

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Europe

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This article surveys important legal developments in Europe during 2012.¹

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1. For developments during 2011, see Marie Tedesco Scott et al., *Europe*, 46 INT'L LAW. 537 (2012).

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I. European Union

A. GERMANY — EUROPEAN MONETARY STABILITY, MONISM, AND DUALISM

On September 12, 2012, Germany's Federal Constitutional Court declined to enjoin the German president from signing the treaty establishing the European Stability Mechanism (ESM), allowing Germany to collaborate in a key effort to preserve the Euro.²

Opponents to collaboration argued that the ESM treaty would violate fundamental rights guaranteed by the German Constitution by impermissibly shifting power to supranational institutions. One constitutional provision guarantees the free and equal participation of the citizenry in the exercise of state authority, achieved through election of the lower house of Germany's parliament.³ Another provision prohibits any constitutional amendment to alter participation of the States (*Länder*) in the parliament's upper chamber, whose members are designated by *Länder* governments.⁴ Further provisions declare Germany a "democratic" state and affirm the "people" as the source of state authority, such authority to be exercised through elections, voting, and the legislative, executive, and judicial branches of government.⁵ In a distinct vein, Germany's constitution guarantees the right of "property" and the right "to resist any person seeking to abolish [its] constitutional order, should no other remedy be possible."⁶

The German court's response turned on the interrelationship of fundamental elements of European and national law. Very early on, the European Court of Justice (ECJ) declared the supremacy of European law over national law.⁷ Various national courts, including Germany's and Italy's constitutional courts, disagreed with the ECJ's monist supremacy doctrine, under which European law would trump even core national constitutional values, especially before clear extension of European law to human rights. Ultimately, the German and Italian constitutional courts articulated a dualist conception of European and national legal orders. Under this dualist construct, the national constitutional order is deemed to admit European law, including its endowment of ordinary national judges with the duty to apply European law in lieu of conflicting national law. But the constitutional court in each country retains the power, as formulated in the Italian Constitutional Court ruling, "to pass on the conformity of Community rules with the fundamental principles of the constitutional order and the inalienable rights of the human being."⁸

Just as the ECJ has often vigorously asserted the monist supremacy of European law, so too have national constitutional courts taken care to apply their reservation of powers of review of European law developments under their dualist conception in ways coherent with European integration. Here, the German court specified the acceptability of ratifica-

2. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 12, 2012, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BverfGE] 1390/12 (Ger.).

3. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl 1, art. 38, § 1 (Ger.).

4. *Id.* art. 79, § 3.

5. *Id.* art. 20, §§ 1-2.

6. *Id.* art. 14, § 1; art. 20, § 4.

7. See Antonio La Pergola & Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598 (1985).

8. *Id.* at 614 (citing Corte Cost., 8 giugno 1984, Giur. it. 1984, 1, 1, 1098 (It.)).

tion only on the apparently anodyne conditions of assurance that Germany's assent be required to exceed an initially contemplated financial ceiling and that Germany's parliament have access to "comprehensive information."

B. EUROPEAN UNION ARTISTS' RIGHTS IN THE GLOBAL ART MARKET

Effective January 1, 2012, all twenty-seven EU Member States are required to implement the EU Art Resale Right Directive no. 84 of 2001,⁹ imposing an Artist's Royalty Right (ARR). Under the ARR, living artists and their heirs and beneficiaries are entitled to payment of a royalty on re-sales of contemporary and modern art and on certain transfers of art. The Directive mandates a maximum ARR of €12,500¹⁰ in all Member States for any single transaction. An artist's right to collect monies based upon re-sales of artworks—alien to the common law concept of private property transfers—is a civil law principle known as *droit de suite*, an aspect of moral rights (*droit moral*). The Directive's application of the *droit de suite* draws inspiration from Article 14 of the Berne Convention for the Protection of Literary and Artistic Works, ratified by 185 states.

The scope and specificity of the objects that the ARR covers varies among Member States, and it is only triggered for certain works under certain conditions. Member States have had ten years to conform their law to the Directive.

The United Kingdom Intellectual Property Law,¹¹ addressing implementation of the Directive, took effect on January 1, 2012. The Intellectual Property Law extends the ARR to artists' heirs and beneficiaries for up to seventy years after the artist's death. An ARR is thus owed on every eligible resale, and on many non-commercial transfers, of art for the life of the artist, plus seventy years. A resale payment is owed even when the same work sells multiple times. A compulsory collective management system administers the royalties in most EU states, charging administration fees ranging from 8 percent to 20 percent. To be eligible for ARR in the United Kingdom, the Copyright, Designs, and Patents Act of 1988 must cover the artwork.¹² In such cases, the applicability of ARR terminates when the copyright term expires.

The Directive contemplates that the ARR may be accorded to living artists who, at the date of sale, are nationals of a European Economic Area state, or another non-Member State, if that state has legislation that provides the ARR on reciprocal terms. The Directive further contemplates that the ARR applies to the sale of the work of a deceased artist if the artist lived in or was from a state that at the time of death contemplated such rights.

China has overtaken the United States in the global art market, boosting its share from 23 percent in 2010 to 30 percent in 2011. Although China is also a member of the Berne Convention, China's proposed revisions to Chinese copyright law do not yet include an ARR. Thus, China may become a magnet for art resale, appealing to collectors who balk at European ARR costs.

9. Council Directive 2001/84, ch. I, art. 1, ¶ 1, 2001 O.J. (L 272) 34 (EU).

10. *Id.* ch. II, art. 4, ¶ 1 (establishing a sliding percentage scale relative to value, subject to the cap).

11. Artist's Resale Right (Amendment) Regulations, 2011, S.I. 2011/2873, (U.K.) (supplementing the Artist's Resale Right Regulations, 2006, S.I. 2006/346 (U.K.)).

12. *Id.*

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C. OLIVE OIL REGULATIONS

The EU's southern Member States, leading producers of olive oil, instigated adoption of the first EU "Olive Oil Action Plan."¹³ The Plan benefits from EU Regulations directly applicable in Member States, the strengthening of olive producers' organizations,¹⁴ and limits on state aids for private storage of olive oil produced in the 2011-2012 season.¹⁵ A 2012 regulation codifies and updates marketing standards, effective January 1, 2013.¹⁶ A further regulation, in effect on December 14, 2012, articulates permitted health and nutritional claims and conditions of use for specific foods, including olive oil, a recognized healthy fat.¹⁷ New rules for imports of organic products from third countries are currently in effect,¹⁸ and since July 1, 2012, organic products produced in the EU must use the EU organic logo.¹⁹

II. European Countries

A. AUSTRIA

In Austria, the Second Stability Act of 2012²⁰ amended the Stock Companies Act,²¹ a regulation that applied to Austria's two-tier corporate governance structure regarding remuneration of members of managing boards and supervisory board eligibility. Prior to amendment, the Stock Companies Act required that management remuneration be commensurate with the obligations of individual members of the management board and the company's status. The amended Act requires that the supervisory board ensure that remuneration reflect the individual's performance and custom in the industry. Companies

13. EUR. COMM'N COMM. OF AGRIC. & RURAL DEV., ACTION PLAN FOR THE EU OLIVE OIL SECTOR 2 (June 18, 2012), available at http://ec.europa.eu/agriculture/olive-oil/action-plan_en.pdf.

14. Commission Regulation 865/2012, Amending Regulation (EC) no. 867/2008, Laying Down Detailed Rules for the Application of Council Regulation (EC) No. 1234/2007 as Regards Operators' Organisations in the Olive Sector, Their Work Programmes and the Financing Thereof, 2012 O.J. (L 256) 18.

15. Commission Regulation 539/2012, Fixing the Maximum Amount of Aid Granted for the Private Storage of Olive Oil Under the Tendering Procedure Opened by Implementing Regulation (EU) No 430/2012, 2012 O.J. (L 164) 8.

16. Commission Regulation 357/2012, Amending Implementing Regulation (EU) No. 29/2012 on Marketing Standards for Olive Oil, 2012 O.J. (L 113) (extending Commission Regulation 29/2012 final compliance date to January 1, 2013). See also Commission Regulation 29/2012, on Marketing Standards for Olive Oil, 2012 O.J. (L 12) 14.

17. Commission Regulation 432/2012, Establishing a List of Permitted Health Claims Made on Foods, Other Than Those Referring to Reduction of Disease Risk and to Children's Development and Health, 2012 O.J. (L 136) 1.

18. Commission Regulation 508/2012, Amending Regulation (EC) No. 1235/2008 Laying Down Detailed Rules for Implementation of Council Regulation (EC) No 834/2007 as regards the Arrangements for Imports of Organic Products from Third Countries, 2012 O.J. (L 162) 1.

19. Commission Regulation 271/2010, Amending Regulation (EC) No 889/2008 Laying Down Detailed Rules for the Implementation of Council Regulation (EC) no. 834/2007, as Regards the Organic Production Logo of the European Union, 2010 O.J. (L 84) 20.

20. STABILITÄTSGESETZ 2012 [SECOND STABILITY ACT] Apr. 24, 2012 BUNDESGESETZBLATT [BGBl I] No. 35/2012 (Austria).

21. AKTIENGESETZ 1965 [STOCK COMPANIES ACT] May 6, 1965 BUNDESGESETZBLATT [BGBl I] No. 98/1965, as amended (Austria).

must also tailor performance-related remuneration to foster long-term motivation rather than short-term focus.

Incumbent management board members of exchange-listed companies and companies seeking access to capital markets are not eligible for supervisory board membership until after the expiration of a two-year term, unless a shareholder or shareholders with more than 25 percent of voting rights nominates such a member. Moreover, only one such recent member may be so elected, and such person may not chair the supervisory board.

B. BULGARIA

Recent developments concerning Bulgaria's April 2011 Law on Energy from Renewable Sources (LERS) fail to establish a viable framework for preferential tariffs.²² For example, the Bulgarian Commission for Energy Regulation initially created a flawed system for determining when renewable energy generators would be eligible for a preferential tariff. Article 31 originally provided that the Commission would set the preferential tariff for purchase of electricity from renewable sources once the generator executed the preliminary contract with the Transmission System Operator (TSO), the last step before beginning construction.²³ If the generator did not commence operation within two years of such execution, however, the preferential rate would be reset as of the actual operation.²⁴ Thus, green energy generators had no certainty as to the tariff, and therefore, were unable to obtain financing.²⁵

The April 2012 amendment of LERS Article 31²⁶ established the preferential rate only when the plant begins operation, rather than on execution of the preliminary agreement with the TSO.²⁷ On September 18, 2012, the Commission issued a decision requiring all renewable energy generators to pay a temporary fee for connection to the grid.²⁸ Despite investor and EU displeasure with this decision, the Bulgarian legislature ratified the Commission's decision in October 2012.²⁹

22. Закон за енергията от възобновяеми източници [Law on Energy from Renewable Sources] May 3, 2011, УКАЗ No. 92 (Bulg.).

23. *Id.*

24. *Id.*

25. Zhechev George & Kalina Kasparian, *Land of the Setting Sun*, CAPITAL (Apr. 21, 2011, 5:09 PM), http://www.capital.bg/politika_i_ikonomika/bulgaria/2011/04/21/1079190_stranata_na_zaliazvashtoto_slunce/.

26. акон за изменение и допълнение на Закона за енергията от възобновяеми източници [LAW AMENDING THE LAW ON RENEWABLE ENERGY] Apr. 4, 2012, УКАЗ No. 147 (Bulg.).

27. *Id.*

28. ДЪРЖАВНАТА КОМИСИЯ ЗА ЕНЕРГИЙНО И ВОДНО РЕГУЛИРАНЕ [State Commission for Energy Regulation], Report No. C-33 (Sept. 14, 2012), available at <http://dker.bg/files/DOWNLOAD/res-tseni-dostap-VI-proizv.pdf> (Bulg.).

29. *Legitimize Secret Decision of the Regulator Warned Producers of Green Energy*, PUBLICS.BG (Oct. 24, 2012, 4:10 PM), <http://www.bpva.org/bg/articles/article1698.html>.

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C. DENMARK

1. *CEO Authority*

In a case involving the authority of a CEO during company financial difficulties, Denmark's Supreme Court held that a CEO is entitled to grant pay increases and bonuses to retain key employees.³⁰ Although the board of directors had not limited the CEO's authority relative to previous years' pay negotiations, it had established a framework for annual pay negotiations. When the CEO gave employees pay increases and bonuses without board consent, the board asserted that the CEO materially breached his contract and dismissed him. The company demanded that the CEO pay damages for financial loss, equal to the bonuses paid. The Court found that because the CEO routinely recruited employees, made agreements on pay and employment, conducted compensation negotiations, and awarded bonuses, the board of directors could not so limit the CEO's authority. As the transactions were neither unusual nor particularly significant, the Court held that the CEO had not breached his obligations, and the Court dismissed the damages claim and granted the CEO the right to severance pay.

2. *Sanctions on Multinational Corporations Failing to Register Whistleblowing Systems*

Danish subsidiaries of U.S.-listed parent companies are required to have whistleblowing systems that comply with U.S. laws, and the companies have a duty to register these systems with the Danish Data Protection Agency. Under Danish law, companies can decide whether to introduce a whistleblowing system, but publicly traded companies in the United States are subject to the Sarbanes-Oxley Act³¹ and are required to have a group-wide whistleblowing system. A company that fails to register its whistleblowing system in Denmark will be subject to fines.³²

Many Danish parent companies are aware of the duty to register a whistleblowing system in Denmark, but subsidiaries with parent companies in the United States may overlook the additional requirements. To ensure compliance with Danish regulations and also that the security is up to code, before a U.S.-subsidiary company registers its whistleblowing system with the Danish Data Protection Agency, the parent and subsidiary must determine which location will be the responsible Data Handler.

D. ENGLAND AND WALES

On May 1, 2012, the Legal Aid, Sentencing, and Punishment of Offenders Bill became an Act of Parliament.³³ Most of the Act's provisions become effective in April 2013, but because certain portions of the Act serve only as enabling legislation, some areas of the law will require additional implementing steps. Part one of the Act reforms the availability of

30. *Rheoscience A/S mod Foreningen af Speciallæger som mandatar for Philip Just Larsen* [Rheoscience A/S v. Ass'n of Specialists as Agent for Phillip Just Larsen], Supreme Court Judgment, § 2 (May 2, 2012), available at <http://www.domstol.dk/hojesteret/nyheder/Afgorelser/Documents/2-2010.pdf> (Den.).

31. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745 (2002).

32. LOV OM BEHANDLING AF PERSONOPLYSNINGER [THE DANISH DATA PROTECTION ACT], May 31, 2000, Law No. 429, §§ 69-70, available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=828&exp=1>.

33. Legal Aid Sentencing and Punishment of Offenders Act, 2012, c.10, (U.K.).

legal aid in civil and criminal proceedings; however, these reforms are generally inapplicable to tort claims, such as personal injury or property damage.³⁴

Part 2 focuses on litigation funding and costs.³⁵ A few notable features of Part two include the following:

1. Section 44 addresses conditional fee agreements (CFA) and success fees.³⁶ CFAs are a version of contingency fees where, if successful, the lawyer is not paid a percentage of recovered damages but instead is paid an hourly fee plus a success fee up to 100 percent of the hourly fee. Previously, with “loser pays” rules, claimants could recover both hourly fees and success fees from the losing defendant. The Act limits success fee percentages and prohibits recovery of the success-fee portion of a CFA as costs from the defendant.
2. Section 45 introduces true contingency fee agreements, called damages-based agreements, which were previously prohibited.³⁷
3. Section 46 prohibits a successful party who has subscribed to a legal expenses insurance policy, known as after-the-event (ATE) insurance, from recovering the premiums from the losing party.³⁸
4. Section 55³⁹ introduces additional sanctions against defendants who fail to accept a claimant’s reasonable offer to settle, known as a Part 36 Offer.⁴⁰ A Part 36 Offer creates cost-shifting consequences for any party who fails to achieve a better result at trial than was offered in settlement by the opponent.

E. IRELAND

The last year evidenced continuing confidence in Ireland as a competitive base for foreign direct investment, with over 12,000 jobs created by multinational companies during the year.⁴¹ Positive legal developments include the following:

1. *Transparency for the Irish commercial real estate market*: The functions of the Property Services Regulatory Authority, established in April 2012, include establishment and maintenance of a database containing commercial leases and rents.⁴² The database enables prospective commercial tenants to enter into negotiations armed with current market information.
2. *Extensive reform of Irish anti-corruption law*: The proposed Criminal Justice (Prevention of Corruption) Bill 2012 would replace Ireland’s current anti-corruption legislation.⁴³ One significant new proposal is that companies be liable for corrupt

34. *Id.* §§ 1-43.

35. *Id.* §§ 44-62.

36. *Id.* § 44.

37. *Id.* § 45.

38. *Id.* § 46.

39. *Id.* § 55.

40. Civil Procedure Rules, 1998, S.I. 1998/3132, pt. 36 (U.K.).

41. Press Release, IDA Ireland, IDA Ireland Client Companies Created 12,722 New Jobs in 2012 (Jan. 7, 2013), <http://www.idaireland.com/news-media/press-releases/ida-ireland-client-compan/index.xml>.

42. Property Services (Regulation) Act 2011 (Act No. 40/2011) (Ir.), available at <http://www.irishstatutebook.ie/2011/en/act/pub/0040/index.html>.

43. Ir. Dep’t of Justice & Equality, *Criminal Justice (Corruption) Bill 2012: General Scheme*, <http://www.justice.ie/en/JELR/Pages/WP12000178> (last visited Feb. 5, 2013).

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offenses committed by their employees and associated persons. The key message for Irish companies is to promptly implement anti-corruption policies and procedures to avail themselves of the proposed defense under the draft scheme.

3. *Use of GAAP extended:* The exemption allowing use of U.S. Generally Accepted Accounting Principles (GAAP) by certain Irish companies has been extended from financial years ending at the latest on December 31, 2015, to financial years ending at the latest on December 31, 2020.⁴⁴ The restriction on use of GAAP to four years was also removed. The change benefits a number of U.S. companies that established new top-holding companies in Ireland, but remain publicly listed in the United States.
4. *Companies Consolidation Bill:* Draft legislation to consolidate and simplify Irish company law (the Companies Bill 2012) was published on December 21, 2012.⁴⁵ The implementing legislation is expected in late 2013 or early 2014.
5. *Constitutional Changes:* On May 31, 2012, Ireland approved a referendum to ratify the Treaty on Stability, Cooperation and Governance in the Economic and Monetary Union. The Treaty aims to improve stability for the Euro. The relevant legislation to amend the Irish Constitution became law on June 27, 2012.⁴⁶

On November 10, 2012, Ireland approved a referendum to amend the Constitution to strengthen the rights of children and affirm the State's obligation to protect those rights.⁴⁷

F. ITALY

1. *Civil Procedure*

In June, Italy approved measures to reduce the timeline for civil legal proceedings.⁴⁸ The legislative decree makes two amendments to the civil appeals process: the first creates a filter of admissibility to the appellate courts, and the second amends the rules of recourse to the Supreme Court of Cassation.

Under new articles 348-*bis* and 348-*ter* of the code of civil procedure, the competent court must determine whether an appeal has a reasonable probability of being heard. If the appeal does not meet the standard of reasonable probability after an initial hearing before proceeding to the discussion, the judge declares the appeal inadmissible.⁴⁹ Because the amendments seek to abbreviate timelines, the law requires the judge to provide only succinct reasoning for the decision. A party cannot challenge the order of inadmissibility. Instead, the only remedy is to challenge the judgment directly before the Court of Cassa-

44. Companies (Amendment) Act 2012 (Act No. 22/2012) (Ir.), available at <http://www.irishstatutebook.ie/2012/en/act/pub/0022/index.html>.

45. Companies Bill 2012 (No. 116/2012) (Ir.), available at <http://www.oireachtas.ie/viewdoc.asp?DocID=22537&&CatID=59>.

46. IR. CONST., 1937, Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Act 2012, available at <http://www.irishstatutebook.ie/2012/en/act/cam/0030/print.html>.

47. See *Thirty-First Amendment of the Constitution*, 91 IRIS OIFIGIÚIL 1649, 1657 (2012), available at <http://www.irisofigiuil.ie/currentissues/Ir131112.pdf>.

48. Decreto Legislativo 22 giugno 2012, n. 83, in G.U. 26 giugno 2012, n. 147, art. 54 (It.); Legge 7 agosto 2012, n. 134, in G.U. 11 agosto 2012, n. 171 (It.).

49. Codice di procedura civile (C.p.p.) [Code of Civil Procedure] art. 350 (It.).

tion, within a period running from the earlier of communication or notification of the order of inadmissibility.

The second amendment modifies the rule of civil procedure concerning which judgments can be appealed and the grounds of recourse to the Supreme Court of Cassation.⁵⁰ Under the new amendment, the Court of Cassation can hear a case for omitted consideration of a fact decisive for the dispute that has been the subject of discussion among the parties.⁵¹

The Constitutional Court has declared the portion of Legislative Decree 28/2010 that provided for compulsory mediation unconstitutional, for excessive legislative delegation.⁵²

2. *Labor Law*

Italy reformed its labor law to create an inclusive and dynamic labor market.⁵³ The reform reaffirmed that the employment contract of indefinite duration is the general form of employment,⁵⁴ but eliminated the obligation that employers provide written justification of any employment contract of less than twelve months.⁵⁵ The contract of apprenticeship was reformed to require a minimum duration of six months, while also increasing the ceiling on the number of apprentices that an employer can simultaneously employ.⁵⁶

The new law provides a special procedure to expedite resolution of disputes concerning dismissals.⁵⁷ It includes a new phase of urgent protection for the dismissed worker, where the court must establish whether conditions exist to grant the worker's provisional reinstatement. The losing party may appeal to the same court that will decide the merits of the dispute. The consequent judgment is not subject to appeal, but it is possible to file a complaint to the Court of Appeal as a simple request to review the ruling, which is not tied to rigid constraints of specific reasons, but extended to a thorough review of the decision on the merits.

G. MALTA

Effective August 1, 2012, Malta's Collective Proceedings Act contains a method to file class action claims for damages and injunctive relief based on violations of the Competition, Consumer Affairs, and Product Safety Acts.⁵⁸ The Act's final article, however, allows the Prime Minister to alter its scope and standing provisions.⁵⁹

To initiate a class action, a plaintiff must submit an application to the court asserting that a class action is the most appropriate procedure for resolving the claims. The plaintiff

50. *Id.* art. 360.

51. Decreto Legislativo [D.Lgs.] n. 83/2012, art. 54(c) (It.).

52. Decreto Legislativo 4 marzo 2010, n. 28, in G.U. 5 marzo 2010, n. 53 (It.). See Marie Tedesco Scott et al., *Europe*, 46 INT'L LAW. 537, 547 (2011) (section on Italy by Stefano Viola).

53. Decreto Presidente della Repubblica 28 giugno 2012, n. 92, in G.U. 3 luglio 2012, n. 153, art. 1, § 1 (It.).

54. *Id.* § 1(a).

55. *Id.* § 9(b).

56. *Id.* § 16.

57. *Id.* §§ 47-69.

58. Collective Proceedings Act, 1 Awissu 2012, ch. 520, art. 3 (Malta), available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11910&l=1>.

59. *Id.* art. 24.

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must also state the name of the class representative, the name of the defendant, a description of the class, the common issues among the class members, and evidence in support of these requirements.⁶⁰ In determining whether a class action is the most appropriate procedure, the court must consider the benefits of the proposed proceedings and the nature of the class,⁶¹ but the Act specifically excludes denial of certification merely because the claim involves individual issues.⁶² In fact, the Act provides for collective proceedings brought by an individual or a registered consumer association.⁶³ The Act also allows for sub-classes.⁶⁴

If the court admits the class, the court will order the publication of notice to class members.⁶⁵ An interlocutory appeal of a class certification decision is allowed, but only with leave of court.⁶⁶ The court may resolve common issues together and hear individual issues separately.⁶⁷ If the judge orders the defendant to compensate the class for common issues, the court may direct the defendant to credit the representative's account and then the court may direct the distribution.⁶⁸ Parties may appeal final judgments.⁶⁹ The law preserves the "loser pays" rule, which allows the prevailing party to shift its costs to the loser for the class representatives, but not for individual class members.⁷⁰ Registered consumer associations are responsible only for 10 to 50 percent of the normal costs assessable.⁷¹

H. POLAND

1. *Shale Gas Legislation*

The Polish government is drafting a new act specifically regulating shale gas operations, separate from the Geological and Mining Law.⁷² The announcement date is scheduled for December 2012 or early 2013. The new act does the following:

- (a) Creates a National Energy Minerals Operator (NEMO or *Narodowy Operator Kopalni Energetycznych*)—a public company charged with overseeing production of oil and gas in Poland. The NEMO would have regulatory and geological competency over each mineral concession granted by the government. NEMO would take stakes in shale gas projects in exchange for government investment. This Act will increase the administrative oversight of shale gas operations.

60. *Id.* art. 5.

61. *Id.* art. 9(2).

62. *Id.* art. 10.

63. *Id.* art. 12.

64. *Id.* art. 14.

65. *Id.* art. 13(2).

66. *Id.* art. 21(2).

67. *Id.* art. 15(4).

68. *Id.* art. 18(3).

69. *Id.* art. 21(1).

70. *Id.* art. 23(1).

71. *Id.* art. 23(4).

72. PRAWO GEOLOGICZNE I GÓRNICZE [GEOLOGICAL AND MINING LAW] 9 czerwca 2011, Dziennik Ustaw [Journal of Laws] [Dz. U.] No. 163, item 981 (Pol.).

- (b) Creates a Hydrocarbons Fund (*Fundusz Węglowodorowy*)—a public fund that will invest some of the national proceeds from the production of gas into education, research, and development.
- (c) Regulates the taxation of oil and gas production through a new tax likely to take effect in 2015 or 2016.
- (d) Increases the participation of local governments in the creation of income from production of gas.
- (e) Introduces new procedures regarding exploration and production of oil and gas, including concession grants.
- (f) Enhances environmental regulations and procedures involving consultations with local municipalities regarding the grant of concessions for shale gas operations.

2. *Civil Procedure Code Amendments*

Poland's Parliament amended the Polish Civil Procedure Code⁷³ by the Act on the Amendment of the Civil Procedure Code and other Acts.⁷⁴ The amendment became effective May 3, 2012. Changes include:

- (a) Abandonment of the separate procedure for resolving civil disputes between entrepreneurs. Such disputes will now be resolved pursuant to the general rules of the Civil Procedure Code.
- (b) Granting judges hearing civil cases more discretion. Judges now have authority to request that parties submit additional pre-trial pleadings, especially when the complaint and the response are insufficient to resolve the case. Parties may submit other pleadings during the proceedings only with court permission.
- (c) Modification of the law regarding preclusion of evidence. The general rule is that all evidence must be in the complaint and in the response. Judges decide the number and order of the pleadings that parties may submit, and therefore the possibility of invoking new evidence. The judge may now determine whether certain evidence is timely submitted. It is, however, possible to invoke use of untimely submitted evidence if (1) the submitting party proves that it was not at fault for the late submission; (2) admission of such late evidence will not delay the proceedings; or (3) extraordinary circumstances justify submission.

3. *Citizenship*

In the case of Kp 5/09,⁷⁵ the Polish Constitutional Tribunal held that under the Polish Citizenship Act of 2009,⁷⁶ in conjunction with article 137 of Poland's Constitution,⁷⁷ the

73. KODEKS POSTĘPOWANIA CYWILNEGO [CIVIL PROCEDURE CODE] 17 listopada 1964, Dziennik Ustaw [Journal of Laws] [Dz. U.] No. 43, item 296 (Pol.).

74. ZMIANIE KODEKSU POSTĘPOWANIA CYWILNEGO ORAZ NIEKTÓRYCH INNYCH USTAW [AMENDMENT OF THE CIVIL PROCEDURE CODE] 16 września 2011, Dziennik Ustaw [Journal of Laws] [Dz. U.] No. 233, item 1381 (Pol.).

75. Trybunał Konstytucyjny w składzie [Const. Ct.] Jan. 18, 2012, Kp 5/09 (Pol.), available at <http://www.trybunal.gov.pl/OTK/otk.htm>.

76. Dziennik Ustaw [Journal of Laws] [Dz. U.] item 161 (Pol.).

77. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art. 137 (Pol.). "The President of the Republic shall grant Polish citizenship and shall give consent for renunciation of Polish

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President of Poland does not have exclusive power to grant Polish citizenship (note that Polish citizenship automatically grants EU citizenship), and Parliament may create additional statutory categories of persons who may acquire Polish citizenship by naturalization.

4. *Anti-Counterfeiting Trade Agreement*

Notwithstanding concerns about personal freedoms expressed by Poland's Inspector General for Personal Data Protection (GIODO),⁷⁸ Poland signed the Anti-Counterfeiting Trade Agreement (ACTA), a multilateral treaty supported and signed by the United States.⁷⁹ Poland has not yet ratified the agreement, and in July, the European Parliament voted 478 to 39 to reject the ACTA,⁸⁰ with the consequence that it cannot come into force within the national legal systems of EU Member States. The theoretical preclusion of the ACTA coming into effect in Poland raises, under Polish law, the broader issues of the principle of *pacta sunt servanda* and the supremacy of EU law.⁸¹

5. *Polish Freedom of Information Law*

The Polish Constitutional Tribunal struck down the amendment to Poland's Freedom of Information Law⁸² in the case of K 33/11.⁸³ The amendment would have exempted disclosure of any information limiting the "negotiating capacity" of the Polish State when entering into international agreements with the EU. The ruling has no impact on the continued enforceability of EU law.

6. *Limitations on Freedom of Assembly*

Despite criticism from non-governmental organizations⁸⁴ and legal experts,⁸⁵ Parliament adopted and the President signed into law a provision that, inter alia, prohibits fire-

citizenship." *Id.* "Polish citizenship shall be acquired by birth to parents being Polish citizens. Other methods of acquiring Polish citizenship shall be specified by statute." *Id.* art. 34(1). "A Polish citizen shall not lose Polish citizenship except by renunciation thereof." *Id.* art. 34(2).

78. See generally Generalny Inspektor Ochrony Danych Osobowych [GIODO] [Inspector General for Personal Data Protection], Wojciech Rafał Wiewiórowski, Jan. 23, 2012 (Pol.), available at http://www.giodo.gov.pl/1520128/id_art/4495/y/pl/.

79. U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, ANTI-COUNTERFEITING TRADE AGREEMENT [ACTA] (Oct. 1, 2011), available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf; see also Sean Flynn, *Law Professors Ask Senate to Take Up ACTA, Challenging ACTA Constitutionality (Again): The Context*, INFOJUSTICE (May 16, 2012, 9:00 AM), <http://infojustice.org/archives/23390> (questioning the constitutionality of ACTA).

80. *ACTA – Anti-counterfeiting Trade Agreement*, EUR. COMMISSION, <http://ec.europa.eu/trade/tackling-unfair-trade/acta> (last updated Sept. 20, 2012) (stating it wishes to first obtain the opinion of the European Court of Justice as to whether the treaty would be violative of the rights of individuals).

81. See Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

82. See Scott et. al, *supra* note 1, at 548.

83. Trybunał Konstytucyjny [Const. Ct.] Apr. 18, 2012, K 33/11, 2012 Dziennik Ustaw [Journal of Laws] [Dz. U.] 473 (Pol.).

84. Arthur Pietryka, *Kondycja Procesu Legislacyjnego a Gwarancje Ochrony Praw Człowieka – Perspektywa Pozarządowa* [The Condition of the Legislative Process and Guarantees of Protection of Human Rights – The Perspective of a Non-Governmental], HELSINKI HUM. RTS. FOUND., <http://www.hfhrpol.waw.pl/legislacja/images/stories/file/skan%20zgromadzenia%20popr.pdf> (last visited Jan. 7, 2013).

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works and “other hazardous materials” at public gatherings and allows governmental prohibition of two or more people assembling at the same time and place if there is a risk of such assembly causing harm to public safety or health.⁸⁶ The provision provides for the imposition of fines on any group leader who fails to foresee or forestall a risk of assembly. Commentators claim the law violates the European Convention on Human Rights and the standards established in 2007 by the European Court of Human Rights.⁸⁷

I. SPAIN

1. *Budgetary Stability*

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed March 2, 2012 among all EU Member States except for the United Kingdom and Czech Republic, established limits to structural deficits and debt.⁸⁸ Member States were required to implement certain rules before June 30, 2012. Organic Law 2/2012, regarding budgetary stability and financial sustainability in compliance with European rules, was effective in Spain on May 1, 2012.⁸⁹ Although limits to structural deficit and public debt will not be compulsory until January 1, 2020, a schedule for reduction of deficit and debt was implemented in accordance with the European requirements.

2. *Labor Reform*

Royal Decree-Law 3/2012⁹⁰ and Law 3/2012⁹¹ involve urgent measures for comprehensive labor market reform to promote investments in Spain by making labor law more flexible. The reform facilitates dismissals by decreasing the compensation for termination of contract and reducing requirements for mass dismissals. Both the geographical mobility of employees and the procedure to modify working conditions are simplified.

3. *Spanish Financial Restructuring*

The Spanish government approved Royal Decree-Law 24/2012 on August 31, 2012.⁹² The law is a complex rule designed to implement structural reform of the Spanish finan-

85. David Goldberger et. al, *Nota o Projekcie Ustawy o Zmianie Ustawy – Prawo o Zgromadzeniach w Polsce* [Note About the Project Act, The Act – Law on Assemblies in Poland], ORG. FOR SEC. & CO-OPERATION EUR. (May 21, 2012, 9:30 AM), <http://www.osce.org/pl/odihr/90856.pdf>.

86. Ustawa z dnia 14 września 2012 r. o zmianie ustawy — Prawo o zgromadzeniach [Law of 14 Sept. 2012 on Amending the Freedom of Assembly Act] (Dz.U. No. 0, item 1115) (Pol.); Ustawa z dnia 5 lipca 1990 Prawo o zgromadzeniach [Law on Assemblies] (Dz.U. No. 51, item 297) (Pol.).

87. See *Bączkowski v. Poland*, No. 1543/06, 48 Eur. H.R. Rep. 19 (2007).

88. *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, EUROPEAN COUNCIL (Mar. 2, 2012), <http://european-council.europa.eu/eurozone-governance/treaty-on-stability>.

89. *Estabilidad Presupuestaria y Sostenibilidad Financiera* [Budgetary Sustainability and Financial Stability] (B.O.E. 2012, 103) (Spain).

90. *Medidas Urgentes para la Reforma del Mercado Laboral* [Urgent Measures to Reform the Labor Market] (B.O.E. 2012, 36) (Spain).

91. *Medidas Urgentes para la Reforma del Mercado Laboral* [Urgent Measures to Reform the Labor Market] (B.O.E. 2012, 162) (Spain).

92. *Reestructuración y Resolución de Entidades de Crédito* [Restructuring and Resolution of Credit Institutions] (B.O.E. 2012, 210) (Spain).

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cial system. This rule follows the guidelines set forth by the European Union by incorporating the Memorandum of Understanding on Financial Sector entered into by the Kingdom of Spain, which will enable the European bailout of the Spanish banks for an amount of €100 billion.⁹³

The Royal Decree-Law 24/2012 establishes three alternative measures to protect Spanish financial stability and to managing credit institutions, depending on their solvency, including: (1) early action measures, (2) restructuring, and (3) orderly resolution.⁹⁴ Functions of the Fund for Orderly Banking Restructuring (FROB) were redesigned, establishing the legal framework for the creation of an Assets Management Company, which will acquire assets of those credit institutions determined by the FROB.

J. SWITZERLAND

1. *Banking Regulations*

In the wake of the too-big-to-fail debate, the Swiss government enacted an amendment to the Banking Act intended to alleviate risks emanating from the system-relevant banks for the stability of the Swiss financial system.⁹⁵ System-relevant banks now need equity capital, which, measured against statutory requirements, will cushion higher losses. Additionally, the Banking Act now expressly contemplates the obligation to diversify risk. System-relevant banks are now further obligated to spread their risks, such that counterparty risks and risk concentrations are limited.⁹⁶

Another change in the Banking Act affects the sphere of remuneration, which is not limited to a certain management level in the Act. If a bank requires government aid from federal resources, the Federal Council will impose measures in the field of remuneration.⁹⁷

2. *Amendment to the Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (FINMA Stock Exchange Ordinance, SESTO-FINMA)*

On January 1, 2012, the Swiss Financial Market Supervisory Authority amended the FINMA Stock Exchange Ordinance with respect to stock exchange reporting requirements. Under this new regime, if a threshold is reached, there will be no need for a renewed report if the threshold is exceeded or reached again, unless the next higher threshold is reached or exceeded in the meantime.⁹⁸ For foreign collective capital invest-

93. MEMORANDUM OF UNDERSTANDING ON FINANCIAL-SECTOR POLICY CONDITIONALITY, EUR. COUNCIL ¶ 32 (July 20, 2012), available at http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-07-20-spain-mou_en.pdf.

94. *Id.* art. 2.

95. BUNDESGESETZ ÜBER DIE BANKEN UND SPARKASSEN [FEDERAL LAW ON BANKS AND SAVINGS BANKS] Sept. 30, 2011, SR 952.0, art. 7 et seq. (Switz.).

96. *Id.* art. 9(c).

97. *Id.* art. 10.

98. VERORDNUNG DER EIDGENÖSSISCHEN FINANZMARKTAUFSICHT ÜBER DIE BÖRSEN UND DEN EFFEKTENHANDEL [ORDINANCE OF THE SWISS FINANCIAL MARKET SUPERVISORY AUTHORITY ON STOCK EXCHANGES AND SECURITIES TRADING] Nov. 23, 2011, SR 954.193, art. 9, para. 4 (Switz.).

ments that have not been approved for distribution, the fund management or company will not be able to satisfy its reporting requirements unless it is dependent on a group of affiliated companies.⁹⁹

3. *Revision of the Federal Act Against Unfair Competition*

The amendments to the Unfair Competition Act primarily reinforce the substantive protection against unfair competition through the adoption of new provisions. Under the new provisions, individuals engage in unfair competition if they use bid forms, corrected bids, or similar documents to advertise entries in directories or advertisement orders, or if they immediately offer such entries without indicating their payment basis, periods of time, and prices. Distributions must be in large font and comprehensible language (letter “p”), and unfair competition will include invoices for entries into directories or for advertisement orders without previously receiving a corresponding order (letter “q”).¹⁰⁰ The amendment supplements the Unfair Competition Act by a specific offense, which classifies so-called snowball systems, Ponzi schemes, or pyramid systems as unfair competition.¹⁰¹ Additionally, letter “s” establishes information requirements in electronic business transactions and establishes letter “t,” the so-called loss leaders.¹⁰² Article 8 of the Unfair Competition Act concerning abusive general terms and conditions (GTC) is now in effect. According to the Federal Council, this provision serves to provide a sharper configuration of the existing GTC provision and better protection against abusive terms.¹⁰³

K. TURKEY

Turkish constitutional law faced two important issues in 2012: uncertainty regarding length of the term of the incumbent president of the Republic, Abdullah Gül, and the work of the Constitution Reconciliation Commission (CRC) in drafting a new constitution.

After the 2007 constitutional crisis over the presidency, the Turkish Grand National Assembly called new elections. The Turkish Parliament amended the Turkish Constitution¹⁰⁴ to change the presidential term of office from one seven-year term to a re-electable five-year term, and to change the election procedure.¹⁰⁵ But because the current president had been elected before the change, a question remained as to the term of President Gül. In response, the government proposed a “Bill on Election of the President of the

99. *Id.* art. 17, para. 3.

100. BUNDESGESETZ GEGEN DEN UNLAUTEREN WETTBEWERB [FEDERAL LAW AGAINST UNFAIR COMPETITION] June 17, 2011, SR 241, art. 3, para. 1(q) (Switz.).

101. *Id.* art. 3, para. 1(t).

102. *Id.* art. 3, para. 1(s)-(t).

103. ZUR ÄNDERUNG DES BUNDESGESETZES GEGEN DEN UNLAUTEREN WETTBEWERB [AMENDING THE FEDERAL LAW AGAINST UNFAIR COMPETITION] Sep. 2, 2009, BBL 6151, 6152 (Switz.) (comment by government as forward to draft legislation amendment).

104. TÜRKİYE CUMHURİYETİ ANAYASASI [TURKISH CONSTITUTION], art. 175 (Turk.) (describing the process for constitutional amendment).

105. Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun [LAW 5678 ON AMENDMENTS MADE TO SOME ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF TURKEY], 2007, promulgated in Official Gazette No. 26554, 16 June 2007.

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Republic.”¹⁰⁶ With this Act, the Parliament clarified that President Gül may be elected to a further five-year term, but the Republican People’s Party challenged this measure before the Constitutional Court. On June 15, 2012, the Constitutional Court rendered its judgment, which annulled the provision for further election, but found the provision for the President’s completion of his initial seven-year term constitutional.¹⁰⁷ Accordingly, the next presidential election is contemplated for 2014.

Efforts to write a new constitution are still pending. A schedule is set in CRC’s working principles and, according to those principles, the commission is to complete its work by the end of 2012.¹⁰⁸ Fundamental disagreements have arisen between the prime minister and the president as to whether the future structure of the government should include a powerful presidency.¹⁰⁹

L. UKRAINE

Ukraine’s law on the electric power sector contemplates “green” tariffs for electricity produced from renewable energy sources.¹¹⁰ Pending amendments were approved on November 20, 2012 after a second reading by Ukraine’s parliament, which, if signed by the President, will be effective January 1, 2013.¹¹¹ These amendments will alter the preferred tariffs, envisaging a 2:3 coefficient for electricity produced from biogas.¹¹² The amendments will also decrease coefficients for solar energy,¹¹³ but differentiate among small hydro power stations, increasing the corresponding coefficients.¹¹⁴ The amendments will introduce a “green” tariff, not subject to license, for individuals who produce electricity from solar panels affixed to the roofs of homes¹¹⁵ and will also recast the definition of the “local content” requirement and introduce fixed shares of the local component’s elements instead of the share of raw stock, materials, main assets, works, and services of Ukrainian origin in the cost of construction of the respective facility.¹¹⁶

106. CUMHURBASKANI SEÇİMİ KANUNU [Law 6271, PRESIDENT ELECTION LAW], 16 January 2012, promulgated in Official Gazette No. 28185, 26 January 2012.

107. T.C. ANYASA MAHKEMESİ [Turkish Constitutional Court of the Republic of Turkey], File 2012/30, June 15, 2012, available at <http://www.anayasa.gov.tr/index.php?l=gundem&id=378> (last visited Jan. 8, 2012).

108. *End of 2012 Deadline for New Constitution*, HURRIYET DAILY NEWS (Oct. 31, 2011), <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=end-of-2012-deadline-for-new-constitution-2011-10-31>.

109. Tulin Daloglu, *Erdogan’s Bigger Game: Change the Constitution*, AL-MONITOR (Nov. 5, 2012), <http://www.al-monitor.com/pulse/originals/2012/al-monitor/turkeyerdoganconstitution.html>.

110. Закон України Про Електроенергетику [LAW ON ELECTRICAL POWER INDUSTRY] 16 жовтня 1997, Офіційний Вісник України [OFFICIAL JOURNAL OF UKRAINE], 1998, No. 575/97-BP.

111. *Amendments to the Law of Ukraine “On Electric Power Industry” on Promotion of Electricity Generation from Biogas Adopted At the First Reading*, ARZINGER NEWSLETTER (July 15, 2012), http://www.liaa.lv/files/liaa/attachments/en_71_arzinger_07_2012.pdf.

112. *Id.* at 13.

113. *Id.* (providing “that surface power facilities—3.5 (4.8 as currently applied); Power facilities fixed on roofs, rated capacity ≥100 KW — 3.6 (4.6 currently applied); Power facilities fixed on roofs, rated capacity ≥100 KW, objects fixed on facades — 3.7 (4.4 currently applied)”).

114. *Id.* (providing as currently applied: micro (<200 kW) — 2.0; mini (>200 kW, <1MW) — 1.6; small (>1MW) — 1.2).

115. *Id.* (rated capacity <16 kW).

116. *Id.* at 14.