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INTERNATIONAL LEGAL DEVELOPMENTS IN REVIEW: 2009

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Mark E. Wojcik

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Europe

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I. Sixty Years of the Council of Europe: A Common Achievement in Democracy and Human Rights

The Council of Europe is the oldest international organization founded for political cooperation in Europe.¹ It was established after the horrors of World War II, with the signature, on May 5, 1949, of the Statute of the Council of Europe.² In Article 3 of the Statute, the signatories manifested their determination that “[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate

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1. Council of Europe in Brief, <http://www.coe.int/aboutCoe/default.asp> (last visited Mar. 30, 2010).

2. Statute of the Council of Europe, Nov. 5, 1949, E.T.S. No. 001; 87 U.N.T.S. 104.

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sincerely and effectively in the realization of the aim of the Council. . . .”³ The Organization was established on impulse by Sir Winston Churchill, and followed by other European leaders to guarantee peace and stability throughout Europe in a more effective manner than after World War I with the League of Nations.

At this time another group of states, led by France and West Germany and symbolized by the “Schuman Declaration,”⁴ proposed the establishment of an international organization for the common management of the steel and coal industries to better control the arms industry in Europe and to foster cooperation among Europeans. This idea materialized with the European Community of Steel and Coal, founded in Paris in 1951,⁵ and further developed through the Treaty of the European Economic Community and the Treaty of the European Atomic Energy Community, signed in Rome in 1957.⁶ These three international organizations were the forerunners of what we know today as the European Union.

During the last sixty years, the Council of Europe has been functioning separately, but closely coordinated with the other European organizations. While it witnessed the economic and political integration of the European Union, the Council of Europe has contributed to the consolidation of genuinely democratic regimes throughout the continent, the strengthening of the rule of law, and the protection and promotion of human rights. The European Court of Human Rights (ECHR) has largely contributed to this success.

The ECHR was the first international tribunal where individual complaints could be submitted. It was set up in 1959, after the 1950 European Convention of Human Rights and Fundamental Freedoms entered into force.⁷ At present, the ECHR exercises jurisdiction over approximately 800 million people belonging to the forty-seven Council of Europe member states.

ECHR judgments are final and binding upon the defendant state.⁸ The Committee of Ministers is in charge of executing the Court’s final judgments, although the powers of the Committee of Ministers are somewhat limited to sanctioning the state by suspending certain voting rights within the Council of Europe. In extreme cases, the Committee of Ministers can coordinate decentralized sanctions among the Council of Europe member states.

In 2009, the ECHR celebrated its fiftieth anniversary, and in 2010, will celebrate the sixtieth anniversary of the signing of the European Convention will take place. During these fifty and sixty years, respectively, the system set up by the European Convention has experienced many changes related to the expansion of the mechanism to protect rights, as well as to its own competence due to the increase in state parties.

3. *Id.* art. 3.

4. EUROPA—The Symbols of the EU, Declaration of 9 May 1950, *available at* http://europa.eu/abc/symbols/9-may/decl_en.htm.

5. Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140.

6. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

7. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005, 213 U.N.T.S. 221, *opened for signature* Nov. 4, 1950, *entered into force* Sept. 3, 1953 [hereinafter ECHR].

8. *Id.* art. 46.1.

II. Austria

On August 1, 2009, the Austrian Stock Corporation Amendment Act (the Amendment Act),⁹ which implements Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (the EC Directive), entered into force.¹⁰ Austria not only included new provisions concerning listed companies, but also changed some regulations on companies that are not listed. The most significant change was the amendment of the rules for the general meeting under the Austrian Stock Corporation Act (the Corporation Act) (§§102–136 of the Corporation Act).¹¹ Furthermore, the few rules on listed companies that previously existed in the Corporation Act were supplemented by provisions whereby a company is listed if the company's shares are permitted to trade on a recognized stock exchange per §2(32) of the Austrian Banking Act.¹² So not only companies that are listed in European Economic Area (EEA) member states are covered but also companies whose shares are traded in third countries. Prior to this amendment only companies listed on a stock exchange in an Organisation for Economic Co-operation and Development (OECD) full-member state were covered.

Prior to implementation of this EC directive, Austrian corporate law provided that, as a precondition for participating in the general meeting, shares must be deposited and could not be traded.¹³ Article 7(2) of the EC Directive requested that member states introduce a "record date" system for bearer shares so that a shareholder's right to participate in a general meeting and vote is determined by the shares held by that shareholder on a specified date prior to the general meeting (the record date). This record date system was introduced in §111(1) of the Corporation Act, providing that proof of qualification as a shareholder must refer to the tenth day prior to the general meeting (the record date).¹⁴ Newly inserted §10a of the Corporation Act stipulates that for a shareholder to prove its right to participate in the general meeting, a confirmation of the custodian bank is required. The custodian bank must have its registered office in an EEA member state or in a full member state of the OECD. This new provision extends the number of banks from which a company has to accept such confirmation. Before the amendment, listed companies would accept confirmations only from domestic custodian banks, which was contrary to EC non-discrimination rules. To ensure the authenticity of a deposit confirmation, §10a(3) of the Amendment Act provides that a listed company must accept deposit confirmations sent through an internationally secured communication network between banks whose participants can be clearly identified.¹⁵ Deposit confirmations can be sent by using the SWIFT-network; there is a transitional period until December 31, 2011, however, whereby companies may not accept deposit confirmations via such a network if they use a different electronic communication channel.

9. Österreichische Aktiengesetz [AktRAG] [Austrian Stock Corporation Amendment Act] Bundesgesetzblatt Teil I, BGBl I No. 71/2009 (Austria) [hereinafter ASCAA].

10. Shareholders' Rights (Directive 2007/36/Ec) Regulations 2009. Adopted June 11, 2007.

11. ASCAA §§ 102-36.

12. Bankwesengesetz [BWG] [Austrian Banking Act] *Bundesgesetzblatt Teil I [BGBl] No. 108/2007, § 2(32) (Austria)*.

13. Shareholders' Rights (Directive 2007/36/Ec), art. 7(2).

14. ASCAA §111(1).

15. *Id.* § 10a(3).

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Pursuant to § 10a(2) of the Amendment Act, a deposit confirmation cannot be older than seven days at the time of submission. A shareholder must request a deposit confirmation certifying its shareholder capacity ten days before the general meeting; the bank must then submit the deposit confirmation three days prior to the general meeting.¹⁶

Following the EC Directive, the Corporation Act's provisions on the general meeting (§§102–136) have changed significantly.¹⁷ Section 102(2) stipulates that the general meeting must occur in Austria, so that shareholders can participate in person to exercise their voting rights before the chairman and notary.¹⁸ Austrian law forbids a solely virtual general meeting. To avoid unnecessary travel costs, new electronic forms of participating and voting in the general meeting have been passed. Additionally, participating and voting via mail is also possible. If the company and shareholders make use of these new possibilities, conceivably only the supervisory board chairman and the notary public may be present at a general meeting. Pursuant to §102(3) of the Amendment Act, articles of association must provide for participating in the general meeting by electronic means. This provision is flexible and permits companies to determine specifics; §102(3), nos. 1–3 of the Amendment Act enumerates acceptable forms of electronic participation.¹⁹

Minor changes have also been made to the rights of minority shareholders to convoke general meetings or add agenda items.²⁰ Minority shareholders holding five percent interest in share capital are given the right to convoke a general meeting if the board refuses to include demanded items on the agenda.²¹ Contrary to the former legal situation, the company must now bear the costs of the general meeting. Section 110 of the Amendment Act is a new provision, applicable only to listed companies. Shareholders with at least a one percent interest in share capital have the right to submit draft resolutions to the company on every agenda item and may demand that those proposals be published on the company's website. The Amendment Act (§§105–110) introduced the right to waive formalities of the convocation and preparation of the general meeting if all shareholders who participate in the general meeting personally, by proxy, or by electronic means agree unanimously to such waiver.²² Before the amendment, this was an accepted principle, but was not explicitly provided for in the Corporation Act.

III. Belgium

Recent developments in Belgian corporate law are strongly colored by the current financial climate. During the last two years, bankruptcy rates have been climbing steadily. Unfortunately, the previous judicial proceedings, which were expensive and rigid, did not provide much comfort to companies in financial difficulties. Therefore, on April 1, 2009, a new act providing for bankruptcy prevention measures (the Act) came into force, offering more options for companies in distress.²³ Pursuant to the Act, the new prevention

16. *Id.* § 10(a)(2).

17. *Id.* §§ 102–36.

18. *Id.* § 102(2)

19. *Id.* § 102(3).

20. *Id.* § 110.

21. *Id.*

22. *Id.* §§ 105–10.

23. Wet Betreffende de Continuïteit Van der Ondernemingen [Continuity of Enterprises Act], Belgisch Staatsblad [Belgium Official Journal] Jan. 31, 2009 (Belg.).

measures can be taken with or without the court's involvement. The Act distinguishes three types of judicial reorganization: (1) amicable settlement with at least two creditors, (2) collective agreement with all creditors, and (3) transfer under judicial supervision.²⁴

Chambers of Commercial Enquiry (led by a commercial judge) monitor the financial situation of enterprises based on information regarding unpaid invoices, social security contributions, and taxes. This information is centralized at the clerk's office of the Commercial Court.²⁵ The Chambers' role is to provide a "wake up call" rather than to advise on actual recovery measures.

Once the company is aware of its financial problems, it can request the appointment of a mediator.²⁶ The mediator's task is to increase the company's credibility and facilitate negotiations with its creditors on an amicable settlement. If such settlement is reached between the company and at least two of its creditors (with or without the involvement of a mediator), these agreements will be considered bankruptcy-proof if filed with the clerk's office of the Commercial Court and explicitly mention their purpose of redressing the financial position of the company.²⁷

In the event of manifest and gross shortcomings by a company's directors that jeopardize the vitality of a company, any stakeholder can request the appointment of a "Court Mandatee," who is authorized to initiate judicial reorganization procedures on behalf of stakeholders.²⁸

If no solution is found through the abovementioned procedures, the company in distress can initiate a judicial reorganization procedure, provided it can prove that its continuity suffers an immediate or future risk.²⁹

The opening of bankruptcy proceedings by the Court triggers a six month suspension period. During this period, the company cannot be declared bankrupt, and no enforcement measures can be taken. In exceptional circumstances, this suspension period may be extended.³⁰

As a result of the current financial crisis, the Belgian Corporate Governance Committee has published a new Corporate Governance Code for Listed Companies in March 2009 (Code 2009), which addresses executive remunerations, including bonuses and golden parachutes.³¹ Code 2009 concerns three primary changes: (1) transparency in the distribution of responsibilities, appointment and evaluation of directors and executive management; (2) the role of the (mandatory) audit committee; and (3) the publication of a remuneration report as part of the company's policy statement introducing severance payments, which, in principle, may not exceed twelve months basic and variable remuneration.³²

24. Tom Vantroyen, *New Belgium Legislation – Continuity of Enterprises Act*, ALTIUS, June 24, 2009, <http://www.altius.com/en/knowledge-base/recent-publications/2009/06/24/new-belgian-legislation-continuity-of-enterprises-act/>.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Corporate Governance Committee, *Guidelines (2009)*, available at <http://www.corporategovernancecommittee.be/en/committee/guidelines/default.aspx>.

32. *Id.*

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In June 2009, a new Corporate Governance Code for Non Listed Companies (Code *Buyse II*) was published.³³ Code *Buyse II* updates and extends the scope of the previous Code *Buyse*, notably regarding the importance of corporate social responsibility.³⁴ Code *Buyse II* also introduces an advisory committee and risk management.³⁵

IV. Malta

In 2009, Malta continued attempts to resolve questions of irregular migration, and sought the development of a European Asylum Support Office. A migrant rescue prompted a dispute between Italy and Malta over the interpretation of the International Convention for the Safety of Life and Sea (SOLAS)³⁶ regarding which country was responsible for migrants rescued in the Maltese Search and Rescue (SAR) area.³⁷ On April 17, 2009, a Turkish cargo ship responded to a distress signal concerning 140 African migrants located forty-one nautical miles south of Lampedusa, Italy, and 114 nautical miles southwest of Malta. The Turkish ship did not have resources to handle the migrants and waited on scene for assistance. The Italians stated that the rescue took place within the Maltese SAR area, and therefore the migrants should be taken to Valletta. The Maltese asserted that the closest safe port was Lampedusa, Italy. Thus, the question presented was whether a rescue at sea, governed by the SOLAS and SAR conventions, allowed for delivery of those rescued to the “nearest safe port” or to the homeport of the nation affecting the rescue.

The incident, and the still-unresolved question, will affect the interpretation of an E.U. burden-sharing plan to relocate irregular migrants from the country of first refuge to other E.U. countries, and the pending E.U. proposal for the establishment of a European Asylum Support Office in Malta. A burden-sharing plan would benefit Malta, Italy, and Spain—the primary E.U. countries of first refuge for migrants.³⁸ The European Commission adopted a measure on February 18, 2009, to pursue development of a support office with authority over migrant issues facing the Union.³⁹ While these discussions continue, the E.U. is presented with a migration problem generating tension among the member states, an atmosphere of xenophobia, the involvement of the United Nations High Commissioner for Refugees (UNHCR), and considerable press and non-governmental organization interest. In addition, with migrant detention centers at or near their capacity in both Italy and Malta, the UNHCR continues to press both countries to im-

33. Corporate Governance Committee, *Code Buysee II: Corporate Governance for Non-listed Companies* (2009), available at <http://www.codebuyse.be/downloads/Code%20Buyse%20II%20-%20English%20version.pdf>.

34. *Id.*

35. *Id.*

36. International Convention for the Safety of Life and Sea, May 25, 1980, 32 U.S.T. 47; 1184 U.N.T.S. 278 [hereinafter SOLAS].

37. The Maltese SAR area of responsibility is based upon its Flight Information Region. See International Maritime Organization, International Convention on Maritime Search and Rescue, April 27, 1979, 1403 U.N.T.S.; see also Derek Lutterbeck, *Small Frontier Island: Malta and the Challenge of Irregular Immigration*, 1:119 MEDITERRANEAN Q. 20 (2009).

38. See *EU Mulls Immigration Burden-Sharing*, EURACTIV, Nov. 7, 2009, <http://www.euractiv.com/en/mobility/eu-mulls-immigration-burden-sharing/article-184983#>; see also UNHCR, *EU Asylum Programme Must Focus on Burden-Sharing*, says Lubbers, Nov. 5, 2004, <http://www.unhcr.org/418bd4534.html>.

39. EURACTIV, *supra* note 38.

prove living conditions for migrants, some of whom have unresolved claims for asylum.⁴⁰ The European Union has no single standard for asylum,⁴¹ and there are conflicting definitions for the terms “refugee” and “asylum-seeker.”

V. Netherlands

A. NETHERLANDS: AMSTERDAM COURT OF APPEAL APPROVES GROUNDBREAKING GLOBAL SETTLEMENTS UNDER THE DUTCH ACT ON THE COLLECTIVE SETTLEMENT OF MASS CLAIMS

In 2005, the Dutch Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade* or *WCAM*) came into force.⁴² It is the first, and so far the only, mechanism in Europe to settle class-wide claims on an opt-out basis. Under *WCAM*, one or more potentially liable persons may enter into a settlement agreement with one or more foundations (stitching) or associations promoting the interests of a class of claimants.⁴³ *WCAM* does not provide a means of filing a class action, but provides a way to settle mass claims if the interested parties agree.

WCAM requires “representativity,” which means that the foundation or association settling with the defendants must properly represent the persons for whose benefit the settlement agreement was negotiated.⁴⁴ The statute is silent on whether the foundation may include non-Dutch claimants and still properly represent their interests. In 2009, the Amsterdam Court of Appeal, the court with original jurisdiction to approve and declare binding any proposed *WCAM* settlement, answered this question in the affirmative—making it possible to use Dutch courts to settle global class actions, regardless of where initiated, even if non-Dutch claimants are included in, or even dominate, the class.

On May 29, 2009, the Court of Appeal approved a settlement agreement among a number of shareholder foundations and “Shell,” a term the court used to signify Shell Petroleum N.V. and The Shell Transport and Trading Co. Ltd., related to material misrepresentations to shareholders regarding Shell’s proven oil and gas reserves.⁴⁵ For the first time, investors domiciled outside the Netherlands were included in the class of claimants. Less than two months later, on July 15, 2009, the Court of Appeal approved a

40. See UNHCR, 2010 Regional Operations Profile—Northern, Western, and Southern Europe: Working Environment, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48e996> (last visited Jan. 31, 2010).

41. See UNHCR, Reception standards for asylum seekers in the European Union, July 2000, <http://www.unhcr.org/refworld/docid/3ae6b3440.html> (last visited Jan. 31, 2010); see also Press Release, Europa, Questions and Answers on the Commission Proposal to amend the Reception Conditions Directive (Dec. 3, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/760&format=HTML&aged=0&language=EN&guiLanguage=en>; Press Release, Europa, Putting the Asylum Seekers at the Heart of a Human and Fair Procedure: the EU Commission Proposes to Modify the Common European Asylum System (Dec. 3, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1875&format=HTML&aged=0&language=EN&guiLanguage=en>.

42. *Wet collectieve afwikkeling massaschade [WCAM] [Collective Settlement of Mass Claims]* *Stattsblad van het Koninkrijk der Nederlanden [Dutch Civil Code]* 7:907 (2005) (Neth.); *Wetboek van Burgerlijke Rechtsvordering [Code of Civil Procedure]* art. 1013 (2009) (Neth.).

43. *Collective Settlement of Mass Claims*, art. 7:907, ¶ 1.

44. *Id.* ¶ 3.

45. In the case of *Royal Dutch Shell, Gerechtshof [Hof] [Court of Appeal]* Amsterdam, 29 mei 2009, no. 106.010.887.

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second global settlement between Vedior N.V. and the Dutch shareholders' association VEB, which purported to represent shareholders injured by insider trading on the day prior to the announcement of the merger with Randstad Holding N.V.⁴⁶

In both *Sbell* and *Randstad Holding*, the Court of Appeal grounded jurisdiction on Articles 2 and 6 of Brussels I.⁴⁷ Under Article 2, the Dutch courts have jurisdiction over any claim if the "person to be sued" is domiciled in the Netherlands, and, under Article 6, the courts have jurisdiction over claims against additional non-Dutch persons if the claims are so closely related that justice dictates the claims be brought together.⁴⁸

The recent *Sbell* and *Randstad Holding* opinions demonstrate that WCAM has truly global potential to settle class claims, at least against Dutch defendants.

B. NETHERLANDS: WHEN IS IT TOO LATE TO PROFFER NEW FACTUAL OR LEGAL ARGUMENTS IN AN ARBITRAL PROCEEDING?

When is it too late to proffer new factual or legal arguments in an arbitral proceeding? Two Netherlands Supreme Court cases, both issued on March 27, 2009, address these questions.

In *Smit v. Ruwa*, HR 27 March 2009, *LJN* BG 6443, the Netherlands Supreme Court (*Hogeraad*) [Court] decided whether and to what extent it is permissible for a party in arbitral proceedings or in set-aside proceedings to raise new factual or legal arguments in support of a claim that there is no valid arbitration agreement.⁴⁹

The Dutch Code of Civil Procedure (DCCP), Article 1052(2), states that an arbitral tribunal's jurisdiction may be challenged when no valid arbitration agreement exists, but the challenge must be made prior to the start of the proceedings; otherwise, the opportunity to make this challenge has passed.⁵⁰ Article 1065(1) DCCP indicates when an arbitral award may be set aside, listing lack of a valid arbitration agreement as one such reason.⁵¹

The Court stated these statutes are intended to ensure that the arbitral tribunal can decide its jurisdiction at an early stage in the proceedings. This allowance prevents the arbitral tribunal from taking unnecessary procedural steps if it is later determined that no valid arbitration agreement exists and the arbitral tribunal lacks jurisdiction. The Court ruled that whether a new factual or legal argument conflicts with the intent of this statutory rule must be decided in each specific case, partly in view of due process requirements.⁵² Three factors that may be relevant in this context are: (1) the degree to which new arguments follow from previously raised arguments, (2) the reason why the arguments were not previously raised, and (3) whether or not a lawyer represented the party concerned in the arbitral proceedings.⁵³

Building on *Smit*, the Court in *HPB v. Bursban*, HR 27 March 2009, *LJN* BG 4003, reasoned that in every specific case a court must address whether a new factual or legal

46. In the case of Randstad Holding N.V., Gerechtshof [Hof] [Court of Appeal] Amsterdam, 15 juli 2009.

47. Council Regulation (EC) No. 44/2001, 2001 J.O. (012) 1 [hereinafter Brussels I].

48. *Id.* art. 2.

49. *Smit v. Ruwa*, Hoge Raad der Nederlanden [HR] 27 maart 2009, NJ 6443 (Neth.).

50. Wetboek van Burgerlijke Rechtsvordering [Code of Civil Procedure] art. 1052(2).

51. *Id.* art. 1065(1).

52. *Smit*, NJ 6443.

53. *Id.*

argument raised in set-aside proceedings—either in the original summons to set aside or subsequently in support of the ground that there was no valid arbitration agreement—conflicts with the intent of the statutory rule as set out in *Smit* that the arbitral tribunal can decide jurisdictional questions early on in the proceedings and its decision may be relied upon.⁵⁴ The HPB Court listed the same three factors as the *Smit* Court used when making this determination.⁵⁵

VI. Poland

The Polish Constitutional Tribunal (Tribunal), for the first time, in Decision Kpt 2/08, exercised its constitutional⁵⁶ and statutory powers⁵⁷ to adjudicate⁵⁸ a jurisdictional dispute between the two autonomous constitutional organs that share the executive power.⁵⁹ The 1997 constitution established a *sui generis* combination of the chancellorial and presidential systems, which has produced certain ambiguities. The conflict addressed by the Tribunal was whether the President or the Council of Ministers (headed by the Prime Minister) is to represent Poland at E.U. Summit meetings.⁶⁰ The controversy arose in late 2008, when the President of Poland invoked his status as “the supreme representative”⁶¹ of the nation charged to safeguard the nation’s sovereignty and security,⁶² and traveled to attend the E.U. Summit—notwithstanding that a delegation consisting of the Prime Minister and two other Ministers,⁶³ occupying the seats allotted to Poland, were already there.⁶⁴

The Prime Minister, invoking the express constitutional authority of the Council of Ministers to conduct foreign policy, requested a ruling from the Constitutional Tribunal. The Prime Minister claimed that the President had, by acting unilaterally, encroached on the constitutional competencies of the Council.⁶⁵ In response, the President denied that any justiciable controversy had arisen in view of his own broad constitutional mandate to represent the nation.

54. HPB v. Burshan, Hoge Raad der Nederlanden [HR] 27 maart 2009, NJ 4003 (Neth.).

55. *Id.*

56. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [The Constitution of the Republic of Poland] [hereinafter Constitution] art. 189 (1997).

57. Ustawa o Trybunale Konstytucyjnym [Law on the Constitutional Court] [hereinafter Constitutional Tribunal Act], Dziennik Ustaw [Journal of Laws], No. 102, item 643 (1997) (Pol.).

58. Kpt 2/08, 78/5/A/2009, May 20, 2009.

59. Constitution of the Republic of Poland art. 10.

60. See Presidency Conclusions (EC) 13463/02, 2002, at 20, [Restricted to Heads of State or of Government], available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72638.pdf.

61. Constitution of the Republic of Poland art. 126(1).

62. *Id.* art. 126(2).

63. See Uchwała [Resolution of the Council of Ministers], 196, Monitor Polski [Polish Monitor], Oct. 10, 2008, No. 75, Item 674; The Chancellery of the Prime Minister, Prime Minister started his visit to Brussels (Oct. 15, 2008), http://www.kprm.gov.pl/en/press_centre/news/id:2360/. <http://www.kprm.gov.pl/english/s.php?id=2637>

64. Christina Hebel, *Two Leaders Head to EU Summit. Poland's Power Struggle Reaches Brussels*, DER SPIEGEL, Oct. 15, 2008, <http://www.spiegel.de/international/europe/0,1518,584259,00.html>; Philippa Runner, *Polish President Wins EU Summit Banflight*, EU OBSERVER, Oct. 16, 2008, <http://euobserver.com/9/26948>. <http://euobserver.com/9/26948>

65. Constitution of the Republic of Poland arts. 126(1); 133(3); 146(1), (2), and (4)(9) (when taken in conjunction with subsections 1, 4 and 5 of Art. 148(1)) (1997).

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The Constitutional Tribunal sat *en banc*, as is required for the adjudication of a conflict in executive competencies,⁶⁶ to decide this matter. Both Reporting Judges in the Kpt 2/08 case had previously addressed, albeit as a theoretical doctrinal matter, the key point of the very question now before it. Judge Mirosław Wyrzykowski had presciently written in 2006 that “Poland is represented *only* by the Prime Minister in the European Council of the European Union”⁶⁷ rather than the President, but expressly noted that “some authors, however, support the participation of the Polish President in some (but not all) of the summits of the European Council,” citing the writings of his colleague, Judge Marian Grzybowski.⁶⁸

The result reached by the Constitutional Tribunal was precisely along those lines. Noting that the positions taken by the Prime Minister and the President, respectively, diverged in their interpretations of the Constitution, the Court found a properly justiciable controversy. Holding that attendance at European Council meetings lies with the Prime Minister because the Constitution expressly allocates the conduct of internal and external policy matters to the Council of Ministers, the Court went on to state that because the Constitution itself predates Poland’s membership in the E.U., the applicable legal framework in constitutional terms is no longer unambiguously divisible into “internal” and “external” areas because E.U. law in many cases now constitutes binding national law.⁶⁹ Thus, the overarching principle articulated in both the Preamble and Article 133(3) of the Constitution (“the President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy”) mandates that the two executive branches function collaboratively.⁷⁰ Turning to the broad executive powers vested in the President and the specific duties allocated to that office, the Constitutional Tribunal held that there may indeed be specific meetings of the Council of the European Union where the topics under consideration are such that the President deems his involvement necessary in light of his constitutional duties. Thus, the Council of Ministers should keep the President apprised of the agenda for upcoming meetings. The President’s attendance at any given meeting should be the subject of mutual cooperation and may even be the subject of a joint decision by the two executive organs.

VII. Romania

Upon due public debate, the New Civil Code will enter into force on July 24, 2010.⁷¹ The draft incorporates the past decade’s efforts to replace the existing Code, of mainly French inspiration, with a new Civil Code that would implement both the legislative innovations included in foreign civil legislations (particularly the Québecois and the Swiss

66. Constitutional Tribunal Act art. 25 (1)(1).

67. Mirosław Wyrzykowski & Agnieszka Cielen, *Presidential Elements in Government Poland—Semi-Presidentialism or ‘Rationalised Parliamentarianism’?*, 2 EU CONST. L. REV. 253, 258 (2006).

68. *Id.* at 258 n. 11 (citing M. Grzybowski in *Role ustrojowe Prezydenta RP w kontekście członkostwa w Unii Europejskiej* [Constitutional role of the President in the Context of Polish Membership of the European Union], 7 PASTWO I PRAWO 14 (2004)).

69. See generally BOGUSŁAW BANASZAK, *IMPACT ON EUROPEAN INTEGRATION ON THE LAW AND CONSTITUTIONAL SYSTEM IN POLAND* (2009).

70. Constitution of the Republic of Poland pmbl., art.133(3).

71. Codul civil român [Romania Civil Code] No. 287/2009, Monitorul Oficial al României (M.Of.) - Partile I 511/24.07.2009 [Official Gazette of Romania Part I No. 511/24.07.2009] (Rom.).

Codes) and the interpretations given over time to various civil law institutions by local practitioners and scholars.

Among its novelties, and in contrast with the current code, the New Civil Code encompasses both civil and commercial law relationships.⁷² Several legal instruments and agreements relevant for the business environment have been incorporated in the new text including, *inter alia*, commission agreements, consignment agreements, agency agreements, supply agreements, and several agreements specific to the banking sector.⁷³

The New Civil Code expressly regulates hardship clauses, allowing courts either to rework the contract to the change in circumstances or to terminate it.⁷⁴

Other key provisions include the express regulation of mortgages over moveable assets and an entire new chapter on international private law relationships.⁷⁵

A draft Civil Procedure Code is also under discussion by the Romanian Parliament and subject to an institutional impact study. The new text will incorporate major changes including restructuring of the arbitration section.

VIII. Switzerland

On March 13, 2009, the Swiss government (Bundesrat) adopted the standards of Article 26 of the OECD Model Treaty in its tax treaties, withdrawing its reservation regarding this provision. In turn, Switzerland obligates itself to disclose tax-related information to the tax authorities of partner states upon specific request with supporting reasons, irrespective of the presence of a violation of tax law. The exchange of information, according to OECD standards, becomes effective following the entry into force of individual tax treaties.

In order to avoid gaps and contradictions, the Swiss government also resolved, on May 29, 2009, to expand the level of cooperation between the authorities of partner states in cases of tax evasion through judicial assistance, as was already the case with administrative assistance. Further development of judicial assistance through international treaties will be a prominent objective. Revision of the Federal Law on International Judicial Assistance in Criminal Matters (IRSG), however, is not currently envisioned.⁷⁶

On February 1, 2009, the partially-amended Anti-Money Laundering Act came into force.⁷⁷ The amendments implemented the revised recommendations of the Groupe d'Action Financière (Gafi) and brought Swiss law into conformity with international standards in the fight against money laundering and terrorism.

At the heart of the revision of anti-money laundering legislation are more rigorous reporting duties for financial intermediaries. These entities must now promptly report to the Reporting Office for Money Laundering any reasonable suspicions that assets they

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See generally Swiss Federal Department of Finance [FDF], <http://www.efd.admin.ch> (last visited Jan. 6, 2010).

77. Systematische Sammlung des Bundesrechts [SR] [Anti-money Laundering Act] Feb. 1, 2009, SR 955.0 (Switz.).

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handled finance terrorism.⁷⁸ Additionally, financial intermediaries must report any negotiations for the establishment of a business relationship terminated following reasonable suspicion that money laundering was involved.⁷⁹

Reports to the Reporting Office for Money Laundering may be anonymous in that only the name of the financial intermediary needs to appear, not that of the reporting employee. This feature is intended to provide better protection against possible reprisals. In addition, the conditions for immunity from criminal and civil liability have been relaxed in favor of financial intermediaries to boost the number of reports and overall effectiveness of the system. Duties concerning the identification of clients and the nature and object of business relationships have also been more explicitly defined.⁸⁰

IX. Turkey

The overriding theme in Turkish law remains preparation to enter the European Union. Although political issues have slowed things down, there is a steady trend to make Turkish law compatible (harmonized) with the EU *acquis communautaire*. A good example of this is Law 5898, which strengthens the protection of children from harmful substances.⁸¹

With regards to general governmental matters, Turkey has strengthened the requirements for companies to participate in government tenders, and the result should be more transparency in the public procurement process. Turkey enacted Law 5901,⁸² which allows non-citizens with Turkish parents to obtain Turkish citizenship more easily, and creates a method for non-citizen investors and significant monetary contributors to Turkey to obtain Turkish citizenship.⁸³ Turkey also enacted Law 5902,⁸⁴ which created a Directorate in the Prime Minister's office to coordinate responses to natural disasters and ensure continuity of vital services.

To encourage business, particularly during the current economic situation, Turkey has taken a number of measures. Under Law 5909,⁸⁵ the Finance Minister was given the power to transfer one billion Turkish Lira (roughly US\$700 million) to credit institutions

78. Raccolta Sistemica del Diritto Federale [RS] [*Federal Authorities of the Swiss Confederation*] Oct. 1, 2003, RS 311.0 art. 260(d) (Switz.).

79. See Anti-money Laundering Act, art. 9(1)(b).

80. *Id.* arts. 3-5. Additional information available at <http://www.efd.admin.ch> under the links "Topics," "Economic, Monetary and Financial Affairs."

81. UÇUCU MADDELERİN ZARARLARINDAN İNSAN SAĞLIĞININ KORUNMASINA DAİR KANUN [Protection of Human Health From Volatile Substances Law] No. 5898, May 7, 2009, Resmi Gazete [Official Gazette] 27230, May 16, 2009, available at http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic.

82. TÜRK VATANDASLIĞI KANUNU [Turkish Citizenship Law], May 29, 2009, Resmi Gazete [Official Gazette] 27256, June 12, 2009, available at http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic.

83. *Id.*

84. AFET VE ACIL DURUM YÖNETİMİ BAKANLIĞININ TESKİLAT VE GÖREVLERİ HAKKINDA KANUN [Disaster and Emergency Management Organization and Duties Law] May 29, 2009, Resmi Gazete [Official Gazette] 27261, June 17, 2009.

85. KAMU FİNANSMANI VE BORÇ YÖNETİMİNİN DÜZENLENMESİ HAKKINDA KANUNDA DEĞİŞİKLİK YAPILMASINA DAİR KANUN [Public Debt Financing Law Amendment] June 17, 2009, Resmi Gazete [Official Gazette] 27268, June 24, 2009.

to ensure the availability of credit. Under Law 5904,⁸⁶ small and medium-sized companies that merge will be exempt from corporate tax the year of the merger, with reduced taxes for the first three years after the merger. In addition, certain divestitures may be exempt from taxation for two years. Pursuant to Council of Ministers Decision 2009/15199,⁸⁷ investments may also be exempt from value-added tax and customs duties; the same decision also contains significant incentives for textile and clothing industries to move to a priority development region. Law 5915⁸⁸ helps consumers by providing greater protections for credit card users by clarifying their rights.

The Turkish government has also continued on its quest to significantly increase Turkish exports. Law 5910⁸⁹ creates an Exporters Council, which provides exporters with a stronger voice to address their concerns. Law 5911⁹⁰ streamlined the customs process and harmonized it with the EU customs scheme. In addition, Communiqué 2009/11⁹¹ clarified the eleven categories of goods that are exempt from export on public policy grounds, mainly tobacco, some nut products, and cultural objects. On the other hand, Turkish Customs will now employ a risk management approach, with electronic submission of customs declaration prior to arrival; the new Customs Regulation imposes additional fines on late and under-valued reporting.

X. EC Trade Defense Instruments: Precedent for Threat of Injury

The EC institutions in charge of Trade Defense Instruments (TDI), such as anti-dumping and countervailing measures, have consistently abstained from utilizing the legal standard of “threat of injury” to justify the imposition of measures until two determinations relating to Chinese pipe and tube imports: Commission Regulation (EC) No. 289/2009,⁹² which contains findings on threat of injury; and Council Regulation (EC) No. 926/2009,⁹³ which confirmed the earlier finding.

EC trade institutions have traditionally preferred the standard of (actual) material injury. This standard, in combination with proof of dumping or subsidization, has become the typical basis for imposition of anti-dumping and countervailing measures on imports for years.

86. GELİR VERGİSİ KANUNU VE BAZI KANUNLARDA DEĞİŞİKLİK YAPILMASI HAKKINDA KANUN [Income Tax Law Amendment] June 16, 2009, Resmi Gazete [Official Gazette] 27277, July 3, 2009.

87. Son Dönem Türkiye Büyük Millet Meclisi Kararları [Minister's Decision] 15199 of 2009, Resmi Gazete [Official Gazette] 27290, July 16, 2009.

88. BANKA KARTLARI VE KREDİ KARTLARI KANUNUNDA DEĞİŞİKLİK YAPILMASI HAKKINDA KANUN [Bank and Credit Card Act Law] June 29, 2009, Resmi Gazete [Official Gazette] 27281, July 7, 2009.

89. TÜRKİYE İHRACATÇILAR MECLİSİ İLE İHRACATÇI BİRLİKLERİNİN KURULUS VE GÖREVLERİ HAKKINDA KANUN [Turkish Exporters Assembly Law] June 18, 2009, Resmi Gazete [Official Gazette] 27277, July 3, 2009.

90. GÜMRÜK KANUNU İLE BAZI KANUN VE KANUN HÜKMÜNDE KARARNAMELERDE DEĞİŞİKLİK YAPILMASINA DAİR KANUN [Customs Law Amendment] June 19, 2009, Resmi Gazete [Official Gazette] 27281, July 7, 2009.

91. Communiqué 2009/11 Türk İthalat Rejimi [Turkish Import Regime] Resmi Gazete [Official Gazette] 27353, Sept. 18, 2009.

92. Commission Regulation 289/2009, 2009 O.J. (L 94) 48 (EC).

93. Council Regulation 926/2009, 2009 O.J. (L 262) 19 (EC).

Article 3(9) of the Basic Anti-dumping Regulation⁹⁴ and Articles 3.7 and 3.8 of the WTO's Anti-Dumping Agreement⁹⁵ establish a strict legal standard for finding a threat of injury. The WTO provision in Article 3.8 ADA states in part that "where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care."⁹⁶

According to these provisions, a finding of a threat of injury must be based on facts that show a clearly imminent change of circumstances resulting in actual material injury. Imports must demonstrate a significant rate of increase, and authorities cannot make conjectures or allegations.

The institutions' fact-finding is built on identifying future developments that can be expected as well as forecasts provided by the complaining industry.⁹⁷ Forecasts provided by the complaining party cannot automatically be taken as a factual basis for a finding of injury.

The findings of "significant rate of increase" of imports in the Chinese pipe and tube case were questionable. The investigated imports demonstrated an increase only in 2006-2007 and in early 2008 when the Community market was booming. Yet for a threat to be credible (clearly imminent), the trend of significant rate of increase of imports should have continued throughout the second half of 2008 and in 2009 – immediately before the imposition of measures. For the most recent period, however, the investigated imports decreased significantly in absolute terms, and increased by only 0.7 percentage points in market share,⁹⁸ a result of drastic contraction of the market. Since imports did not increase from July 2008 to March 2009, the finding that the threat of injury was still imminent is hardly tenable.

Thus, the trade-regulating institutions do not appear to have established sound precedent for "threat of injury." It remains to be seen if this precedent can be regarded as a textbook reference, or only as part of the Community's policy response to the economic and financial crisis.

XI. The European Union Directive on Alternative Investment Funds

The European Union's legislative response to the global financial crisis was designed to "extend appropriate regulation and oversight to all actors and activities that embed significant risks."⁹⁹ This response included a proposed directive (Directive) on alternative in-

94. Council Regulation 384/96, 1995 O.J. (L 56) 1, 12-3 (EC) *amended by* Council Regulation 2117/2005, 2005 O.J. (L 340) 17 (EC).

95. Agreement on Implementation of Article VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A(8), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1124 (1994).

96. *Id.* art. 3.8.

97. *See, e.g.*, Commission Regulation 289/2009, *supra* note 92, at 61-64; Council Regulation 926/2009, *supra* note 93, at 26.

98. Council Regulation 926/2009, *supra* note 93, at 25.

99. *See* Commission Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and Amending Directives 2004/39/EC and 2009/. . . /EC, at 2, COM (2009) 207 final (Apr. 30, 2009), http://ec.europa.eu/internal_market/investment/docs/alternative_investments/fund_managers_proposal_en.pdf

vestment funds (Funds).¹⁰⁰ The Directive's explanatory memorandum (Memo) identifies various forms of risk generated by Funds, although it acknowledges that Funds were not the cause of the crisis.

The Directive's guiding principle is that all Funds not regulated by the existing Undertakings for Collective Investment in Transferable Securities Directive are candidates for regulation, administered within a harmonized E.U. monitoring and supervisory framework.¹⁰¹ The Memo estimates that around €2 trillion of assets are currently managed by such Funds.¹⁰² The Directive's benefits will include enhanced risk prevention and the introduction of an E.U.-wide Funds marketing platform for professional investors, as such term is defined in the Markets in Financial Instruments Directive 2004.¹⁰³ Marketing to retail investors will remain regulated by the competent authority of the applicable E.U. state.¹⁰⁴

The Directive's focus includes delegation, fund manager authorization, leverage and regular reporting requirements (including to the Fund's competent authority). The draft, however, is expected to be revised. Examples of proposed regulations include, *inter alia*:

- Delegation: When delegating functions, Funds would have to comply with a list of prescriptive and discretionary conditions administered by the Fund's competent authority. Delegation to non-E.U. third parties could be prevented on the basis of non-equivalency of the corresponding regulatory regime. In addition, Funds would be required to appoint E.U. credit institutions as depositaries.¹⁰⁵
- Authorization: Extensive conditions would be imposed on authorization of fund managers, with reviewing taking up to two months, and Fund managers would have to maintain specified levels of capital. Fund managers with assets under management of under €100 million, or €500 million unleveraged, would be exempt, although these amounts would be aggregated across all of the manager's Funds.¹⁰⁶
- Leverage: Competent authorities would be empowered to place discretionary limits on leverage and to require Funds that consistently use high levels of leverage to disclose their uses and sources.¹⁰⁷
- Reporting: Ongoing reporting obligations would be imposed with respect to these new standards.¹⁰⁸

Sweden's presidency of the E.U. oversaw a comprehensive analysis of some of the concerns expressed in relation to the Directive.¹⁰⁹ Ultimately, a harmonized Funds platform should bring enhancements to the E.U. Funds industry, including improved liquidity, speed of access to markets, and investor protection.

100. *Id.* Explanatory Memorandum.

101. *Id.* at 13.

102. *Id.* at 2. "The sector includes hedge funds and private equity, as well as real estate funds, commodity funds, infrastructure funds and other types of institutional fund." *Id.* Memo, § 1.1.

103. Commission Proposal for a Directive, *supra* note 99, at 6.

104. *Id.* at 10.

105. *Id.* arts. 18, 36, 38.

106. *Id.* ch. II.

107. *Id.* ch. V, § 1.

108. *Id.* ch. IV.

109. Sweden acted as EU president from July 1 to December 31, 2009. The "issues note" dated September 2, 2009, addresses a number of issues with the Directive and suggests possible solutions.

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XII. EC Directive 2009/81/EC: New Directive on Defense and Security Procurement

Directive 2009/81/EC¹¹⁰ introduces public procurement rules designed for defense and sensitive-security contracts. Under current E.U. law, the award of such contracts is governed by standard procurement rules.¹¹¹ Member states, however, often opt not to apply the standard rules by relying on Article 346 of the Treaty on the Functioning of the European Union (TFEU), which permits derogation from such rules if essential security (rather than industrial or economic) interests of that member state are at stake.¹¹²

The European Court of Justice has consistently held that this right to derogate must be strictly interpreted.¹¹³ The Commission has also stressed the importance of a stringent case-by-case assessment.¹¹⁴ In spite of this, member states derogate frequently, and most defense and sensitive-security contracts are procured under uncoordinated national rules.¹¹⁵

Article 346 TFEU does not limit the E.U. legislature's freedom to introduce secondary legislation.¹¹⁶ Rather, the adoption of directives that take into account specific security interests should indirectly limit, but not totally extinguish, member states' abilities to argue that their essential security interests require derogation. Following Directive 2009/81/EC's transposition, by August 22, 2011, there should be less derogation from E.U. rules in this area.

Directive 2009/81/EC applies to contracts for (a) the supply of military and sensitive equipment; (b) works, supplies and services directly related thereto; and (c) works and services for specifically military purposes or sensitive works and services. "Military" refers to equipment designed or adapted for military purposes and intended for use as arms, munitions, or war material. "Sensitive" refers to equipment, works, and services for security purposes that involve classified information.

Certain contracts in the military and security field are excluded from Directive 2009/81/EC's scope: (a) contracts that relate to intelligence activities, most research and development contracts, and contracts with another government; and (b) contracts for which application of the harmonized rules would lead to disclosure of information contrary to the member state's essential security interests (which is identical to Article 346(1)(a) TFEU).¹¹⁷

Directive 2009/81/EC's main characteristics, as opposed to the standard procurement rules, include:

110. Council Directive 2009/81, 2009 O.J. (L 216) 76 (EC).

111. Council Directive 2004/18, 2004 O.J. (L 134) 114 (EC).

112. Treaty of the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47, 194 [hereinafter TFEU].

113. See, e.g., Case 222/84, *Johnston v. Chief Constable*, 1986 E.C.R. 1651; Case C-414/97, *Comm'n v. Spain*, 1999 E.C.R. I-5585; Case C-157/06, *Comm'n v. Italy*, 2008 E.C.R. I-7313.

114. Press Release, Comm'n of the European Cmty's., *New Directive on Defence and Security Procurement Enters Into Force IP/09/1250* (Aug. 25, 2009) [hereinafter *Commission Interpretative Communication*].

115. Press Release, Comm'n of the European Cmty's., *New Directive on Defence and Security Procurement Enters Into Force IP/09/1250* (Aug. 25, 2009).

116. TFEU, *supra* note 112, at 194.

117. Council Directive 2009/81, *supra* note 110, art. 13.

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- The contracting authority may require specific commitments to safeguard classified information and to ensure timely and reliable execution of contracts.¹¹⁸
- The “negotiated procedure with publication of a contract notice” may always be used.¹¹⁹
- The normal sanction for significant violations of EU procurement rules is cancellation of the contract. Under Directive 2009/81, however, member states may provide that contracts will not be cancelled if overriding reasons relating to a general interest, particularly in connection with defense or security, require that the contract remain in effect. In such cases, there must be a fine on the contracting authority or a shortening of the contract’s duration.¹²⁰

118. *Id.* arts. 22-23.

119. *Id.* art. 26.

120. *Id.* art. 60.

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