EU Marital Property Regulation in force soon, but not in the UK even if we Remain (Updated)

The EU Marital Property Regulation (MPR) has been in draft form since 2011. The European Council called on the European Commission to prepare a paper on marital property regimes as long ago as 2004. It has had many delays and obstacles but it would now seem as if it will pass through the various EU bodies, especially the EU Council, by the end of June 2016.

(Updated: On 9 June 2016, the EC Council Justice and Home Affairs Committee adopted a decision (8112/16) on enhanced cooperation on matrimonial property regimes and property consequences of registered partnerships. The European Parliament will give its opinion in the course of June 2016 with formal adoption expected at the end of June 2016, coming into force 20 days after official publication in the usual way.)

But it will not come into force in the UK, nor several other EU member states. Instead it will be subject to the so-called Enhanced Cooperation process whereby if all member states will not agree to a proposed piece of EU legislation, at least nine states can agree to be bound by the EU law. This enhanced cooperation was used in respect of Rome III regarding applicable law leading to EU Regulation 1259/2010.

If the UK will not be bound, why is it of any interest to UK family lawyers? First, in deciding best and appropriate forum for a client in an intra-EU matter, we need to know what may be the outcome in the other EU member state involved. This will now require consideration of this proposed EU Regulation, albeit in consultation with a specialist lawyer in the other member state. Secondly, there is a close inter-relationship with the EU Maintenance Regulation (EU MR) (4/2009) and the EU Brussels II bis (BII) (2201/2003). Thirdly, enforcing an English sharing order in an EU member state may require consideration of this MPR. Fourthly, even though some of us are keen for Brexit, we must equally plan for Remaining which means understanding what is happening across the EU with EU family laws. There are other good reasons.

I was grateful to speakers from the Dutch Ministry of Justice at the IAFL conference in Amsterdam in May for the up-to-date progress report. The Netherlands presently holds the Presidency of the EU. They must be congratulated on a vigorous work in driving this forward during their Presidency.

The political journey of this proposed legislation
In 2004 the European Council called on the European Commission to submit a paper by 2011 on conflict of laws in matters concerning matrimonial property regimes. They did so with a draft proposal in respect of matrimonial property regimes and a similar proposal in respect of registered partnerships. Even then, the UK, Ireland and Denmark either were not bound or did not give notice of a wish to take part. But it was the involvement of registered partnerships which caused the greater political opposition from those countries unwilling to have legislation which anticipated same-sex relationships.

The 2011 proposals were discussed within the EU until the end of 2014 when the European Council gave a 12 month reflection period. In effect, it was an ultimatum. At a meeting on 3 December 2015, the European Council concluded no unanimity could be reached within a reasonable period. Apart from the UK, Ireland and Denmark, the opposition continued to be in respect of the registered partnerships element. So as an EU-wide piece of legislation it failed.

From then until February 2016, 17 member states indicated they wanted to establish enhanced cooperation between themselves on this issue and asked the European Commission to submit a proposal. This has gained ground under the Dutch Presidency. There was a report in mid-May 2016 which approved this process and was hoped that it will be adopted by 9 June 2016 and then passed by the European Council at a meeting before the end of June 2016. The Netherlands hopes to conclude it to become law as, at that stage, the Presidency passes to Slovakia. This has significance because of the member states not taking part in this Enhanced Cooperation Regulation.

The UK and Ireland, as they are entitled, did not give notice of a wish to take part in the proposed MPR. Denmark is not bound or subject to its application. Poland and Hungary are not willing to take part because, it is understood, of the differences in respect of registered partnerships. This leaves Slovakia, Romania, Estonia, Latvia and Lithuania who have not yet indicated willingness to be part of the Enhanced Cooperation, although may yet do so (although, updated, Estonia has just announced an intention to take part after its adoption). All other member states would be parties to the MPR.

From the UK perspective, and subject absolutely to not being a party ourselves, this Regulation makes perfect sense to overcome the many differences in application of national laws of various countries to the marital property rights of married couples, extended to registered partnerships. It was hoped that the process can go through by the end of June 2016.

**Why is it needed and what are the differences with England and Wales?**

There are very many families across the EU with connections with more than one member state, significantly accelerated by the freedom of movement and freedom of labour. They
face difficulties where different laws apply to the property consequences of marriage. Similar applies to registered partnerships and these are two parallel Regulations.

The MPR provides for recognition and enforcement of decisions on the property regimes of international couples. Crucially, where there are very different laws around Europe about which law concerning marital property should be applied in which situation, there should be unified rules. The MPR supplies this unification, clarity and certainty of which laws will be applied to marital property. Yet this obviously does not apply in the UK, the Republic of Ireland and a couple of other EU member states which always apply their own local, national law.

This is indeed not the most fundamental difference in this particular family law legislation. Many, indeed perhaps most, continental European family law systems have a marital property regime. In some countries it is the default out of which couples can contract. In some countries couples can contract into a particular regime. Some countries have several regimes, any of which can be chosen by the couples. Invariably it applies to property, itself variously defined, arising during the marriage relationship. Invariably it does not apply to property arising before the relationship or after the date of separation, sometimes the date of the divorce. In many such countries, it applies immediately and automatically from the date of marriage in any particular country.

In contrast, England and Wales, and some other EU member states and countries within EU member states, do not have any regime of statute based or default marital property and so it is difficult to contemplate how such EU legislation could apply. This point has been made several times during the consultation process over the years.

Moreover in undertaking a discretionary fairness exercise, the courts, lawyers, mediators and arbitrators in England and Wales and some other countries bring about a settlement involving all of the assets owned by either party, legally or beneficiary and worldwide held, and will invade so-called non-marital acquired assets if required to produce a fair outcome. In other words, the fairness redistribution often involves premarital and post separation assets. This is relatively rare in many continental European countries where it is only the marital property which is divided up.

In many continental European countries with marital property regimes, there is a very strict demarcation between maintenance, understood to be needs, and sharing the marital property. These aspects may be sorted out at different times, with different lawyers involved, different courts and distinctively different laws. Indeed they may not necessarily be sorted out all within one country. England and Wales has certainly moved much closer to the continental European model over recent years but is still some way apart. Whilst sharing and needs are distinctive elements, they are dealt with all at one time with one set of fairness criteria before one court and dealt with by the same set of lawyers as part of the overall final settlement. Again therefore England and Wales are very different to many continental European countries.
Finally in this overview, the MPR makes a number of cross references to the EU Succession Regulation (650/2012) which itself had a difficult journey through the EU process. In England and Wales, specialist family lawyers would not undertake succession, probate and similar areas of work. In a number of continental European civil law jurisdictions, family lawyers would expect ordinarily to cover both family law and succession law. The marital property regime chosen by the couple would affect both divorce and succession so it makes perfect sense for the same lawyers to deal with similar provisions. It is highly unlikely that English family law specialists have given much attention to the EU Succession Regulation, leaving it to their probate colleagues. But it needs to be well understood in order to implement the proposed law regarding marital property.

For these and many other reasons, it makes perfect sense to have this legislation for many EU member states and makes no sense whatsoever to have it for England and Wales and some other parts of the EU

**What is it about?**

The formal title is: “on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes”. This is only a brief overview. It follows the helpful explanatory memorandum to the MPR. It is very much a civil law piece of legislation

At the outset, Article 1 provides what it does not cover. Some of this is predictable; matters of maintenance, succession, legal capacity, recognition of marriages, social security. But it does not also cover rights to pensions where pension income did not arise during the marriage even though the pension was acquired during the marriage. In England and Wales we are very familiar with the pension often being the second biggest asset. It is difficult to understand how there can be any fairness outcome when the pension is not included. The other crucial exception is rights in rem in property. It will be interesting to see how this is interpreted especially if there might be third-party interests. In England and Wales, it is not at all unusual to find properties which are clearly marital acquired yet held in the name of third parties whether personal or corporate, and equally for properties in the name of one of the spouses yet asserted to be held beneficially for a third party. Will these sorts of issues be outside the EU legislation? They probably will if third parties are involved as this is a very sensitive and crucial area when dealing with property. Yet the matrimonial property regime in Article 3 specifically contemplates rules dealing with the relationship between a couple and third parties.

A court settlement, entitled to recognition and enforcement, includes decisions by notaries which is treated in some member states as equivalent of court process.

Article 4 highlights the closeness between divorce and succession. The intention is that the same courts will deal with both. So a court dealing with succession of one party will also deal
with the liquidation of the matrimonial property regime of the couple.

There is then an interesting interrelationship with the jurisdictional requirements for a divorce under Brussels II. If that jurisdiction exists, the same court can deal with the liquidation of marital property with a few exceptions. If it is the fifth or sixth indent of Article 3 of BII, which is the habitual residence along with either six months or 12 months residence, or the residual jurisdiction then the divorce court can only deal with the marital property with the agreement of the spouses. This would be highly relevant if the law was introduced into the UK because the fifth or sixth indent and the residual jurisdiction are the primary grounds used by the forum shopper. Crucially the EU MR does not allow courts to have powers to make needs-based orders if relying only on the so-called residual jurisdiction of sole domicile or sole nationality.

Otherwise there is standard jurisdiction provisions based on habitual residence, last habitual residence and one still residing in the country or the habitual residence of the respondent. What is most interesting in the context of the present EU review of jurisdiction under Brussels II where there is a wide menu of choices and all that matters is the first to commence proceedings, the MPR provides for a hierarchy of jurisdiction in Article 6. A number of lawyers from England and Wales have strongly argued to the EU that lis pendens, the rush to court, should be abolished and in its place a hierarchy of jurisdiction. The EU has been strongly critical against this reform, continuing in meetings in Brussels in the past six months. Yet where it suits the EU, perhaps even where the EU doesn’t have to admit it got it wrong in the first place in Brussels II in March 2001, they are perfectly happy to have a hierarchy of jurisdiction. This should be in the reform of Brussels II.

Strikingly, jurisdiction under MPR is not the same as under the EU Maintenance Regulation. It may not be the same as under Brussels II for the divorce. So this EU proposed law anticipates matters of maintenance being dealt with in one country, the divorce being dealt with in another country and matrimonial property being dealt with in a third country. If the children were habitually resident in a fourth country, then following a European court decision last autumn the financial affairs of the children would be in yet another country. This multiplicity of countries with jurisdiction in respect of a family’s affairs on relationship breakdown has been highly criticised by a number of English lawyers and others. To English eyes, it seems a recipe for increase costs, uncertainty about reaching an overall outcome and prospects for delays and opportunities for tactics.

Similar to the EU Maintenance Regulation, a couple can elect the law to apply to their marital property in Article 7. Also similar to other EU legislation, whilst it has to be in writing and permanent form, there is no need for legal representation or disclosure or indeed reference to the opportunity of taking independent legal advice and having disclosure. This is part of the major continental rift within Europe whereby common law jurisdictions such as England and Wales are extremely anxious about elements of duress and misrepresentation, especially affecting women, in respect of these major marital agreements.

Article 20 onwards deals with applicable law, the heart of the MPR. It deals head-on with the
problematical issue of real property. In many countries around the world, any dealings with real property are according to the law of the country where the real property is situated. But the EU has decided not to follow this. It records, quite rightly, that it would be better to have all matrimonial property issues dealt with in one country (albeit maintenance and divorce etc. may be dealt with in other countries as above). The MPR therefore provides, Article 21, that the law applicable to the marital property will apply to all of the property of the couple, movable and immovable, personal and real, irrespective of location of the real property. The consequence may well be therefore that a decision on marital property may be taken in one of the signatory member states to this MPR in respect of English real property, leading on to issues of recognition and enforcement. This may well be via Part III MFPA 1984. Just because the UK is not a signatory does not mean the UK will not be the recipient of marital property orders pursuant to the MPR.

There are detailed provisions in the MPR about the choice of law for the marital property regime and then the rules which apply, Articles 26 – 30, when the couple do not choose themselves.

Unlike the EU Maintenance Regulation, there is still reference to the intermediate enforcement process of exequatur although the EU states that it hopes this can be removed at a later stage. In fact the MPR says that recognition and enforcement are closer in line to the EU Succession Regulation than the EU MR.

**Conclusion**

For many continental European civil law countries, this proposed legislation makes perfect sense and will be very beneficial to many families with connections with those countries. It overcomes the myriad of various rules regarding applicable law for the marital property, including registered partnership property, along with jurisdiction, recognition and enforcement. It is to be hoped that it can end its long journey and become law as a consequence of European Council decisions in June 2016.

But for England and Wales, as part of the UK, it is absolutely vital that we have had the right not to be bound. The MPR has so many areas of law and practice which are very contrary to English law and practice. Our lack of any marital regime. Our dealing with non-marital property as part of the fairness objective. Multiplicity of proceedings with maintenance and marital property, perhaps also divorce and children financial provision, in separate member states. Anxieties about being bound by agreements where there has been no opportunities for independent legal representation or disclosure. Close linkage to succession law and practice which is thoroughly alien for English family law professional practice. And several other features as set out.

If the UK decides to Remain, there are some tricky issues ahead in EU family law.
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