

represent an **indispensable tool** for **preventing the transfer or withdrawal of funds** held by the debtor (especially in a bank account). Without such measures, the subsequent enforcement of the creditor's claim against the debtor in many cases becomes substantially more difficult – even more so if the debtors' funds are located in a different Member State.³

In recent years, however, the European legislator has taken important steps to **overcome these shortcomings**. The **recast of the Brussels I Regulation**⁴ (now called Brussels Ia Regulation;⁵ applicable since 10 January 2015) not only enlarges the bandwidth of enforceable **national interim measures** (even *ex parte* measures can now⁶ be enforced under certain circumstances)⁶ but also facilitates the actual enforcement by abolishing the exequatur procedure.⁷ On the other hand, the entirely new **European Account Preservation Order Regulation**⁸ establishes a genuine European procedure for creating provisional measures enabling the creditor to obtain a European account preservation order and preventing the withdrawal or transfer of funds held by the debtor in a bank account in a Member State.⁹ This new Regulation became effective on 18 January 2017 (Art. 54 EAPO Regulation).¹⁰

This paper provides a comparative analysis of these two new and rather distinct instruments for European creditors. Thereby it evaluates the rules on **preconditions, legal remedies** and the **different effects** of national interim measures that shall be recognised and enforced within the Brussels Ia regime and the new EAPO. The paper mainly seeks to answer the following questions:

- a) How do the two Regulations differ in scope regarding provisional account preservation measures?
- b) To what extent do the new Regulations provide a **surprise effect** concerning the preservation of bank accounts?
- c) What are the differences in **effect** between a European Account Preservation Order and an interim measure to be enforced according to the Brussels Ia Regulation?

Domej, *Internationale Zwangsvollstreckung zwischen Territorialitätsprinzip, Gläubigerinteressen und Schuldnerschutz*, in DIE ANERKENNUNG IM INTERNATIONALEN ZIVILPROZESSRECHT – EUROPÄISCHES VOLLSTRECKUNGSRECHT 109, 110–115 (Burkhard Hess ed., 2014); Claudia Reith, *Wissenswertes zur Europäischen Kontenpfändungsverordnung*, 2016 ECOLX 780, 780.

3 Nils Harbeck, *Ein Entwurf! Zum Vorschlag einer Europäischen Verordnung zur vorläufigen Kontenpfändung in grenzüberschreitenden Verfahren*, 15 ZEITSCHRIFT FÜR DAS GESAMTE INSOLVENZRECHT 805, 805 (2012); Hubertus Schumacher & Barbara Köllensperger, *Die „Europäische Kontenpfändung“ und der Schutz des Unternehmens – Gibt es noch Anpassungsbedarf am Weg zum „fair trial“?* 136 JURISTISCHE BLÄTTER 413, 413 (2014).

4 Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

5 Regulation 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 (Recast), 2012 O.J. (L 351) 1.

6 Reinhold Geimer, *Das Anerkennungsregime der neuen Brüssel I-Verordnung (EU) Nr 1215/2012*, in FESTSCHRIFT FÜR HELLWIG TORGLER 311, 328 (Hanns Fitz et al. eds., 2013).

7 REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT ¶ 3174b–3174e (7th ed. 2015).

8 Regulation 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order Procedure to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters, 2014 O.J. (L 189) 59.

9 Tanja Domej, *Das Rechtsbehelfsverfahren bei der europäischen vorläufigen Kontenpfändung*, in FESTSCHRIFT FÜR DAPHNE-ARIANE SIMOTTA 129, 129 (Reinhold Geimer et al. eds., 2012); Nunner-Krautgasser, *supra* note 2, at 133; Reith, *supra* note 2, at 781.

10 The economic analysis of the EAPO Regulation shows that the introduction of this instrument will encourage the full use of the EU internal market, debtors' solvency, and recovery of debts. On the other hand, unjustified orders will create a number of harmful externalities to creditors, national authorities, and financial institutions; cf. Nicolas Kyriakides, *An Economic Analysis of the European Commission's Proposal for a European Account Preservation Order* (2013), available at http://www.virtusinterpress.org/IMG/pdf/10-22495_rgc3i4art5.pdf (last visited Aug. 14, 2017).

II. Recognition and Enforcement of Interim Measures according to Brussels Ia

A. Preconditions and Legal Remedies

1. Requirements for the Recognition and Enforcement of a Provisional Measure

The recognition and enforcement of judgments issued in other Member States is regulated in Chapter III of the Brussels Ia Regulation. For the purposes of Chapter III, the term judgment includes 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. However, it does not include provisional measures ordered by 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 (Art. 2 point a subpara. 2 Brussels Ia Regulation). This means that – contrary to previous case law¹¹ on Article 32 Brussels I Regulation – there is **no longer any absolute requirement for a contradictory proceeding**.¹² However, the suggested¹³ inclusion of provisional measures that were issued without prior service on the defendant (if the defendant has the right to subsequently challenge the measure under the national law of the Member State of origin) did not make it into the Brussels I recast.¹⁴ Instead, if the defendant was not summoned prior to the decision making, he or she at least has to be served with the decision prior to enforcement in a different Member State. This mechanism ensures the right to a fair hearing but comes at the cost of a far lower surprise effect of the provisional measure.¹⁵ According to Recital 33 of the Brussels Ia Regulation, however, this restriction does not preclude the recognition and enforcement of such measures under national law. Since the Brussels Ia Regulation now **explicitly regulates ex parte provisional measures** (Art. 2 point a subpara. 2 Brussels Ia Regulation; unlike previously Art. 32 Brussels I Regulation), some authors argue that more favourable¹⁶ bilateral treaties are no longer applicable.¹⁷ Others maintain that, on the basis of Recital 33 Brussels Ia Regulation, *ex parte* provisional measures can still be recognised and enforced according to domestic law.¹⁸

The jurisdiction regime of the Brussels Ia Regulation (as well as its precedents) applies only to **cross-border cases**.¹⁹ With regard to **recognition and enforcement**, Articles 36 and 39 Brussels Ia Regulation clearly state that a judgment given in a Member State shall be recognised and en-

11 Case C-125/79, *Denilauler v. Couchet Frères*, ECLI:EU:C:1980:130.

12 Burkhard Hess, in *EU-ZIVILPROZESSRECHT* Art. 2 EuGVVO ¶ 12–13 (Peter Schlosser & Burkhard Hess eds., 4th ed. 2015); Stefan Leible, in *1 EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT EUZPR/EUIPR* Art. 2 Brüssel Ia-VO ¶ 15 (Thomas Rauscher ed., 4th ed. 2016).

13 Cf. *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (Recast)*, COM (2010) 748 final (Dec. 14, 2010) Art. 2.

14 Tanja Domej, *Ein wackeliger Balanceakt – Die geplante Verordnung über die Europäische vorläufige Kontenpfändung*, 21 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 496, 516–517 (2013); Xandra Kramer, *Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights*, 60 *NETHERLANDS INTERNATIONAL LAW REVIEW* 343, 362 (2013).

15 Leible, *supra* note 12, at Art. 2 Brüssel Ia-VO ¶ 15.

16 Such treaties existed, for example, between Austria and Germany, Austria and Norway or Austria and Sweden.

17 Thomas Garber, *Einstweiliger Rechtsschutz nach der neuen EuGVVO*, 12 *ECOLEX* 1071, 1074 (2013); Georg Kodek, in *EUROPÄISCHES GERICHTSSTANDS- UND VOLLSTRECKUNGSRECHT – BRÜSSEL IA-VERORDNUNG (EUGVVO 2012) UND ÜBEREINKOMMEN VON LUGANO 2007* Art. 36 EuGVVO ¶ 20 (Dietmar Czernich et al. ed., 4th ed. 2015).

18 Martin Illmer, Arnaud Nuyts & Jonathan Fitchen, *Scope and Definitions*, in *THE BRUSSELS I-REGULATION RECAST* 55, 103–104 (Andrew Dickinson & Eva Lein eds., 2015).

19 Ansgar Staudinger, in *1 EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT EUZPR/EUIPR* Einl Brüssel Ia-VO ¶ 19 (Thomas Rauscher ed., 4th ed. 2016); Georg Kodek, in *5/1 KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN* Art. 1 EuGVVO ¶ 18 (Hans W. Fasching & Andreas Konecny eds., 2nd ed. 2008).