

# Family law news: Harmony in Europe? An English perspective

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On 18 June 2011, the EU Maintenance Regulation<sup>1</sup> (EC No 4/2009) came into force, replacing what has colloquially been known as 'Brussels I' (Council Regulation No 44/2001) for all issues arising in the family context which relate to maintenance.

The primary aim of the Maintenance Regulation is to simplify the enforcement of maintenance orders between EU Member States by abolishing the requirement of a declaration of enforceability as between signatories to the Hague Protocol.<sup>2</sup> However, the effects of this Regulation are not quite that simple, and it is worth noting that the Regulation contains provisions relating to jurisdiction and applicable law which are more wide reaching.

## Jurisdiction

A Member State will have jurisdiction to make a maintenance order if the maintenance creditor and debtor are both 'habitually resident' in that country or in the event that they have related proceedings for divorce or parental responsibility in that country already. It is also possible for spouses/parents to elect the country which should have jurisdiction to deal with maintenance issues, in writing (even by email), as long as there is a connecting link (set out in the Regulation) with the country chosen, whether at the time the pre-nuptial agreement was signed (if they have one) or at the time the proceedings are brought.

## Hague Protocol and Applicable Law

In addition to the choice of court, by adopting the Hague Protocol, which has been signed by all the Member States apart from the UK and Denmark, the Maintenance Regulation also contains rules which will determine the law that will be applied when maintenance is sought pursuant to the Regulation. Again, it is possible for parties to elect the applicable law in a similar way to jurisdiction, as outlined previously. However, it is important to note that, as the UK is not a signatory, the English Court will continue to apply its own law to any dispute before it.

## Recognition and Enforcement

A key feature of the new Regulation is the automatic recognition and enforcement of maintenance orders in EU Member States which, in theory at least, should make it easier to enforce orders against a reluctant payer. There is no longer a requirement for a party with the benefit of a maintenance order to obtain a declaration of enforceability, nor is it possible for another signatory State to oppose recognition. However, because the UK decided not to opt into the Hague Protocol (which has far-reaching effects concerning the introduction of rules of applicable law), maintenance orders of the English Court will not be directly enforceable elsewhere. The practical application is that Member States will be able to refuse to recognise an English order, for example, in circumstances where it is seen to be contrary to their public policy or where the maintenance order has been made in default of appearance by the paying party.

## What the Regulation does not address

Regrettably, the Regulation misses the opportunity to address the vexed question of what 'maintenance' encapsulates. As a general principle, the English Court adopts a holistic approach to the resolution of financial issues relating to a divorce; considering the assets, income and all other circumstances of the case in the round. This is very different to the approach taken in other Member States of the EU who are bound by strict codes that determine the division of a marital property regime without the room for manoeuvre afforded by the world famous discretionary jurisdiction of the English judiciary. Although there is significant European case law on the subject of 'maintenance' (eg *Van den Boogaard v Laumen* ECJ C-220/95), the approach to the division of assets on a family breakdown is likely to continue to vary significantly and one perhaps unintended and unfortunate consequence of the 'choice of law and choice of jurisdiction clauses' in this Maintenance Regulation is that parties continue to be faced with the risk that their maintenance claims will be dealt with in one jurisdiction, and all other financial claims dealt with in another.

Also left open is how to address the situation where a maintenance award has been made in one jurisdiction, but the receiving party issues a further application in England under Part III of the Matrimonial and Family Proceedings Act 1984 for a financial award following a foreign divorce. It is not clear from the Regulation whether that party is barred from pursuing any aspect of maintenance under the 1984 Act and that issue will have to be determined in the due course by case law.

In short, whilst our EU counterparts can rest assured that their maintenance orders should be directly recognised and enforceable in England, English practitioners will have to keep an eye on the possibility that English orders will not be so readily enforced overseas, in particular where the awards in so called 'big money' cases are clearly contrary to foreign policy.

1. Council Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
2. The Protocol to the Hague Convention on the International Recovery of Child Support and other forms of Family Maintenance

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