



Why Should a U.S. Defendant Be Aware?

Introduction of a European System for the Attachment of Bank Accounts

By Carlijn van Rest and Sanne Bouwers

As of January 18, 2017, a new uniform European procedure has applied, which is an efficient and speedy way to preserve funds held in bank accounts in cross-border cases. The new European Account Preservation Order (EAPO) was established by Regulation (EU) No. 655/2014 (EAPO Regulation), which came into force in 2014 and will apply in all EU member states, excluding Denmark and the United Kingdom. The EAPO Regulation aims to simplify the recovery of cross-border debts.

What Is an EAPO?

Under the new procedure, a creditor will be able to obtain an EAPO enabling it to freeze the debtor's funds in an EU bank account up to an amount specified in the application. It will only apply in cross-border cases, meaning cases in which the relevant bank account is held in a different EU member state than where the EAPO application is made or where the creditor is domiciled. For example, the EAPO Regulation allows a Dutch creditor to freeze the funds of an Italian debtor held in a French bank account.

Why Should a U.S. Defendant Be Aware?

A U.S. creditor is not able to obtain an EAPO against a debtor in a participating member state. However, it will still be possible for a creditor in a participating member state to apply for an EAPO against the bank account of a U.S. debtor that is held in another participating member state. Therefore, a U.S. creditor will not be able to take advantage of the EAPO Regulation but will still run the risk of attachment of its bank accounts that are held in participating EU member states.

How and When Can an EAPO Be Obtained?

The EAPO Regulation will enable a creditor to make a single application to the courts of one EU member state

for an order that will freeze the debtor's funds that are held in bank accounts in other EU member states. Such orders shall be recognized in the other member states without requiring any additional special procedure. The application will be made by submitting a standardized (online) form, which can be filed without the need for representation by a lawyer.

It is possible to obtain an EAPO *before* initiating proceedings on the merits (*i.e.*, prejudgment attachment), as well as *during* the course of proceedings, or *after* a judgment has been obtained.

The court will issue the EAPO if the creditor provides "*sufficient evidence*" that there is a need for such an order because a real risk exists that without the attachment, the "*subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult.*"

The threshold for obtaining an EAPO in the scenario in which no judgment has yet been obtained is somewhat higher. In the event of a prejudgment attachment, the claimant must also submit sufficient evidence to persuade the court that the claimant is "*likely to succeed*" in pursuing the claim. In addition, the creditor must provide security, unless the court deems this inappropriate, considering the circumstances of the case. Such security aims to prevent abuse of the procedure and will ensure compensation for any damages suffered by the debtor in the event of a wrongful attachment. Furthermore, the creditor must initiate proceedings on the merits within 30 days from the date that the application was filed, or 14 days from the issue of the order. Failure to do so will result in the order being revoked or terminated.

The debtor will not be notified of the application and will not be heard before an EAPO is issued. This will ensure surprise and will prevent the debtor from transferring or withdrawing funds before the attachment will actually be levied. The debtor will become aware of the EAPO once the order is served on the debtor.

New Tool to Obtain Account Information

The EAPO Regulation provides a useful tool for the creditor that does not have the debtor's account information in cases in which the creditor has already obtained an enforceable judgment against the debtor. If the creditor

Think Globally, continued on page 84



■ Carlijn van Rest is a counsel and Sanne Bouwers is an associate in the Amsterdam office of Hogan Lovells International LLP. Ms. van Rest is a litigator at heart who has extensive experience in financial services litigation. She also regularly deals with corporate disputes. Ms. Bouwers focuses her practice in commercial litigation and antitrust litigation. Both Ms. van Rest and Ms. Bouwers have represented mostly international clients before the Dutch courts and courts of appeal. Ms. Bouwers is co-chair of DRI International's Young Lawyers Subcommittee (Europe).

Think Globally, from page 81

knows neither the name and address of the bank, nor the International Bank Account Number (IBAN), the Bank Identifier Code (BIC), or another bank number, the creditor can file a request to obtain this information, provided that the creditor makes it plausible that the debtor, in fact, holds one or more bank accounts in a specific EU member state.

Prejudgment Attachment in the Netherlands

The Netherlands are known as a “creditor friendly” country. Apart from obtaining an EAPO, it is relatively easy to obtain a leave for prejudgment attachment against assets that are located in the Netherlands because limited requirements apply. In principle, any creditor (including a U.S. creditor) that has a due and payable claim against a debtor may seek to attach any or all of the assets (not limited to bank accounts) located in the Netherlands of the debtor, irrespective of whether the debtor is a resident of or located in the Netherlands. This makes the Netherlands unique within the European Union, and as such, the EAPO Regulation will not change the Dutch attachment landscape dramatically.

