OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 10 April 2003 [1]

1. By order of 26 September 2001, the Bundesgerichtshof (Federal Court of Justice) (Federal Republic of Germany) referred to the Court a question for a preliminary ruling concerning the interpretation of Article 5(2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ('the Brussels Convention' or 'the Convention'). [2] In essence, the national court asks whether a public body of a Contracting State which has provided assistance to a person requiring support and has therefore been subrogated to the maintenance claim which the beneficiary has against a third party may rely on the special rule of jurisdiction of the courts for the place where the maintenance creditor is domiciled, laid down in Article 5(2) of the Convention, when it brings an action for recovery against the defaulting maintenance debtor.

I — Relevant provisions

The Brussels Convention

2. The scope of the Brussels Convention is determined by Article 1 thereof. The first paragraph of Article 1 provides that the Convention:

'... shall apply in civil and commercial matters whatever the nature of the court or tribunal.'

3. As is well-known, for the purpose of determining the jurisdiction of the courts of the Contracting States, the Convention establishes the domicile of the defendant as the general forum (Article 2), but also makes provision for some special rules of jurisdiction. These include, for present purposes, the rule on jurisdiction 'in matters relating to maintenance', laid down in Article 5(2), under which the defendant may be sued 'in the courts for the place where the maintenance creditor is domiciled or habitually resident'.

1 — Language of the case: Italian.

2 — OJ 1998 C 27, p. 1.

National provisions

4. Under Paragraph 1602 of the Bürgerliches Gesetzbuch (German Civil Code, 'BGB'), parents are obliged to maintain their children and are therefore bound, under Paragraph 1610(2) of the BGB, to pay for the whole of their cost of living, including the cost of reasonable vocational training.

5. The Bundesausbildungsförderungsgesetz (Federal Law on Educational Support, 'the BAföG') entitles a student who does not have at his disposal the means necessary for his maintenance and education the right to a grant paid by the competent grant-paying Land.

6. Under Paragraph 11 of the BAföG, the calculation of the amount of the grant takes into account the maintenance obligations of the beneficiary's parents. However, should the student prove that his parents are not fulfilling those obligations, and that his training is at risk, Paragraph 36(1) of the BAföG provides that the grant is to be calculated without taking into account that maintenance.

7. In this case, under Paragraph 37(1) of the BAföG, the Land which pays the grant is subrogated by statute to the maintenance claim which the student has against his parents. The subrogation takes place up to the amount of the sums paid as a grant and may not exceed, in any event, that part of the income and the assets of the parents which may be allotted for the maintenance of the child under the criteria laid down in the BAföG.

II — Facts and procedure

8. In 1976 Mr Jan Blijdenstein and his wife, who live in Enschede in the Netherlands, adopted a child.

9. In the 1993/1994 academic year, the Blijdensteins' daughter began training as a technical pharmacy assistant at a private college in Munich, Bavaria. From September 1993, she received an education grant from Freistaat Bayern (Land of Bavaria), the amount of which was calculated without taking into account the maintenance which the girl should have received from her parents, in accordance with Article 36 of the BAföG.

10. Freistaat Bayern, subrogated to the maintenance claim that the girl had against her father, later brought an action for

compensation against Mr Blijdenstein before the Amtsgericht (Local Court) of Munich seeking reimbursement of the grant paid to his daughter for the 1993/94 academic year, and judgment was entered against the defendant.

11. Freistaat Bayern subsequently commenced a second action against Mr Blijdenstein seeking reimbursement of the amounts paid for the 1994/1995 and 1995/1996 academic years.

12. This time the respondent disputed the jurisdiction of the Amtsgericht of Munich. The Amtsgericht, however, dismissed the plea, relying on Article 5(2) of the Brussels Convention, and upheld Freistaat Bayern's claim.

13. Mr Blijdenstein appealed to the Oberlandesgericht (Higher Regional Court) of Munich which varied the judgment of the Amtsgericht, finding that the court seised had no international jurisdiction. According to the appeal court, Article 5(2) of the Brussels Convention was not applicable to the case, and Freistaat Bayern's action could be commenced only in the State of the domicile of the respondent, pursuant to Article 2 of the Convention.

14. Freistaat Bayern brought an appeal on a point of law against that judgment before the Bundesgerichtshof. The Bundesgerichtshof, unsure whether Article 5(2) of the Convention was applicable in the case of an action for recovery brought by a public body in a Contracting State, referred the following question to the Court for a preliminary ruling:

'May a public body in a Contracting State, which has paid an education grant to a trainee for a certain period of time under public law, rely on the special rule of jurisdiction in Article 5(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, when it seeks, through a statutory subrogation, to enforce in an action for recovery the trainee's maintenance claim against her parents in respect of the period for which the education grant was paid?'

15. During the proceedings before the Court written observations were submitted by the Commission and the Austrian, German and United Kingdom Governments.

III — Legal analysis

Application of the Convention of Bruxelles

16. The United Kingdom asserts, as a preliminary remark, that the public authority's right of recovery is necessarily derived from the payment of a grant, which is an act in the exercise of its public powers. It is therefore not a 'civil and commercial matter' within the meaning of Article 1 of the Convention, which, therefore, does not apply to the present case.

17. All the other parties submitting observations, on the other hand, assume that the Convention is applicable, *ratione materiae*, to the case pending before the national court. However, only the Commission submits specific observations in support of this view, noting in particular that the public body in question, in bringing the action for recovery, is not exercising power of a public nature, but is enforcing a claim governed by rules of ordinary law. Referring to the principles developed by the case-law of the Court [3] and to the Jenard [4] and Schlosser [5] reports, the Commission concludes that the dispute before the national court falls unequivocally under civil and commercial matters.

18. First of all, and from a general point of view, I must point out that the concept of civil and commercial matters in Article 1 of the Convention must, according to the settled case-law of the Court, be regarded 'as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of national legal systems'. [6] Again from a general point of view, I also note that, according to the Court, in order to determine whether a decision comes within the concept of civil matters, the nature of the persons party to the legal relationship in question is to a certain extent irrelevant, irrespective of the national law applicable; [7] the decisive criterion is rather whether the relationship is

3 — In particular in Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, paragraph 4, and Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 18 et seq.

4 — Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) by Mr P. Jenard (OJ 1979 C 59, p. 1 to 65), p. 13.

5 — Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed at Luxembourg, 9 October 1978) by Professor Dr P. Schlosser (OJ 1979 C 59, p. 71 to 144), paragraphs 60 and 97.

6 — *LTU* v *Eurocontrol*, cited above, paragraph 3; similarly see Case 133/78 *Gourdain* v *Nadler* [1979] ECR 733, paragraph 3; Case 814/79 *Netherlands State* v *Rüffer* [1980] ECR 3807, paragraphs 7 and 8, and *Sonntag*, cited above, paragraph 18.

7 — See *Eurocontrol*, paragraph 4, and *Rüffer*, cited above, paragraph 8.

based on an act in the exercise of the public powers of the public authority. [8]

19. In line with that general approach, the Court stated in the recent *Baten* case of 14 November 2002 that '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... 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.' [9]

20. Applied to the present case, this principle provides, in my opinion, a clear reply to the objection raised by the United Kingdom Government.

21. I find that in the present case, the order for reference indicates that the basis of and the detailed rules relating to the exercise of the right of recourse of Freistaat Bayern — according to which the public body is subrogated by statute to the maintenance claim which Miss Blijdenstein has against her parents — are governed by the rules of ordinary law on maintenance obligations.

22. I conclude, therefore, that the dispute pending before the national court falls within the concept of civil and commercial matters in Article 1 of the Convention.

The question submitted by the national court

23. All the parties submitting observations propose that the Court give a negative answer to the question submitted by the Bundesgerichtshof, since they take the view that a public body which has paid a grant to a person requiring support and has been subrogated to the maintenance claim which that person has against a third party may not rely on the special rule of jurisdiction laid down in Article 5(2) of the Convention when it brings an action for recovery against the defaulting maintenance debtor.

24. I must state at the outset that this conclusion appears convincing.

8 — See *Eurocontrol*, paragraph 4, and *Sonntag*, paragraph 20. See also the Opinion of Advocate General Darmon in *Sonntag*, point 43.

9 — Case C-271/00 *Gemeente Steenbergen* v *Baten* [2002] ECR I-10489, paragraph 37.

25. First of all I must point out — as the German and United Kingdom Governments and the Commission have done — that, according to settled case-law, in order to ensure that the Convention is uniformly applied in all the Contracting States, the concepts used therein must be interpreted independently, by reference to the system and objectives of the Convention. [10] In the same way, the Court has also observed on several occasions that the provisions which lay down special rules of jurisdiction must be interpreted restrictively, since they remove the defendant from his natural forum. [11]

26. This principle should therefore also be used to determine the scope of the special rule of jurisdiction in maintenance matters in Article 5(2) given that this also derogates from the general rule of the domicile of the defendant.

27. That said in common with all the parties submitting observations, I note that the principal objective of the provision in question is to offer the weaker party in maintenance proceedings, the maintenance creditor, the advantage of a forum near to him and therefore effective access to the legal system.

28. It is true that the provision also pursues other objectives, such as that of allowing a correlation between applicable law and jurisdiction, or that of allowing a dispute to be judged by the courts which appear best placed to assess the maintenance requirements of the maintenance applicant.

29. Those are, however, clearly aims of a secondary nature, which are ancillary to those stated above and which in some way reinforce the choice of the Contracting Parties to the Convention. But alone they would not be and are not sufficient to justify the choice of the rule of special jurisdiction and the derogation from the general rule of the forum of the defendant. [12]

30. The judgment in *Farrell* also supports this view. After having confirmed that Article 5(2) must be interpreted in the light of the objectives which this provision pursues in the scheme of the Convention, the Court stated that 'the derogation provided for in Article 5(2) is intended to offer the maintenance applicant, who is regarded as the weaker party in such proceedings, an alternative basis of jurisdiction. In adopting that approach, the drafters of the Con-

10 — See, *inter alia*, Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 13, and the cases cited therein.

11 — See Case C-412/98 *Group Josi* [2000] ECR I-5925, paragraph 49; Case C-51/97 *Réunion Européenne and Others* [1998] ECR I-6511, paragraph 16; Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 13; *Shearson Lehman Hutton*, cited, paragraphs 15 and 16; Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 14.

12 — See Geimer, R., Schütze, R.A., *Europäisches Zivilverfahrensrecht*, Munich, 1997, p. 144, note 108; Kropholler, J., *Europäisches Zivilprozeßrecht*, 7th Ed., Heidelberg, 2002, p. 147.

vention considered that that specific objective had to prevail over the objective of the rule contained in the first paragraph of Article 2, which is to protect the defendant as the party who, being the person sued, is generally in a weaker position.' [13]

31. I would add that this interpretation is also supported by authority in the explanatory report to the 1978 Accession Convention by Professor Schlosser.

32. After having made clear that an action in which a public body which has paid maintenance to a person requiring support seeks to recover against the defaulting maintenance debtor comes within the scope of application of the Convention, paragraph 97 of the report states that 'it is not, however, the purpose of the special rules of jurisdiction in Article 5(2) to confer jurisdiction in respect of compensation claims on the courts of the domicile of the maintenance creditor or even those of the seat of the public authority'. [14]

33. In my view, therefore, Article 5(2) of the Convention must be interpreted as meaning that the special rule of jurisdiction therein may be relied on only by the maintenance creditor, since it aims essentially to guarantee effective access to the legal system for the party dependent on maintenance payments to meet his basic needs.

34. On the other hand, as all the parties submitting observations have rightly pointed out, a public body which has paid a grant to a person requiring support is not in a position of weakness *vis-à-vis* the maintenance debtor against whom it brings an action for recovery, and cannot therefore make use of the special forum of the domicile of the maintenance creditor provided for in the provision concerned. [15]

35. The reply to the question referred by the Bundesgerichtshof should therefore be that the special rule of jurisdiction in Article 5(2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as subsequently amended, does not apply where a public body which has paid a grant to a person requiring support and has been subrogated to the maintenance claim which that person has against a third party brings an action for recovery against the defaulting maintenance debtor.

13 — Case C-295/95 *Farrell* [1997] ECR I-1683, paragraph 19.

14 — Schlosser Report, cited above, paragraph 97.

15 — See again Geimer and Schütze, cited, p.145, note 111; Kropholler, cited, p. 148; Mari, L., *Il diritto processuale civile della Convenzione di Bruxelles, I, Il sistema della competenza*, Padua, 1999, p. 373.

IV — Conclusion

36. In the light of the foregoing I propose that the Court should:

'Declare that the special rule of jurisdiction in Article 5(2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as subsequently amended, does not apply where a public body which has paid a grant to a person requiring support and has been subrogated to the maintenance claim which that person has against a third party brings an action for recovery against the defaulting maintenance debtor.'