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Trenk-Hinterberger, Peter

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the trade mark must be assessed globally with respect to an average consumer who is deemed to be reasonably well informed, reasonably observant and circumspect. The sign produces an overall impression on such a consumer. That consumer only rarely has the chance to make a direct comparison between signs and trade marks and must place his trust in the imperfect picture of them that he has kept in his mind. Moreover, his level of attention is likely to vary according to the category of goods or services in question.[11]

53. Since the perception of identity between the sign and the trade mark is not the result of a direct comparison of all the characteristics of the elements compared, insignificant differences between the sign and the trade mark may go unnoticed by an average consumer.

54. In those circumstances, the answer to the question referred must be that Article 5(1)(a) of the directive must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer. (...)"

[11] See, to that effect, ECJ 22 June 1999 – C-342/97 – *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, para. 26.

INTERNATIONAL AND EUROPEAN PROCEDURAL LAW

Recourse to maintenance in European procedural law

Comment on the ECJ decision of 14 November 2002,
Gemeente Steenbergen v *Luc Baten*

Prof. Dr Peter Trenk-Hinterberger[*]

I. Subsidiary public allowances by way of social assistance and maintenance claims

1. Individuals who are not in a position to secure a minimum subsistence level through their own efforts and means (income, assets and working capacity) obtain subsidiary public allowances by way of social assistance in numerous legal systems. In many cases individuals wind up in hardship because those obligated to provide maintenance (e.g. divorced spouses) do not pay the amounts owed on time or whatsoever. Social assistance agencies, which in fact have only a secondary obligation to provide benefits, offer allowances to individuals in need on the basis of public welfare considerations; however, they turn to the person who is primarily responsible for maintenance to request reimbursement for the amounts paid by way of social assistance. As different as welfare systems may be with regard to specifics, it is recognised as a general principle that the assistance provided does not eliminate individual maintenance obligations and that public authorities may redress the subsidiarity of their obligations by way of recourse against the maintenance debtor. Under German law, for instance, this redress is governed by § 91 of the Bundessozialhilfegesetzes (Federal Social Assistance Act, BSHG).

2. Individual legal systems provide for different statutory mechanisms for recourse against a person owing maintenance.[1] German law as well has over time developed various techniques which incidentally crop up also in other legal systems:[2]

a) Recourse can be based on an independent claim for compensation. Fashioned in this manner, the regress against the person obligated to furnish maintenance does not derive from the original entitlement to maintenance, but rather from a primary claim for compensation created by statute. It takes the form of a public law claim asserted by public authorities. Thus, for instance, pursuant to § 23 of the Welfare Regulation (*Verordnung über die Fürsorgepflicht*) under German law, a social assistance agency could up until 30 June 1961 take administrative action to compel the retroactive reimbursement of costs and prospective fulfilment of maintenance obligations. In this proceeding, the social assistance agency could request the competent administrative authority to issue a decision (*Resolut*) against the individual with a maintenance obligation. On the basis of this decision on reimbursement, the agency could then institute execution proceedings to collect debts due to the government.[3]

b) The public body may also assert the original maintenance claim of the recipient of social assistance (as an individual entitled to maintenance); the claim would be transferred to the institution by way of an administrative decision. Under German law, assignments of claims up until 26 June 1993 were made

[*] *University of Bamberg (D), Chair for Labour and Social Law.*

[1] See examples in *Brückner*, Unterhaltsregress im internationalen Privat- und Verfahrensrecht, Tübingen (D), 1994, at 88 et seq. Numerous references also appear throughout *Martiny*, Unterhaltsrang und –rückgriff, Tübingen (D), 2000.

[2] Other (seldom used) techniques (such as subrogation of maintenance claims as precondition for the provision of allowances by way of social assistance, or the reassignment of claims transferred or assigned pursuant to statutory provisions to social aid recipients with maintenance entitlements) will not be discussed in this article.

[3] For in-depth commentary, see *Kraegeloh*, Handbuch des fürsorgerechtlichen Erstattungsrechts, Staßfurt (D), 1933, at 188 et seq.

by a notification of assignment at the social assistance agency's discretion (an administrative act). Thus, the social assistance agency assumed the legal position of the welfare recipient (as maintenance creditor), including the right to assert the claim on its own behalf. Nothing changed with respect to the legal nature of the claim; it remained a claim under civil law to be pursued before civil courts. The individual with the maintenance obligation could naturally have administrative courts review the lawfulness of the administrative action.[4]

c) However, the public body may also raise the original maintenance claim of the social assistance recipient because this claim against the individual with a maintenance obligation devolves to the social assistance agency by force of law (*cessio legis*). Under German law since 27 June 1993, for example, maintenance claims are thus automatically subrogated to social assistance agencies, as a direct result of the maintenance grant itself, without the necessity of an official act to this effect.[5]

3. The various forms of recourse just described raise the question of the applicability of the Brussels Convention (now Regulation (EC) No. 44/2001[6]) to actions for redress by public welfare institutions against maintenance debtors in cases with cross-border dimensions. The ECJ confronted this very question in the decision discussed here.[7]

II. First question: "civil matters" in the Brussels Convention

1. The scope of the Brussels Convention as regards subject matter is governed by Article 1. Accordingly, the Convention is only to be applied to "civil and commercial matters" – in contrast to public law matters, whatever the nature of the court or tribunal (Article 1(1), first sentence).[8] The Convention's framers consciously provided no definition for "civil and commercial matters".

2. The ECJ decided upon an autonomous European concept of "civil matters".[9] This approach – thankfully amenable to integration – is strengthened and continued in the instant case.[10] Not all legal disputes "where the public authority is acting in the exercise of its public powers"[11] fall under the Convention. For the ECJ, the legal dispute (in the sense of its subject matter) must be reviewed to see whether a connection exists with the exercise of public powers.

3. In a legal dispute where a public body seeks from a person governed by private law recovery of sums it has paid by way of social assistance to the former spouse and the children of that person, determining whether the public authority is acting in exercise of its public powers requires an examination – as the ECJ has differentiated it – of

a) "the basis" and

b) "the detailed rules governing the bringing of that action".[12]

4. After an analysis of Netherlands law, the ECJ concludes that a "civil matter" is concerned if

a) the rules of civil law determine the cases in which public bodies may bring actions under a right of recourse, "namely where there is a person under a statutory obligation to pay maintenance". On the basis of those same rules, the person against whom the public body may proceed is identified and the limits to the amounts recoverable by that body are determined, those limits being coterminous with those of the statutory maintenance obligation itself;[13]

b) the action under a right of recourse must be brought before civil courts and is governed by the rules of civil procedure.[14]

5. The ECJ thereby develops two important criteria for reviewing actions for recourse by public bodies against individuals required to pay maintenance. These criteria help determine whether such proceedings deal with "civil matters" within the meaning of Article 1 of the Brussels Convention (or with a public law matter excluded from its scope). However, the application of the first criterion laid out by the ECJ in the subsequent analysis of Netherlands law (i.e. the basis of the action) is unclear and therefore unsatisfactory. It would have been more persuasive to pose the question whether the action constituted the exercise of public powers.[15] The analysis of Netherlands law would then also have arrived at the result that, although the municipality of Steenbergen could request (re)payment as a public body providing social assistance, it could not use its public powers to compel such action and ultimately had to sue the person required to pay maintenance before the civil courts, just like a person governed by private law. Such a precise criterion (the exercise of public powers as basis of the action) facilitates the classification of the different forms for the action under a right of recourse sketched out above (I.2.) within the scope of the Brussels Convention. The forms described in I.2.b) and c) fall under "civil matters" and are thereby subsumed under Article 1(1); the same does not hold true for the form presented in I.2.a) of a public law matter pursued under public authority.

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4 To that effect, see, e.g., *Schellhorn* et al., in: Kommentar zum Bundessozialhilfegesetz, 14th ed., Neuwied (D) et al., 1993, § 90 para. 7 et seq.

5 To that effect, see, e.g., *W. Schellhorn/H. Schellhorn*, in: Kommentar zum Bundessozialhilfegesetz, 16th ed., Neuwied (D) et al., 2002, §§ 91 para. 7 et seq.

6 Since 1 March 2002, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, at 1) applies for all Member States of the EC (except Denmark) instead of the Brussels Convention. The provisions of interest here remain unchanged.

7 ECJ 14 November 2002 – C-271/00 – *Gemeente Steenbergen* v *Luc Baten*, nyr, reprinted in this issue at 90.

8 Article 1(1), first sentence, of Regulation (EC) No. 44/2001 (*supra* note 6) corresponds word-for-word to Article 1(1), first sentence, of the Brussels Convention.

9 See, e.g., ECJ 14 October 1976 – 29/76 – *LTU* [1976] ECR 1541.

10 *Baten* (*supra* note 7), para. 28.

11 Para. 30.

12 Para. 31.

13 Para. 32.

14 Para. 33.

15 The ECJ even identifies this as the decisive viewpoint in para. 30 of its decision in *Baten* (*supra* note 7).

III. Effects of maintenance waivers and "civil matters" under the Brussels Convention

1. Quite surprisingly, the ECJ makes an important limitation[16] in connection with the maintenance waiver and its relevance for the regress: If – as Netherlands law provides under certain conditions – a public body can disregard such a waiver in taking recourse, it is "no longer acting under rules of the civil law but under a prerogative of its own, specifically conferred on it by the legislature".[17] Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in 'civil matters'.[18] The limitation created by the ECJ is surprising in two respects. On the one hand, the ECJ introduces a consideration that is never hinted at in the opinion of Advocate General Tizzano. On the other hand, the ECJ offers no convincing rationale for its point of view.

2. A consideration of these various causes of action raises at the outset the question of whether a maintenance waiver also produces binding effects for a social assistance agency (which becomes mainly relevant for all intents and purposes in divorce agreements). The question can thereby be governed by rules of civil law (relating to maintenance) or of public law (relating to social assistance).[19]

a) The maintenance waiver can be contrary to public policy under civil law rules and thereby void. Consequently it cannot be raised against the regress by the social assistance agency (as, for example, the solution under German law[20]).

b) However, the maintenance waiver can also be declared null and void *vis-à-vis* the social assistance under public law (social law) rules (as is the case in Netherlands law). This statutory solution certainly permits the classification as a 'civil matter' within the meaning of the Brussels Convention. In this constellation, the social assistance agency is not exercising any public powers; it does not proceed by virtue of sovereign rights. Rather, the public body must (like a person governed by private law) take legal action in civil courts; a maintenance waiver as such does not bar the action. The opposing party cannot invoke this particular (civil law) exception to invalidate the action (but could still invoke other civil law exceptions). In any event, the ECJ could have tailored its qualification to those particular cases in which the social assistance agency has a primary public law claim under a right of recourse (as in I.2.a) above) which could be enforced by public powers and which is not subject to any civil law exceptions. However, this is not the case under Netherlands law – which indeed the ECJ itself recognises.

16 Para. 35 et seq.

17 Para. 36.

18 Para. 37.

19 For a comparative law approach, see *Brückner* (*supra* note 1), at 130 et seq.

20 For in-depth commentary, see *W. Schellhorn/H. Schellhorn* (*supra* note 5), § 91 para. 26 et seq.

IV. Second question: "social security" in the Brussels Convention

1. The applicability of the Brussels Convention to recourse for social assistance agencies against maintenance debtors seems dubious in terms of Article 1(2), point 3.[21] This clause excludes application of the Brussels Convention in the field of "social security". This exclusion was meant to avoid difficulties that could emerge from the fact that social security law is classified in some states as a purely public law matter, while in others it straddles both private and public law. For the area of social assistance of interest here, the question arises as to whether this term can be subsumed under the Brussels Convention's concept of "social security" in the first place.

2. The Brussels Convention itself contains no definition for the term "social security". In the instant decision, the ECJ makes it clear that from now on – here no differently from the concept of "civil matters" – the term is to be autonomously interpreted.[22]

3. In fleshing out the term "social security", the ECJ refers to its use in Article 51 of the EEC Treaty (later Article 51 of the EC Treaty, now Article 42 EC) and its concretion through Regulation (EEC) No. 1408/71,[23] issued to implement this provision.[24] Pursuant to Article 4(4) of this Regulation (and its more precise rendering in the ECJ's case-law), however, social assistance is excluded from the ambit of social security.[25] But this applies equally to actions for recourse brought by public bodies against maintenance debtors which the Regulation's application does not even concern – as the ECJ correctly emphasises with appropriate mention of the *Jenard* and *Schlosser* Reports.[26] The basis for exclusion contained in Article 1(2), point 3 of the Brussels Convention thus does not interfere with recourse to maintenance through a social assistance agency.[27]

V. Jurisdiction over actions for recourse brought by the public social assistance agency

1. The ECJ did not have to decide the question of whether Article 5(2) of the Brussels Convention[28] determines the fo-

21 Article 1(2), lit. c of Regulation (EC) No. 44/2001 (*supra* note 6) corresponds word-for-word to Article 1(2), point 3, of the Brussels Convention.

22 *Baten* (*supra* note 7), para. 42.

23 Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996 (OJ 1997 L 28, at 1) (hereinafter: Regulation No. 1408/71).

24 *Baten* (*supra* note 7), paras 44 and 45.

25 On this point and on pertinent jurisprudence of the ECJ, see *Eichenhofer*, in: *Fuchs* (ed.), Kommentar zum Europäischen Sozialrecht, 3rd ed., Baden-Baden (D), 2002, Article 4 para. 33 et seq.

26 *Baten* (*supra* note 7), paras 46-48.

27 See also, e.g., *Brückner* (*supra* note 1), at 149 et seq.; *Kropholler*, Europäisches Zivilprozessrecht, 6th ed., Heidelberg (D), 1998, Article 1 para. 38.

28 Article 5, point 2, of Regulation (EC) No. 44/2001 (*supra* note 6) corresponds word-for-word to Article 5, point 2, of the Brussels Convention.

rum for actions for recourse by social assistance agencies. Accordingly, the maintenance debtor can also be sued in the court with jurisdiction over the maintenance creditor's domicile or ordinary residence.

2. Here, what remains open to dispute is whether a public law institution can likewise rely on Article 5(2) of the Brussels Convention when asserting maintenance claims on the basis of assignment.[29] The Bundesgerichtshof (Federal High Court of Justice, Germany) accordingly leans towards the point of view that Article 5(2) also applies to these types of actions in its ruling of 26 September 2001,[30] which presented this question for preliminary ruling by the ECJ.[31]

[29] On the current opinion, see, e.g., *Brückner* (*supra* note 1), at 154 et seq.; *Kropholler* (*supra* note 27), Article 5 para. 48.

[30] BGH (D) 26 September 2001 – XII ZR 89/99 [2002] FamRZ 21 = [2002] MDR 50.

[31] In the BGH case, the issue was not social assistance, but rather educational assistance (subsidiary to maintenance claims); the difficulty of recourse by public authorities against the primarily responsible maintenance debtor remains the same.

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Brussels Convention[1] Article 1(1) and Article 1(2) Point 3 – Scope – Action under a right of recourse under national legislation providing for payment of allowances by way of social assistance – Concept of "civil matters" – Concept of "social security"

The first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that the concept of "civil matters" encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in "civil matters".

Point 3 of the second paragraph of Article 1 of this Convention must be interpreted as meaning that the concept of "social security" does not encompass the action under a right of recourse by which a public body seeks from a person governed by private law recovery in accordance with the rules of the ordinary law of sums paid by it by way of social assistance to the divorced spouse and the child of that person.

Facts: A Belgian court granted Mr Baten and Mrs Kil's divorce on 14 May 1987. In an agreement of 25 March 1986 made before a Belgian notary, the couple had agreed that no maintenance would be payable as between themselves and that Mr Baten would pay BEF 3 000 in monthly child support.

Mrs Kil and her child settled in the municipality of Steenbergen (NL), which granted them an allowance by way of social assistance. In July 1996, the Arrondissementsrechtbank te Breda (District Court, Breda) (NL) ordered Mr Baten to pay to the municipality for the amounts granted. In February 1998, the President of the Rechtbank van eerste aanleg te Turnhout (Court of First Instance, Turnhout) (B) made an initial declaration that this order was enforceable.

On appeal, the Rechtbank held the order of the Netherlands court was not enforceable because it was incompatible with the divorce decree, which by implication included and confirmed the notarised agreement. The municipality appealed to the Hof van Beroep (Court of Appeals) in Antwerp (B), claiming that the dispute fell within the scope of the Belgium-Netherlands Convention of 1925 rather than of the Brussels Convention since it concerned a matter of social security. The Hof van Beroep stayed its proceedings and referred the questions to the Court for a preliminary ruling.

Extract from the decision: "(...)

Legal framework

The Brussels Convention

3. The scope of the Brussels Convention is defined in Article 1 thereof, which provides:

> This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> The Convention shall not apply to:
>
> (...)
>
> 3. social security;
>
> (...)

4. Under Article 26 of the Brussels Convention, a judgment given in a Contracting State is to be automatically recognised in the other Contracting States without any special procedure being required.

5. However, Article 27 of the Brussels Convention specifies exhaustively the cases in which recognition is to be refused. It is worded as follows:

> A judgment shall not be recognised:
>
> (...);
>
> 3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;
>
> (...)

6. Under Article 55 the Brussels Convention supersedes, for the States which are parties to it, certain conventions listed therein. These include 'the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy and the validity and enforcement of judgments, arbitration awards and authentic instruments signed in Brussels on 28 March 1925' (hereinafter the Belgium-Netherlands Convention of 1925).

7. Under Article 56 of the Brussels Convention the conventions men-

[1] Convention of 27 September 1968 (OJ 1978 L 304, at 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, at 1 and - amended version - at 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, at 1).