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Variation of orders under the maintenance regulation: a nod to substantive harmonisation?

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It is no secret that over the last 20 years the legislators of the EU have been pushing a process of harmonisation of European family law in areas of procedure, jurisdiction and conflicts of law and recognition and enforcement of judgments. Whilst it is generally accepted that the EU has no competence under the Treaty of the Functioning of the European Union (TFEU) to unify or harmonise substantive law, in her explanatory report in relation to the Brussels II Regulation of 29 May 2000 (the first instrument that moved the EU into an area of law in which the Community had hitherto not played an active part), Dr Allegría Borrás said as follows:

> 'European integration was mainly an economic affair to begin with and for that reason the legal instruments established were designed to serve an economic purpose. However, the situation has changed fundamentally in recent times so that integration is now no longer purely economic and is coming to have an increasingly profound effect on the life of the European citizen, who finds it hard to understand that he encounters problems in matters of family law while so much progress has been made in property law. The issue of family law therefore has to be faced as part of the phenomenon of European integration.
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> …
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> This Convention is a first step, and a positive and decisive one, along this new road and it may open the way to other texts on matters of family law and succession.'

Brussels II entered into force on 1 March 2001. Just a few months later, on 1 September 2001, the Commission on European Family Law (CEFL) was established. A main objective of the commission was to seek out a 'common core for the solution of legal problems'. At the inaugural meeting in December 2002, Professor Nina Dethloff set out the case for harmonisation, identifying the efforts already made in relation to private international law but stating that 'this alone could not provide a solution to the complex and intricate problems elicited' (quoted in [2003] IFL 1–54).

Support for substantive harmonisation of family law is not by any means uniform. The most frequently cited detractor is cultural diversity. The variance in approach to family law problems seen across Europe presents a considerable obstacle on the path to harmonisation – obstacles which arise not just because of differing approaches borne out of differing value systems, but also because of the macro complexity in approximating civil and common law systems. When taken with Europe's inherent and prized cultural diversity, substantive harmonisation becomes not only fraught with difficulty, but undesirable as a concept.

Professor Dieter Martiny (2011) notes, however, that between substantive norms and conflicts of laws there is, in Community law, an absence of a clear dividing line. Citing the strength of private international law, Professor Martiny argues that a 'unification of substantive law itself is probably unnecessary as long as adequate solutions are afforded by rules of conflicts of laws'. There is force in how he describes this:

> 'Allowing this process of adjustment to societal change to occur in a manner commensurate with a country's own national development facilitates a substantial convergence and the preservation of a distinctive legal consciousness, while avoiding the imposition of a prescribed legal order and disregard of the national context.'

The adoption of the Maintenance Regulation (in force since 18 June 2011) has brought about a wholesale change to jurisdiction and enforcement in cross-border European maintenance cases. In terms of impact, the full title (Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations) would suggest that the scope of the regulation does little to mark a significant departure from the jurisdiction and judgment recognition-focus of Brussels II bis. Following in the footsteps of Brussels II and Brussels II bis, it is the third major European regulation to address exclusively a family law issue and to be applied across all EU Member States. The complexity to the jurisdictional provisions and the scope and impact of the regulation generally have provoked considerable academic debate.

Enforcement is central to the regulation's purpose. Chapter IV, entitled 'Recognition, Enforceability and Enforcement of Decisions' addresses first enforcement of decisions made in Member States bound by the 2007 Hague Protocol on Applicable Law. For those decisions, exequatur is not required, and the process and speed by which such decisions can be enforced is notably superior to decisions made in Member States not bound by the 2007 Hague Protocol (the UK and – currently – Denmark). For Protocol states, Art 19 provides for only a limited right of review, whereas the grounds for refusal of recognition of a decision made in a non-Protocol state under Art 21 are wider. Chapter VII of the Maintenance Regulation sets out the procedure by which the enforcement process is conducted, providing, for instance, for the use of Central Authorities and the availability of legal aid. In easing the process of international enforcement of maintenance – particularly for decisions made in Protocol states – this element of the Maintenance Regulation may be considered a classic procedural tool with limited harmonisation impact.

However, such a conclusion would be superficial. The decision in *EDG v RR (Enforcement of Foreign Maintenance Order)* [2014] EWHC 816 (Fam), [2015] 1 FLR 270, in which Mostyn J held that Chapter IV of the Maintenance Regulation provides a route for direct enforcement of foreign orders (rather than indirect via Central Authorities), is a subtle green light on the European harmonisation road. Having highlighted the cumbersome processes of enforcement available to a creditor prior to the Maintenance Regulation, Mostyn J continued at para [11]:

> 'For the purposes of the decision that I have to make, the relevant article is Article 41, which provides as follows:
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> "Subject to the provisions of this Regulation, the procedure for the enforcement of decisions given in another Member State shall be governed by the law of the Member State of enforcement. A decision given in a Member State which is enforceable in the Member State of enforcement shall be enforced there under the same conditions as a decision given in that

> Member State of enforcement."
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> Therefore, if the route of direct enforcement is adopted, by virtue of Article 41 the foreign order is treated as if it is a domestic order. Further, there is no requirement for any special or additional procedural steps to be taken on an application for enforcement of a foreign order. This much is made clear by Article 17, which says that:
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> "A decision given in a Member State bound by the 2007 Hague Protocol shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition." '

Against a background of cultural and legal diversity across Europe, the equal treatment of foreign orders and domestic orders is not insignificant. Even in the seemingly vanilla realm of enforcement, it is hinting at an approximation of differing European legal orders.

The desire of Mostyn J to promote simplicity in enforcement is palpably in line with the ideals of the Maintenance Regulation in particular and the European family law harmonisation agenda in general. But what is equally interesting about the decision in *EDG* is that it appears out of kilter with domestic (UK) legal policy. At para [14] of his judgment, Mostyn J referred to the domestic secondary legislation (the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011) which gives effect to the Maintenance Regulation. He notes that this legislation specifically provides for enforcement applications to be made not directly, but through the Lord Chancellor to the magistrates' court. Referring to the fact that by virtue of the European Communities Act 1972 European law has direct effect in the UK, and therefore it was in fact strictly unnecessary for domestic secondary legislation to be enacted, he concluded:

> 'It seems to me to be inconceivable that the Secretary of State could have intended to have imposed more restrictive measures of enforcement by virtue of the 2011 Regulations, in circumstances where Articles 17 and 41 expressly forbid that'.

The judgment concluded with an invitation to the Ministry of Justice to amend the secondary legislation. Interestingly, Melanie Barnes has recently reported in this journal that the Ministry of Justice has confirmed that it was not the case that there was any drafting error; the process was deliberate ([2014] IFL 175).

Since the secondary legislation requires the creditor to undertake a more onerous procedure, it may be argued that it restricts access to the court – since the Lord Chancellor (operating through the Reciprocal Enforcement of Maintenance Orders Unit (REMO) at the office of the Official Solicitor) would forward the application to the magistrates' court without the creditor having to (or being in a position to) take an active part. As against a domestic creditor's ability to enforce directly on application to the court (making use of the menu of enforcement options under Part 33 of the Family Procedure Rules 2010), the question is whether the REMO route is a 'special procedure' within the meaning of Art 17 and/or being enforced 'under the same conditions' for the purposes of Art 41. Mostyn J has taken a clear view; the executive (Ministry of Justice) appears, at least anecdotally, to have taken a different one. Few would dispute that maintenance creditors should be able to easily enforce their maintenance orders and it is perhaps no surprise that a Family Division judge (seeing such problems on a daily basis) adopted a broad interpretative approach.

However, enforcement is but a slippery slope into variation, and here rather different factors are at play. From an English perspective, two main situations arise: variation of English orders (whether in England or abroad) and variation of foreign orders in England. The Maintenance Regulation has brought sharply into focus the possibility that, at the point of variation, a foreign jurisdiction, perhaps applying very different principles, may have jurisdiction to consider an application for variation to the exclusion of the original English court. Variance in approach from one state to another could therefore generate significant

amendment to an order.

VARIATION OF FOREIGN ORDERS IN ENGLAND

On an application to vary a foreign order in this jurisdiction, the first question must be from where does jurisdiction arise. That may be under Sch 1 to the Children Act 1989, or, for spousal provision, possibly under Part III of the Matrimonial and Family Proceedings Act 1984 (financial relief after an overseas divorce). But if the application to vary is a spousal maintenance order made in another Member State where substantive provision has already been made, it is difficult to see that Part III could apply and as such it is possible that there may be no substantive jurisdiction. Furthermore, some Member States have a much wider category of potential payers and recipients of maintenance than England: see for instance Italy, where non-immediate relatives can be liable for maintenance (see http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm). Could the English court, on an application under the Maintenance Regulation, vary such an order? In other words, does the Maintenance Regulation itself provide jurisdiction for a variation application? And if so, what principles would apply? These questions were the subject of the recent decision of the High Court in *AB v JJB (EU Maintenance Regulation: modification application procedure)* [2015] EWHC 192 (Fam), in which a German maintenance payer sought to vary a German order in England on an application directly to the English court. The order was subject to a non-variability clause approved by the German court when the order was made; as such, the applicant would have struggled to vary the order in Germany, even though there would have been jurisdiction to apply in Germany (Germany having jurisdiction under Art 3 of the Maintenance Regulation). The applicant relied on Art 56(2)(c) of the Maintenance Regulation under which a debtor may apply for 'modification of a decision given in a State other than the requested Member State'. There was no domestic jurisdiction for the application; the applicant's case was that Art 56 provided him with a direct route to apply to the English court. It is highly unlikely that this application would have been contemplated prior to the Maintenance Regulation. Sir Peter Singer found that the Art 56 procedure did not provide for a direct route of modification; it was a requirement of Art 56 that the application be made through Central Authorities. As such, the application was struck out.

Had the English court proceeded to determine the applicant's modification application in *AB v JJB*, the English court would have been compelled to give consideration to the impact of a German non-variability clause. Despite England applying the lex fori, would the enforceability of such a clause as a matter of German law have been applied (even if by the back door)? If evidence had pointed to the likelihood of Germany dismissing the application because of that clause, could the English court adopt a different approach? Modification of foreign orders in such circumstances raises thorny questions. Equally difficult questions arise in relation to the Italian example of forms of maintenance not provided in domestic English law: what principles apply?

It is clear that both Brussels I and the Maintenance Regulation intended to introduce a power to modify foreign orders. Both Art 8 and Chapter VII of the Maintenance Regulation make it clear that modification is in contemplation. *AB v JJB* does not dismiss the prospect of modification in its entirety, merely the possibility of direct modification. But whether made directly or indirectly, this hugely significant power with wide-ranging implications is given little attention in the Maintenance Regulation. It does not feature in the title, which refers only to recognition, enforcement, applicable law and jurisdiction. It is not mentioned in the preambles. Chapter VII, which provides explicitly for the possibility of a modification application, does not set out any clear guidance on how such an application would proceed, even if made indirectly. This lack of clarity notwithstanding, the rise in perceived acceptability of Member States varying the orders of other Member States is a big leap forward for the European family law project. Modifying other states' orders goes to the heart of principles of comity and reconcilability of decisions. Modification must necessarily involve knowledge of, and the giving of respect to, the principles that the original court would have applied. It is a signal of a degree of accommodation of substantive harmonisation within a procedural harmonisation instrument. But it also demonstrates the difficulty in providing a clear demarcation between the two. Furthermore, modification is likely to depend for success on an approximation of substantive principles of maintenance – even if on a gradual creeping basis over time – to avoid variance in approach which might encourage modification forum shopping.

Under the current state of the law, the Maintenance Regulation does not provide a mechanism for direct modification. Amongst the profession there appears to be some support for such a possibility, and there are of course compelling reasons why a mechanism for direct modification may be advantageous. In his interpretation of the terms of the regulation, Sir Peter Singer came to the clear conclusion that 'there is only one route laid down by the Maintenance Regulation, via Central Authorities' – a conclusion that was reached with detailed reasoning and in respect of which the strength is apparent. Is it possible that in another case a different judge might reach a different conclusion? A strict reading of the regulation would point away from a more catholic interpretation, and even though, as Lord Mance emphasised in *Assange v The Swedish Prosecution Authority* [2012] UKSC 22, interpretation under EU law may require departure from the precise words used in contrast to established domestic rules of construction which may result in quite radical readings in and out, there are limits. But Mostyn J was prepared to embark upon such an interpretation in the field of enforcement and it is not, therefore, wholly inconceivable that at some point, in an appropriate case which (in contrast to *AB v JJB*) calls for it on its facts, the court might 'read down' the Maintenance Regulation (contrary to Sir Peter Singer's view) so as to include direct modification. But Sir Peter's 'second string' – namely that the domestic legislation setting out the rules on a modification application also requires an indirect process – is a potentially impenetrable barrier. The only way through that – which would take a brave judge – would probably be in reliance on the fact that the constitutional barriers preventing proactivity by the court when legislation appears to have spoken may be said to be not as impenetrable as they might once have been: the recent resurgence of the common law in its protection of fundamental rights (eg *Osborn v Parole Board* [2013] UKSC 61; *Kennedy v Charity Commission* [2014] UKSC 20) is indicative of a renewed vigour in the common law. And maybe there is some scope for the (interesting) argument that (as long as we have the Human Rights Act 1998) domestic legislation requiring a more difficult process for variation of foreign orders than domestic orders unlawfully discriminates contrary to Art 14 ECHR, justifying a declaration of incompatibility under s 4 of the 1998 Act. For similar reasons, an argument could be advanced that the scheme might be contrary to the Equality Act 2010. Interesting and novel though all those arguments might be, their power against the rationality of Sir Peter Singer's reasoning would remain to be seen.

The efforts of EU legislators over the past 15 years have had a profound effect on EU family law. But the steps in harmonisation have not come about only by the introduction of directly effective EU regulations, but also through an ever-increasing dialogue between and within Member States as they engage with the European family law debate. The courts have been open to this dialogue, both judicially, in exhibiting a more international outlook in their decision-making, and extra-judicially, through for instance the efforts of Sir Mathew Thorpe in promoting judicial networks and international conferences. By its ever-increasing awareness of the international nature of family law, the profession has also embraced this dialogue. But taking place against the backdrop of pan-European cultural and legal difference and political euroscepticism, the plurality in the process is apparent: whilst there is a proactive embrace in legal circles of the European agenda, as a state the UK is largely a passive recipient of EU legislative action as a result of its lack of engagement.

The complexities and difficulties highlighted above that present themselves on applications to vary foreign orders show that if through judicial activism direct modification becomes part of the Maintenance Regulation armoury, it will be a gallant step that will demand clear judicial guidelines as to the principles which should apply. That is not to say that such guidelines are not needed where the application to modify is indirect: they clearly are. Modification, whether direct or indirect, whilst evincing the obvious benefits for the EU goal of free movement, may be seen as a further gentle nod to harmonisation. The easier it is and the more accepted it is, the further we proceed on the slow road to harmonisation.