

EU Maintenance Regulation

David Hodson

This EU Regulation No 4/2009 of 18 December, 2008 on jurisdiction, applicable law, recognition and decisions and cooperation in matters relating to maintenance obligations came into force on 30 January, 2009. It will generally apply from June 2011 subject to progress with other international legislation. In summary it replaces Brussels I in respect of family law maintenance obligations. Brussels I covers a wide range of civil liabilities including family law. It was felt appropriate that there should be a distinctive Regulation specifically directed to family law maintenance and the situations when cross-border maintenance orders are to be enforced. Most specialist family law practitioners across Europe will welcome this development. It recognises that there are special features to obligations and orders in the family law context.

The intention is that a maintenance creditor should be able to obtain easily in a member state a decision which will be automatically enforceable in another member state without further formalities. This requires bringing together provisions on jurisdiction, conflict of laws, recognition and enforceability, enforcement, legal aid and cooperation between Central Authorities.

At present the UK has not opted in. However it is anticipated that the UK will have done so by the time the Regulation applies in a couple of years.

There is already a European Enforcement Order Regulation No 805/2004 for consent orders and other uncontested claims to be enforced across Europe. The EU maintenance regulation will extend to contested claims and improve the procedure.

The Regulation will cover child support orders but on present analysis will not cover assessments of administrative child support agencies. Within England and Wales C-Mec has no jurisdiction when a parent is resident abroad etc but there will be a number of circumstances where a child support assessment will have to be enforced abroad in another member state. It is to be hoped that before the Regulation comes into force, there can be a change to encompass all maintenance obligations however arising, through court, tribunal or properly constituted administrative agencies.

Jurisdiction is based on habitual residence of either the creditor or the defendant or written agreement. Proposals by some of us during consultation to give primary jurisdiction to the location of the party pursuing outstanding maintenance, invariably the more vulnerable and financially weaker party, were not successful.

Consistent with other areas of the European Union family law reform, for instance Brussels II revised, enforcement will not require intermediate registration action and procedures, thereby further abolishing exequatur. Similarly, decisions made in one member state cannot be reviewed in another. Enforcement can take place directly against third parties abroad.

Maintenance in this context is wider than pure maintenance orders such as spousal periodical payments and child support. It is better interpreted as “needs”. The most recent leading English case is Moore (2007) 2 FLR 339 in which the Court of Appeal set out six propositions for ascertaining whether an order is within the definition of maintenance in the European Union context. It will include capital provision orders if to provide for needs. It will not include capital provision if solely on a fairness division. Ironically, it may not include those parts of spousal maintenance orders which are based on fairness provision e.g. compensation, rather than pure needs. For more on this complex area of international enforcement, see chapter 7 of “A Practical Guide to International Family Law” (Jordans)

Perhaps predictably, the stumbling block for its introduction has been the earlier insistence by the

European Union about the incorporation of applicable law. The United Kingdom had opposed for this reason alone and opted out. In parallel discussions had been taking place within the Hague Conference including a 2007 Convention on Recovery of Child Support along with a Protocol on the law applicable to maintenance obligations. This is awaiting final ratification. Crucially, whereas the United Kingdom is in a minority within Europe by always applying its own local law, there are very many countries worldwide, parties to the Hague Conference, who are adamant that they will only ever apply local law and have no pressures, such as from the European Union, to give way. Accordingly the Protocol ancillary to the Hague Convention deals with issues of the law to be applied in respect of international maintenance cases and in which of course the United Kingdom has played a full part. The EU Maintenance Regulation has been amended at a relatively late stage to reflect these concerns and will only now be fully applied once the Hague Protocol is applicable across the European Union.

This development is naturally excellent news for countries such as the United Kingdom which is adamant that we should only ever have to apply local law. It is hopefully a recognition that the European Union acknowledges that the issue of applicable law is a fundamental and deep seated one and cannot simply be imposed on a minority of European Union member states.

However this development goes much further in its benefit for family law. Too often it has seemed that the European Union and the Hague Conference have been at odds. This has been to the detriment of global family law. The European Union can impose its reforms on all European Union states and has a fast timetable for family law harmonisation. Yet it is only Europe and over the past few years has put the United Kingdom at odds with the many countries with which we have historic family law links and which will not follow certain European Union family law reforms e.g. applicable law and first to issue, *lis pendens*. The Hague Conference covers very many worldwide jurisdictions and cannot impose. It can only reform by consensus. It therefore goes much more slowly and in a more measured and careful fashion, deliberately incorporating the concerns of the various and diverse family law jurisdictions around the world. The European Union is a colossal family law block on the family law world scene; it incorporates a good majority of the world's international families who have any material level of financial resources. Nevertheless it is for the benefit of the European Union as well as global family law that future EU progress should go closely with the progress being made consensually across the world by the Hague Conference. Each needs the other. This Regulation recognises this reality.

On 17 January, 2009 a very successful meeting was held between the European Commission and the Hague Conference to discuss joint ventures; a very encouraging development for global, rather than just European, family law.

The EU maintenance regulation can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:01:EN:HTML>

David Hodson will write a fuller, explanatory article, explaining the new procedures and practical impact, nearer the time the Maintenance Regulation comes into force.

David Hodson
dh@davidhodson.com
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David Hodson is an English solicitor, mediator, family law arbitrator and DDJ at the PRFD, and an Australian solicitor, barrister and mediator. He is a consultant at The International Family Law Group in London. He is the author of "A Practical Guide to International Family Law" (Jordans)