

Mapping the jurisdiction minefield: steering clear of the traps of the EU Maintenance Regulation

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The EU Maintenance Regulation (Council Regulation (EC) No 4/2009 of 18 December 2008) came into force on 18 June 2011. Since that date practitioners have been grappling with the applicability, meaning and impact of the Regulation. This article is intended to help practitioners identify the impact and potential traps arising out of the jurisdiction provisions of the Maintenance Regulation in relation to claims for financial orders pursuant to divorce (under the Matrimonial Causes Act 1973) and dissolution of civil partnerships (under the Civil Partnership Act 2004) (hereinafter referred to simply as 'financial provision on divorce'), between spouses for failure to maintain pursuant to s 27 of the Matrimonial Causes Act 1973 ('s 27'), for financial relief following an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984 ('Part III') and for financial provision for children under Sch 1 to the Children Act 1989 ('Schedule 1'). There are eight jurisdictional grounds under the Maintenance Regulation which for ease of reference (and in summary) are as follows:

Article 3

- (1) The court of the defendant's habitual residence (Art 3(a)).
- (2) The court of the creditor's habitual residence (Art 3(b)) ('creditor' includes 'prospective creditor' or 'claimant').
- (3) Jurisdiction ancillary to status, if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties (Art 3(c)). 'Status' means 'marital status', ie divorce/nullity/dissolution of civil partnership. Under English law, the reference to 'nationality' will be a reference to 'domicile'.
- (4) Jurisdiction ancillary to parental responsibility, if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties (Art 3(d)). Under English law, the reference to 'nationality' will be a reference to 'domicile'.

Article 4

- (5) A jurisdiction agreement reached between the parties, subject to a number of conditions specified within Art 4.

Article 5

- (6) The entering of an appearance, save where appearance was entered to contest the jurisdiction.

Article 6

- (7) The common domicile of the parties, where no other Member State or Lugano State has jurisdiction.

Article 7

- (8) Forum necessitatis.

Financial provision on divorce

It is well-known that prior to 18 June 2011 the ability of the court in England and Wales to make financial orders (including maintenance orders) ancillary to a decree of divorce flowed from the satisfaction of jurisdictional requirements on the original petition. The advent of the Maintenance Regulation has now cast this important principle into doubt, since the jurisdictional requirements of the Maintenance Regulation may now supersede the jurisdiction as provided by the original petition. There are two obvious traps:

- (1) Where the courts of another Member State also have jurisdiction over the maintenance claims, even if England and Wales has jurisdiction over the divorce and remaining financial claims ancillary thereto ('the two-jurisdiction conundrum').
- (2) In circumstances where it is possible that the English court now has no jurisdiction at all in relation to maintenance ('the jurisdiction lacuna').

The two-jurisdiction conundrum

Under Art 12 of the Maintenance Regulation (lis pendens), where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court. As a result, if an application for maintenance is made in a Member State before the issuing of a Form A in England and Wales, England and Wales will lack jurisdiction in respect of the maintenance aspects of financial claims, even if England and Wales has jurisdiction over the divorce (but of course only if the foreign court has jurisdiction to entertain a

(free-standing) application for maintenance and/or a prior maintenance order exists).

If a maintenance action was proceeding in another Member State, it may also be the case that an application could be made for the English court to stay the remaining financial claims and transfer the consideration of those aspects to the court seized of the maintenance element provided that court has jurisdiction to hear those claims and its law permits the consolidation thereof (Art 13(1) and (2)). Furthermore, the loss of the primacy of jurisdiction of the maintenance claims ancillary to an English divorce petition is (also) to be seen where a choice of court agreement has been reached pursuant to Art 4. The prevalence of marital agreements containing jurisdiction clauses in continental Europe is likely to mean that the scope of the maintenance aspects of financial claims ancillary to divorce proceedings pending in English courts being decided in the pre-agreed foreign jurisdiction will not be uncommon.

The combined effect of Arts 4, 12 and 13 is to impact significantly on the ability of the English court to determine all aspects of financial claims on divorce. This therefore necessitates consideration as to possible consequences and avoidance strategies. There are inevitable disadvantages to litigation proceeding in two jurisdictions. Whilst amounting to separate subject matters, maintenance and other financial claims are difficult to divide truly and the risk of overlap (with resulting unfairness) is by no means negligible. Furthermore, litigating in two countries, with a resulting duality of lawyers, court proceedings and disclosure requirements, will be costly. There are a number of possible ways of tackling the two-jurisdiction conundrum. To avoid the situation arising at all, the first is to issue Form A fast, simultaneous with the petition (and therefore not relying on the jurisdiction as provided by the divorce itself): if the other party were to apply in the other jurisdiction, under Art 12 (*lis pendens*) the second court must decline jurisdiction.

In the unfortunate situation of the English court finding itself in the position of having jurisdiction over the divorce and non-maintenance ancillary financial claims, but no jurisdiction over maintenance, it appears to have three options in respect of how to proceed in relation to the remaining claims:

- First, the English court could transfer the non-maintenance claims as a related action under Art 13 to the foreign court. There may be many cases where there are advantages to this, not least because all aspects of the parties' financial claims arising on the breakdown of their marriage could be addressed simultaneously. Equally however, the parties (one or both) may be left in a position of significant disadvantage if, for instance, the parties' property or pensions are located in England, or one or other of the parties has limited connection with the foreign country (it may be that they had concluded their jurisdiction agreement many years previously).

- Secondly, the court could adjourn the non-maintenance claims pending determination of the maintenance aspects in the foreign jurisdiction. It is open to dispute how attractive the English court may find this argument bearing in mind the potential uncertainty of how long the adjournment may have to last.
- Thirdly, the English court could proceed to resolve the non-maintenance claims before the maintenance aspects have been resolved abroad. It may be argued that it would be difficult to resolve fairly the residual claims without knowing the level of maintenance that would be ordered by the foreign court. What it could mean, however, is that the English court, in incorporating an element of 'sharing' of the marital assets (see *Miller; McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186) provides for the meeting of maintenance needs such that the foreign court would not need to consider the issue further. It may (perhaps fairly) be said in some quarters that for the English court to act in such a way would be in stark contravention of the spirit (if not the rules themselves) of the Maintenance Regulation, but it is by no means unusual for needs to be subsumed within sharing in larger money cases. Unfortunately, the Maintenance Regulation does not include provision for the court seized of maintenance claims to be able to transfer those claims to the court seized of the wider financial aspects.

The jurisdiction lacuna

(a) The sole domicile trap

Under Art 3(c), jurisdiction may be founded on the fact that the court has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings. However, Art 3(c) cannot be used if the jurisdiction is based solely on the domicile (nationality) of one of the parties. It appears, therefore, that this has created the surprising result that where a petition for divorce is based on the sole domicile of one of the parties then the court will not, ancillary to those divorce proceedings, have jurisdiction to order maintenance for any spouse or child of the family.

(b) Does 'status' remain?

Furthermore, if the only possible basis of jurisdiction is through Art 3(c), will it bite after a final decree of divorce has already been pronounced? This might occur in, and have relevance in respect of, two situations:

- (i) First, if the application for financial relief ancillary to the divorce has simply been made after the pronouncement of a decree absolute.
- (ii) Secondly, if the application for financial relief is the variation of an existing maintenance order under s 31 of the MCA 1973.

In the first scenario, it is at least arguable that the effect must be that an English court will lack jurisdiction to entertain a maintenance application even though it may have jurisdiction in respect of other financial orders (eg for lump sums, pension sharing orders or property adjustment orders). The wording of Art 3(c) is plain: ‘the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person ...’; it does not say ‘has or had’.

The second scenario involves a consideration of s 31 of the MCA 1973 (variation of maintenance orders), which purports to provide the court with an almost unlimited power to vary its own extant maintenance orders. It has been said that on an application to vary under s 31, the court has the power not only to vary the maintenance order from the date of the application (ie retrospectively) but beyond that as far back as the date of the pronouncement of divorce (see for instance *Warden v Warden* [1982] Fam 10, (1981) 2 FLR 232 and *Grey v Grey* [2009] EWCA Civ 1424, [2010] 1 FLR 1764). However, if at the time of an application for a variation (or discharge or suspension) of a maintenance order neither party was habitually resident in England (and there is no agreement as to jurisdiction for the purposes of Art 4), has the jurisdiction of the court to vary orders pursuant to s 31 thereby been eradicated? The applicant would be compelled to rely on Art 3(c), and may be faced with a challenge from the respondent to the application if it were suggested that the court lacked jurisdiction because it no longer had jurisdiction to entertain proceedings concerning status. It is suggested, however, that such an argument should fail: first of all, the wording of Art 3(c) mirrors Art 5(2) of the regulation which preceded the Maintenance Regulation, Brussels I, and it does not appear that such an argument has met with success under that regulation (unless the argument had not been thought of). Article 3(c) is of course a pragmatic provision, intended to preserve the jurisdiction of the court which conducts the divorce proceedings. In Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, 14th edn, 2006) it is stated, at r 91 18–172 that: ‘It would seem that once the jurisdiction of the court is established, no change in the domicile of the parties or either of them can deprive it of its jurisdiction to discharge, vary, suspend or revive any order it has made.’

The best of way of mitigating any risk of a successful argument that Art 3(c) does not apply to an application under s 31 where a final decree of divorce has been pronounced is by the inclusion in the final ancillary relief/financial remedy order of a watertight jurisdiction agreement for any future application to vary which would satisfy the requirements of Art 4, although such a course would serve to lock people into litigating in England and Wales.

Section 27

Whilst applications under s 27 are relatively rare, it is worth considering jurisdiction in such applications in light of the Maintenance Regulation. Section 27 previously made specific provision for jurisdiction, on the basis of either party’s domicile, the applicant’s habitual residence (if more than one year) or the respondent’s residence. While it might have been the case that jurisdiction could be established pursuant to s 27 but not according to the Maintenance Regulation (ie where neither party was habitually resident), the Civil Jurisdiction and Judgments (Maintenance) Regulation 2011 has amended subs (2) as follows:

In s 27(1) (financial provision orders in case of neglect to maintain), for subs (2), substitute –

‘(2) The court may not entertain an application under this s unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.’

It is possible that proceedings under s 27 may be considered a related action for the purposes of Art 13. Thus, even though an order under s 27 may be considered a short-term and temporary maintenance order, practitioners should bear in mind that it might have longer-term consequences in terms of founding jurisdiction, by virtue of Art 13, in circumstances where jurisdiction for substantive maintenance orders might otherwise have not been possible.

Part III Matrimonial and Family Proceedings Act 1984 (MFPA 1984)

The Maintenance Regulation, through the Civil Jurisdiction and Judgments (Maintenance) Regulation 2011, has made some important changes to the ss 15 (Jurisdiction of the court) and 16 (Duty of the court to consider whether England and Wales is appropriate venue for application) of the Family Proceedings Act 1984 (MFPA 1984). A new subs 1A has been inserted as follows:

‘(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, those requirements are to determine whether the court has jurisdiction to entertain the application or that part of it.’

The effect of this is that an applicant for leave under Part III now has to satisfy the requirements of subs 1 (Part III’s own jurisdiction requirements) as well as the requirements of the Maintenance Regulation. As a result, it will now be almost (if not totally) impossible

to pursue remedies under Part III following a maintenance order having been made in another EU Member State. In respect of s 16 (duty of the court to consider whether England and Wales is the appropriate venue for the making of the application), a new subs 3 has been inserted:

‘(3) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgment (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in subs (1) if to do so would be inconsistent with the jurisdictional requirements of that Regulation and that Schedule.

(4) In this section, “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.’

The effect of this inclusion within s 16 is to widen the scope of Part III applications in EU cases where the court may otherwise have exercised its jurisdiction to dismiss the application on the grounds of a greater connection to another Member State. The new section would have a bearing, for instance, in circumstances where parties have divorced in another state and yet affected a valid jurisdiction agreement providing that maintenance claims shall be determined in England and Wales.

Schedule 1

Until the Maintenance Regulation came into force, Sch 1 effectively had no jurisdictional provisions except for limited provision under para 14 which expressly limited the power of the court to make lump sum orders or transfer property where the child is resident outside England and Wales. The only provision which could be made for such children was periodical payments and secured periodical payments (maintenance). However, the Maintenance Regulation has now been specifically applied to the Children Act 1989 and to Sch 1, by virtue of the provisions of Sch 7 of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011. Paragraph 12(3) of Sch 7 states, in relation to para 14 of Sch 1:

‘For paragraph 14 substitute
14

(1) if an application under paragraph 1 or 2, or part of such an application, relates to a matter where jurisdiction falls to be determined by reference of the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.

(2) in sub-paragraph (1) “the Maintenance Regulation” means Council Regulation (EC) No. 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark.’

Thus, the jurisdictional grounds of the Maintenance Regulation are applied to applications under Sch 1. However, it appears that, by doing so, the legislators have (inadvertently?) widened the scope of orders which the court can make under Sch 1 for the benefit of children, ie removing the prohibition on lump sum or property transfer orders. Now, with effect from 18 June 2011, it appears that the court can make orders for the benefit of a child living outside England and Wales for the full range of orders available under Sch 1; not just periodical payments and secured periodical payments but also lump sums, settlement of property and transfer of property. One wonders whether the legislators fully realised the impact of this amendment which was, presumably, made simply to bring Sch 1 proceedings in line with the jurisdictional requirements of the EU Maintenance Regulation.

Transitional provisions: to what cases does the Maintenance Regulation apply?

The jurisdictional provisions of the Maintenance Regulation apply to proceedings commenced after 18 June 2011 (Art 75(1)). In the case of an application to vary an existing order, it may be possible to argue that that the issuing of an application to vary does not amount to ‘fresh’ proceedings for these purposes. The term ‘proceedings’ is not defined in the definitions section in Art 2.