

Can arbitrated claims be secured with European account preservation order?

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Introduction

Cross-border debt recovery undoubtedly has a great chance of becoming more efficient following the adoption of EU Regulation 655/2014, which establishes a European account preservation order (EAPO) procedure to facilitate cross-border debt recovery in civil and commercial matters.

According to Article 1 of the regulation, an EAPO aims to prevent the subsequent enforcement of a creditor's claim from being jeopardised through the transfer or withdrawal of funds up to the amount specified in the order which are held by the debtor or on its behalf in a bank account held in an EU member state. Clearly, obtaining a favourable award is an important step, but it is the efficient enforcement that matters most for the client in the end.

As of January 18 2017, parties obtained the right to petition state courts to grant an EAPO under the Code of Civil Procedure. Recent amendments to the code regulate the issue procedure for EAPOs not covered by the regulation. The code's new rules have been included in the section dedicated to the security of claims procedure, which also applies to claims submitted to arbitration (ie, arbitrated claims may also be secured by state courts). However, serious doubts have arisen regarding whether an EAPO could be used in the course of arbitration proceedings, as Article 2(2)(e) of the regulation explicitly states that "it does not apply to arbitration". Therefore, the question is whether the intention of the legislature was to:

- exclude the possibility of claims pursued in arbitration proceedings from being secured by an EAPO; or
- give state courts an exclusive right to grant this measure, but also in arbitration proceedings provided that the laws of the EU member state in question allow the arbitrated claims to be secured by state courts.

According to Article 730.1 of the Code of Civil Procedure, the security of a claim may be requested in each civil case, including those heard by an arbitration tribunal. The Rzeszow Appellate Court's recent ruling has confirmed that an EAPO can be issued by a state court to secure claims which have been submitted by the parties to arbitration.

Background

The claimant and respondent to the arbitration proceedings had entered into a construction contract governed by Polish law under which all disputes were to be settled in arbitration. Due to the respondent's lack of fulfilment of its contractual obligations, the claimant filed the request for arbitration with the International Chamber of Commerce. The request was followed by a petition to state court (regional court) requesting that an EAPO be issued against the respondent in the pending arbitration.

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Regional court decision

The regional court, as the court of first instance, dismissed the petition to grant an EAPO. The main argument was that Article 2(2)(e) of EU Regulation 655/2014 should be understood to mean that claims disputed in arbitration may not be secured with an EAPO. This argument was followed by the claim that Polish state courts lack jurisdiction to issue preservation orders, as the parties had submitted the dispute to arbitration (ie, they concluded an arbitration agreement). To support this statement, the court referred to the European Court of Justice's (ECJ's) November 17 1998 decision (C-391/95 *Van Uden Maritime v Deco Line*, ECLI:EU:C1998:543) in which it stated that:

"Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case."

Appellate court view

The regional court decision was challenged by the claimant and the Rzeszow Appellate Court agreed that an EAPO may be granted for arbitrated claims and set aside the regional court's decision, referring the case back to the court of first instance for reconsideration.

The appellate court had no doubts that Article 2(2)(e) of the regulation does not deprive claims disputed in arbitration from the right to be secured by the state courts via a freezing order, but that such freezing orders may not be issued by arbitration tribunals and are the exclusive competence of the state courts. In the appellate court's view, such interpretation was also supported by ECJ case law (ie, *Van Uden Maritime*) in which the ECJ stated that provisional measures are not in principle ancillary to arbitration proceedings, but rather they are ordered in parallel to such proceedings and intended as measures of support. Such provisional measures concern the protection of a wide variety of rights (Paragraph 33) rather than just arbitration. In this regard, the Rzeszow Appellate Court also raised (and strongly underlined) that the ECJ's view in the abovementioned verdict referred to the jurisdiction of state courts on the grounds of the Brussels Convention 1952, but the assessment of jurisdiction on the grounds of EU Regulation 655/2014 must also consider its aims and the fact that the ECJ's view from 1995 could not and did not include regulations introduced thereafter.

Therefore, as for the state court's lack of jurisdiction to issue a freezing order (Article 6 of the regulation), the appellate court stated that jurisdiction could not have been excluded definitively at that time, as the claimant had not yet filed a claim with a state court (which is admissible under the regulation). More importantly, the claimant was entitled to do so as, according to Article 1165.3 of the Code of Civil Procedure, the fact that an action has been brought before a court does not prevent an arbitration court from hearing the case concerned. Therefore, the jurisdiction of the state court existed, as it could not have been definitively excluded, hence the claimant's right to apply for the EAPO.

Comment

After the decision was set aside, the regional court reconsidered the case and once again dismissed the petition, but this time due to the fact that, in its view, the prerequisites for granting security of a claim envisaged by the Code of Civil Procedure had not been fulfilled. The decision was not challenged by the claimant and shortly thereafter the arbitrated claim was admitted by the respondent and the arbitration concluded.

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