerning the authenticity of the content, was not fulfilled. Under Bulgarian law, when creditors apply for a payment order, they do not have to provide the court with any documentary evidence, they simply indicate the basis of their claim and the amount due. Therefore, the judge who grants a preservation order is merely confirming the obligation to pay a debt, but without "authenticating" the content of that obligation. Consequently, in the AG's view, the order for payment would not be an authentic instrument under the regulation. *Obiter dictum*, he considered the payment order to be a judgment under the EAPO Regulation (at para. 46).

IV. Enforceable or not enforceable, that is the question

Retaking and reformulating the original question, AG Szpunar proceeded to analyse if titles other than authentic instruments (e.g. judgments and court settlements), are enforceable for the purposes of the EAPO Regulation (at para. 59). This question is not superfluous. As AG Szpunar remarked, the EAPO Regulation establishes two different regimes: one for creditors without a title, and one for creditors with a title. Creditors who lack a title are subject to stricter conditions when they apply for an EAPO (at para. 53). They have to prove their likelihood of success on the substance of the claim (art. 7.2), and the provision of a security becomes mandatory, unless the court decides to dispense of this requirement if it finds it inappropriate in the particular circumstances of the case (art. 12.1). Furthermore, the court has ten days to render the decision on the EAPO application (art. 18.1), instead of the five working days when the creditor has a title (art. 18.2).

Regarding this question, the European Commission suggested examining whether "enforceability" as a prerequisite for other titles is present under different European civil procedural instruments, particularly in regards to the

European Enforcement Order Regulation ("EEO Regulation"), the Maintenance Regulation, and the Brussels I bis Regulation (at para. 51). AG Szpunar declined drawing any comparisons with other regulations due to the "provisional" nature of the EAPO Regulation. These other instruments are mainly focus on facilitating the enforcement of final decisions on the substance of a claim, thus, the concept of title would have a different understanding (at para. 51). On this basis, AG Szpunar considered it more appropriate to elaborate an "individualized" analysis of the EAPO Regulation and proceeded with a literal, systemic, historical and teleological interpretation of this instrument:

- In the literal and systemic analysis, AG Szpunar found several provisions referring to the different types of title. In particular, he referred to Article 6 (jurisdiction); Article 7 (material prerequisites); Article 12 (security); Article 14 (information mechanism); and Article 18 (time-limits to render the decision on the EAPO application) (at paras. 55 – 59). None of these provisions, except Article 14(1), specify whether the title has to be enforceable or not. Article 14(1) is the sole provision which distinguishes between enforceable and non-enforceable titles. This provision contains the prerequisites that creditors have to satisfy if they want to request information on debtors' bank accounts. Creditors with a non-enforceable title can apply for bank account information, but under a stricter regime than those who have an enforceable title (at para. 64). AG Szpunar considered that this is an exception, in which creditors without an enforceable title are recognized. For the other cases, these creditors would be placed under the same status as creditors without any kind of title (at para. 66).
- The historical interpretation was based on the Commission Proposal of the EAPO Regulation (at paras. 74 -79). This text still operated under an *exequatur* Unlike the current version of the EAPO Regulation, it systematically distinguished between two different regimes, one applied to creditors without an enforceable title or a title enforceable in the Member State of origin; another applied to creditors whose titles were already declared enforceable in the Member State of enforcement. Within the first regime, there were also differences between creditors with an enforceable title and creditors without. Creditors with an enforceable title did not have to prove the *boni fumus iuris.* After the Council reviewed the Commission Proposal, the *exequatur* was removed along with the

distinction between enforceable title in the Member State of origin and in the Member State of enforcement. In AG Szpunar's view, both "enforceable" titles would then have been subsumed into the more generic term of "title", which did not expressly refer to the enforceability (at para. 79).

- Perhaps the strongest point of the AG's Opinion was the teleological argument. In AG Szpunar's view, including non-enforceable titles within the concept of title would impair the balance between the claimants' and defendants' rights (at para. 68). As stated above, creditors with a title do not have to prove the existence of the *boni fumus iuri*. This barrier is also a prevention against fraudulent requests of an EAPO. An enlargement of the concept of title would facilitate access to the EAPO, undermining one of the protections against abusive behaviour.

Based on the above reasoning, AG Szpunar concluded that any title for the purposes of the EAPO has to be enforceable.

V. Beyond the preliminary reference: casting light on the EAPO Regulation

The preliminary reference made by the Bulgarian court is a good example of the problems that might arise out of the intersection between domestic procedural law and the uniform procedural rules of the EAPO Regulation. Indeed, observing the questions, they implicitly require a certain analysis (and interpretation) of the domestic procedural system, an inquiry that is not for the CJEU to carry out. This might also be one the reasons why AG Szpunar opted for a more general interpretation of the EAPO Regulation, especially in the second part of the Opinion. It is in this more general overview where we can find the most interesting insights of his analysis. There are three relevant points that I would like to highlight:

- The first one is the distinction made between the EAPO Regulation and other civil procedural instruments based on its provisional nature. Indeed, this is the very first uniform provisional measure at European level, whereas the other instruments to which AG Szpunar referred are mainly focused on the recognition and enforcement decisions of the merits of a claim (with the exception of some jurisdictional rules on provisional measures). One might speculate that, eventually, the CJEU might adopt a

different interpretation of the EAPO Regulation, taking into account elements that it shares with other civil procedural instruments.

- The second point is on the dividing line between the two regimes existing within the EAPO Regulation. The bulk of AG Szpunar's analysis focused on the distinction between the two different regimes implicitly reflected in the EAPO Regulation. This question is fundamental, not only for creditors who might have to satisfy different prerequisites when they apply for an EAPO, but also for the debtors. Neither the systemic nor the literal interpretation of the regulation seem conclusive. Only in the Spanish version is it mentioned that the authentic instruments have to be enforceable ("documento público con fuerza ejecutiva"). Nonetheless, it seems to have been erroneously transposed from the EEO Regulation. The historical interpretation could lead to different conclusions. The suppression of an express reference to the "enforceability" of the title in the final version of the EAPO Regulation could also be understood as the willingness of the European legislator to include non-enforceable titles. Thus, it seems that the only decisive interpretative tool was the teleological one, which leads to the third and final point.
- The last point relates to a pro-defendant interpretation of the EAPO Regulation. By restricting the most lenient regime to those creditors with an enforceable title, the regulation indirectly protects the defendant's position or at least, maintains the *status quo* between both parties. From the debtor's perspective, the EAPO Regulation could be perceived as too "aggressive". Some authors have labelled it as too "creditor-friendly" and this was one of the grounds raised by the United Kingdom when they refused to opt-in to the EAPO Regulation. Despite all the safeguards given to the debtor, this criticism does not come without reason. The regulation operates *inaudita altera parte*, so debtors can only contest the EAPO once it is already enforced. The *fumus boni iuris* discourages abusive and fraudulent behaviour. For that reason, a broad interpretation of "title", encompassing those that are non-enforceable, would allow more creditors to circumvent this prerequisite. In this respect, the AG's approach attempts to maintain the existing fragile equilibrium between both parties.

It is unlikely that in the final judgement the CJEU will reproduce AG Szpunar's extensive analysis of the EAPO Regulation. Nevertheless, this is a good starting

point for an instrument that provokes plenty of inquiries and, for the time being, has seen little application by domestic courts. This will not be the last time that an Advocate General confronts a preliminary reference concerning the EAPO Regulation.

Swedish Conference on Civil Justice in the EU

On 17-18 October 2013, the Swedish Network for European Legal Studies, the Faculty of Law of Uppsala University and the Max Planck Institute Luxembourg will organize a conference in Uppsala: Civil Justice in the EU – Growing and Teething? Questions regarding implementation, practice and the outlook for future policy.

Conference Day 1: October 17th

9.00 Opening of the Conference
Prof. Antonina Bakardjieva Engelbrekt, Stockholm University, Chairman of the Swedish Network for European Legal Studies

9.15 Keynote Address – The State of the Civil Justice Union
Prof. Burkhard Hess, Max Planck Institute Luxembourg

9.45 Avoiding "Torpedoes" and Forum Shopping
Does the jurisdiction framework work in practice?
What about third country litigants and the EU legal order?
Has the ECJ:s case law added predictability?
Chair Docent Marie Linton, Uppsala University
Prof. Gilles Cuniberti, University of Luxembourg
Prof. Trevor Hartley, London School of Economics
Prof. Michael Hellner, Stockholm University

Deputy director Erik Tiberg, The Government Offices of Sweden

11.00 Coffee

11.30 Alternative Dispute Resolution
Are the new rules for consumer ADR and ODR the right approach?
Can mandatory mediation ensure access to justice?
Is further and deeper regulation the way forward?
Chair Prof. Bengt Lindell, Uppsala University
Prof. Antonina Bakardjieva-Engelbrekt, Stockholm University
Dr. Jim Davies, University of Northampton
Dr. Cristina Mariottini, Max Planck Institute Luxembourg

12.45 Lunch

14.15 Simplified Procedures and Debt Collection – Much Ado About Nothing?
Has an additional small claims mechanism added anything in practice?
Enforcement and payment orders – Has the removal of exequatur been successful?
Attachment of bank accounts – First step to harmonization of execution measures?
Chair Prof. Torbjörn Andersson, Uppsala University
Dr. Mikael Berglund, The Swedish Enforcement Authority
Dr. Carla Crifò, University of Leicester
Prof. Xandra Kramer, Erasmus University
Dr. Cristian Oro, Max Planck Institute Luxembourg

15.30 Coffee

16.00 Track 1 – Family Law
Choice of law in divorce matters not for all Member States –First step in civil justice fragmentation?
How will the new Regulation on Succession change the landscape of civil justice?
Chair Prof. Maarit Jänterä-Jaareborg, Uppsala University
Dr. Björn Laukemann, Max Planck Institute Luxembourg
Other speakers pending confirmation

Track 2 – Collective Redress
Can it provide additional guarantees for European consumers?

Is it a necessary step in private enforcement of competition law?
Observations on the Commission Recommendation
Chair Dr. Eva Storskrubb, Roschier
Prof. Laura Ervo, Örebro University
Prof. Michele Carpagnano, University of Trento
Dr. Rebecca Money-Kyrle, University of Oxford
Dr. Stefaan Voet, Ghent University

Conference Day 2: Friday, October 18th

9.00 The Quest for Mutual Recognition
Are the current network initiatives and e-justice measures enough?
Balancing efficiency in civil justice against procedural human rights
How are the national courts coping with mutual recognition?
Is complete abolition of exequatur possible?
Chair Prof. Antonina Bakardjieva-Engelbrekt, Stockholm University
Prof. Torbjörn Andersson, Uppsala University
Docent Marie Linton, Uppsala University
Prof. Marta Requejo-Isidro, Max Planck Institute Luxembourg
Dr. Eva Storskrubb, Roschier

10.15 Future Measures and Challenges
EU Commission (Representative to be confirmed)
Legal Counsellor Signe Öhman, The Permanent Representation of Sweden

11.30 End of Day 2

The conference is free of charge. For registration, see here.