

# The Maintenance Regulation – keeping up to date

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## Introduction

Five years have passed since the Maintenance Regulation came into force and a number of cases are starting to trickle through.

## Recognition – can you have a second bite of the cherry?

Chapter IV of the Regulation deals with recognition and enforcement. Article 17(1) provides that:-

*“A decision given in a Member State bound by the 2007 Hague Protocol [i.e. all Member States except for the UK and Ireland] shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition.”*

What does recognition mean in practice? *Hoffman v Krieg* [1988] ECR 645 was a decision of the ECJ which concerned the recognition and enforcement in Holland of a maintenance order which had been made in Germany. The ECJ said this about the meaning of recognising an order made in another Member State:-

*“9. The national court’s first question seeks, in essence, to establish whether a foreign judgment, which has been recognised pursuant to Article 26 of the Convention, must in principle have the same effects in the state in which enforcement is sought as it does in the state in which judgment was given.*

*10. In that regard it should be recalled that the Convention “seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit”.*

*Recognition must therefore “have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given” (Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Official Journal 1979, C 59, periodical payments. 43 and 43).*

*11. It follows that the answer to be given to the national court’s first question is that a foreign judgment which has been recognised by virtue of Article 26 of the Convention must*

*in principle have the same effects in the state in which enforcement is sought as it does in the state in which judgment was given.”*

In **Ramadani v Ramadani** [2015] EWCA Civ 1138 (on appeal from *AA v BB* [2015] 2 FLR 1251; [2014] EWHC 4210 (Fam)) the wife started divorce proceedings in Slovenia in June 2008 which included a claim for maintenance for the two younger children. In December 2008 she made a separate claim in respect of matrimonial property rights. In 2009 her June 2008 claim was amended to include a claim for maintenance for herself. In 2010 she withdrew the claim for maintenance for herself and for one of the two children.

On 8 November 2011 the Slovenian court made an order in seven paragraphs which dissolved the marriage and dealt with welfare and maintenance arrangements for the youngest child. Paragraph 1 of the order recited that because of the wife’s withdrawal of her maintenance claim for herself, that claim had been ‘stopped’. Under Slovenian law the wife would have been able to make a fresh application within one year, but once 12 months had passed her claim for maintenance for herself was finally terminated.

On 3 October 2013 (i.e. more than 12 months after the Slovenian order) the wife was given leave to make an application under Part III of the MFPA 1984. The husband sought to stay the wife’s claim and/or set aside the permission. Although permission is granted without notice, an application to set aside permission will not succeed unless a knock-out blow can be delivered. See *Agbaje v Agbaje* [2010] 1 FLR 1813 and *Traversa v Freddi* [2011] 2 FLR 272. His application was dismissed by Moylan J.

On appeal the husband argued that the wife’s Part III claim should not be entitled to proceed in so far as it consists of a claim for maintenance. Since the Part III claim is based in part on needs and in part on sharing, a successful appeal would not have been a knock-out blow. The wife would still have been able to pursue her claim in so far as it is not a claim for maintenance – i.e. under the sharing principle.

The argument for the appeal was in four stages:-

- (i) The Slovenian spousal maintenance order was a ‘decision’ for the purposes of the Maintenance Regulation (see Article 2.1.1). Alternatively it was a ‘court settlement’ which must be treated in the same way as a decision (see Article 48).
- (ii) As a decision emanating from a Member State which is bound by the 2007 Hague Protocol, it must be recognised in England without question (Article 17). Also the English court is not entitled to examine the substance of the Slovenian decision (Article 42).
- (iii) The Slovenian spousal maintenance order amounted to a final termination of W’s maintenance entitlement in Slovenia once 12 months had passed from the date of the order.

- (iv) Once a party's spousal maintenance entitlement has been finally determined and terminated in the Member State of origin, it is not open to that party to claim spousal maintenance in another Member State. The effect of recognising the Slovenian order is that it must be given the same effect in England that it has in Slovenia.

In the event the Court of Appeal upheld Moylan J's decision on the first stage in the argument, namely that the Slovenian order had been neither a decision nor a court settlement. The court did not go on to consider the further arguments.

The substantive argument is thus still up for grabs in another case: namely that the need for a judgment given in one Member State to have the same authority and effectiveness in all other Member States means that a person's right to claim maintenance cannot be resurrected in Member State B when it has been killed in Member State A. To allow a fresh claim to be made in Member State B (a) would fail to give proper recognition to the judgment in Member State A; and (b) would amount to a review of the substance of the decision in Member State A, contrary to Article 42.

Suppose that in English proceedings a wife received a lump sum representing a capitalised maintenance entitlement. On that basis the English court made a clean break. Should she be entitled at some later date to make a spousal maintenance application in another Member State?

### **Variation: *AB v JJB***

The ancestor of the Maintenance Regulation is the 1968 Brussels Convention. The Convention included maintenance within its scope but was mainly concerned with civil and commercial matters: as was the Brussels I Regulation which succeeded it. Civil and commercial cases generally conclude with a final judgment which is not open to subsequent variation. There are no provisions about variation in either the Convention or in Brussels I.

The Maintenance Regulation does make some references to modification and clearly presupposes that in certain circumstances maintenance orders may be varied. Article 8(1) of the Regulation provides that "*Where a decision is given in a Member State ... where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given.*"

Article 8 is an anti-forum shopping provision which favours the maintenance creditor (i.e. recipient). The paying party cannot take advantage of a more favourable (to him) regime in a different Member State as long as the creditor remains in the State where the original order was made. The wider importance of Article 8 is that it clearly presupposes that, subject to the

limitation which it imposes, there is no general restriction on applications to vary an ongoing order or to obtain a new order.

At #37 of his judgment in ***AB v JJB (EU Maintenance Regulation: Modification Application Procedure)*** [2015] 2 FLR 1143 Sir Peter Singer cites the note in the Red Book which says that Article 8 “*provides a restrictive jurisdiction for applications to vary*”. This is potentially misleading. Although Article 8 forms part of the overall jurisdictional scheme of the Regulation, it does not create any separate or additional basis of jurisdiction. What it does is to limit any right to apply to vary which otherwise exists.

In *AB v JJB* an order was made in Germany in 2008 by which the husband (Herr B) undertook to pay one third of his pension (in payment) to the wife by way of maintenance. In 2013 he wished to reduce the level of this obligation. The wife was living in England. Since she was both the maintenance creditor (see Article 3(b) of the Regulation) and also the Defendant to the application to vary (see Article 3(a)) the English courts had exclusive jurisdiction.

H’s solicitors initially wrote to the local Magistrates’ Court asking that the 2008 order be registered so that H could apply to vary it downwards. The matter was transferred to the PRFD which declined to accept it on the basis that such an application could not be made by a party directly: it had to be channelled through the German Central Authority.

After various fruitless attempts to get the German order registered, Herr B’s solicitors issued a Form A applying for a variation of the German order. W applied to strike this out. The issue before the court was whether it is open to a party to apply directly to the English court to vary a maintenance order made in another Member State; or whether such an application has to be channelled through Central Authorities.

Sir Peter Singer held that the only route available for a variation is via the Central Authorities. He pointed out that Chapter IV of the Regulation is entitled “Recognition, Enforceability and Enforcement of Decisions” and that that is very much its focus. Modification is only mentioned in passing.

Although Sir Peter also examined provisions of The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, his conclusion that Herr B had no alternative to the Central Authority route was principally based on his analysis of Chapter VII of the Maintenance Regulation which is headed “Cooperation between Central Authorities”.

Article 56 (which falls within Chapter VII) sets out the range of applications which may be made via Central Authorities. Article 56(2)(b) provides that:-

*“A debtor against whom there is an existing maintenance decision may make applications for the following:-*

*(b) modification of the decision given in the requested Member State.”*

So Herr B undoubtedly had a right to apply for a variation by means of an application transmitted by the German Central Authority to the English Central Authority. The question was whether that was his only option. Sir Peter's reasoning seems to have been that since the Regulation does not provide for any route for a variation application other than Article 56(2)(b), that was the only route available to Herr B. He distinguished modification from enforcement which (under Article 41) can be done directly: see below.

However Sir Peter was not referred to *Hoffman v Krieg* which states that the German order must be given the same authority and effectiveness in England as it has in Germany. Does that mean that Herr B was entitled to apply directly to an English court to vary the German order, as he tried to do? I suggest that this was the question which Sir Peter should have been asking. Whether he reached the right conclusion in spite of not asking the right question is problematic.

As Sir Peter pointed out at #7-8 of his judgment, S31 Matrimonial Causes Act only permits an application to be made for the variation of a previous order made under that Act. If the Regulation creates a right to make a direct application to vary an order made in another Member State, a procedural issue of that kind could not stand in the way of exercising that right. S31 would have to be read as if it extended to a periodic maintenance order made in another Member State.

At a practical level it is very unfortunate if the Central Authority route is the only route available. It is slow and cumbersome (as Mostyn J recognised in *EDG v RR*). The central goal of the Maintenance Regulation is to have maintenance judgments which are portable and which are equally valid in all Member States. This goal will be damaged if applications to vary cannot be made and processed promptly.

It also leaves an asymmetrical position between adult and child maintenance cases. If child maintenance had been in issue and Frau B had wanted to increase the level of this, she could have issued an application under Sch. 1 Children Act for a fresh order. Arguably Herr B could have issued an application under Sch. 1 for a fresh order at a lower level. In spousal maintenance cases no equivalent remedy is available, at least in England.

*AB v JJB* may not be the last word. This is an important point which is open for further argument in another case.

### **Enforcement: *MP v PS***

Ease of enforcement in one Member State of a maintenance order made in another Member State is one of the key goals of the Maintenance Regulation. The Regulation provides two routes for enforcement:-

- Chapter IV provides (apparently) for the maintenance creditor to be able to apply directly to the courts of the second Member State.

- Chapter VII provides for the maintenance creditor to apply to the central authority of the country where the order was made, which will pass the enforcement request to the central authority of the Member State where the maintenance debtor is living. The central authority for England and Wales is the Lord Chancellor, who devolves this duty to the Reciprocal Enforcement of Maintenance Orders unit (“REMO”).

The central authority route will have advantages in some cases – e.g. if it is the debtor rather than the creditor who has moved to another Member State, especially if the creditor knows that he is in a given state but does not know where. However, the central authority route is time-consuming and cumbersome. For many creditors a direct application to the court is more attractive.

The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (“the CJJMR”) were introduced in the UK at the same time as the Maintenance Regulation in June 2011, ostensibly to facilitate its operation. Schedule 1, Paragraph 4 of the CJJMR (as amended) provides in part as follows:-

*“(1) Subject to sub-paragraph (2), where a maintenance decision falls to be enforced in the United Kingdom under Section 1 of Chapter IV of the Maintenance Regulation, the court to which an application for enforcement is to be made is –*  
*(a) In England and Wales, the family court,*

*(2) An application for enforcement is to be transmitted to the family court ... (“the enforcing court”) –*  
*(a) In England and Wales, by the Lord Chancellor”*

The effect of this Paragraph is that an application for enforcement in England of an order made in another Member State cannot be made directly by the creditor. She is required to pass the enforcement application to REMO, which will then transmit it to the Family Court – a process over which the creditor has no control, and which is carried out by REMO as a low level administrative task with little or no legal oversight.

The effect of CJJMR Sch. 1 Paragraph 4 was first considered by Mostyn J in *EDG v RR* [2015] 1 FLR 270. Mostyn J accepted that Chapter IV of the Maintenance Regulation does give the maintenance creditor an unfettered right to apply directly to the court for enforcement. He therefore concluded that Paragraph 4 must have been erroneously drafted.

That judgment was referred to REMO, which was asked whether it accepted that Paragraph 4 had been wrongly drafted. It said that it did not, and that the CJJMR had intentionally been drafted so that applications for enforcement under Chapter IV had to be routed via itself. REMO did not comment of Mostyn J’s conclusion that Chapter IV gave the creditor a right to apply directly to the court.

This issue was raised again ***MP v PS (Enforcement Procedure under the Maintenance Regulation: Reference to CJEU)*** [2016] EWHC 88 (Fam). Roberts J accepted that there was at least an arguable case that the Paragraph in the CJMR failed to give effect to the right conferred on maintenance creditors by Chapter IV and has referred the issue to the Court of Justice of the EU.

One might wonder why the CJMR were apparently drafted in a way which deprives creditors of their right to apply directly to the court. The answer is likely to be that Chapter V of the Maintenance Regulation requires legal aid to be provided for enforcement applications. The MoJ may well have been reluctant to give legal aid to maintenance creditors (most of whom are likely not to be British) at a time when legal aid has been cut back savagely in other areas.

### **Jurisdiction for child maintenance: *A v B***

In ***A v B*** [2015] 2 FLR 637 the parties are Italian but lived in England throughout their marriage. W and the children still live in London. H's Italian divorce petition was first in time but W started Sch. 1 proceedings in England which were stayed: see ***EA v AP*** [2013] EWHC 2344 (Fam). There were also proceedings in England relating to the welfare of the children.

The Italian Supreme Court referred to the CJEU the question of whether child maintenance should be determined in Italy (where the divorce was taking place), or in England (where parental responsibility issues were being heard).

The CJEU held that the court with jurisdiction to entertain issues relating to parental responsibility was in the best position to determine the level of child maintenance. Great stress was laid on the importance of child welfare, and the link between parental responsibility and maintenance.

The first point to note about *A v B* is that it is an erosion of the first in time principle. England has jurisdiction for child maintenance because the children live here and there are proceedings concerning them here, even though the first proceedings in time were the Italian divorce proceedings.

It is not clear from the judgment what the position would be if the children had been living in England but there were no proceedings concerning them on foot. There are some indications that is the existence of the welfare proceedings which is the key (e.g. #40), but elsewhere it seems that it would be enough if England had jurisdiction for welfare proceedings (#43). This is an unfortunate ambiguity. A mother who wished to secure jurisdiction for a Sch. 1 application might be tempted to start welfare proceedings even if these were not otherwise necessary.

## The Scottish dimension: *Re V*

In general jurisdictional provisions in EU Regulations do not operate as between constituent parts of a Member State. If there are competing divorce petitions in England and Scotland the first in time will not necessarily prevail. The English court will make an obligatory stay under Paragraph 8 of Sch. 1 to the DMPA 1973 if the conditions for that are met, namely that:-

- The place where the parties last resided together was in Scotland; and
- Either of the parties was habitually resident in Scotland throughout the period of one year before they separated.

If the conditions for Paragraph 8 are not met, the court will consider making a discretionary stay under Paragraph 9.

The provisions of the Maintenance Regulation have in effect been extended by national legislation so as to apply to competing proceedings in different parts of the UK: see Sch. 6 to the CJMR.

In *Re V (European Maintenance Regulation)* [2016] EWHC 668 (Fam) there were competing divorce proceedings in Scotland and England. The conditions were met for an obligatory stay of the English proceedings so the Scottish proceedings have prevailed.

However, H did not make any financial applications in his Scottish divorce proceedings. There is no matrimonial property to speak of but since the separation H's mother has died and H has become the beneficiary of a very large trust. W would have virtually no rights in Scotland on this account.

W (who is now habitually resident in England) applied in England under S27 MCA 1973 seeking maintenance (in the *Van den Boogard v Laumen* sense). She says that by virtue of Sch. 6 to the 2011 Regulations the English court is seised of her maintenance claim. H (who is in person) applied for her application to be dismissed or stayed.

Parker J upheld W's right to make a S27 application in England. Since there was no financial application in H's Scottish divorce proceedings, the Scottish court is not seised of maintenance issues. Accordingly W's S27 application is first in time so far as maintenance is concerned, even though it is Scotland which has divorce jurisdiction because of Paragraph 8.

Bifurcation of jurisdiction in some cases is an inevitable consequence of the way in which BIIIR and the Maintenance Regulation interact. Another circumstance which could give rise to bifurcation is if there was an Article 4 choice of court agreement in favour of (say) Spain, but the divorce was in England. The position would then apparently be that the English court would have jurisdiction to deal with financial claims ancillary to the divorce only in so far as these did not include any element of maintenance. In other words a claim could be made on the sharing basis but not on the needs basis. No claim could be made for MPS or under S22ZA.



## A forthcoming case: Choice of court agreements

H and W are Swedish. They married in 2000 when they were living in the USA because of H's career. They had maintained strong links with Sweden. They entered into a one Paragraph separation of goods contract in Sweden but also into a parallel premarital agreement in the USA which provided inter alia that:-

- The parties waived any right to claim maintenance, alimony or support in the event of the marriage breaking down.
- Any issue arising out of the agreement should be referred in the first instance to the court in Stockholm and only to any other court if that court declined jurisdiction.

The marriage has now broken down when the parties are living in England. The English petition is first in time (by about two hours). H is challenging the maintenance jurisdiction of the English court on the basis that the American prenup is a binding choice of court agreement (aka prorogation of jurisdiction) either under Article 4 of the Maintenance Regulation, or perhaps under Article 17 of the Brussels Convention which was in force at the time when the agreement was entered into.

*If* Article 4 of the Maintenance Regulation is to be applied the position is simpler. Both H and W have been Swedish nationals at all times and Article 4.1(b) is engaged.

Spousal maintenance is almost unknown in Sweden. If the agreement is effective to knock out W's maintenance claim in England, what is left? In principle she has a sharing claim. However, the American agreement amounts to a waiver of this also and was entered into after disclosure and legal advice.

*Radmacher* makes it clear that an agreement is unlikely to be upheld if it fails to meet a party's needs. However, in *Radmacher* the court was not concerned with an agreement which, as a matter of non-discretionary EU law, prevents a maintenance claim in England. Unless W is able to attack the American prenup on some basis, the logical answer is that she has no claim for herself but only a claim under Sch. 1. Whether the English courts will be willing to go that far (assuming H asks them to) is another matter.

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