

## European Law

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This article updates selected international legal developments in 2017 in European Law.

### I. Brexit Developments

#### A. THE UNITED KINGDOM'S EXIT FROM THE EUROPEAN UNION (BREXIT): GENERAL LEGAL UPDATE

The major events in 2017 relating to Brexit law include: The Supreme Court's decision in *Miller*, notification to the European Union (EU) Council of withdrawal from the EU, a snap general election, and progression of the Great Repeal Bill through Parliament.

*Miller & Notifying European Council of Withdrawal from EU*: On January 24, 2017, an *en banc* United Kingdom (UK) Supreme Court upheld the judgment of the High Court of Justice<sup>2</sup> in *Miller*, finding that an Act of Parliament is required to invoke Article 50 of the Treaty on European Union (TEU).<sup>3</sup> By an eight to three majority, the Court said the government could not rely on prerogative power alone to notify the European Council of the UK's decision to withdraw from the EU.<sup>4</sup> Additionally, the Supreme Court unanimously held that there was no legal requirement to consult or secure the consent of the devolved governments of Scotland, Wales, and Northern Ireland.<sup>5</sup>

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1. James Henry Bergeron, Matthew Soper (BREXIT general legal update), John Richards (BREXIT intellectual property law developments), Adam Obadia and Molly O'Casey (Update on CETA), Aaron Schildhaus and Demetrios Eleftherlou (EU General Data Protection Regulation and dispute funding/litigation finance developments), Bradley Varley (2017 EU Conflict Minerals Regulation), Valeria Camboni Miller (Key Italian legislation in 2017), Angélique Devaux (French family law developments), and Richard Silberstein (The Catalan Political and Constitutional Crisis of 2017).

2. R. (on the application of Miller) v. Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin), 2016 WL 06476190.

3. R. (on the application of Miller and another) v. Secretary of State for Exiting the European Union [2017] UKSC 5.

4. *Id.*

5. *Id.*

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Following the *Miller* decision, the government introduced the EU (Notification of Withdrawal) Bill to Parliament on January 26.<sup>6</sup> The Bill received Royal Assent on March 16.<sup>7</sup> In accordance with Article 50(2) TEU, Prime Minister Theresa May officially sent notice to European Council President Donald Tusk on March 29 of the UK's intention to leave the EU.<sup>8</sup>

*The 2017 Snap General Election:* On April 19, 2017, Prime Minister Theresa May stunned the political world by announcing a snap general election to be held on June 8.<sup>9</sup> Under the Fixed-Term Parliament Act 2011, general elections are to be held every fifth year on the first Thursday in May, beginning with the May 7, 2015, general election.<sup>10</sup> But, the Act also created two mechanisms for calling a general election early, one is by a “vote of no confidence” and the other is by a two-thirds majority vote of the House of Commons.<sup>11</sup> The next regularly scheduled general election was supposed to take place a little over a year after the UK was scheduled to leave the EU. All political parties agreed with Prime Minister May to an early election in a 522 to thirteen vote.<sup>12</sup>

The 2017 general election resulted in the Conservative Party failing to win an overall majority.<sup>13</sup> Prime Minister May announced she would lead a minority government, partnering with the Northern Ireland-based Democratic Unionist Party (DUP).<sup>14</sup> As a clause in a partnering deal, Prime Minister May announced that the Queen's June 21st Speech would launch a two-year parliamentary session, rather than the traditional one-year session.<sup>15</sup> The rare extra-long session will give Member Parties an opportunity to “debate Britain's approach to Brexit without interruption.”<sup>16</sup>

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6. 620 Parl Deb HC (6th ser.) (2017) col. 473 (UK).

7. European Union (Notification of Withdrawal) Act 2017.

8. Letter from Theresa May, The Prime Minister, to Donald Tusk, President of the European Council (Mar. 29, 2017), <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> (triggering article 50).

9. 624 Parl Deb HC (6th ser.) (2017) col. 681-712 (UK).

10. Fixed-term Parliaments Act 2011.

11. 624 Parl Deb H, *supra* note 9.

12. 624 PARL. DEB., H.C. (6th ser.) (2017) 681-712.

13. Steven Erlanger & Stephen Castle, *Theresa May Loses Overall Majority in U.K. Parliament*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/world/europe/theresa-may-britain-election-conservatives-parliament.html>.

14. See Leanna Brinded, *Northern Ireland's DUP agrees to a 'confidence and supply' deal to help May form a minority government*, BUSINESS INSIDER (June 10, 2017, 2:48 PM), <http://www.businessinsider.com/democratic-unionist-party-dup-agree-to-minority-government-with-conservatives-in-confidence-and-supply-deal-2017-6>.

15. Press Release, Parliament, Government to confirm two-year Parliament to deliver Brexit and beyond (June 17, 2017), <https://www.gov.uk/government/news/government-to-confirm-two-year-parliament-to-deliver-brexit-and-beyond>.

16. *Britain to hold special two-year parliament session to tackle Brexit*, REUTERS ¶ 1 (June 17, 2017, 4:53 PM), <https://www.reuters.com/article/us-britain-eu-parliament/britain-to-hold-special-two-year-parliament-session-to-tackle-brexit-idUSKBN1980TD?il=0>.

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*The Great Repeal Bill*: Officially known as the EU (Withdrawal) Bill 2017-19,<sup>17</sup> the government has dubbed it the “Great Repeal Bill.”<sup>18</sup> The Bill will repeal the European Communities Act 1972 (ECA), which made the UK a member of the EU,<sup>19</sup> and it will convert the existing body of EU law into UK law through a mechanism called “Henry VIII Clauses.”<sup>20</sup> The first reading was on July 13, 2017<sup>21</sup> and the Bill survived the second reading vote by a margin of 326 to 290 on September 11.<sup>22</sup> The EU Withdrawal Bill is currently in the Committee stage of the legislative process, where the government has been fending off opposition amendments.<sup>23</sup>

The UK notification makes clear that the UK will leave the EU on March 29, 2019, at 23:00 GMT.<sup>24</sup> Brexit Secretary David Davis is leading the negotiations team and guiding the passage of the EU Withdrawal Bill.<sup>25</sup> Starting from November 27, 2017, until the Christmas holiday, Prime Minister May lead negotiations with the EU with the goal of securing a post-Brexit trade deal.<sup>26</sup>

**B. THE EFFECT OF BREXIT ON INTELLECTUAL PROPERTY RIGHTS**

Brexit has a number of implications for intellectual property rights that have emerged in 2017 and will play out over the coming years.

*Patents*: The European Patent Convention was created outside EU structures.<sup>27</sup> Consequently, Brexit will not affect the right to designate the UK in a patent application filed in the European Patent Office.<sup>28</sup> The EU has, however, adopted a number of patent-related provisions. These include regulations on compulsory licensing of drugs in a health crisis,<sup>29</sup> Supplementary Protection Certificates that extend patent protection for

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17. European Union (Withdrawal) Bill 2017-19, UK Parliament (Nov. 21, 2017), <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>.

18. *EU Withdrawal Bill: A Guide to the Brexit repeal legislation*, BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/uk-politics-39266723>.

19. European Communities Act 1972, c.49 (Eng.).

20. *Henry VIII Clauses*, U.K. PARLIAMENT (Nov. 21, 2017), <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/>.

21. 627 Parl Deb HC (6th ser.) (2017) col. 464 (UK).

22. *Brexit: EU repeal bill wins first Commons vote*, BBC (Sept. 12, 2017), <http://www.bbc.com/news/uk-politics-41235522>.

23. *See id.*

24. Theresa May, *I am determined to give our country the best possible Brexit*, THE TELEGRAPH (Nov. 9, 2017, 10:30 PM), <http://www.telegraph.co.uk/news/2017/11/09/determined-give-country-best-possible-brexit/>.

25. Alastair Macdonald, *As London feuds, full Brexit negotiations open in Brussels*, REUTERS (Jul. 16, 2017, 5:05 PM), <https://www.reuters.com/article/us-britain-eu-brexit/as-london-feuds-full-brexit-negotiations-open-in-brussels-idUSKBN1A10YE>.

26. *Id.*

27. *See* European Patent Convention, 16th ed., June 2016.

28. *Id.*

29. Commission Regulation 816/2006, 2006 O.J. (L 157) (EC).

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drugs whose initial marketing was delayed by health authority approval,<sup>30</sup> directives exempting testing of generic drugs when needed to obtain marketing approval from patent infringement,<sup>31</sup> and a directive that defines the nature of patent-eligible biotechnological inventions.<sup>32</sup> Early change to UK law on these patent rules is unlikely.

Another issue is the project for a voluntary EU unitary patent<sup>33</sup> and a new treaty for a unified patent court system.<sup>34</sup> The UK was one of its main advocates but will not be able to participate in the unitary patent post-Brexit.<sup>35</sup> It is less clear whether the UK will be able to participate in the new court system, because the system is created by a separate treaty.<sup>36</sup> As written, the treaty is limited to EU members.<sup>37</sup> But many experts believe that it could easily be amended to permit the UK to remain a party after Brexit—and the UK government has recently indicated its intention to ratify the treaty.<sup>38</sup>

*Designs:* The EU has adopted both a regulation creating EU-wide rights, registrable at the EU Intellectual Property Office (EUIPO) in Alicante<sup>39</sup> and a directive setting out norms for design protection in national law.<sup>40</sup> Following Brexit, it will no longer be possible to register designs in Alicante that will encompass the UK, but UK substantive law on design protection will still be in harmony with that of the EU.<sup>41</sup> It is likely that re-registration or extension of designs registered in Alicante before Brexit will provide for their continued effectiveness in the UK.<sup>42</sup> New post-Brexit applications for design protection should be registered in the UK as well as in EUIPO.<sup>43</sup> Both EU and UK law provide some protection for unregistered designs for a limited period from first marketing.<sup>44</sup> After Brexit, the dates of first marketing in the UK and the EU could differ.<sup>45</sup>

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30. Commission Regulation 469/2009, 2009 O.J. (L 152) (EC).

31. Council Directive 2001/83, 2001 O.J. (L 311) (EC), as amended by Council Directive 2004/27, 2004 O.J. (L 136) (EC).

32. Council Directive 98/44, 1998 O.J. (L 213) (EC).

33. Commission Regulation 1257/2012, 2012 O.J. (L 157) (EU).

34. Agreement on a Unified Patent Court, Jan. 1, 2014.

35. *See id.* at art. 2.

36. *Id.*

37. *Id.*

38. *Id.*

39. Commission Regulation 6/2002, 2002 O.J. (L 3) (EC).

40. Council Directive 98/71, 1998 O.J. (L 289) (EC).

41. *Impact of the United Kingdom's withdrawal from the European Union on the European Union trademark and the Community design*, EUIPO (Jan. 18, 2018), [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/news/QandA\\_brexit\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/news/QandA_brexit_en.pdf).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

*Trademarks:* The situation for registered trademarks is similar to that for designs.<sup>46</sup> After Brexit, it will no longer be possible to register trademarks in Alicante that will encompass the UK.<sup>47</sup> It seems likely that EU rights will be able to be transformed into UK national rights relatively simply, although questions could arise with respect to “seniority” if an EU registration was based on a prior UK registration that had been allowed to lapse during the UK’s period of EU membership.<sup>48</sup> Further, EU trademark registration becomes vulnerable to attack if not used within “the territory” for a period of five years.<sup>49</sup> This could lead to invalidation of rights in the EU mark if only used in the UK and invalidation of any “successor UK mark” if only used in the EU outside Britain.<sup>50</sup>

*Copyright:* A number of EU directives relating to copyright have been incorporated into UK national law. Those directives’ features include defining what is protectable by copyright, setting the duration of copyright protection, harmonizing copyright law relating to software computer programs, providing resale rights, and provision of a limited *sui generis* right for databases.<sup>51</sup> As noted above, the changes effected to UK law by implementation of these directives will initially remain in place. The law based on the resale right and database directives might see modification in the future.

*Free Movement of Goods and Intellectual Property:* Within the EU, if the owner of an intellectual property (IP) right puts goods protected by IP on the market within the EU or consents to others putting such goods on the market within the EU, the right to enforce such IP rights is normally exhausted throughout the EU.<sup>52</sup> Unless otherwise agreed, after Brexit, first marketing in the UK will not necessarily exhaust the right to enforce IP rights in the EU.<sup>53</sup>

## II. European Union Law Developments

### A. THE EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT FOUNDATION (CETA)

The Comprehensive Economic and Trade Agreement (CETA) is a recent free-trade agreement between the EU and Canada. CETA negotiations

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46. See Commission Regulation 207/2009, 2009 O.J. (L 78) (EC); see Council Directive 2008/95, 2008 O.J. (L 299) (EC).

47. *Impact of the United Kingdom’s withdrawal from the European Union on the European Union trademark and the Community design*, EUIPO (Jan. 18, 2018), [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/news/QandA\\_brexit\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/news/QandA_brexit_en.pdf).

48. *Id.*

49. See *Id.*

50. *Id.*

51. Council Directive 2001/29, 2001 O.J. (L 167) (EC).

52. *Exhaustion of rights*, CITMA, [https://www.citma.org.uk/membership/brexit/exhaustion\\_rights](https://www.citma.org.uk/membership/brexit/exhaustion_rights) (last visited Mar. 21, 2018).

53. *Id.*

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commenced in 2014 and substantial provisions entered into force on September 21, 2017.<sup>54</sup> The purpose of the agreement is to promote and facilitate the trade of goods and services between the EU and Canada.<sup>55</sup>

Throughout the negotiation process, many politicians and public figures have been highly critical of the agreement.<sup>56</sup> In spite of the European Parliament's approval of CETA on February 15, 2017, several national parliaments (e.g., the French Parliament) have asked their respective constitutional courts to confirm that the agreement is compatible with their national constitutions.<sup>57</sup> Similarly, Belgium requested that the European Court of Justice (ECJ) issue an opinion on the legality of the agreement.<sup>58</sup>

The two major issues at stake are the implementation of a tribunal—the Investment Court System<sup>59</sup>—to settle disputes between investors and states,<sup>60</sup> and CETA's impact on European agriculture.<sup>61</sup>

*The Dispute Settlement Mechanism:* In what had been described as a “clear break” from the old Investor to State Dispute Settlement approach,<sup>62</sup> CETA provides for a permanent Investment Tribunal and an Appellate Tribunal.<sup>63</sup> The tribunal will be composed of fifteen members nominated by the EU and Canada and who are to have the same qualifications as required for the International Court of Justice.<sup>64</sup> The tribunal will hear cases in divisions of three members appointed randomly, and its decisions will be subject to review by the Appellate Tribunal.<sup>65</sup> Investment dispute settlement claims

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54. *In Focus: Comprehensive Economic and Trade Agreement (CETA)*, EU COMMISSION, [http://ec.europa.eu/trade/policy/in-focus/ceta/index\\_en.htm](http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm) (last visited Nov. 21, 2017).

55. *Le Conseil Constitutionnel Juge L'accord Economique UE/Canada (CETA) Compatible avec la Constitution*, JURIDICONLINE (Aug. 1, 2017), <http://www.juridiconline.com/actualites-juridiques/societes/88-concurrence/22883-le-conseil-constitutionnel-juge-laccord-economique-ue-canada-ceta-compatible-avec-la-constitution.html>

56. *See id.*

57. *Id.*

58. *Belgium Seeks EU Court Opinion on EU-Canada Free Trade Deal*, EURACTIV WITH REUTERS (Sept. 6, 2017), <https://www.euractiv.com/section/ceta/news/belgium-seeks-eu-court-opinion-on-eu-canada-free-trade-deal/>.

59. Mark Klaver & Roy Millen, *Dispute Resolution under CETA: A New Investment Court for Canada and Europe*, JDSUPRA (Dec. 15, 2016), <https://www.jdsupra.com/legalnews/dispute-resolution-under-ceta-a-new-69479/>.

60. Lucia Baldino, *Desjardins Group: CETA Is Strengthening Cross – Atlantic Trade*, THE NEW ECONOMY (Oct. 27, 2017), <https://www.theneweconomy.com/business/desjardins-group-ceta-is-strengthening-cross-atlantic-trade>

61. Xavier Van Overmeire, *What Does the Entry into Force of the CETA Mean?*, LEXOLOGY (Mar. 17, 2017), <https://www.lexology.com/library/detail.aspx?g=5ee2326c-6fcf-4a85-a89b-b68ea22a5a9c>.

62. European Commission Press Release IP/16/399, CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement (Feb. 29, 2016).

63. Comprehensive Economic and Trade Agreement, E.U.–Can., art. 8.27–8.29, Sept. 21, 2017.

64. *Id.*

65. EU COMMISSION, INVESTMENT PROVISIONS IN THE EU-CANADA FREE TRADE AGREEMENT (CETA) 4 (Feb. 2016).

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under CETA are limited to those related to non-discriminatory treatment<sup>66</sup> and investment protection.<sup>67</sup> Additionally, investors cannot “import” substantive provisions relating to dispute settlement procedures from other agreements (i.e. Treaties of EU Member States).<sup>68</sup>

The main criticism of the Tribunal is the risk of infringing on states’ sovereign control over foreign investment.<sup>69</sup> A second concern is that the rules implementing the Investment Court would put states at a disadvantage to foreign companies.<sup>70</sup>

But CETA’s rules of ethics require the respect of independence and impartiality.<sup>71</sup> Additionally, “CETA clarifies and limits the protective scope of fair and equitable treatment” to put states at an advantage against foreign investors.<sup>72</sup> The fact that only Canadian investors have recourse to this special tribunal could be criticized as a violation of the principle of equality in relation to European investors.<sup>73</sup> Notwithstanding that, France’s *Conseil Constitutionnel* has held that this restriction met the requirement of general interest.<sup>74</sup>

*Impact on the Agriculture Industry:* CETA is intended to create new opportunities for European food producers in Canadian markets.<sup>75</sup> But farmers have had mixed reactions to the agreement, citing concern about increased competition, scaled back safeguards on “sensitive products,” and the introduction of genetically modified organisms.<sup>76</sup> The EU maintains that markets will be opened to certain competing Canadian products in a

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66. See Comprehensive Economic and Trade Agreement, *supra* note 63, at § C.

67. *Id.* at § D

68. *Id.* at art. 8.7.

69. Mark Klaver & Roy Millen, *Dispute Resolution under CETA: A New Investment Court for Canada and Europe*, JDSUPRA (Dec. 15, 2016), <https://www.jdsupra.com/legalnews/dispute-resolution-under-ceta-a-new-69479/>.

70. *Id.*

71. *Le Conseil Constitutionnel Juge L'accord Economique UE/Canada (CETA) Compatible avec la Constitution*, JURIDICONLINE (Aug. 1, 2017), <http://www.juridiconline.com/actualites-juridiques/societes/88-concurrence/22883-le-conseil-constitutionnel-juge-laccord-economique-ue-canada-ceta-compatible-avec-la-constitution.html>.

72. Mark Klaver & Roy Millen, *Dispute Resolution under CETA: A New Investment Court for Canada and Europe*, JDSUPRA (Dec. 15, 2016), <https://www.jdsupra.com/legalnews/dispute-resolution-under-ceta-a-new-69479/>.

73. See *id.*

74. *Le Conseil Constitutionnel Juge L'accord Economique UE/Canada (CETA) Compatible avec la Constitution*, JURIDICONLINE (Aug. 1, 2017), <http://www.juridiconline.com/actualites-juridiques/societes/88-concurrence/22883-le-conseil-constitutionnel-juge-laccord-economique-ue-canada-ceta-compatible-avec-la-constitution.html>.

75. European Commission Press Release IP/17/3121, EU–Canada trade agreement enters into force (Sept. 20, 2017).

76. See Ian Austen, *Safe for Now, Canadian Dairy Farmers Fret Over E.U. Trade Deal*, N.Y. TIMES (Oct. 31, 2016), [https://www.nytimes.com/2016/11/01/world/canada/canada-trade-ceta-dairy-farmers.html?\\_r=0](https://www.nytimes.com/2016/11/01/world/canada/canada-trade-ceta-dairy-farmers.html?_r=0); Daniel Mutzel, *German Farmers Divided over EU-Canada Trade DEAL*, EURACTIV (Sept. 29, 2016), <https://www.euractiv.com/section/agriculture-food/news/for-deer-tomorrowceta-death-knell-for-traditional-farming/> (translated by Sam Morgan).

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“limited and calibrated way,” and that EU’s sensitive sectors will be “fully” protected.<sup>77</sup>

**B. 2017 EU PRIVACY DEVELOPMENTS: EU GENERAL DATA PROTECTION REGULATION 2016/679 (GDPR)**

In 2016, the EU General Data Protection Regulation (GDPR) was finalized, replacing the Data Protection Directive 95/46/EC.<sup>78</sup> The GDPR will come into full force and effect on May 25, 2018.<sup>79</sup> It was designed to harmonize privacy and data security laws across Europe and to reshape the way organizations across the region approach data protection.<sup>80</sup> Because it is a regulation and not a directive, it will be directly applicable in all EU member states.<sup>81</sup> Its lead time included all of 2017 for business and governments to prepare.<sup>82</sup>

2017 has also seen the first year of operation of the EU-US Privacy Shield and its analogue, the Switzerland-US Privacy Shield (jointly referred to as the “Shield”), agreed to by the United States (U.S.) Department of Commerce and the European Commission and Switzerland.<sup>83</sup> The Shield, which replaced the invalidated Safe Harbor provisions, is the latest mechanism enabling U.S. entities to comply with personal data transfer requirements in Europe.<sup>84</sup> As of September 2017, over 2,400 companies had been certified as compliant, presumably hopeful that their compliance will help them to satisfy the coming GDPR mandate.<sup>85</sup>

The GDPR is aimed at the protection of personal data and applies to the processing of that data through the activities of a controller or a processor established in the EU, whether or not the processing of the data takes place in the EU.<sup>86</sup> Organizations in breach of the GDPR can be fined up to the greater of 2 percent of annual global revenues or twenty million Euros.<sup>87</sup>

The regulation is extensive and only a brief overview can be provided here. Under the GDPR, *inter alia*, a request for consent must be given in a “concise, transparent, intelligible, and easily accessible form,”<sup>88</sup> and the

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77. *UK poised to be among the biggest winners as the EU-Canada free trade deal enters into force*, EU COMMISSION (Sept. 20, 2017), [https://ec.europa.eu/unitedkingdom/news/uk-poised-be-among-biggest-winners-eu-canada-free-trade-deal-enters-force\\_en](https://ec.europa.eu/unitedkingdom/news/uk-poised-be-among-biggest-winners-eu-canada-free-trade-deal-enters-force_en).

78. Commission Regulation 2016/679, 2016 O.J. (L 119) (EU).

79. *Id.*

80. *Id.*

81. *Id.*

82. See GDPR, <https://www.eugdpr.org> (last visited Mar. 19, 2018).

83. See PRIVACY SHIELD, <https://www.privacyshield.gov/> (last visited Mar. 19, 2018).

84. See Stanton et. al., *Europe*, 50 ABA/SIL YIR 595–605 (2016) (detailing Schrems v. Data Protection Commissioner which invalidated the EU-US data protection safe harbor program).

85. PRIVACY SHIELD, *supra* note 83.

86. Commission Regulation 2016/679, 2016 O.J. (L 119) (EU) at art. 3(1).

87. *Id.* at art. 83.

88. *Id.* at art. 1.



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consent must be given “for one or more specific purposes.”<sup>89</sup> If a data breach occurs, notification must be given within seventy-two hours from first awareness of the breach in all member states where the breach is likely to “result in a risk for the rights and freedoms of individuals.”<sup>90</sup> Data processors will also be required to notify their customers, the controllers, “without undue delay” after first becoming aware of a data breach.<sup>91</sup>

The right to rectification is provided in Article 16,<sup>92</sup> and the right to erasure (the right to be forgotten) set forth in Article 17 entitles the data subject to have the data controller erase his/her personal data, cease its further dissemination, and potentially have third parties stop processing the data.<sup>93</sup> The conditions for erasure include the data no longer being relevant to the original purposes for processing or data subjects withdrawing their consent.<sup>94</sup> Controllers are required to compare the subjects’ rights to the public interest in the availability of the data when considering such requests.<sup>95</sup> By design, under the GDPR data protection must be a consideration from the onset of systems’ design, rather than an addition.<sup>96</sup>

Under the GDPR it will no longer be necessary for data processors to submit notifications or registrations to each local Data Processing Authority of data processing activities, nor to notify or obtain approval for transfers based on the Standard Contractual Clauses (SCCs).<sup>97</sup> Instead, there will be internal recordkeeping requirements, and Data Protection Officers (DPO) will be obligatory only for controllers and processors whose core activities require regular and systematic monitoring of data subjects on a large scale, or for special categories of data or data relating to criminal convictions and offences.<sup>98</sup> The DPO must be appointed on the basis of qualifications and experience, must report directly to the highest level of management, and must not carry out any other tasks that could result in a conflict of interest.<sup>99</sup>

C. THE 2017 EU CONFLICT MINERALS REGULATION

Pursuant to Regulation 2017/821 (the EU Conflict Minerals Regulation), importers of certain gold, tantalum, tin, and tungsten products will be required to comply with supply chain due diligence obligations that are intended to break the nexus between armed conflicts, human rights abuses, and the illegal exploitation of minerals in conflict-affected areas.<sup>100</sup> Human

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89. *Id.* at art . 6(1)(a).

90. *Id.* at art. 33.

91. Commission Regulation 2016/679, 2016 O.J. (L 119) (EU) at art. 34.

92. *Id.* at art. 16.

93. *Id.* at art. 17.

94. *Id.*

95. *Id.*

96. Commission Regulation 2016/679, 2016 O.J. (L 119) (EU) at art. 25.

97. *Id.* at art. 38

98. *Id.*

99. *Id.*

100. *See* Commission Regulation 2017/821, 2017 O.J. (L 130) (EU).

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rights advocates, including the United Nations Group of Experts on the Democratic Republic of the Congo (DRC), have been documenting how armed groups committing severe human rights abuses in the DRC have traded tin, tantalum, tungsten, and gold from mines under their control in order to finance violent conflicts.<sup>101</sup> In response, there has been a wide call for increased supply chain due diligence by companies as well as legislative action to ensure that businesses and consumers do not contribute to human rights violations in conflict-affected or high-risk areas.<sup>102</sup>

The EU Conflict Minerals Regulation is the most significant measure adopted by a government since the US Congress enacted conflict-mineral disclosure requirements under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>103</sup> But in contrast to the Dodd-Frank conflict mineral rules issued by the U.S. Securities and Exchange Commission, which focus primarily on the DRC and due diligence of downstream companies, the EU Conflict Minerals Regulation imposes comprehensive upstream due diligence obligations on importers of metals and minerals that may originate from any conflict-affected areas around the world.<sup>104</sup>

The mandatory compliance obligations under the regulation will apply to importers of gold, tantalum, tin, and tungsten products into the EU, which products include mineral ores, concentrates, oxides, powders, wires, and bars (but exclude recycled or secondary scrap metals).<sup>105</sup> Importers of the regulated minerals and metals must adhere to the five-step due diligence framework that has been incorporated from the OECD Due Diligence Guidance:

- (1) establish strong company management systems,
- (2) identify and assess risks and red flags in the supply chain,
- (3) design and implement a strategy to respond to identified risks,
- (4) carry out independent third-party audits of supply chain due diligence, and
- (5) publicly report on supply chain due diligence efforts.<sup>106</sup>

Some of the specific measures required of importers under this framework include comprehensive conflict mineral policies and procedures, contractual flow-downs on suppliers, chain of custody and traceability systems, a grievance mechanism, public annual reports (including on the internet), and record retention requirements.<sup>107</sup> Further, importers must undergo third party audits of their purchasing activities, processes, and systems, unless the importer can demonstrate with substantial evidence that minerals and metals

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101. See S.C. Res. 1952 (Nov. 29, 2010); see S.C. Res. 1857 (Dec. 22, 2008).

102. See *id.*

103. See Commission Regulation 2017/821, *supra* note 100.

104. *Id.*

105. *Id.*

106. *OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas*, OECD (2nd ed.) (2013).

107. See Commission Regulation 2017/821, 2017 O.J. (L 130) (EU).

are sourced exclusively from smelters and refiners found on the Commission's list of responsible global smelters and refiners.<sup>108</sup>

Responsibility for enforcement of the regulation lies primarily with each EU member state.<sup>109</sup> States will designate one or more competent authorities to carry out their implementation and enforcement activities.<sup>110</sup> Importers will be subject to on-the-spot inspections to examine records, audit materials, and due diligence measures.<sup>111</sup> To aid in implementation and enforcement, the Commission will release a set of non-binding guidelines on ex-post checks and ensuring uniform application.<sup>112</sup>

The effective date for compliance obligations on importers is January 1, 2021.<sup>113</sup> The Commission will prepare and release a handbook to assist in risk assessment of supply chains, identifying "conflict-affected and high-risk areas" as well as potential "red flags" that would trigger the need for enhanced due diligence.<sup>114</sup> Importers of the regulated products will need to establish corresponding policies, procedures, and control mechanisms prior to the effective date.<sup>115</sup> To the extent that importers or other economic operators are members of industry association due diligence schemes that have been recognized by the Commission, such membership will be recognized as satisfying the requirements of this regulation, thereby avoiding double auditing.<sup>116</sup> The Commission will establish and keep up-to-date a list of recognized supply chain due diligence schemes, a list of global responsible smelters and refiners, and a list of conflict-affected and high-risk areas, all of which should be released prior to the effective date of the regulation.<sup>117</sup>

### III. National Legal Developments

#### A. UPDATE ON ITALIAN LEGISLATION

In 2017, the Italian Parliament passed several laws that are of international interest and importance. The Parliament ratified several international agreements with foreign countries including Angola, Azerbaijan, France, Israel, Montenegro, Slovenia, and Qatar.<sup>118</sup> The Italian Parliament also

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at art. 11.

112. *Id.* at art. 11(5)

113. See Commission Regulation 2017/821, 2017 O.J. (L 130) (EU).

114. *Id.* at art. 14(1).

115. Commission Regulation 2017/821, *supra* note 100.

116. *Id.* at art. 21.

117. *Id.* at art. 20.

118. *Angola and Italy sign agreement in parliamentary domain*, ANGOP (Apr. 29, 2017, 11:08 AM), [http://www.angop.ao/angola/en\\_us/noticias/politica/2017/3/17/Angola-and-Italy-sign-agreement-parliamentary-domain,a8324433-b6b4-4bab-bcb0-509d0abedfc7.html](http://www.angop.ao/angola/en_us/noticias/politica/2017/3/17/Angola-and-Italy-sign-agreement-parliamentary-domain,a8324433-b6b4-4bab-bcb0-509d0abedfc7.html); *Azerbaijan Seeks to Speed Up Conclusion of New Agreement with the EU*, THE CENTRAL ASIA-CAUCAS ANALYST (Jan. 23, 2018), <https://www.cacianalyst.org/publications/analytical-articles/item/>

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passed laws to provide aid to its citizens displaced by the earthquakes in 2016 and 2017,<sup>119</sup> and a law to create a day of commemoration of the victims of organized crimes.<sup>120</sup> Two notable new laws deal with the protection of foreign, unaccompanied minors, and one against cyber bullying.<sup>121</sup>

The Law on Protections for Unaccompanied Foreign Minors protects foreign minors (those without Italian or European citizenship) that arrive in Italy without a parent or legal guardian.<sup>122</sup> Under this law, once they reach Italy; the foreign, unaccompanied minors cannot be expelled from Italian territory.<sup>123</sup> Once the relevant authorities have been notified of the presence of such a minor in Italy, he or she is taken to a reception facility where the facility's personnel will collect information about the minor's family to determine identity and age.<sup>124</sup> The law guarantees the presence of a cultural mediator during this meeting.<sup>125</sup> The identity of the minor is then verified by the police with the aid of a cultural mediator, but only after the minor has received humanitarian aid.<sup>126</sup> In case of doubt about the declared age of the minor, the authorities will obtain a birth certificate unless the minor requests international protection.<sup>127</sup> If doubts persist, the courts can order socio-health tests to verify the age, and if needed will legally adjudicate the minor's age.<sup>128</sup>

Under this new law, if the minor wants to be reunited with his or her family, the courts can order his or her return to country of origin, if doing so is in the minor's best interest.<sup>129</sup> If the minor remains in Italy, the reception

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13493-azerbaijan-seeks-to-speak-up-conclusion-of-new-agreement-with-the-eu.html; *France and Italy*, FRANCE DIPLOMATIE, <https://www.diplomatie.gouv.fr/en/country-files/italy/france-and-italy/> (last visited Mar. 21, 2018); *Italy-Israel, the Mixed Commission for Science and Technology meets at the Farnesina*, FARNESINA (June 23, 2017), [https://www.esteri.it/mae/en/sala\\_stampal/archivionotizie/comunicati/2017/06/italia-israele-riunita-alla-farnesina.html](https://www.esteri.it/mae/en/sala_stampal/archivionotizie/comunicati/2017/06/italia-israele-riunita-alla-farnesina.html); *Montenegro – Trade Agreements*, EXPORT (Mar. 5, 2018), <https://www.export.gov/article?id=montenegro-Trade-Agreements>; Joint Science and Technology Cooperation Call for Joint Project Proposals, It-Slovn., Feb. 15, 2018; *Qatar and Italy sign a nearly \$6B deal for naval vessels*, ASSOCIATED PRESS (Aug. 2, 2017), <https://www.defensenews.com/naval/2017/08/02/qatar-and-italy-sign-a-nearly-6b-deal-for-naval-vessels/>.

119. European Commission Press Release Plenary Session, Earthquake damage in Italy: \_1.2bn in EU aid approved (Sept. 14, 2017).

120. Dante Figueroa, *Italy: New Law to Combat Organized Crime Takes Effect*, LIBRARY OF CONGRESS (Jan. 3, 2018), <http://www.loc.gov/law/foreign-news/article/italy-new-law-to-combat-organized-crime-takes-effect/>.

121. See D.P.R. 29 maggio 2017, n. 71, G.U. June 3, 2017, n. 127 (It.); see D.P.R. 7 aprile 2017, n. 47, G.U. Apr. 21, 2017, n. 93 (It.).

122. Legge 7 Aprile 2017, n.47, D.P.R. Apr. 7, 2017 n. 47 (It.).

123. *Id.*

124. D.P.R. n. 47/2017, art. 5 (It.).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* The minor, in a language that the minor can understand, is notified that his or her age can be determined by such testing, the expected results of the testing and the consequences for the refusal to undergo the testing.

129. Legge 7 Aprile 2017, n.47, D.P.R. Apr. 7, 2017 n. 47 (It.) art. 8.

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facility's personnel will create a file for the courts and for social services to formulate a long-term solution for the minor.<sup>130</sup> The minor will then automatically acquire temporary residency valid until the age of majority.<sup>131</sup> Once the minor reaches the age of eighteen, he or she can receive additional support if necessary to become autonomous.<sup>132</sup> While in Italy, the minor will also have the right to free medical care and education.<sup>133</sup> This new law became effective on May 5, 2017.<sup>134</sup>

The Law Against Cyber Bullying seeks to prevent cyber bullying and to protect and educate victims and perpetrators.<sup>135</sup> The new law directs the creation of a committee, coordinated by the Department of Education, to formulate and supervise action plans to prevent cyber bullying in conformity with European Directives.<sup>136</sup> In addition, the Department of Education, with the assistance of the Department of Justice, will release guidelines for the prevention of cyber bullying in schools, including provisions on the training of school personnel, a peer education program taught by students and alumni, and the support and rehabilitation of cyber-bullied minors.<sup>137</sup> Unless the act constitutes a crime, a school that discovers cyber bullying must notify the parents of the minors involved; it must educate the minors, and it can discipline the minors.<sup>138</sup>

Under this new law, where a victim over the age of fourteen or the victim's parents press charges against a minor for cyber bullying, the police can issue a warning to that minor, in the presence of the minor's parents or legal guardian, which can last until the age of majority.<sup>139</sup> Further, a minor over the age of fourteen or a parent of a minor can formally request that a website or social media platform remove or block the minor's personal information.<sup>140</sup> The request must be acknowledged within twenty-four hours and the information removed within forty-eight hours of the request.<sup>141</sup> If after such time, the minor's personal information has not been removed, the parents can send their request for the removal of their minor child's personal information to the Italian Data Protection Authority (DPA).<sup>142</sup> This new law became effective on June 18, 2017.<sup>143</sup>

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130. *Id.* at art. 9.

131. *Id.*

132. *Id.*

133. *Id.* at art. 14.

134. Legge 7 Aprile 2017, n.47, D.P.R. Apr. 7, 2017 n. 47 (It.) art. 14.

135. Legge 29 maggio 2017, n.71, D.P.R. May 29, 2017, n. 71 (It.).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Legge 29 maggio 2017, n.71, D.P.R. May 29, 2017, n. 71 (It.).

142. *Id.*

143. *Id.*

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B. DEVELOPMENTS IN FRENCH FAMILY AND ESTATES LAW

*Introduction of non-judicial divorce in France:* On January 1, 2017, the French legislature profoundly reformed family law in France by introducing non-judicial divorce by mutual consent.<sup>144</sup> The purpose of the new form of divorce is to refocus judges' activities on litigation, simplify proceedings, reduce court time, and ease the relations between separating spouses.<sup>145</sup>

In mutual consent cases—when parties agree on the terms and conditions of the divorce—no judge will be required because there is no dispute to settle.<sup>146</sup> Non-judicial divorce is a private agreement signed by the spouses and countersigned by their respective attorneys (*avocats*).<sup>147</sup> The Attorneys' deed (*acte d'avocat*) enjoys a strong probative value because it provides proof of the writing and of the signature of the parties.<sup>148</sup> Moreover, by countersigning the agreement, the *avocats* certify having informed the spouses of the legal consequences of the agreement.<sup>149</sup>

Safeguards have been introduced to prevent abuse.<sup>150</sup> First, in compliance with international commitments, spouses are not allowed to divorce by agreement when minors are involved and where the children request to be heard by a judge.<sup>151</sup> Parents now have a duty to inform their children about the divorce and failure to comply with this requirement makes the agreement invalid.<sup>152</sup>

Second, spouses have a fifteen-day cooling-off period before signing the agreement, and spouses that are protected by a procedure of guardianship cannot divorce by mutual consent.<sup>153</sup>

When the divorce involves cross-border elements, *avocats* should raise international issues with their clients.<sup>154</sup> The agreement may therefore include provisions related to the applicable divorce law,<sup>155</sup> to the applicable

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144. See Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI<sup>e</sup> siècle [Law 2016-1547 of November 18, 2016 on the Modernization of Justice of the 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI<sup>e</sup> siècle [Law 2016-1547 of November 18, 2016 on the Modernization of Justice of the 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Commission Regulation 1259/2010, 2010 O.J. (L 343) (EU).

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law to maintenance obligations,<sup>156</sup> and to the applicable law of matrimonial property regimes.<sup>157</sup>

Once the spouses have agreed on the terms and conditions of divorce, the signed agreement is finally checked and registered by a *notaire*.<sup>158</sup> As with French judicial divorce, the dissolution of the marriage occurs between spouses the day the divorce's agreement is registered by the *notaire*, and between spouses and third parties the day the transcription on the public civil register is produced.<sup>159</sup>

There remain some pending issues about the recognition of non-judicial divorces abroad. The divorce gets its force from a contract; thus, its recognition may be uncertain in jurisdictions where judicial divorce is a public policy rule or where the parties were not domiciled in France. French lawyers will need to work with their international counterparts to ensure the new form of divorce can be enforced outside France.

*French forced heirship in an international context:* On September 27, 2017,<sup>160</sup> the French Cassation Court ruled in two different cases that forced heirship is not a principle of French international public policy (*Ordre Public*).<sup>161</sup> The facts are quite similar in both cases.<sup>162</sup> In one, a French national died in California, where he was domiciled for a very long time, leaving his wife domiciled in California and his children from a previous marriage domiciled in France.<sup>163</sup> The deceased's estate consisted of assets located both in France and in the U.S., all included in a Californian trust.<sup>164</sup>

According to the French common private international law rules, the law of California applied to the French movable assets as the law of the deceased's last domicile.<sup>165</sup> As a result, the surviving spouse inherited from the French movable assets and the children were deprived of their rights.<sup>166</sup> The children took the case to the French courts and claimed that the application of Californian law should have been refused because Californian

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156. Commission Regulation 4/2009, Implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, 2009 O.J. (L 7) (EC).

157. Commission Regulation 2016/1103, Implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 2016 O.J. (L 183) (EU).

158. *See* Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI<sup>e</sup> siècle [Law 2016-1547 of November 18, 2016 on the Modernization of Justice of the 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016 at art. 44.

159. *Id.*

160. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-17.198 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-13.151 (Fr.).

161. *Id.*

162. *See id.*

163. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-13.151 (Fr.).

164. *Id.*

165. *Id.*

166. *Id.*

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law does not know the forced heirship concept which is an international public policy of France.<sup>167</sup>

This issue has been debated among scholars and practitioners of French private international law for many years.<sup>168</sup> After more than fifteen years of judicial battle, the French Cassation Court held that a foreign succession law, which is applicable according to the French conflict of laws but does not recognize forced heirship, is not contrary to French international public policy.<sup>169</sup>

The facts in both cases occurred before the introduction of the European regulation on successions (successions regulations), but the cases were decided in consideration of this European text.<sup>170</sup> The successions regulations harmonize the conflict of laws in Europe and provides for the unity of succession law by applying whether by the law of the deceased's habitual residence<sup>171</sup> or the law of the deceased's nationality.<sup>172</sup> The decisions also respect the party autonomy principle by ensuring that a foreign national owning assets in France can freely declare the national law applicable to future succession.<sup>173</sup> The rulings highlight the continuing importance of international and comparative law knowledge and cooperation between international lawyers.

C. THE CATALAN POLITICAL AND CONSTITUTIONAL CRISIS OF  
2017

On October 27, 2017, the Catalan parliament (*Parlament*) made a unilateral declaration of independence, based on the results of an illegal October 1st referendum.<sup>174</sup> This prompted the Spanish government to intervene in the autonomous government of Catalonia.<sup>175</sup> The intervention, to restore the rule of law in Catalonia, was carried out in application of article 155 of the Spanish Constitution.<sup>176</sup> The intervention required a request by the Spanish government to the President of the Catalan autonomous community to rectify the situation.<sup>177</sup> He did not, and a majority vote of the Spanish Senate authorized the government to intervene.<sup>178</sup> The executive dismissed the Catalan President and his

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167. *Id.*

168. *Id.*

169. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-13.151 (Fr.).

170. Commission Regulation 650/2012, 2012 O.J. (L 201) (EU) (regulation on successions was introduced on Aug. 17, 2015).

171. *Id.* at art. 21

172. *Id.* at art 22.

173. *Id.*

174. S.T.C., Oct. 17, 2017, (No. 114/2017) (Spain).

175. *See id.*

176. C.E., § 155 Dec. 29, 1978 (Spain).

177. *Id.*

178. *See id.* The vote was actually over 2/3.



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ministers, along with the leading political appointees of the Catalan administration, and the Chief of Police, who was being investigated for sedition and had called for elections in Catalonia.<sup>179</sup>

At this writing, half of the ministers representing the Catalan government elected in September 2015 are in preventative custody.<sup>180</sup> There are five in Belgium awaiting extradition hearings. Former members of the Catalan *Parlament* are out on bail and preparing their defences before the Supreme Court.<sup>181</sup> All are accused of rebellion, sedition, and embezzlement.<sup>182</sup>

The chain of events leading to the Spanish government's intervention began when a coalition of separatist politicians promising a rich and independent Republic of Catalonia (with continued EU membership) took control of the Catalan *Parlament* with a minority vote of 47 percent of the 2015 electorate.<sup>183</sup> The coalition's electoral program provided a roadmap, or "*procés*" (process), to independence.<sup>184</sup> The *procés* involved two phases.<sup>185</sup> The first phase would begin with the creation of the necessary state structures and the beginning of social and popular constituent process.<sup>186</sup> Next, there was to be a declaration of independence that would disconnect Catalonia from the Spanish legal order and create a transitory law and a constituent process law.<sup>187</sup> To the stupefaction of many and the delight of many others, this is actually what the Catalan government did.<sup>188</sup> The *procés* did not make it to the second phase, which would have included elections, the approval of a constitution and its ratification in a referendum.<sup>189</sup>

While the promoters of the *procés* threw around terminology such as "the right to decide" based on United Nations Resolution 2625, "it is democratic to vote" and "democracy," they trampled the Spanish and Catalan

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179. See Jake W. Simmons, *Sacked Catalan leader vows to go back to work on Monday unless he is 'forcibly prevented' after calling on civil servants to 'peacefully resist' Spanish Prime Minister's takeover of the regional government*, DAILY MAIL (Oct. 28, 2017, 3:40 PM), <http://www.dailymail.co.uk/news/article-5026353/Tensions-boil-streets-Barcelona.html>.

180. See Camila Domonoske, *4 Separatist Catalan Leaders Remain In Jail, 6 Others Out on Bail*, NPR (Dec. 4, 2017, 1:14 PM), <https://www.npr.org/sections/thetwo-way/2017/12/04/568307145/4-separatist-catalan-leaders-to-remain-in-jail-6-others-out-on-bail>.

181. *Id.*

182. *Catalan leaders facing rebellion charges flee to Belgium*, THE GUARDIAN (Oct. 31, 2017, 5:37 PM), <https://www.theguardian.com/world/2017/oct/30/spanish-prosecutor-calls-for-rebellion-charges-against-catalan-leaders>.

183. See PROGRAMA ELECTORAL (Sept. 5, 2015), [http://www.esquerra.cat/partit/programes/c2015\\_programa.pdf](http://www.esquerra.cat/partit/programes/c2015_programa.pdf).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. PROGRAMA ELECTORAL (Sept. 5, 2015), [http://www.esquerra.cat/partit/programes/c2015\\_programa.pdf](http://www.esquerra.cat/partit/programes/c2015_programa.pdf).

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Constitution.<sup>190</sup> They did not tell their supporters that the right to self-determination did not apply when the action would dismember the political unity of a state, such as Spain, that has a government that represents all the people.<sup>191</sup> They ignored that the Spanish Constitution provides for the indissoluble character of the Spanish state.<sup>192</sup>

When the separatist coalition passed the Law of Disconnection on September 8th with a slim majority in the Catalan parliament, they ignored the opinion of the *Parlament's* internal legal advisers that it was illegal.<sup>193</sup> They violated the 66 percent majority voting requirement established by the Catalan Constitution, *Estatut*, for its modification.<sup>194</sup> The Spanish Constitution was also violated.<sup>195</sup>

While the separatists qualify the application of article 155 as oppression and illegal intervention, constitutions around the world have mechanisms to protect the State and the rule of law.<sup>196</sup> The German and Spanish Constitutions foresee intervention, or “federal coercion,” in articles 37 and 155.<sup>197</sup> Other examples of constitutional systems with state or federal intervention include the Austrian Constitution, article 100;<sup>198</sup> the Italian Constitution, article 126;<sup>199</sup> and the Argentinian Constitution, section 31 of article 75.<sup>200</sup>

Elections shall be held in Catalonia on December 21.<sup>201</sup>

**D. DISPUTE FUNDING AND LITIGATION FINANCE DEVELOPMENTS**

“Dispute funding” refers to the financing provided by a third party to the law firms or parties on either side of a dispute on a nonrecourse basis in

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190. See G.A. Res. 25/2625 (Oct. 24, 1970); PROGRAMA ELECTORAL (Sept. 5, 2015), [http://www.esquerra.cat/partit/programes/c2015\\_programa.pdf](http://www.esquerra.cat/partit/programes/c2015_programa.pdf).

191. See G.A. Res. 25/2625 (Oct. 24, 1970).

192. C.E., Dec. 29, 1978 (Spain) at art. 2.

193. See Francisco de Borja Lasheras, *Three myths about Catalonia's independence movement*, EURO. COUNCIL ON FOREIGN REL. (Sept. 22, 2017), [http://www.ecfr.eu/article/commentary\\_three\\_myths\\_about\\_catalonias\\_independence\\_movement](http://www.ecfr.eu/article/commentary_three_myths_about_catalonias_independence_movement).

194. See C.E., Dec. 29, 1978 (Spain).

195. See Commission Regulation 650/2012, 2012 O.J. (L 201) (EU) (regulation on successions was introduced on Aug. 17, 2015); see also PROGRAMA ELECTORAL (Sept. 5, 2015), [http://www.esquerra.cat/partit/programes/c2015\\_programa.pdf](http://www.esquerra.cat/partit/programes/c2015_programa.pdf).

196. See GRUNDGESETZ [GG] [Basic Law], translation at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.pdf](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf) (Ger.); see C.E., Dec. 29, 1978 (Spain).

197. GG, art. 35; C.E., § 155.

198. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl 1 No. 2/2008, art. 100, <http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000138/B-VG%2c%20Fassung%20vom%2022.03.2018.pdf> (Austria).

199. Art. 126 Costituzione [Cost.] (It.).

200. Art. 75, ¶ 31, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

201. See Jon Henley, *Catalonia secessionist parties declare victory in regional elections – as it happened*, THE GUARDIAN (Dec. 21, 2017, 8:34 PM), <https://www.theguardian.com/world/live/2017/dec/21/catalonia-voters-results-regional-election-spain-live>.

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exchange for a percentage of the funding recipient's recovery.<sup>202</sup> Increasing numbers of large and small law firms and their clients are seeking funds to help them defray the legal fees and expenses of costly dispute resolution.<sup>203</sup> The original rationale was that a good case should not fail to be brought because the claimant is unable to compete with a deep-pocket defendant, having many times the resources as the claimant.<sup>204</sup> Moreover, funding is now being sought (and granted) increasingly because the claimant wishes to monetize the value of a promising case or portfolio of cases.<sup>205</sup>

The classic argument against such funding, as it concerns litigation, is that it constitutes a violation of the two ancient common law crimes of champerty and maintenance.<sup>206</sup> It is also argued that it encourages frivolous litigation<sup>207</sup> and that it perverts the legal system by giving nonparties an improper interest in litigation that is not their own.<sup>208</sup> In many jurisdictions today, however, the concepts of champerty and maintenance, with some exceptions, are fading away. Many consider dispute funding to be a logical evolution of contingent fees, value-added legal fees, insurance practices, legal aid, etc.

Despite the objections to dispute funding, it is expanding at a rapid pace globally, including in Europe, as more claimants learn about its availability, and as more funders enter the market and increase the amount of capital available to invest in disputes.<sup>209</sup> Dispute funding started several years ago in Australia, and it spread quickly to other common law countries: notably, the UK and the U.S.<sup>210</sup> In the UK, dispute funding is widespread.<sup>211</sup>

Dispute funding is advancing, not only in common law jurisdictions, but in a number of civil law countries in Europe, as well. In response to a European Commission questionnaire regarding dispute funding, the Council of Bars and Law Societies of Europe (CCBE), which represents all the bars and law societies of Europe, recommended that the EU not

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202. See AMERICAN BAR ASSOCIATION COMM'N ON ETHICS 20/20 INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 2011, [http://www.law.columbia.edu/sites/default/files/microsites/clwa/CIAA/keynote\\_third\\_party\\_funding.pdf](http://www.law.columbia.edu/sites/default/files/microsites/clwa/CIAA/keynote_third_party_funding.pdf) (last visited Mar. 19, 2018) (also known as dispute finance, it includes litigation finance and alternative litigation finance).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. See Michael K. Velchik & Jeffery Y. Zhang, ISLANDS OF LITIGATION FINANCE, 34–35 (2017).

208. See AMERICAN BAR ASSOCIATION COMM'N ON ETHICS 20/20 INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 2011, [http://www.law.columbia.edu/sites/default/files/microsites/clwa/CIAA/keynote\\_third\\_party\\_funding.pdf](http://www.law.columbia.edu/sites/default/files/microsites/clwa/CIAA/keynote_third_party_funding.pdf) (last visited Mar. 19, 2018) (also known as dispute finance, it includes litigation finance and alternative litigation finance).

209. See Velchik, *supra* note 207, at 4.

210. *Id.*

211. See Barney Thompson, *Lawsuit funders raise £10bn from yield-hungry investors*, FIN. TIMES (Nov. 19, 2017), <https://www.ft.com/content/926355de-c941-11e7-ab18-7a9fb7d6163e>.

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interfere with the decisions made by consumers to pledge a part of their potential gain to third parties in exchange for funding.<sup>212</sup>

Although dispute funding is expanding in Europe, it is not permitted in all European countries. A significant decision of the Irish Supreme Court, on May 23, 2017, held that third party funding agreements are against public policy and constituted the “torts and offences” of champerty and maintenance.<sup>213</sup>

In Germany, litigation funding is available, providing funders with a percentage of amounts awarded, and depending on the risk assessment, the percentage varies upwards from 7.5 percent based on minimum litigation value above 50,000 Euros.<sup>214</sup> When the borrower’s claim fails, the funder must bear the agreed costs, which usually include court fees, legal fees on both sides, and expert and witness costs.<sup>215</sup> Legal expense insurance is also common in Germany, but does not cover the fees of the losing party.<sup>216</sup>

Funding of arbitration is also becoming very popular, particularly in countries with major arbitration practices. On February 21, 2017, the Paris Bar Council adopted the following resolution favoring the practice of third-party funding in general, and particularly in arbitration: “La pratique du financement des procès par les tiers est favorable à l’intérêt des justiciables et des avocats inscrits au barreau de Paris, particulièrement dans les arbitrages internationaux.”<sup>217</sup>

Overall, dispute funding is likely to continue its expansion in Europe and its increased utilization in all forms of disputes.

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212. See *Towards a Coherent Approach to Collective Redress*, EU COMMISSION (Feb. 4, 2011), [http://ec.europa.eu/competition/antitrust/actionsdamages/collective\\_redress\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html).

213. See *Persona Digital Telephony v. The Minister for Public Enterprise* [2016] IESCDET 106 (Ir.).

214. GLOBAL LEGAL INSIGHTS 5, <https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution/global-legal-insights-litigation-and-dispute-resolution-6th-ed/germany> (last visited Mar. 19, 2018).

215. *Id.*

216. *Id.*

217. See *Conseil de l’Ordre du 21 février 2017* [Council of the Order of February 21, 2017], 1 (meaning “The practice of financing third-party suits is favorable to the interests of litigants and lawyers registered at the Paris Bar, particularly in international arbitrations.”).