



The Law Society

Hague Convention Consultation

Response to the Ministry of Justice Consultation

September 2012



The Law Society is the representative body for more than 145,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Family Law Committee and Children's Law Sub Committee. The Committees are made up specialist family lawyers who practise in both public and private law.

The Law Society is grateful to the individual firms which have helped with this response, and especially to David Hodson and Hannah Budd from the International Family Law Group LLP for their advice and for generously sharing with us their own comprehensive response. The views expressed here are, of course, the Law Society's alone.

Applicable law

Three forms of maintenance form the core of the Hague Convention on the International Recovery of Child Support 2007.

1. obligations towards children below the age of 21 (or 18, if a reservation is made)
2. spousal support in a case linked to child support
3. spousal support (with limited governmental assistance in obtaining results)

Under the Convention a central authority in the country of residence of the requester deals with requests for enforcement of judicial or administrative decisions on child maintenance, while the authority in the country to which the request is lodged should provide further, free, help with the application.

The Maintenance Regulation¹ (MR) in conjunction with the 2007 Hague protocol enables a twin track procedure for dealing with international claims for child maintenance where there is enforcement from either an applicable law jurisdiction or local law jurisdiction.

It is clearly desirable that there should be as much co-operation as possible between countries for recognition and enforcement of needs-based arrangements and provisions on relationship breakdown.

Only two EU countries (the UK and Denmark) adopt the local law provision, although across the Hague signatory countries, most are local law jurisdictions, including those countries with which England and Wales has most child support traffic, outside of Europe - predominately Commonwealth countries along with the USA. The Law Society believes that the local law jurisdiction should continue to be applied within England and Wales.

Scope of the 2007 Hague Convention: same-sex relationships.

The Law Society believes that registered same-sex relationships should be included when maintenance arrangements arise.

Response to Consultation Questions

- 1. Respondents are asked to consider whether the two grounds described in paragraph 2(3) of these Regulations are adequate bases on which to take**

¹ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

jurisdiction to enforce a foreign maintenance order. If respondents consider that the additional basis (a territory in which any other matter relevant to enforcement arises) is required, would they please give reasons and practical examples to support that view.

The Law Society agrees that it would be appropriate for the additional basis to be included. Every opportunity should be given to engage enforcement measures, with the benefit of any doubt being given to the recipient party.

There are creditors who would not be able to have a maintenance decision registered in England because the debtor was neither resident nor has assets here. The debtor may do their utmost to avoid either disclosing assets or making payment. Everything practicable should be done to enable enforcement in these circumstances, and the 'any other matter relevant to enforcement' provision would help with this.

2. Do you think provision should be made for enforcement to be suspended (except for any available procedures to prevent dissipation of assets) pending expiry of the period allowed Article 23(6) for the initial appeal in Article 23(5), and during the period taken to deal with the appeal if an application is made?

In principle yes, which would mirror Article 36(3) of the Maintenance Regulation, although there are a number of factors to be considered and balanced, including the fact that in all actions concerning children the best interests of the child must be a primary consideration. For that reason delay may not be appropriate, particularly where it is likely to be some time before an appeal is determined.

If there were a designated and limited period within which an appeal had to be determined, then it may be appropriate for enforcement to be suspended, subject to the best interest of the child.

In some circumstances it may be appropriate for the court to consider whether to make a *Hadkinson* order, imposing conditions on the granting of leave to appeal, such as the payment into court, or a solicitors client account, the sum that is the subject of the enforcement action.

If the court acts proportionately in imposing such a condition then this would not prejudice the debtor's right to a fair trial (Article 6 ECHR). The relevant considerations are whether justice is being impeded by the non payment and that there is no effective way to secure compliance with the order (*Laing v Laing* [2007] 2 FLR 199)

2. Should any suspension be mandatory or discretionary?

We believe that a stay should be subject to judicial discretion, taking into account all of the circumstances of the case including:

- The debtor's means
- Whether, and the extent to which, the debtor engaged in/co-operated with the proceedings in the originating contracting state

- The impact on the child of any stay
- The timescale within which the appeal will be determined
- Whether it is appropriate to make a Hadkinson order requiring the debtor to make a payment into court, or money to be held on a solicitor's client account, as a condition of the appeal.

Schedule 2

3. Is the procedure relating to Driving Disqualification Orders sufficiently clear? (Please bear in mind that these are not 'family proceedings' for which provision can be made in Family Procedure Rules 2010.)

Given that these orders are not family proceedings for which provision can be made under the Family Procedure Rules, there is a need for greater clarification.

The procedure mirrors that contained in the Child Support Act 1991. Paragraph 4 mirrors the terms of s.39A of the Act in that the court will inquire as to whether

- The debtor needs a driving licence to earn his living
- His means
- Whether there has been wilful refusal or culpable neglect in the failure to pay.

The 1991 Act, and the meaning of '*wilful refusal or culpable neglect*' has been developed in case law. Wait J in R v Luton Magistrates Court defined it to mean '*blameworthiness... at a very high level. It is not just a matter of improvidence or dilatoriness. Something in the nature of the deliberate defiance or reckless disregard of the Court's order is required*'. It is not clear if this test will remain for Driving Disqualification Orders under the regulations.

It is not clear to us the extent to which the debtor requires a driving licence to earn his living will be taken into account by the court. For example, where an offender has committed a driving offence, or has 'totted up' significant points, they could have their driving licence removed. The mere fact that the Defendant will lose his job is not sufficient.

It might be helpful to set more clearly the test to be applied, including the appeal process.

4. By paragraph 6, it is intended to make sure that the debtor cannot be both committed to prison and receive a Driving Disqualification Order in respect of the same arrears. Do you consider that the wording of paragraph 6 is sufficiently clear to protect the debtor in this respect?

We do not consider that this is sufficiently clear. As an alternative we would suggest the following wording:

'Where the court has made a disqualification order in respect of arrears as quantified in accordance in paragraph 7 below, the court may not then

issue a warrant for the commitment of the debtor to prison in respect of the same arrears.

Where the court has previously issued a warrant for the commitment of the debtor to prison in respect of arrears the court may not then make a disqualification order in respect of the same arrears’.

Furthermore, it is unclear whether a debtor may be committed to prison in respect of different arrears during the period of disqualification.

It would also be helpful to expand the wording at paragraph 7 as follows (as shown in bold):

*‘A driving disqualification order must state the amount of arrears in respect of which it is made **and the period to which they relate**, which amount...’*

The rationale behind this amendment is that of course, it is likely that even once crystallised in an order further arrears will continue to accrue.

5. **Paragraph 7 gives the court a discretion to include the costs of the creditor in applying for the Driving Disqualification Order as part of the amount in respect of which the order is made. Do you consider this appropriate in the light of the power of the court to make costs orders under s.64 of the Magistrates’ Courts Act 1980?**

Yes. Such provision is also provided for at s.40B(3)(b) of the Child Support Act 1991.

In relation to applications made under the Regulations, in addition to litigation in their own contracting state (or agreement), the creditor will have already had to seek recovery of arrears/maintenance by way of a writ/warrant for control of goods, charging order or third party debt order here. If the arrears remain unpaid, meaning a driving disqualification order is necessary, then it is appropriate that a costs order be made in their favour.

6. **Do you think the rights of both debtors and creditors are adequately protected through this process?**

From the debtor’s perspective no driving disqualification order may be made in their absence. Enquiries will be made as to whether their driving licence is needed to earn a living, their means and whether their breach is due to wilful refusal or culpable neglect on the part of the debtor. Only in circumstances in which the court considers that there has been wilful refusal or culpable neglect will a disqualification order be made. The disqualification order may also be revoked or varied to a shorter period in circumstances in which payment is paid to any person authorised to receive it.

Conversely, the creditor has the protection that the court will summons a debtor if necessary to attend before the court. They are also able to make further applications in the event that the arrears remain unpaid at the period at which the order expires, although as set out in response to question 5 above, we are unclear whether the existence of the disqualification order then precludes an application for a warrant for commitment to prison.