

JURISDICTION, RECOGNITION AND ENFORCEMENT IN CASES OF REIMBURSEMENT CLAIMS BY PUBLIC BODIES

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A. CROSS-BORDER RECOVERY OF MAINTENANCE BY PUBLIC BODIES

In maintenance cases it is common for public bodies to be called upon to provide benefits in place of a maintenance debtor or support the individual seeking maintenance by other means¹. The *European Maintenance Regulation* of 2009² and the *Hague Maintenance Convention* of 2007³ address situations where an applicant is such a public body. The *Hague Maintenance Protocol* of 2007⁴ provides that reimbursement claims by public bodies are governed by the domestic law to which that body is subject.

What do these new rules mean for jurisdiction, recognition and enforcement in cross-border recovery of maintenance?

B. INVOLVEMENT OF PUBLIC BODIES

¹ Cf. D. Martiny, Current Developments in the National Laws of Maintenance, *European Journal of Law Reform* 2012, 64 (81 f.).

² Article 64 Public bodies as applicants

1. For the purposes of an application for recognition and declaration of enforceability of decisions or for the purposes of enforcement of decisions, the term 'creditor' shall include a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance.

2. The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

3. A public body may seek recognition and a declaration of enforceability or claim enforcement of:

(a) a decision given against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;

(b) a decision given between a creditor and a debtor to the extent of the benefits provided to the creditor in place of maintenance.

4. The public body seeking recognition and a declaration of enforceability or claiming enforcement of a decision shall upon request provide any document necessary to establish its right under paragraph 2 and to establish that benefits have been provided to the creditor.

³ Article 36 Public bodies as applicants

(1) For the purposes of applications for recognition and enforcement under Article 10(1) a) and b) and cases covered by Article 20(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance.

(2) The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

(3) A public body may seek recognition or claim enforcement of –

a) a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;

b) a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.

(4) The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.

⁴ Article 10 Public bodies

The right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which that body is subject.

Public body: A public authority or another organisation. There are two main tasks required of the public body by the Regulation and the Convention:

- The public body acts in place of a maintenance creditor
 - e.g. Dutch National Bureau Collection of Maintenance (*Landelijk Bureau Inning Onderhoudsbijdragen; LBIO*)
- The public body provides benefits in place of maintenance. This encompasses social security benefits (social welfare authorities), advance maintenance payments (maintenance advance payment office, guarantee fund).

C. RECOVERY OF MAINTENANCE BY PUBLIC BODIES

I. Applicability of *Maintenance Regulation* and *Maintenance Convention 2007* to maintenance claims.

Recovery of maintenance by public bodies is in principle treated like a maintenance claim⁵.

II. Support of creditor

- Public body acts in place of a maintenance creditor
- Public body provides benefits in place of maintenance

III. Different kinds of reimbursement

1. Legal subrogation (*cessio legis*)

The maintenance claim passes to the public body as a consequence of providing benefits, such as basic social security benefits⁶, social assistance,⁷ advance maintenance payments,⁸ and scholarships.⁹

2. Separate reimbursement claims

Separate claims for reimbursement of benefits paid in place of maintenance. Claims for reimbursement are treated like maintenance claims.

IV. Separate claims for reimbursement of costs

A separate claim for reimbursement of costs (e.g. for institutional care) is not a maintenance claim.

⁵ Cf. ECJ 14. Nov. 2002, Case C-271/00 – Gemeente Steenberg/Baten, ECR 2002 I-10489 = IPRax 2004, 237 annot. D. Martiny (195)(Reimbursement claim of public body covered by Brussels Convention); P. Trenk-Hinterberger, Recourse to maintenance in European procedural law, The European Legal Forum 2003, 87 ff. (<http://www.simons-law.com/library/pdf/e/388.pdf>).

⁶ § 33(1) German Social Security Act II.

⁷ § 94(1) Social Security Act XII.

⁸ § 7(1) Maintenance Advancements Act.

⁹ § 37(1) Federal Training Assistance Act.

V. Retransferred maintenance claims

A specific reimbursement technique under German law is the “retransfer” of maintenance claims. Where a claim has been the subject of a statutory transfer to a public body, that claim can, by way of a voluntary assignment, be transferred back to the creditor who may then pursue it in a fiduciary capacity (e.g. possible under § 94(5)(1) German Social Security Act XII, § 7(4)(2) Maintenance Advancements Act). In cross-border enforcement proceedings, this technique secures the privileged treatment of the claim like the original maintenance claim¹⁰.

Differing opinion: It is only a reimbursement claim¹¹.

D. JURISDICTION

I. Grounds for jurisdiction under the European *Maintenance Regulation*

- General jurisdiction
- Ancillary jurisdiction
- Choice of court
- Special jurisdiction

II. General jurisdiction

1. Habitual residence of the debtor (Art. 3(a) *Maintenance Reg.*)
2. Habitual residence of the creditor (Art. 3(b) *Maintenance Reg.*)¹²?
 - Dominant view: not for public bodies¹³.
3. No ancillary jurisdiction
 - (Art. 3(c)(d) *Maintenance Reg.*)

III. Other grounds for jurisdiction

- Choice of court (Art. 4)?
- Subsidiary jurisdiction (Art. 6)?
- *Forum necessitatis* (Art. 7)?

¹⁰ Cf. N.Hartig/I.Jäger-Maillet, Durchsetzung übergegangener Unterhaltsansprüche im Ausland, in: C. Schmidt (ed.), *Internationale Unterhaltsrealisierung*, 2011, p. 115 (122).

¹¹ M. Andrae, Der Unterhaltsregress öffentlicher Einrichtungen nach der EuUntVO, dem HUÜ 2007 und dem HUP, *Familie Partnerschaft Recht* 2013, 38 ff.

¹² Cf. ECJ 15 Jan. 2004, Case C-433/01 - Freistaat Bayern/Blijdenstein, ECR 2004 I-981 = IPRax 2004, 240 annotation D. Martiny (195) (Public body could not take advantage of the more favourable jurisdictional rules provided for maintenance creditors)

¹³ See B. Hess, Die Verordnung Nr. 4/2009/EG zum Unterhaltsrecht, in: C. Schmidt (ed.), *Internationale Unterhaltsrealisierung*, 2011, p. 27 (30). Contra M. Andrae FPR 2013, 41 ff.

E. RECOGNITION, DECLARATION OF ENFORCEABILITY AND ENFORCEMENT

I. Different situations

- Recognition and enforcement of foreign decisions between Contracting States of the *Hague Convention 2007*.
- Recognition and enforcement of foreign decisions without exequatur between EU Contracting States of the *Hague Protocol* (Art. 17 ff. *Maintenance Reg.*). Under this system the decision is automatically enforceable in another Member State without further formalities.
- Exequatur procedure between EU non-Contracting States (Art. 23 ff. *Maintenance Reg.*)
- National procedural law.

II. Recognition and enforcement

For the purposes of an application for recognition and declaration of enforceability of decisions, or for the purposes of enforcement of decisions, the term 'creditor' includes a public body (Art. 64(1) *Maintenance Reg.*, Art. 36(1) *Maintenance Convention 2007*). However, a public body is excluded from the *Maintenance Convention*, and the support by the Central Authorities, where the public body applies for the establishment of a maintenance decision in another Contracting State (but see Art. 20(4) *Maintenance Convention*)¹⁴.

III. Decision for the public body

There are different categories of foreign decisions. The first category concerns recognition of decisions and declarations of enforceability, as well as enforcement of decisions made against debtors on the application of public bodies claiming payments of benefits provided in place of maintenance (Art. 64(3)(a) *Maintenance Reg.*, Art. 36(3)(a) *Maintenance Convention 2007*). There is equality between creditor and public body; the public body is entitled to the same services and the same legal aid as a creditor.

IV. Decision for the original maintenance creditor

The second category of decisions concerns recognition of decisions and declarations of enforceability, as well as claim enforcement of decisions given between creditors and debtors, to the extent of the benefits provided to the creditor in place of maintenance (Art. 64(3)(b) *Maintenance Reg.*, Art. 36(3)(b) *Maintenance Convention 2007*). If there has been a later transfer of the claim to the public body then the original maintenance creditor is no longer the real creditor. If the original maintenance creditor nevertheless applies for enforcement of the foreign decision then his position in the enforcement proceedings must be determined.

1. Position of the maintenance creditor after a later transfer of the claim

If recognition and enforcement is sought according to the *Hague Convention*, under the procedural framework for declarations of enforceability, it can be taken into account that

¹⁴ See A. Borrás/J. Degling, Explanatory Report (2009) No. 590.

there is now another creditor. The debtor has an objection based on substantive law against the claim to be enforced¹⁵.

However, if a recognition and an application for declaration of enforceability are made under European procedural rules, the European court of Justice has held that the exequatur courts of the State addressed have no competence to decide on such objections¹⁶. It is primarily the task of the courts in the first State to make a decision. However, it is not clear how such an objection can nevertheless be raised in the enforcement proceedings in the State addressed¹⁷.

There is no requirement for an exequatur if an enforcement proceeding is based on the European rules between Contracting States of the *Hague Protocol*. There is no European legal provision stipulating how such an objection, based on substantive law, against the claim has to be dealt with. It is clear that the competent court for the execution proceedings has to decide the issue. However, in Germany there is uncertainty as to which specific provision should be applied¹⁸.

2. Position of the public body after a later transfer of the claim

In the framework of an exequatur procedure, the change of creditor can be taken into account. A declaration of enforceability in favour of the public body is possible (cf. § 39 Foreign Maintenance Act)¹⁹. In cases of enforcement of a foreign decision without exequatur between EU Contracting States of the *Hague Protocol*, it is doubtful if and how such a change could be taken into account. An amendment according to the general provision of § 727 CCP seems to be unlikely.

F. CONCLUSION

Under the new European *Maintenance Regulation* and the *Hague Convention* there have been major improvements for cross-border recovery of maintenance claims and enforcement. However, equality between the maintenance creditor and the public body exists only for recognition and enforcement of decisions. The bases for jurisdiction are restricted. The fact that there are different recognition schemes and many questions of delineation between European and international rules on the one hand and national procedural law on the other hand will, in the future, give rise to many more questions and lead to some complicated problems.

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¹⁵ See for the Hague Convention of 1973, German Federal Supreme Court 2 March 2011, FamRZ 2011, 802 = IPRax 2012, 360 annotation K. Hilbig-Lugani, 333 (Swiss judgment).

¹⁶ Cf. ECJ 13 Oct. 2011, Case C-139/10 - Prism Investments, NJW 2011, 3506 = IPRax 2012, 357 annot. R. Wagner, 326.

¹⁷ For § 767 CCP Andrae FPR 2013, 45.

¹⁸ For proceedings according to § 66 Foreign Maintenance Act in conjunction with § 767 CCP (action to oppose enforcement), K. Hilbig-Lugani IPRax 2012, 336. Only for an analogous application of § 767 CCP M. Andrae FPR 2013, 45.

¹⁹ M. Andrae FPR 2013, 44.