The boundaries of arbitration exclusion in the EAPO Regulation

By Carlos Santaló Goris

Abstract:

The European Account Preservation Order consists of an interim measure at the EU level. It allows the temporary attachment of debtors' funds in cross-border civil and commercial claims. The EAPO Regulation states that it does not apply to 'arbitration'. The meaning of 'arbitration' is not a settled question among scholars and national courts. In this article, Dr Carlos Santaló Goris, Lecturer at EIPA Luxembourg explores the underpinning debate surrounding the arbitration exclusion, focusing on the interpretation some national courts have made of it.

A. Courts interim measures in arbitration proceedings

1. National procedural systems generally permit courts to grant interim measures in support of civil claims brought before arbitral courts. The fact that the parties decide to bring a civil claim before an arbitral court does not necessarily exclude them from measures granted by ordinary courts. For instance, the German Code of Civil Procedure (*Zivilprozessordnung*) states that 'an arbitration agreement does not preclude a court from ordering, at the request of a party, an interim or conservatory measure with respect to the subject matter of the arbitration before or after the commencement of the arbitration'.[1] A similar provision can be found in the Spanish Code of Civil Procedure (*Ley de Enjuiciamento Civil*).[2] The 2010 Irish Arbitration Act, referring to the UNCITRAL Model Law on International Commercial Arbitration,[3] acknowledges that it 'is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure'.[4]

2. Regulation No 655/2014 introduced the European Account Preservation Order ('EAPO'), which is the very first cross-border civil interim measure at the European Union level.[5] It applies in all EU Member States but Denmark.[6] It permits courts of the EU Member States where the EAPO Regulation applies to order the provisional attachment of the funds in the bank accounts located in other Member States.[7] The EAPO can be used only in civil and commercial claims with a cross-border dimension.[8] Creditors can apply for the EAPO *ante demandam*, during the proceeding on the merits or once they have already obtained an enforceable judgment, authentic instrument or court settlement.[9] Moreover, creditors who have a title, enforceable or not, by the time they submit an EAPO application can also request the investigation of the debtors' bank accounts.[10] One of the EAPO's most attractive features is that is always granted *ex parte*,[11] so debtors are only informed about the attachment of their bank accounts once it has already happened.

3. Can the EAPO be included among those interim measures that courts can grant to secure a claim before an arbitral tribunal? In this regard, it should be noted that the EAPO Regulation states that 'arbitration' is an excluded subject matter.[12] Depending

on how arbitration exclusion is interpreted, one could argue that an EAPO may or not be granted to secure a claim brought before an arbitral court. This article explores the different interpretations of the arbitration exclusion, relying on the contributions scholars have made to the topic and the approaches followed by some national courts.

B. The boundaries of the arbitration exclusion

4. Among scholars, there are different interpretations of what the 'exclusion of arbitration' means.[13] Nonetheless, the most prevalent view is that the moment there is an arbitration clause that compels the parties to bring their claim before an arbitral court, they can no longer apply for an EAPO.[14] This broad interpretation was seemingly embraced by the European Commission, which in the Proposal of the EAPO Regulation it stated that 'even though there might be a case for allowing parties to an arbitration to have recourse to the European procedure, the inclusion of arbitration would entail complex questions which have not yet been addressed by EU law, e.g. under which circumstances arbitral awards can be put on an equal footing with judgments and it did not seem appropriate to address them for the first time in this instrument'.[15]

6. There are some authors who have a more restrictive view of the arbitration exclusion. For *Hilbig-Lugani*, it is possible to obtain an EAPO before initiation of the arbitration proceedings, even when there is an arbitration clause compelling parties to bring their claim before an arbitral court.[16] The arbitration exclusion would only operate once the arbitration proceeding begins. For *Schumacher,* once the arbitration proceeding has come to an end and there is an arbitral award, the arbitration exclusion would no longer operate.[17] Creditors could apply for an EAPO to guarantee the enforcement of an arbitral award.

C. The CJEU approach towards the exclusion of arbitration in the Brussels system: is this of any relevance for the EAPO Regulation?

7. The EAPO Regulation is not the only EU civil procedural instrument for which arbitration is excluded. The European Enforcement Order, the European Small Claims Regulation and the Brussels I bis Regulation all contain a similar reference excluding arbitration.[18] Under the two predecessors of the Brussels I bis Regulation, the 1968 Brussels Convention and the 2001 Brussels I Regulation,[19] the CJEU has rendered several key judgments interpreting the arbitration exclusion.[20] Part of this case-law was codified to the Preamble of the Brussels I bis Regulation.[21]

8. Among of the judgments rendered by the CJEU on the arbitration exclusion, C-391/95, *Van Uden* is the most relevant for the EAPO Regulation.[22] In this case, the CJEU was asked to determine whether, given the arbitration exclusion, is possible to use the jurisdictional rules of the 1968 Brussels Convention to obtain an interim measure.[23] In this judgment, the CJEU affirmed that what was relevant to decide 'whether the 1968 Brussels Convention could apply to a procedure on interim measures was the 'nature of the rights which they serve to protect'.[24] Therefore, as long as the claim does not concern the arbitration procedure as a subject manner, claimants could still rely on the 1968 Brussels Convention.[25] For instance, claims by arbitrators for the payment of their fees would be excluded.[26] At the

same time, the CJEU state 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 for the purposes of the Convention'.[27] However, courts could still rely on Art. 24 (now Art. 35 of the Brussels I bis Regulation) which stated that other courts than those with jurisdiction to decide on the merits of the claim can render interim measures.[28] It should be noted that, unless the CJEU decides the opposite, *Van Uden* remains applicable to the Brussels I bis Regulation unless the CJEU decides to the contrary.[29]

9. Can the *Van Uden* solution be transposed to the EAPO Regulation? When an EAPO is requested before the creditor has obtained an enforceable title, and the debtor is not a consumer, the jurisdiction to issue the EAPO 'shall lie with the courts of the Member State which have jurisdiction to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable'.[30] These relevant rules on jurisdiction include the Brussels I bis Regulation.[31] However, only the rules on jurisdiction of the Brussels I bis Regulation that permit 'to rule on the substance of the matter' can be used. Since there is an arbitration agreement, there would be no courts with jurisdiction to decide on the merits.[32] Art. 35 of the Brussels I bis Regulation would also be excluded since it only serves to grant 'provisional, including protective measures' but not to decide on the merits.[33] Therefore, the *Van Uden* solution would not fit in the jurisdictional regime of the EAPO Regulation.[34]

D. National courts' approach towards the arbitration exclusion: from Lithuania to Luxembourg passing by Poland

10. The extension of the arbitration exclusion is no longer a merely theoretical question. Domestic case law on the EAPO Regulation shows that courts in at least three different Member State have already dealt with this issue. One of these courts was the Lithuanian Court of Appeals (*Lietuvos apeliacinis teismas*). It was asked to clarify whether District Court of Vilnius (*Vilniaus apygardos teismo*) could grant an EAPO in a case pending before the Vilnius Commercial Arbitration Court (*Vilniaus komercinio arbitražo teisme*).[35] First, the Lithuanian Court of Appeals (*Lietuvos apeliacinis teismas*) found that the above-mentioned judgment C-391/95, *Van Uden*, did not apply to the EAPO Regulation.[36] Therefore, it determined that under the Brussels I bis Regulation Lithuanian courts did not have jurisdiction to grant an EAPO in a claim pending before an arbitral court.

11. Since the Brussels I bis Regulation was not applicable, the Lithuanian Court of Appeals (*Lietuvos apeliacinis teismas*) explored whether it would be possible to grant the EAPO relying on the domestic rules on jurisdiction.[37] It needs to be recalled that the jurisdiction to grant an EAPO 'lie with the courts of the Member State which have jurisdiction to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable'.[38] Those 'relevant rules of jurisdiction' include not only the Brussels I bis Regulation but also domestic rules on jurisdiction.[39] In this case, the Lithuanian Court of Appeals (*Lietuvos apeliacinis teismas*) wondered if Article 27(2) of the Lithuanian Act on Commercial Arbitration could provide the jurisdiction to grant an

EAPO. This provision states that 'a party shall be entitled to request Vilnius Regional Court to take interim measures or require to preserve evidence before the commencement of arbitral proceedings or the constitution of an arbitral tribunal'. Nonetheless, the Lithuanian legislation implementing the EAPO Regulation states that the court with jurisdiction to decide on the merits is the only competent to grant the EAPO.[40] Therefore, Lithuanian Court of Appeals (*Lietuvos apeliacinis teismas*) concluded if the claim is brought before an arbitral court, under Lithuanian law, there would not be a competent court to grant the EAPO.[41]

12. In Poland, the Court of Appeal in Rzeszów (*Sąd Apelacyjny w Rzeszowie*) also found that the domestic rules of jurisdiction could serve to grant an EAPO in support of claim brought before an arbitral tribunal.[42] More precisely, this court referred to Art. 1166 of the Polish Code of Civil Procedure, which states that 'subjecting the dispute to the arbitration court does not exclude the ability of the court to secure the claims which are brought before the arbitration court'.

13. Using the domestic rules on jurisdiction can be a solution to circumvent the limitations of the Brussels I bis Regulation. Nonetheless, there is an aspect of the EAPO Regulation that Lithuanian and Polish courts should have considered that would prevent granting an EAPO when a claim is brought before an arbitral court. The EAPO Regulation requires that the procedure on the substance of the matter has to be conducted before a court.[43] This leads to the question: does an arbitral court fit in the category of a court that decides on the merits of the claim? In this regard, the CJEU has stated that, in principle, arbitral courts do not enter in the category of courts that can make a preliminary reference under Article 267 of the Treaty on the Functioning of the European Union.[44] Relying on this definition, an arbitral court cannot be a court that decides on the merits of the claim in an EAPO procedure.[45] Against this argument one could wonder whether the definition of a court that decides on the merits needs to match the definition of court that can make a preliminary reference.[46] This is an open question that only the CJEU can answer. In the meantime, as a matter of caution, a coherent interpretation of both notions would be preferable.[47] It would be up to the CJEU to decide differently (if it ever has that chance).

14. Luxembourg was the third Member State where a court dealt with an arbitration exclusion. In this case, the creditor already had an arbitral award and requested an EAPO before the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) to secure its enforcement.[48] The court granted the EAPO. Subsequently, the debtor requested before the same court the revocation of the EAPO under Article 33 of the EAPO Regulation.[49] The debtor argued, among other reasons, that the claim fell within the arbitration exclusion. The court did not examine whether the claim did or did not fall within that arbitration exclusion.[50] In the court's view, since the EAPO had not attached any funds, the debtor did not have an interest (*interet d'agir*) to obtain the revocation of the EAPO. In other words, the debtor lacked the locus standi required by Luxembourgish law.[51]

15. The critical point of this case is the reason why the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) issued an EAPO to secure

the enforcement of an arbitral award. The EAPO Regulation only acknowledges three kinds of titles that can be used to apply for an EAPO: judgments, court settlements, and authentic instruments.[52] The EAPO Regulation defines 'judgment' as 'any judgment given by a court of a Member State'.[53] This means that an arbitral award cannot be a judgment unless an arbitral court is considered to be 'a court of a Member State'. An arbitral award is neither an authentic instrument nor a court settlement. Therefore, if an arbitral award does not fit within any of the three categories of titles, why did the District Court of Luxembourg grant the EAPO? Luxembourgish law requires arbitral awards to be declared enforceable by a court before seeking their enforcement.[54] Perhaps the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) considered that the judgment declaring an arbitral award enforceable to be a 'judgment' that can be used to apply for an EAPO.[55] The influence of domestic practice on the enforcement arbitral awards might offer another explanation. Luxembourgish courts often grant national attachment orders (*saisie-arrêts*) to secure the enforcement of arbitral awards. The District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) might have addressed the EAPO application as it would have done with a national provisional attachment order requested to secure the enforcement of an arbitral award. Regardless of the reasons that led the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) to grant the EAPO based on an arbitral award, it is difficult to reconcile such a solution with the text of the EAPO Regulation.

16. Overall, case law shows that national courts seem keener towards a more limited interpretation of the arbitration exclusion than most scholars.

E. A need to shed light on the EAPO arbitration exclusion

17. The existence of different interpretations concerning the arbitration exclusion among courts and scholars reveals that this is not a settled question and needs to be clarified. One could hope that a national court decides to submit a preliminary reference to the CJEU about this. That would allow the CJEU to address the arbitration exclusion as it was able to do with the Brussels I bis Regulation. However, considering the scarce use of the EAPO that statistics show,[56] the probability of a national court referring a question on the EAPO Regulation's arbitration exclusion is slim. Another option is that in the case of a reform of the EAPO Regulation, the EU legislator decides to include a specific provision in the Preamble explaining the boundaries of the arbitration exclusion, as was done in the Brussels I bis Regulation. Until one of these possibilities occurs, the controversy surrounding the arbitration exclusion will continue.

List of references

[1] Section 1033 German Code of Civil Procedure (*Zivilprozessordnung*)

[2] This possibility also features in Art. 722(1) Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil*). The Spanish Arbitration Act reiterates this possibility: Art. 11(3) Act 60/2003 of Arbitration (*Ley 60/2003 de Arbitraje*).

[3] Article 9 UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006)

[4] Article 10 Irish Arbitration Act.

[5] Regulation (EU) No 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, OJ L 189, 27.6.2014, p. 59–92 ('EAPO Regulation').

[6] Recital 51 EAPO Regulation.

[7] For a more exhaustive overview of the EAPO Regulation, see the previous edition of the FraudNet Global Annual Report: Carlos Santaló Goris, 'Searching for the Debtors' Bank Accounts across the European Union: the EAPO Regulation Information Mechanism' FraudNet Global Annual Report (2022), 231.

[8] Art. 2 EAPO Regulation. The EAPO Regulation defines a cross-border claim as one where the creditors' domicile or the court that grants the EAPO is in a different Member State than the bank account to be attached is located: Art. 3 EAPO Regulation.

[9] Art. 5 EAPO Regulation.

[10] Art. 14(1) EAPO Regulation.

[11] Art. 11 EAPO Regulation.

[12] Art. 2(1) EAPO Regulation.

[13] For an extensive overview on the different interpretations that scholars have made of the EAPO's arbitration exclusion, see: Denise Wiedemann, 'The European Account Preservation Order' in Jan von Hein and Thalia Kruger (eds.), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021) 109 – 114.

[14] Burkhard Hess, 'Art. 2 EuKoPfVO' in Peter Schlosser and Burkhard Hess (eds.), *EU-Zivilprozessrecht* (5th edition C.H. Beck 2021), margin no. 3; Pilar Jiménez Blanco, 'La Orden Europea de Retención de Cuentas: Avances y limitaciones' Anuario español de Derecho internacional privado (2014/2015) 245 – 245; Martin Klöpfer, 'Art. 2 Verordnung (EU) Nr 655/2014' in Reinhold Geimer and Rolf A Schütze (eds.), *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (CH Beck 2016), margin no. 7; Franz Mohr, *Die vorläufige Kontenpfändung. EuKoPfVO* (LexisNexis 2014), margin no. 34; Miguel Teixeira de Sousa, 'O Reg. 655/2014 sobre o Procedimento de decisão europeia de arresto de Contas: uma apresentação geral' Revista da Ordem dos Advogados (2019) 194 – 195; Martin Trenker, 'Vorläufige Kontenpfändung: Überblick und ausgewählte Fragen' in Bernhard König and Peter G. Mayr (eds.), *Europäisches Zivilverfahrensrecht in Österreich IV* (Manz 2015) 129; Marcin Walasik, 'Article 2' in Elena D'Alessandro and Fernando Gascón Inchausti (eds.), *The European Account Preservation Order. A Commentary on Regulation (EU) No 655/2014* (Edward Elgar 2022), paras. 2.26-2.30; Nora Wallner-Friedl, 'Artikle 2 EuKoPfVO' in Andreas Geroldinger and Nora Wallner-Friedl (eds.), *IZVR Praxiskommentar Internationales Zivilverfahrensrecht* (LexisNexis 2021), margin no. 13; Denise Wiedemann, 'Artikel 2 EU-KpfVO' in Thomas Rauscher (ed.), *Europäsches Zivilprozess- und Kollisionsrecht* (5th edition Otto Schmidt 2022), paras. 12 - 18.

[15] COM/2011/0445 final, 5.

[16] Katharina Hilbig-Lugani, 'Art. 2 EuKoPfVO' in Thomas Rauscher and Wolfgang Krüger (eds.), *Münchener Kommentar zur Zivilprozessordnung. Band 3* (6th edition C.H. Beck 2022), margin no. 9.

[17] Hubertus Schumacher, 'Art. 2 EuKoPfVO' in Hubertus Schumacher, Barbara Köllensperger and Martin Trenker (eds.), *Kommentar zur EU-Kontenpfändungsverordnung EuKoPfVO* (MANZ 2017), margin no. 65.

[18] Art. 2(2)(d) Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims OJ L 143, 30.4.2004, p. 15–39; Art. 2(2)(e) 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; Art. 1(2)(d) 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 (recast), OJ L 351, 20.12.2012, p. 1–32 (Brussels I bis Regulation).

[19] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and

commercial matters, OJ L 299, 31.12.1972, p. 32–42 (1968 Brussels Convention); Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, p. 1–23 (Brussels I Regulation).

[20] C-190/89, 25 July 1991, *Marc Rich*, ECLI:EU:C:1991:319; C-185/07, 10 February 2009, *West Tankers*, ECLI:EU:C:2009:69; C-536/13, 13 May 2015, *Gazprom*, ECLI:EU:C:2015:316; C-700/20, 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association*, ECLI:EU:C:2022:488.

[21] Recital Brussels I bis Regulation.

[22]C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543.

[23] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para 18.

[24] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para 33. Something that the CJEU had already determined in previous judgments: C-143/78, 27 March 1979, *De Cavel (I)*, ECLI:EU:C:1979:83, paras. 7 – 9; C-120/79, 6 March 1980, *De Cavel (II)*, ECLI:EU:C:1980:70, para. 9; C-25/81, 31 March 1982, *C.H.W.*, ECLI:EU:C:1982:116, paras. 6 – 8.

[25] Fernando Gascón Inchausti, 'Artículo 35' in José Pedro Pérez-Llorca, Pilar Blanco-Morales Limones, Federico Francisco Garau Sobrino, María Luz Lorenzo Guillén, Félix J. Monteiro Muriel (eds.), *Comentario al Reglamento (UE) nº 1215/2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil. Reglamento Bruselas I* (Aranzadi Thomson Reuters 2016), 713.

[26] Gilles Cuniberti and Sara Migliorini, *The European Account Preservation Order Regulation: A Commentary* (Cambridge 2018), 27.

[27] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para. 24.

[28] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para. 29.

[29] In C-186/19, *Supreme Site Services*, the CJEU stated that the case law on Art. 24 of the 1968 Brussels Convention 'can be transposed to the interpretation of the equivalent provisions in Article 35 of Regulation No 1215/2012 (Brussels I bis Regulation)': C-186/19, 3 September 2020, *Supreme Site Services*, ECLI:EU:C:2020:638, para. 50. In TOTO, the CJEU referred to C-391/95, *Van Uden* when interpreting Art. 35 of the Brussels I bis Regulation: C-581/20, 6 October 2021, *TOTO*, ECLI:EU:C:2021:808, para. 52.

[30] Art. 6(1) EAPO Regulation.

[31] Pietro Franzina, 'Article 6' in Elena D'Alessandro and Fernando Gascón Inchausti (eds.), *The European Account Preservation Order. A Commentary on Regulation (EU) No 655/2014* (Edward Elgar 2022), paras. 6.07 – 6.08.

[32] In this regard, *Leandro* remarks that 'a distinction may be proposed between a "court" having jurisdiction on the merits (and, accordingly, for granting the EAPO) and a "court" which would have had jurisdiction on the merits, absent a valid arbitration agreement, which may nonetheless grant an EAPO': Antonio Leandro, 'Arbitration and European Account Preservation Order' Kluwer Arbitration Blog (2016), available at: <http://arbitrationblog.kluwerarbitration.com/2016/04/04/arbitration-european-account-preservation-order/> accessed on 15 April 2023.

[33] Katharina Hilbig-Lugani, 'Art. 6 EuKoPfVO' in Thomas Rauscher and Wolfgang Krüger (eds.), Münchener Kommentar zur Zivilprozessordnung. Band 3 (6th edition C.H. Beck 2022), margin no. 7; Denise Wiedemann, 'Artikel 6 EU-KpfVO' in Thomas Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht* (5th edition Otto Schmidt 2022), margin no. 5.

[34] Burkhard Hess, 'Art. 2 EuKoPfVO' in Peter Schlosser and Burkhard Hess (eds.), *EU-Zivilprozessrecht* (5th edition C.H. Beck 2021), margin no. 3.

[35] Lietuvos apeliacinis teismas, 28.11.2017, byla e2-1387-178/2017, para 21.

[36] Lietuvos apeliacinis teismas, 28.11.2017, byla e2-1387-178/2017, para 21.

[37] Lietuvos apeliacinis teismas, 28.11.2017, byla e2-1387-178/2017, para 23.

[38] Art. 6(1) EAPO Regulation.

[39] For instance, in Slovakia, the District Court Žilina (*Okresný súd Žilina*) of determined that Slovakian courts had jurisdiction to grant an EAPO against the bank accounts of a debtor domiciled in the USA based on the Slovakian domestic rules on jurisdiction, more precisely on the 1963 Czechoslovakian Act on International Private and Procedural Law (*Zákon o medzinárodnom práve súkromnom a procesnom*): Okresný súd Žilina, 13.08.2020, 50Cb/38/2020, ECLI:SK:OSZA:2020:5120208691.1.

[40] Art 30(18) Law of the Republic of Lithuania on the Implementation of European Union and

International Legal Acts Regulating Civil Procedure (*Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos irtarptautinės teisės aktų įgyvendinimo įstatymas*)

[41] Lietuvos apeliacinis teismas, 28.11.2017, byla e2-1387-178/2017, para 23.

[42] On this case see: Grzegorz Pobożniak and Paweł Sikora, 'The Admissibility of a European Account Preservation Order in the Event of an Arbitration Clause' Czech (& Central European) Yearbook of Arbitration (2018) 226 – 227.

[43] Art. 10(3) EAPO Regulation.

[44] C-284/16, 6 March 2018, *Achmea* ECLI:EU:C:2018:158, 54 – 56. Only an arbitral court which 'had been established by law, its decisions were binding on the parties and its jurisdiction did not depend on their agreement' could make a preliminary reference: C-377/13, 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, ECLI:EU:C:2014:1754, para. 28.

[45] Wiedemann (n 14), 111.

[46] In this regard it should be noted that in the CJEU case C-551/15, *Pula Parking*, Advocate General Bobek relied on the notion of 'court' entitled to make a preliminary reference under Art. 267 of the TFEU to examine the notion of 'court' in the Brussels I bis Regulation. On the one hand, he considered 'it inappropriate to import wholesale definitions that have been developed in different contexts of other instruments of secondary law' (para. 98). Nonetheless, the criteria to determine that a court can make a preliminary reference under Art. 267 of the TFEU can be a term of reference to establish the notion of court under the Brussels I bis Regulation: Opinion AG Bokek in C-551/15, Pula Parking, ECLI:EU:C:2016:825, paras. 82 – 107.

[47] Wiedemann (n 14), 111.

[48] Tribunal d'arrondissement de Luxembourg, Ordonnance du 24 septembre 2021 (unpublished).

[49] Art. 33 EAPO Regulation.

[50] Creditors can only request the revocation of the EAPO under a limited number of grounds. One of those grounds is that 'the conditions or requirements set out in this Regulation were not met', which includes that the claim the EAPO seeks to guarantee falls under the arbitration exclusion: Art. 33(1)(a) EAPO Regulation.

[51] Cour de cassation, arrêt n° 2594 du 12 février 2009, N° JUDOC: 99865114.

[52] Art. 5(b) EAPO Regulation.

[53] Art. 4(8) EAPO Regulation.

[54] Art. 1241 Luxembourgish Code of Civil Procedure (*Nouveau Code de Procedure Civil*).

[55] *Cuniberti* and *Migliorini* consider that the judgments declaring the enforceability of arbitral awards can be used to apply for the EAPO: Cuniberti and Migliorini (n 27), 31.

[56] Marco Buzzoni and Carlos Santaló Goris, *Report on practices in comparative and cross-border perspective* (2022), 64 – 65, available at: <https://efforts.unimi.it/research-outputs/reports/report-on-practices-in-comparative-and-cross-border-perspective/> accessed on 15 April 2023.