# Opinion of AG Campos Sánchez-Bordona in the case WV, C-540/19: jurisdiction and action for recovery of maintenance brought by a public body

According to the judgment in Blijdenstein, delivered by the Court of Justice in 2004, a public body which seeks reimbursement of sums paid under public law to the original maintenance creditor, to whose rights it is subrogated against the maintenance debtor, cannot rely on Article 5(2) of the Brussels Convention. It cannot, therefore, sue the debtor before the courts for the place of domicile/habitual residence of the original maintenance creditor.

In 2008, the EU legislator adopted the Maintenance Regulation. As it follows from Article 68 of this Regulation, it replaced the provisions of the Brussels regime relating to maintenance obligations. The Regulation contains a provision that seems to be somehow similar to Article 5(2) of the Brussels Convention. Its Article 3(b) allows to bring the proceedings in matters relating to maintenance obligations before the court for the place where the creditor is habitually resident.

Is that similarity sufficient to justify faithful application of interpretation provided in the judgment in Blijdenstein in relation to the provisions of the Maintenance Regulation? This is, in essence, the question at stake in the case WV, C-540/19. This Thursday, 18 June 2020, Advocate General Campos Sánchez-Bordona presented his Opinion in which he addresses that question.

## Facts of the case and the question referred

In proceedings before a German court, a social assistance institution being a public body asserts claims for parental maintenance against the defendant who lives in Austria. The public body contends that the parental maintenance claim has been transferred to that body because it regularly granted the defendant's

mother social assistance benefits. Indeed, the defendant's mother lives in Germany where she receives regular social assistance. The defendant submits that the German courts lack international jurisdiction.

In line with the submission of the defendant, the first instance considers that the German courts have no international jurisdiction. It argues that jurisdiction under Article 3(b) of the Maintenance Regulation is excluded because the creditor within the meaning of that provision is only the maintenance creditor itself, and not a state body asserting maintenance claims legally transferred to it by way of recovery. The second instance court disagrees and, ultimately, the German Supreme Court (Bundesgerichtshof, BGH) decides to refer a request for a preliminary ruling to the Court of Justice. It submits a following question:

Can a public body which has provided a maintenance creditor with social assistance benefits in accordance with provisions of public law invoke the place of jurisdiction at the place of habitual residence of the maintenance creditor under Article 3(b) of the Maintenance Regulation in the case where it asserts the maintenance creditor's maintenance claim under civil law, transferred to it on the basis of the granting of social assistance by way of statutory subrogation, against the maintenance debtor by way of recourse?

## Advocate General's Opinion…

In his Opinion, Advocate General proposes to answer the preliminary question in the affirmative. In his view, Article 3(b) of the Maintenance Regulation can be relied on by a public body who contends that it has subrogated the original maintenance creditor.

At point 34, the Opinion recalls the judgment in Blijdenstein and explains that the Court held in its judgment, in essence, that a maintenance creditor is regarded as the weaker party in the proceedings in matters relating to maintenance obligations and therefore that creditor can rely on a rule of jurisdiction which derogates from this general principle of actor sequitur forum rei. The original maintenance creditor could therefore rely on Article 5(2) of the Brussels Convention. A public body which brings an action for recovery against a maintenance debtor is not in an inferior position with regard to the latter and it cannot bring its actions before the courts that would otherwise have jurisdiction

under Article 5(2) of the Brussels Convention.

However, Advocate General develops a series of arguments in support of non-application of the interpretation provided for in the judgment in Blijdenstein within the framework established by the Maintenance Regulation.

First, at points 37 to 42, the Opinion lays down some arguments of systemic interpretation and stresses that **the Maintenance Regulation establishes a complete system: while the Brussels regime is in principle not applicable in relation to the third-State defendants, the circumstance that the defendant is habitually resident in a third State does not entail the non-application of the Maintenance Regulation**. If the public bodies could not rely on Article 3(b) of the Maintenance Regulation, the complete character of the system established by the Regulation would be affected. In all the scenarios where the debtor is a third-State defendant, a public body would most likely have to assert its claim before the courts of that third-State.

Next, at points 43 to 45, the Opinion adds that unlike in the Brussels regime, under the Maintenance Regulation **the place of jurisdiction at the habitual residence of the maintenance creditor is conceptualized not as an exception, but as an alternative general place of jurisdiction**.

Then, at points 46 to 47, the Opinion elaborates on the judgment in R. At paragraph 30 of this judgment, it is stated that the objective of the Maintenance Regulation consists in preserving the interest of the maintenance creditor, who is regarded as the weaker party in an action relating to maintenance obligations; Article 3 of that Regulation offers that party, when it acts as the applicant, the possibility of bringing its claim under bases of jurisdiction that do not follow the actor sequitur forum rei principle. In his Opinion, Advocate General emphasizes that the formulation of paragraph 30 of the judgment in R must have been influenced by the factual context of that case. It should not, however, be understood as preventing the public bodies from relying on some specific grounds of jurisdiction of Article 3.

After that, at point 51, the Opinion has recourse to an argument based on historical interpretation: **even though a proposal endorsing a solution according to which a public body could bring action only before the courts for the place of habitual residence of the defendant was brought up**

**during the drafting of the Maintenance Regulation, that proposal is not reflected in its final version**.

Finally, at points 54 to 60, the Opinion addresses the objectives of the Maintenance Regulation. In particular, at point 59, Advocate General points out that **Blijdenstein case law should be discontinued as it seems to contradict the logics of the Regulation – it does not reinforce the protection of the maintenance creditor. In fact, it favors the maintenance debtors once the maintenance of a creditor is covered by the payments of the public body**: the debtor is no longer at risk of being sued before the courts of a Member State other than the Member State of his habitual residence.

## … and insights on the lessons that may be learned from it:

The above presentation of the arguments developed by Advocate General in his Opinion is far from being extensive. It is best to recommend giving it an attentive lecture as there is much more to bite into. In addition to that, the Opinion raises some arguments that may be relevant in other contexts than that of the case WV, C-540/19.

**continuity / adequacy of case law and its reversals**

As mentioned before, **the Opinion is structured around the question whether Blijdenstein case law should be still applied despite the modification of legal framework.** It is interesting to note that, at point 69, the Opinion even anticipates a scenario in which the Court would decide not to follow the proposal of Advocate General. In this context, Advocate General puts forward some modifications that, according to him, should be introduced into the Blijdenstein case law.

The importance of the debate that this question may inspire extends far beyond the scope of the case reported here. **When it comes to the interpretation of EU private international law instruments, what factors should be taken into account in assessing whether a pre-existing case law should be reversed?**

**coordination between forum and ius**

At points 61 to 66, the Opinion offers an additional argument in favor of discontinuation of Blijdenstein and allowing the public bodies to sue before the courts for the place of the creditor's habitual residence. **It argues that the interpretation proposed in the Opinion allows to ensure coordination between forum and ius – a court having jurisdiction under the Maintenance Regulation will, as far as possible, apply its own law**.

In fact, since Blijdenstein times, not only the instrument containing the rules on jurisdiction in matters relating to maintenance obligations has changed. The legal landscape was profoundly altered by the common conflict of laws rules of the Hague Protocol on the Law Applicable to Maintenance Obligations. Under the general rule on applicable law of Article 3(1) of the Protocol, obligations shall be governed by the law of the State of the habitual residence of the creditor. As the Opinion notes, according to Article 64(2) of the Maintenance Regulation, a 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. In most instances, a public body subrogating the original maintenance creditor is arguably established in the Member State of that creditor's residence.

It seems that a similar point has been already tackled in the judgment in Kainz. At paragraph 20, it addresses the question relating to the necessity to ensure coordination between, on the one hand, jurisdiction to settle a dispute on the liability for damage caused by a product [under Article 5(3) of the Brussels I Regulation] and, on the other hand, law applicable to a non-contractual obligations arising to such damage [under Article 5(1) of the Rome II Regulation]. In the judgment in Kainz, that question is answered in the negative.

Yet, the Maintenance Regulation/the Hague Protocol duo seem to follow different logics than the aforementioned Regulations. There must have been a reason to extract the rules on jurisdiction in matters relating to maintenance from the Brussels regime and adopt a new Regulation.

It is true that the Protocol does not set a general rule according to which the maintenance obligation is governed by the law of the forum. As it follows from Article 3(1), it relies heavily on the law for the place of the creditor's habitual residence.

However, one the one hand, even with its general rule on applicable law of Article 3(1), it can be argued that the Protocol does indirectly promote a coordination between ius and forum. That is the case as long as one accepts that, in practice, the application of the rules of jurisdiction of the Maintenance Regulation leads to the conferral of jurisdiction to the courts for the place of the creditor's habitual residence (see, to that effect, paragraph 49 of the judgment in KP). On the other hand, as the Opinion remarks at its footnote 47, at least in some scenarios where it would reinforce the situation of the maintenance creditor, the Hague Protocol provides for a subsidiary application of the law of the forum. According to Articles 4(2) and (3) of the Protocol, the law of the forum applies when the creditor is 'unable to obtain maintenance' under the law primarily applicable to the maintenance obligation.

Moreover, striving to ensure that a court applies its own law somewhat echoes Recital 27 of the Succession Regulation. As a reminder, this Recital explains, inter alia, that the Regulation is devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law.

At point 61 of the Opinion, Advocate General himself qualifies his argument drawn from the existence of the Maintenance Regulation/the Hague Protocol duo as being of a lesser theoretical importance, yet having practical bearing. However, **the argument provokes also a more general question: to what extent the coordination of ius and forum is – and if so, in which constellations – a point of consideration in EU private international law?**

The Opinion is available in Spanish [original language] and, inter alia, in German and French. There is no English version yet.