Virtual Workshop (in German) on November 9: Christine Budzikiewicz on “The Proposal for the Creation of a European Certificate of Parenthood”

On Tuesday, November 7, 2023, the Hamburg Max Planck Institute will host its 38th monthly virtual workshop Current Research in Private International Law at **11:00-12:30** (CET). Christine Budzikiewicz (Phillips-Universität Marburg) will speak, **in German**, about

The Proposal for the Creation of a European Certificate of Parenthood

The presentation will be followed by open discussion. All are welcome. More information and sign-up here.

If you want to be invited to these events in the future, please write to veranstaltungen@mpipriv.de.

Workshop on ‘The Commission Proposal for a EU Regulation on Parenthood and the Creation of a European Certificate of Parenthood. Czech-German Perspectives’

Magdalena Pfeiffer (Charles University Prague) and Anatol Dutta (Ludwig-Maximilians-Universität München) will be hosting a workshop on the Proposal for a EU Regulation on Parenthood and the Creation of a European Certificate of Parenthood (discussed here) on 24 November 2023 in Prague.

Further information can be found on the flyer.

Certificat de coutume (a statement or certificate issued to attest the content of a foreign law rule) – Practices in International Business Law – Conference, April

12, 2022, Conseil supérieur du notariat, Paris – in French

The *Société de législation comparée* is organising, in partnership with the French *Conseil supérieur du Notariat*, the universities of Nîmes, Strasbourg and Lyon and with the *Institut des Usages* (Montpellier), an international symposium dedicated to the *Certificat de coutume*.

The importance of the subject is major. Statement or written certificate on the content of a foreign law rule, the *Certificat de coutume* is subject to a heterogeneous practice both in terms of its establishment and its processing.

Ignored by many jurists, its reliability is often called into question due to a double insufficiency that it may conceal: with regard to the law attested when it is issued by a public authority, with regard to the impartiality when it is issued by a private person.

However, these criticisms are not insurmountable. In addition to the combination with other means of establishing the content of the foreign law rule in question, the *Certificat de coutume* does not avoid obliterate any contradictory discussion and the freedom of interpretation of the authority before which it is produced. The liabilities associated with the *Certificat de coutume*, whether that of the drafter, the counsel of the parties or the notary using such a certificate, constitute a formidable safeguard against tendentious approaches.

Above all, we must not ignore the virtues of empiricism, which could – in these times of debates regarding a future codification of French private international law – reveal important and good practices to be considered *de lege ferenda*.

The real added value of this project therefore lies in the desire to lift the veil on the *Certificat de coutume*, which currently constitutes a blind spot in private international law. Its name is certainly known to all, but its legal system still appears to be embryonic. The ambition of the symposium is to do constructive work and to offer concrete proposals, fruit of a collective reflection, bringing together the essential players in this field.

The symposium will be held in French on 12 April 2022 at the Amphitheater of the

French Higher Council of Notaries (60 boulevard de la Tour-Maubourg – Paris, 7th).

Prior registration is required before April 7, 2022 by sending an email to: emmanuelle.bouvier@legiscompare.com

Conference validated as continuing education for lawyers.

Programme and description in French: https://www.legiscompare.fr/web/Certificat-de-coutume-Pratiques-en-droit-des-affaires-internationales-12-avril

The Programme is as follows:

CERTIFICAT DE COUTUME

Practices in international business law

Scientific direction

Gustavo Cerqueira, professor at the University of Nîmes

Nicolas Nord, Secretary General of the International Commission on Civil Status

Cyril Nourissat, professor at Jean Moulin University – Lyon 3

Opening / 8:45 a.m.

Me David Ambrosiano, *president of the* Conseil supérieur du notariat

Me Pierre-Jean Meyssan, *2nd vice-president of the CSN, in charge of legal affairs*

Introduction / 9:00 a.m.

Certificat de coutume: historical and functional aspects

Bertrand Ancel*, professor emeritus at the University of Paris II Panthéon Assas*

I. Establishment of the *certificat de coutume* / 9:30 a.m.

under the chairmanship of Bernard Haftel, *professor at the Sorbonne Paris Nord Univ.*

9:30 a.m. *The purpose of the certificate*

Determination of the purpose of the certificate

Gilles Vercken*, lawyer at the Paris Bar*

Attestation of uses

Pierre Mousseron, *professor at the University of Montpellier*

Kevin Magnier-Merran, *lecturer at the University of Lorraine*

Articulation of the sources of foreign law

Gustavo Cerqueira, *professor at the University of Nîmes*

Coffee break

10:50 a.m*. The writer of the certificate*

The plurality of actors

Nicolas Nord, *Secretary General of the ICCS*

The challenges of choosing an editor

Karlo Fonseca Tinoco, *lawyer at the São Paulo Bar*

11:30 a.m. *The certificate method*

Developing the certificate – comparative approaches

Alejandro Garro, *professor at Columbia University, NY*

Editor's discretion

Cyril Nourissat, *professor at Lyon 3 University*

II. The processing of the *certificat de coutume* / 2:00 p.m.

under the chairmanship of Laurence Usunier, *professor at CY Cergy Paris Univ.*

2:00 p.m. *The interest of the certificate for the parties*

Jacques-Alexandre Genet, *lawyer at the Paris Bar*

2:20 p.m. *The value of the certificate for the authorities*

Jean-Luc Vallens, *honorary magistrate, former Pr. assoc. at Unistra*

Louis Degos, *arbitrator, managing partner KL Gates LLP – Paris*

Pierre Tarrade, *notary, rapp. general of the 115th congress of notaries of France*

3:20 p.m. *Certificate distortion control*

Sylvaine Poillot-Peruzzetto, *SE Advisor at the Court of Cassation*

Coffee break

III. *Certificat de coutume* Responsibilities / 4:00 p.m.

under the chairmanship of Etienne Farnoux, *professor at Unistra*

4:00 p.m. *The editor’s responsibility*

Thibault de Ravel d’Esclapon*, lecturer at Unistra*

4:20 p.m. *The responsibility of the council of the parties*

Olivier Berg*, lawyer at the Paris Bar*

4:40 p.m. *The liability of the notary using a certificate*

Marc Cagniart*, first vice-president of the Chamber of Notaries of Paris*

Conclusion: Perspectives *de lege ferenda* / 5:00 p.m.

Pascal de Vareilles-Sommières*, professor at the University of Paris I*

CJEU on the effects of European Certificate of Succession and its certified copy in the case Vorarlberger Landes- und Hypotheken-Bank, C-301/20

Back in April we reported about the Opinion delivered by AG Campos Sánchez-Bordona in the case Vorarlberger Landes- und Hypotheken-Bank, C-301/20, which revolves around the effects produced by an European Certificate of Succession and its certified copy, time-wise (first and third questions) as well as ratione personae, by reason of the person concerned (second question). At the request of the Court, the Opinion covered only the third preliminary question. In today's judgment, the Court addresses all three questions.

In brief, the case concerned a certified copy of an European Certificate of Succession, which bore a marking 'unlimited' in the 'Valid until' field (element linked to the first and third questions). Moreover, the certified copy in question was issued on the application of only one of the two heirs concerned by the main proceedings emanating from Austria (element linked to the second question).

First and third questions, effects time-wise

The Court considered that the first and third question should be examined jointly; for the Court, by these two questions the referring court sought to establish whether a certified copy of an European Certificate of Succession which bears a marking 'unlimited' is valid and produces its effects (described in Article 69 of the Succession Regulation) with no further limitation, as long as this copy was valid when it was first submitted to the concerned authority (paragraph 20).

According to the Court's answer, such certified copy is valid for six month following its issuance and continues to produce its effects, in the sense of Article 69 of the Regulation, if it was valid when it was first submitted to the competent

authority (paragraph 37).

Second question, effects by reason of the person concerned

By its second question, the referring court sought to establish whether an European Certificate of Succession produces its effects only in favour of the person who has applied for it (under this hypothesis, only that person could use the certificate and rely on its effects) or it produces such effects in favour of all persons who are mentioned in its content by name as heirs, legatees, executors of wills or administrators of the estate, regardless whether they applied for it.

The Court clearly approved the second hypothesis; the European Certificate of Succession produces its effects in favour of all persons mentioned in it, whether they have applied for the issue of certificate or not (paragraph 45).

The judgment can be consulted here (in French).

AG Campos Sánchez-Bordona on a certified copy of an European Certificate of Succession and its legitimising effect, time-wise, in the case Vorarlberger Landes- und Hypotheken-Bank, C-301/20

This Thursday AG Campos Sánchez-Bordona delivered his Opinion in an Austrian case pertaining to the interpretation of the Succession Regulation and in

particular to its Articles 69 (Effects of the European Certificate of Succession) and 70 (Certified copies of the Certificate), namely in the case Vorarlberger Landes- und Hypotheken-Bank, C-301/20.

As the Opinion itself clarifies it at its point 2, the Court asked its AG to elaborate only on the third preliminary question, which reads as follows:

> *Must Article 69 read in conjunction with Article 70(3) of the EU Succession Regulation be interpreted as meaning that the legitimising effect of the certified copy of [an ECS] must be recognised if it was still valid when it was first submitted but expired before the requested decision of the authority, or does that provision not preclude national law if the latter requires the certificate to be valid even at the time of the decision?*

According to Article 70(3) of the Regulation, the certified copies issued shall be valid for a limited period of six months, to be indicated in the certified copy by way of an expiry date.

As AG clarifies, the preliminary question seeks to determine the precise moment in relation to which the authority to which the certified copy is presented must verify the validity of this copy (point 25). In principle, two solutions already hinted in the preliminary question seem to be possible for AG: the certified copy has to be valid at the time of its submission to the authority or it has to be valid at the time of the decision (point 26).

However, as AG acknowledges, it has to be first decided whether the Succession Regulation determines itself the moment relevant for the validity of a certified copy or this issue is left for the Member States to decide (point 44).

Ultimately, he concludes that it is the Regulation itself that determines such relevant moment (point 46) and that the legitimising effect of the certified copy of an ECS must be recognized if it was still valid when it was first submitted to an authority, even where subsequently the validity of this certificate has expired (point 63).

This interpretation is accompanied by a caveat to the effect that, by way of exception, if there are reasonable grounds for considering that the ECS has been rectified, modified, withdrawn or suspended as to its effectiveness prior to the

adoption of the requested decision, the authority may call for the production of a new certified copy or a certified copy with an extended period of its validity (point 76).

The Opinion can be consulted here (no English version yet).

Request for preliminary ruling from Bulgaria: Recognition of foreign birth certificate

The Administrative Court of the City of Sofia, Bulgaria, has recently submitted a request for a preliminary ruling revolving around the recognition of a foreign birth certificate issued by another EU Member State (Case C-490/20):
The case concerns a refusal of a municipality in Sofia to issue a Bulgarian birth certificate to a child of two female same sex mothers of Bulgarian and UK nationality who entered into a civil marriage in Gibraltar, UK. The child was born in Spain, where a birth certificate was issued on which it was recorded that mothers of the child were both a Bulgarian national, designated 'Mother A', and a UK national, designated 'Mother', both persons being female. The municipality refused to issue the requested birth certificate because the applicants did not point out who was the biological mother, intending most probably to issue the certificate only for one mother. Bulgaria is one of the few EU Member States without access to either same sex marriage or any type of civil partnership.

The Bulgarian mother brought legal proceedings before the Administrative Court of the City of Sofia against the refusal by the Sofia municipality, where the court referred the following questions to the CJEU for a for preliminary ruling:

1. Must Article 20 TFEU and Article 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the Bulgarian administrative authorities to which an application for a document certifying the birth of a child of Bulgarian nationality in another

Member State of the EU was submitted, which had been certified by way of a Spanish birth certificate in which two persons of the female sex are registered as mothers without specifying whether one of them, and if so, which of them, is the child's biological mother, are not permitted to refuse to issue a Bulgarian birth certificate on the grounds that the applicant refuses to state which of them is the child's biological mother?

2. Must Article 4(2) TEU and Article 9 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that respect for the national identity and constitutional identity of the Member States of the European Union means that those Member States have a broad discretion as regards the rules for establishing parentage? Specifically:
– Must Art. 4(2) TEU be interpreted as allowing the Member State to request information on the biological parentage of the child?
– Must Article 4(2) TEU in conjunction with Article 7 and Article 24(2) of the Charter be interpreted as meaning that it is essential to strike a balance of interests between, on the one hand, the national identity and constitutional identity of a Member State and, on the other hand, the best interests of the child, having regard to the fact that, at the present time, there is neither a consensus as regards values nor, in legal terms, a consensus about the possibility of registering as parents on a birth certificate persons of the same sex without providing further details of whether one of them, and if so, which of them, is the child's biological parent? If this question is answered in the affirmative, how could that balance of interests be achieved in concrete terms?

3. Is the answer to Question 1 affected by the legal consequences of Brexit in that one of the mothers listed on the birth certificate issued in another Member State is a UK national whereas the other mother is a national of an EU Member State, having regard in particular to the fact that the refusal to issue a Bulgarian birth certificate for the child constitutes an obstacle to the issue of an identity document for the child by an EU Member State and, as a result, may impede the unlimited exercise of her rights as an EU citizen?

4. If the first question is answered in the affirmative: does EU law, in particular the principle of effectiveness, oblige the competent national authorities to derogate from the model birth certificate which forms part of the applicable national law?

Thank you, Boriana Musseva, for the tip-off!

‘Force majeure certificates’ issued by the Russian Chamber of Commerce and Industry

The Russian Chamber of Commerce and Industry is issuing ‘force majeure certificates’, like some of their homologues in other countries, as discussed earlier in this blog. Although this practice has existed in Russia since 1993, the number of requests for the certificates has recently increased. The requests come not only from Russian companies but also from foreign entities. While the increase is understandable in these times of the coronavirus pandemic, under Russian law, the ‘force majeure certificate’ can (only) form a part of evidence in possible future disputes, as its impact on the outcome of the dispute is ultimately defined by the (Russian or foreign) courts or arbitration tribunals.

The Russian Chamber of Commerce and Industry (CCI) is issuing ‘force majeure certificates’, like some of their homologues in other countries. Although this practice exists in Russia since 1993, the CCI has recently noticed an increase in the number of requests for the certificates, due to the coronavirus pandemic. The requests come not only from Russian companies but also from foreign entities. What could be the practical value of the certificate in a contractual dispute relating to the consequences of the pandemic?

The legal basis for the CCI’s competence to issue the ‘force majeure certificates’ is laid down in the law ‘On the chambers of commerce and industry in the Russian Federation’ of 7 July 1993. Article 1 of the law defines the CCI as a non-state non-governmental organisation created to foster business and international trade.

Along with other competences, the CCI may act as an 'independent expert' (art. 12) and may provide information services (art. 2) in matters relating to international trade. One of the services is the issuing of 'force majeure certificates'. The Rules for issuing the certificates are defined by the CCI's governing council. These Rules entrust the CCI's legal department with assessing requests and advising whether the certificate should be issued. The advice is given on the basis of the documents that a party submits to substantiate their request, following the Rules.

Notably, the list of documents includes (a copy of) the contract, 'which contains a clause on force majeure' (point 3.3.2 of the Rules). This requirement is not accidental; it has to do with the non-mandatory character of the legal provision on force majeure. Article 401(3) of the Russian Civil Code provides for exoneration of liability for non-performance of a contractual obligation, if the party proves that the non-performance was due to the force majeure. This provision applies by default, if 'the law or the contract does not provide otherwise' (art. 401(3)). The parties may provide otherwise by including a clause about unforeseen circumstances, hardship, frustration, force majeure, or similar circumstances in the contract. This is, at least, the way Russian courts have applied art. 401(3) up to the present time. The Russian CCI does not appear to deviate from this approach. More than 95% of the requests submitted to the Russian CCI for 'force majeure certificates' have so far been rejected, according to the head of the Russian CCI (even though some decrees deliberately label the COVID-19 pandemic 'force majeure' as, for example, the Decree of 14 March 2020 does, this decree is adopted by the municipality of Moscow to prevent the spread of the virus by various measures of social distancing).

Thus, the legal basis of the CCI's competence to issue a 'force majeure certificate' implies that the certificate is the result of a service provided by a non-state non-governmental organisation. The application of Article 401(3) implies the need to interpret the contract, more specifically, the provision on force majeure it possibly includes. If the parties disagree on the interpretation, a dispute may arise. The competence to resolve the dispute lies with the courts or arbitration tribunals. In this way, the ICC's decision (taken upon the advice of the CCI's legal department) to confirm by issuing a certificate that a particular event represents a force majeure in the context of the execution of a specific contract can have persuasive authority in the context of the application of Art. 401 (3). However, it

remains the competence of the courts or arbitration tribunals to apply art. 401(3) to the possible dispute and to establish the ultimate impact of the relevant events on the outcome of the dispute. Under Russian law, one would treat the 'force majeure certificates' issued by the CCI (and possibly a refusal to issue the certificate) as a part of evidence in possible future disputes. A (Russian or foreign) court or arbitration tribunal considering this evidence is free to make a different conclusion than that of the Russian CCI or may consider other evidence.

Coronavirus, force majeure certificate and private international law

Coronavirus outbreak and force majeure certificate

Due to the outbreak, China has adopted a number of public health measures, including closing schools and workplaces, limiting public gatherings, restricting travel and movement of people, screening , quarantine and isolation. At least 48 cities were locked down by 14 Feb 2020. (here) More than two thirds of China's migrant workers were unable to return to work, (see here) leaving those firms that have restarted operation running below capacity.

Coronavirus and the emergency measures significantly affect economic activates in China. The China Council for the Promotion of International Trade (CCPIT), a quasi-governmental entity, issued 3,325 force majeure certificates covering the combined contract value of $38.5bn to exempt Chinese companies from their contractual obligations.

Issuing force majeure certificates is a common practice of trade councils or commercial chambers in the world. These certificates are proof of the existence of relevant events that may constitute force majeure and impinge the company's capacity to perform the contract. The events recorded in the certificates would include the confirmation of coronavirus outbreak, the nature, extent, date and

length of governmental order for lockdown or quarantine, the cancellation of any transportation, etc. These certificate, however, are not legal documents and do not have direct executive or legal effects. They only attest the factual details instead of certifying those events are indeed force majeure in law. They are also called 'force majeure factual certificate' by the CCPIT. The CCPIT states in its webpage that:

The force majeure factual certificate is the proof of objective, factual circumstances, not the 'trump card' to exempt contractual obligations. The CCPIT issues relevant force majeure factual certificates to Chinese enterprises that are unable to perform contracts due to the impact of the new coronavirus epidemic. The certificate can prove objective facts such as delayed resumption of work, traffic control, and limited dispatch of labour personnel. An enterprise can request for delaying performance or termination of the contract based on this certificate, but whether its obligation can be fully or partially exempt depends on individual cases. The parties should take all the circumstances and the applicable law into consideration to prove the causal link between 'the epidemic and its prevention and control measures' and the 'failure to perform'.

Force Majeure in Different Governing Law

The force certificate is thus mainly used to demonstrate to the other party the existence of certain factual difficulties that hamper performance and seek understanding to privately settle the dispute. If the disputes are brought to the court, the court should consider whether the outbreak and the relevant emergency measure constitute force majeure events pursuant to the governing law, treating the force majeure certificate as evidence of fact. There is no international uniform doctrine of force majeure and different countries adopt different doctrines to allocate contractual risk in unforeseeable change of circumstances. China is a member of the UN Convention on the International Sale of Goods (CISG), which shall apply if the other party has its place of business in another contracting state, or the parties choose CISG by agreement. Article 79 of the CISG provides that a party is exempted from paying damages if the breach is due to an impediment beyond its control, and either the impediment could not have been reasonably foreseen at the time of the conclusion of the contract, or the party could not reasonably avoid or overcome the impediment or its consequences. Although the disease outbreak is unforeseeable, it can only be an impediment if it makes performance impossible. Therefore, if the outbreak only

makes production more difficult or expensive, it is not an impediment. There is no consensus as to whether an event that makes performance excessively burdensome can also be counted as an impediment in CISG. In addition, the impediment must uncontrollable. If a Chinese firm could not perform its contractual obligation due to the compulsory lockdown ordered by its local government, this event is out of control. The same applies if a firm manufacturing facial masks cannot deliver on time due to government requisition. On the other hand, when the Chinese State Council announced the extension of the Chinese New Year holiday to 2 Feb 2020, it was not a compulsory ban and if a firm 'chose' not to operate during the extension without additional compulsory order from any authorities, substantive risk of infection in its place of business, or irreparable labour shortage, the impediment may not be considered as uncontrollable. For the same reason, if a company decided to lock down after a worker tested positive for coronavirus in order to reduce the risk of spreading the disease among its workers, without the high risk and with alternative and less extreme prevention measures available, the impossibility to perform may be considered 'self-inflicted' instead of 'uncontrollable'. Consideration should always be given to the necessity and proportionality of the decision. Furthermore, if the local government imposed compulsory prohibition for work resumption to prevent people gathering, a firm cannot claim uncontrollable impediments if working in distance is feasible and possible for the performance of the contract.

If the other party is not located in a CISG contracting state, whether the coronavirus outbreak can exempt Chinese exporters from their contractual obligations depends on the national law that governs the contracts. Most China's major trade partners are contracting states of CISG, except India, South Africa, Nigeria, and the UK. Chinese law accepts both the force majeure and hardship doctrines. The party that breaches the contract may be discharged of its obligations fully or partially if an unforeseeable, uncontrollable and insurmountable causes the impossibility to perform. (Art 117 of the Chinese Contract Law 1999) The party can also ask for the alternation of contract if un unforeseeable circumstance that is not force majeure makes performance clearly inequitable. (Art 26 of the SPC Contract Law Interpretation (II) 2009) The 'force majeure factual certificate' can also be issued if CCPIT considers a event not force majeure but unforeseeable change of circumstances in Art 26 of the Interpretation (II). For example, in Jiangsu Flying Dragon Food Machinery v Ukraine CF Mercury Ltd, CCPIT issued the certificate even after recognising that

the poorly maintained electricity system of the manufacturer that was damaged by the rain was not a force majeure event. In contrast, other national law may adopt a more restrictive standard to exempt parties their obligations in unforeseeable circumstances. In England, for example, the court will not apply force majeure without a force majeure clause in the contract. A more restricted 'frustration' may apply instead.

Jurisdiction and Enforcement

In theory, a Chinese court should apply the same approach as other jurisdictions to apply the governing law and treat the force majeure certificates issued by CCPIT as evidence of fact. in practice, Chinese courts may prefer applying Chinese law if the CISG does not apply and the parties do not choose the law of another country, grant more weight to the CCPIT certificate than other courts, and be more lenient to apply the force majeure criteria to support Chinese companies' claim in relation to the coronavirus outbreak.

Finally, if the dispute is heard in a non-Chinese court or international arbitral tribunal, the judgment holding the Chinese company liable need to be enforced in China unless the Chinese company has assets abroad. Enforcing foreign judgments in China is generally difficult, though there are signs of relaxation. If judgments can be enforced pursuant to bilateral treaties or reciprocity, they may be rejected based on public policy. The question is whether the coronavirus outbreak and the government controlling measures can be public policy. According to the precedents of the Supreme People's Court, (eg. *Tianrui Hotel Investment Co., Ltd. (Petitioner) v. Hangzhou Yiju Hotel Management Co., Ltd. (Respondent)*, (2010) Min Si Ta Zi 18) breach of mandatory administrative regulations *per se* is not violation of public policy. But public policy undoubtedly includes public health. If Chinese courts consider the Chinese company should not resume production to prevent spread of disease event without compulsory government order, the public policy defence may be supported.

Admissibility of a reference for a preliminary ruling regarding the issue of a certificate under Article 53 of Regulation No 1215/2012: On the legal nature of the judgment delivered

Case C-579/17

BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v GRADBENIŠTVO KORANA

The CJEU published last week a judgment on a request for a preliminary ruling by the Vienna Labour and Social Security Court. The facts of the case are presented under recitals 21-31. The Austrian court referred the following question to the Court:

'Is Article 1 of Regulation … No 1215/2012 … to be interpreted as meaning that proceedings involving the assertion of claims by [BUAK] for wage supplements against employers as a result of the posting to Austria of workers without a habitual place of work in Austria for the purposes of performing work or in connection with the hiring-out of workers, or against employers established outside Austria as a result of the employment of workers with a habitual place of work in Austria, constitute "civil and commercial matters" to which the aforementioned regulation applies, even where such claims by BUAK for wage supplements concern employment relationships governed by private law and serve to cover workers' claims to annual leave and payment in respect of annual leave, governed by private law and arising from employment relationships with employers, but nevertheless

– both the amount of the workers' claims against BUAK for annual leave pay and that of BUAK's claims against employers for wage supplements are determined not by contract or collective bargaining agreement but, instead, by decree of a Federal Minister,

– the wage supplements owed by employers to BUAK serve to cover not only the expenses for the payment in respect of annual leave payable to workers but also BUAK's expenses for administrative costs, and

– in connection with the pursuit and enforcement of its claims for such wage supplements, BUAK has more extensive powers by law than a private person, in that

– employers are required to submit reports to BUAK on specific occasions as well as at monthly intervals, using communication channels set up by BUAK, to take part in and allow BUAK's inspection measures, grant BUAK access to wage and business records and other documents, and provide information to BUAK, failing which a fine may be imposed, and

– in the event that an employer breaches its obligations to provide information, BUAK is entitled to calculate the wage supplements owed by the employer on the basis of BUAK's own investigations, whereby, in that case, BUAK has a claim for wage supplements in the amount calculated by BUAK, irrespective of the actual circumstances of the posting or employment?'

1. The admissibility of the request

Prior to answering the question referred, the Court examined the admissibility of the request. The novelty of the matter lies on the existence or non-existence of a judicial character for the issue of a certificate under Article 53 of Brussels I bis Regulation. In other words, the question was raised after the termination of the proceedings and the publication of the judgment. It came to the surface due to the reservations of the competent Austrian body to issue the above certificate, thus labelling the case with a civil or commercial nature. The answer was given in recital 41:

Consequently, the procedure for the issue of a certificate under Article 53 of

*Regulation No 1215/2012, in circumstances such as those at issue in the main proceedings, **is judicial in character**, with the result that a national court ruling in the context of such a procedure is entitled to refer questions to the Court for a preliminary ruling.*

2. On the civil or commercial nature of the dispute

Following the affirmative answer to the admissibility issue, the Court proceeded to the examination of the legal nature of the case at hand. Its analysis extends to recitals 46-64, wherefrom the following could be highlighted:

- The exercise of public powers by one of the parties excludes a case from civil and commercial matters within the meaning of Article 1(1) of Regulation No 1215/2012 [Recital 49].
- The CJEU held that the Austrian court's powers were limited to a simple examination of the conditions for the application of Paragraph 33h (2b) of the BUAG, with the result that, if those conditions are satisfied, the court cannot carry out a detailed examination of the accuracy of the claim relied on by BUAK [Recital 57].
- In so far as Paragraph 33h (2b) of the BUAG places BUAK in a legal position which derogates from the rules of general law regulating the exercise of an action for payment, by attributing a constitutive effect to the determination by it of the claim and by excluding, according to the referring court, the possibility for the court hearing such an action to control the validity of the information on which that determination is based, it must be concluded that that body acted, in that case, under a public law prerogative of its own conferred by law [Recital 60].
- In such a case, BUAK should be considered to be acting in the exercise of State authority in the context of a dispute such as that which led to the judgment delivered on 28 April 2017, which would have a major influence over the modalities for the exercise of that procedure, and therefore over its very nature, such that that dispute does not come within the concept of 'civil and commercial matters' or, therefore, within the scope of application of Regulation No 1215/2012 [Recital 61].

The Court dedicated only six recitals for the concept of social security and its

exclusion pursuant to Article 1(2) (c) Brussels I bis Regulation [Recitals 65-70], concluding that, on the basis of facts delivered, the case does not come within the concept of social security for the purposes of the provision aforementioned.

3. Some thoughts on the ruling

The significance of the judgment is self-explanatory: Unlike its predecessor, the certificate under Art. 53 Brussels I bis is one of the core documents needed for *direct enforcement* in the country of destination. The previous exequatur stage is abolished; hence, the issue on the legal nature of the case is transferred to the court which would try the application for refusal. Therefore, the decision of the Austrian court to refer the matter to the CJEU should be endorsed; the same goes for the position of the latter in regards to the admissibility issue.

The case resembles a recent judgment of the Thessaloniki Court of 1st Instance, which refused to grant exequatur to a German Notice of the National Association of Statutory Health Insurance Physicians against a doctor of Greek origin, active in the region of Rhineland-Palatinate. As in the case of the Austrian BUAK, the notice was issued ex parte, but no court proceedings ensued in the country of origin. Moreover, the German authorities issued a certificate without questioning the legal nature of the matter at hand. Given that the case fell under the scope of Brussels I Regulation, the Greek judge denied exequatur, stating that the above notice was of an administrative nature, thus falling out of the Regulation's ambit. The case is published in its original text in: *Armenopoulos 2018, pp. 812 et seq.* It is also reported in a case note I prepared for the German journal Praxis des Internationalen Privat- und Verfahrensrechts, see: Nichtanwendung der EuGVVO 2001 auf den Bescheid einer deutschen kassenärztlichen Vereinigung in Griechenland – LG Thessaloniki, 19.12.2017 – 19865/2017, IPRax (forthcoming).

Kleinschmidt on the European Certificate of Succession

Jens Kleinschmidt (Max Planck Institute for Comparative and PIL, Hamburg) has Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht (The European Certificate of Succession: An Optional Instrument as a Challenge for Private International Law) posted on SSRN.

The legal systems of the EU Member States have developed varying instruments that enable an heir or legatee to prove his position and protect third parties dealing with the holder of such an instrument ("certificates of succession"). However, these instruments are often of little use when presented abroad. In cases where the estate is located in more than one country, heirs or legatees are therefore required to apply for several national certificates. This will cost them time and money. The EU Succession Regulation (Reg. 650/2012) tackles this unsatisfying situation in two ways. On the one hand, Art. 59 on the "acceptance" of authentic instruments may promote the circulation of national certificates of succession. Under this approach, however, national certificates retain the effects attributed to them by their country of origin. On the other hand, therefore, Arts. 62 ff. create a supranational European Certificate of Succession (ECS) which may be applied for if heirs or legatees of a legatum per vindicationem need to invoke their status or exercise their rights in another Member State. The ECS does not replace the national systems but rather constitutes an optional instrument that may be applied for in lieu of a national certificate. In order to fulfil its purpose, the content of the ECS must be based on uniform private international law rules. Here, despite the harmonization efforts of the Regulation, three areas present particular challenges: (i) the relationship with conflicts rules for matrimonial property, (ii) dealing with legal institutes unknown to the legal system of the Member State where the ECS is presented, and (iii) determining the law applicable to incidental questions. Uniform interpretation and uniform characterization can only be safeguarded by the ECJ, to which, however, not all national authorities competent for issuing an ECS may refer their questions for a preliminary ruling. The ECS is based on a set of uniform rules on competence and procedure that respect the autonomy of the Member States and at the same time ensure that the ECS may perform

its tasks. The question remains whether the ECS will be regarded as an attractive option compared to the existing national certificates. The far-reaching, uniform effects of the ECS and the advantages brought about by standardization regarding language and content speak in favour of the ECS. However, in certain areas a national certificate may afford a more comprehensive protection. Moreover, the implementation of the ECS into practice will have to allay the fear that its issuance may be excessively cumbersome.

Note: Downloadable document is in German.

The paper is forthcoming in the *Rabel Journal of Comparative and International Private Law (RabelsZ)*.