

German Courts: Non-Applicability of Art.5 (2) Lugano Convention in Favour of a Public Authority

According to the *Oberlandesgericht* (Higher Regional Court) *Dresden*, Art.5 (2) Lugano Convention is not applicable in favour of a claimant governed by public law subrogated to the rights of the maintenance creditor.

In the present case, a public authority had paid an education grant to the daughter of the defendant who was legally obliged to provide her maintenance. Afterwards, the public authority brought an action against the defendant aiming at the disclosure of his income as well as the variation of the maintenance order based on a statutory subrogation. The claimant referred to Art.5 (2) Lugano Convention.

The appeal court held that Art.5 (2) Lugano Convention was not intended to facilitate maintenance actions of public authorities subrogated to the rights of the maintenance creditor brought against the maintenance debtor. This point of view is founded on the nature of Art.5 (2) as an exception to the general rule of Art.2, according to which the defendant is to be sued in the courts of his domicile. The exception to this general principle in Art.5 (2) was justified by the goal to protect the maintenance creditor who is regarded as the weaker party and to provide him with the opportunity to sue the maintenance debtor at his, i.e. the creditor's, domicile/habitual residence. This rationale, however, could not be asserted in favour of a public authority since a public authority was – in contrast to a private maintenance creditor – not in an inferior position. Even though the wording of the provision itself did not require the maintenance creditor to be the claimant, the Court advocated, in view of the aforementioned arguments, this restrictive interpretation of Art.5 (2) Lugano Convention.

The Court referred in particular to the ECJ's ruling in C-433/01 (*Freistaat Bayern v. Jan Blijdenstein*) where the ECJ had decided in this sense as well, even though with regard to the Brussels Convention. However, the *Oberlandesgericht Dresden* held that this ruling was applicable to the case at issue since both Conventions had to be interpreted uniformly.

Abstracts of the reasoning can be found in NJW 2007, 446 (OLG Dresden, judgment of 28 September 2006 – 21 UF 381/06).