Europe

JASON R. LINDBLOOM, VIOLETA I. BALAN, LISA BENCH NIEUWVELD, GEORGE L. BUSTIN, PETER WERDMULLER, LORIN VAN NULAND, MARK C. HILGARD, DR. JAN KRAAYVANGER, DR. MARTIN LORENZ, JAN WENDLER, STEFANO VIOLA, BOGUSLAW BANASZAK, ANNE WAGNER-FINDEISEN, ANDRZEJ CHELCHOWSKI, RICHARD A. WALAWENDER, RICHARD SILBERSTEIN, AND DR. FLORIAN S. JÖRG*

I. ROME I and ROME II: EU Rules on Applicable Law

A. ROME I: EU RULES ON APPLICABLE LAW TO CONTRACTUAL OBLIGATIONS

Premised on the 1980 Convention on Law Applicable to Contractual Obligations (1980 Convention),[1] the European Regulation on Law Applicable to Contractual Obligations (otherwise known as Rome I)[2] was published on June 17, 2008. Although intended to capture the terms set out in the 1980 Convention, some modifications to the original 1980 Convention text were implemented.

Rome I covers all contractual obligations for both civil and commercial matters, excluding a few enumerated exceptions found in article 1(2), including contracts pertaining to family matters, trusts and estates, arbitration agreements and agreements on the choice of

---

* The 2008 Year-in-Review of the Europe Committee of the ABA Section of International Law was coordinated and edited by Jason R. Lindbloom, legal officer with Foyer International, S.A. in Luxembourg as well as a Judge Advocate with the United States Air Force Reserve, and Violeta I. Balan, associate at Mayer Brown, LLP, in Washington D.C. The contribution on Rome I and II-*EU Rules on Applicable Law*-was provided by Lisa Bench Nieuwveld, associate at NautaDutilh in Rotterdam. The contribution on *Proposed Regulation on a Statute for a European Private Company* was provided by George L. Bustin, Peter Werdmuller & Lorin Van Nuland, Cleary Gottlieb Steen & Hamilton LLP in Brussels. The contribution on Germany was provided by Dr. Mark C. Hilgard, partner, and Dr. Jan Kraayvanger, Dr. Martin Lorenz and Dr. Jan Wendler, associates, with Mayer Brown LLP in Frankfurt. The contribution on Italy was provided by Stefano Viola associate with Balla & Ciapponi in Rome. The contribution on Poland-*Presidential Refusal to Nominate Judges is not a Justiciable Controversy*-was provided by Prof. Boguslaw Banaszak and Anne Wagner-Findeisen. The other contribution on Poland was provided by Andrzej Chelchowski, partner, and Richard A. Walawender, partner, both with Miller Canfield Paddock and Stone in Detroit. The contribution on Spain was provided by Rick Silberstein, partner at Gómez-Acebo & Pombo in Barcelona. The contribution on Switzerland was provided by Dr. Florian S. Jörg, partner at Bratschi Wiederkehr Buob in Zurich.

1. 1980 Convention on the Law Applicable to Contractual Obligations, 80/934, 1980 O.J. (L266) 1-19 (EEC), *available at* http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

2. European Parliament and Council Regulation 593/2008, 2008 O.J. (L 177) 6-16 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF [hereinafter Rome I].

law courts, etc. Rome I is intended to harmonize the several EU Member States' individual conflict of law rules and to discourage parties from forum shopping.

Although Rome I closely mirrors its 1980 Convention predecessor, there are some substantial differences that are worth noting, particularly pertaining to scope, freedom of choice, and the applicable law in the absence of a specific choice.

The scope of the 1980 Convention was broadly defined as pertaining to "any situation." But in order to provide parties with greater legal certainty, Rome I more narrowly defines its scope as pertaining to all civil and commercial matters.

Additionally, under the freedom of choice clause Rome I creates a loop-hole for mandatory European Community law provisions. Notwithstanding the principle that parties may agree on choice of law, any European Community mandatory provisions—such as those pertaining to public policy—must be adhered to even if such principles are not found in the chosen forum's law.

The new rule governing applicable law in the absence of a specific choice of law provision marks a noteworthy variation from the 1980 Convention. The 1980 Convention sets up a general framework to assist in resolving conflicts of law question; Rome I, however, sets forth a category-by-category basis to determine applicable law. This specificity creates greater legal certainty but arguably at the expense of flexibility.

B. Rome II: EU Rules on Law Applicable to Non-contractual Obligations

The European Council (EC) Regulation on law applicable to non-contractual obligations (Rome II) was published on July 11, 2007.[3] Rome II was informed by the same basic principles as Rome I: both are intended to create greater harmonization and discourage forum shopping.

But in the case of Rome II, there was greater debate as to the exact scope of the proposed regulation. Due to extensive variations in available damages amongst respective EU Member States, finding common ground was a great challenge. Nevertheless, the tort regulation covered new terrain and was greatly needed due to the lack of an established convention with agreed-upon principles.

For example, defamation was intentionally excluded from the scope of Rome II's coverage of torts because legislators could not reconcile the great disparity in damage awards available for this tort in the various member states. In December 2008, the European Council will publish a white paper on this subject and negotiations are on-going with respect to this issue.

Rome II also contains numerous other exceptions including family matters, trust and estates, damages arising from the creation, registration, and legal capacity of companies or even pertaining to the personal liability of officers and directors. Despite this, it successfully covers many torts including product liability and the most frequent cause of tort claims: road traffic accidents.

3. European Parliament and Council Regulation 864/2007, 2007 O.J. (L 199) 40 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF [hereinafter Rome II].

C. Rome I and Rome II: Similar Foundations

Both Rome I and II enshrine the principle of freedom of choice[4] and are intended to grant parties the option of determining which legal principles should govern their disputes. This principle is limited only by the understanding that if all the elements of the dispute arise in a non-designated forum, the laws of that forum will apply.

Both regulations also endorse the habitual residence principle,[5] defined as the location of central administration for parties involved in commercial activities at the time the relevant contract was made (or the location of its subsidiary if the damages pertain to the subsidiary instead of the parent company), or the country of residence of the injured person in cases involving torts.

Finally, although many other similarities do exist, both regulations contain a universal application provision.[6] This provision clearly states that in, appropriate cases, parties may designate a non-EU Member State's laws for the resolution of disputes.

II. Proposed Regulation on a Statute for a European Private Company

On June 25, 2008, the European Commission published a proposal for a Regulation on a Statute for a European Private Company (the Regulation).[7] If adopted, the Regulation will create a *sui generis* European private limited company (*societas privata europaea*) (SPE)). The Regulation is part of the Commission's ongoing efforts to reduce transaction costs for small and medium-size enterprises (SMEs)) that operate within the internal market. The Commission envisages the entry into force of the Regulation on July 1, 2010, but the date will depend on the legislative process.[8]

A. A Small Business Act for Europe

The Regulation is an integral part of the Small Business Act for Europe (SBA), a policy-initiative aimed at facilitating business conditions for SMEs.[9] According to the Commission, SMEs account for 99.8% of businesses and seventy percent of employment within the Community, but only eight percent of SMEs engage in cross-border transactions.[10] SMEs wishing to engage in cross-border transactions are confronted with burdensome transaction costs and "red tape."

---

4. Rome I, *supra* note 2, art. 3; Rome II, *supra* note 3, art. 14.

5. Rome I, *supra* note 2, art. 19; Rome II, *supra* note 3, art. 23.

6. Rome I, *supra* note 2, art 2; Rome II, *supra* note 3, art. 3.

7. *Commission Proposal for a Council Regulation on the Statute for a European Private Company, Brussels*, COM (2008) 396/3, *available at* http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf [hereinafter *Regulation Proposal*].

8. *Id.* art. 48.

9. *Commission Communication "Think Small First" A "Small Business Act" for Europe*, COM (2008) 394 final (June 25, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0394:FIN:EN:PDF.

10. *Regulation Proposal*, *supra* note 7, at 2.

B. The Proposed European Private Company

1. *Introduction*

The compliance and operating costs resulting from twenty-seven different private limited liability company regimes throughout the European Union makes the operation of foreign subsidiaries of SMEs considerably more expensive than domestic subsidiaries. Moreover, EU SMEs that exercise their freedom of establishment rights (e.g., by incorporating as a U.K. private limited liability company while maintaining their central administrative office in another Member State), probably encounter a degree of distrust from creditors and banks.[11]

To reduce this burden, the Commission has launched a proposal to introduce the SPE, a light and flexible corporate vehicle that businesses can opt into throughout the internal market.

2. *Scope*

The SPE is a hybrid structure, governed by the Regulation and by national (or Community) law. The Regulation sets out the principal rules for the formation and operation of the SPE.[12] These provisions are mandatory and directly applicable. Annex 1 to the Regulation lists a range of matters that the articles of association must address, such as the name of the SPE, rights attaching to shares, issues relating to capital, and corporate governance.[13] In order to safeguard the flexibility of the SPE, shareholders are free to regulate these issues as they see fit, subject only to the mandatory rules set out in the Regulation.

The remainder of the corporate law issues are governed by the law of the country where the SPE has its registered office ("the applicable national law"),[14] and, where applicable, by Community law. Tax, labor, accounting, and insolvency issues that are not directly a matter of Community law also fall within the scope of the applicable national law.[15]

3. *Key Provisions of the Regulation*

The Regulation deals extensively with the following aspects of the SPE:

a. Formation. The SPE can be created *ex nihilo*, or by way of legal conversion, merger, or demerger of an existing company.[16] The Regulation aims to facilitate the establishment of an SPE by allowing (i) registration by electronic means and (ii) a single "legality check" of the documents and particulars relating to the SPE (i.e., a one-stop shop).[17]

b. Shares. Parties have considerable freedom to determine the rights and obligations that attach to shares. The Regulation only imposes limitations relating to the

11. *Id.* at 4.
12. *Id.* art. 4(1).
13. *Id.* art. 8(1).
14. *Id.* art. 4(1).
15. *Id.* at 2.
16. *Id.* art. 5.
17. *Id.* art. 10.

interests and rights of minority shareholders and third parties.[18] In addition, the SPE's articles of association must contain rules on the transfer of the shares.[19]

c. Capital. The SPE has a minimum capital requirement of €1. With respect to distributions, the Regulation requires a balance-sheet test.[20] A solvency test may be adopted in the articles of association. Subscription by the SPE for its own shares is permitted under certain conditions.

d. Governance. The Regulation allows for great flexibility regarding governance of the SPE, subject to certain mandatory provisions. Issues related to establishing a quorum and required majorities for shareholder resolutions must be addressed in the articles of association. Moreover, to safeguard the flexibility of the SPE, the Regulation does not require general meetings to be held in person.[21] In addition, the Regulation provides for specific minority rights, such as the right to request the appointment of an independent expert by a national court or administrative authority. But the right to challenge a shareholders' resolution is subject to national law. There is substantial latitude on the composition of the management board, but article 30(1) provides that only natural persons may serve as a director of an SPE. Directors' duties are owed to the SPE and not solely to the shareholders, thus the Regulation entails a choice for the stakeholders model.[22] Furthermore, the Regulation imposes upon individual directors the standard of care that "can reasonably be required in the conduct of business."[23]

e. Transfer of the registered office. The Regulation establishes a procedure on the transfer of the registered office of the SPE. This is an interesting development since the right to transfer the registered office within the Community under primary EC law remains unclear. The Regulation also provides safeguards to prevent abuse of this right. First, transfer of the registered office is not permitted when the SPE is in the process of winding-up or liquidation.[24] Second, transfer of the registered office cannot be used to circumvent rules on employee participation that apply in the SPE's home Member State.[25]

C. Assessment

By presenting an optional twenty-eighth corporate model, rather than harmonizing the twenty-seven existing private limited liability company regimes, the Commission seeks to overcome the many political difficulties related to harmonization of Member States' company laws. Moreover, this optional model might offer greater scope for company law arbitrage within the Community. But the SPE's hybrid nature might impair the desired result of simplicity. Moreover, it would be useful to clarify the precise scope of the Regu-

18. *Id.* art. 14.
19. *Id.* art. 16.
20. *Id.* art. 21.
21. *Id.* art. 27(3).
22. *Id.* art. 31(2).
23. *Id.* art. 23.
24. *Id.* art. 35(2).
25. *Id.* art. 38.

lation on several issues, such as the business judgment rule. Despite these reservations, it seems evident that the introduction of the SPE is a welcome development in European company law.

III. Germany

A. Corporate Law

The German Limited Liability Company (*Gesellschaft mit beschränkter Haftung-GmbH*) is the most popular corporate form in Germany. On November 1, 2008, the Act on the Modernization of the Law on Limited Liability Companies and the Prevention of Malpractice (generally referred to as MoMiG) entered into force. The MoMiG's main objectives are to simplify the formation process, to facilitate share purchases, to limit capital maintenance rules, to facilitate the repayment of shareholder loans and to increase protection against abusive practices.

As an alternative to the "regular" GmbH, which still requires a statutory minimum capital of €25,000, the MoMiG provides for a so called "entrepreneur company with limited liability" (*Unternehmergesellschaft (haftungsbeschränkt)* or *UG (haftungsbeschränkt)*). This "*UG (haftungsbeschränkt)*" may be incorporated with a share capital as low as one euro. But until the minimum share capital of €25,000 is accumulated, the UG must contribute one quarter of its annual profits to its capital reserves.

MoMiG facilitates the share purchase. Currently, the purchaser of a share in a GmbH needs to protect himself against the risk that the share is not owned by the seller by checking on a complete chain of title for the share back to the company's formation. The MoMiG facilitates this situation to the benefit of the purchaser. The purchaser can rely on the shareholders' list as filed with the commercial register if no objection has been raised with regard to an incorrect entry on the list in the last three years. Therefore, it limits any doubts about share ownership to this three-year period. However, it does not provide for a bona fide acquisition in all cases.

MoMiG contains exceptions to the general rule that a GmbH may not repay any of its funds to its shareholders if the funds are required for the preservation of its share capital. MoMiG will allow upstream loans, inter alia by way of cash pooling, if the counterclaim of the company is of full value.

The German Federal Supreme Court recently held that members of the supervisory board are obliged to return business documents and copies after their resignation.[26] It further confirmed that the so-called "existenzvernichtender Eingriff" (existence-destroying interference) qualifies as a willful damage under section 826 of the German Civil Code.[27]

26. Bundesgerichtshof [BGH] [Federal Supreme Court] July 7, 2008, No. II ZR 71/07.

27. Bundesgerichtshof [BGH] [Federal Supreme Court], Apr 28, 2008 (forthcoming).

B. Capital Markets/Banking

In August 2008 the Act on the Limitation of Risks connected with Investments (Risk Limitation Act)[28] as well as the Law on the Modernization of Framework Conditions for Venture Capital and Equity Investments[29] came into force. The purpose of the Risk Limitation Act is to create a legal framework which hinders activities of investors that are, at the overall economic level, undesirable, without affecting transactions that have an efficiency-enhancing impact. Additionally, the Act aims at improving transparency on pending takeovers by financial investors. The purpose of the Law on the Modernization of Framework Conditions for Venture Capital and Equity Investments is to provide the venture capital sector with an internationally competitive legal framework.

On October 18, 2008, the Act for the Implementation of a Package of Measures for the Stabilization of the Financial Markets (Financial Market Stabilization Act–FMStG)[30] came into force. Most notably, it establishes the Financial Market Stabilization Fund (the Fund) and provides for measures to be taken by the Fund. Further, it amends—for a transitional period, i.e. until the end of 2010—certain provisions of the German Banking Act, the German Insurance Supervision Act, and the German Insolvency Code.

The measures represent Germany's response to the current financial crisis and aim at creating a sustainable package of instruments to stabilize financial markets, provide liquidity, restore the confidence of the market players and prevent a further aggravation of the crisis. The Fund is special estate of the Federal Republic of Germany for which the Federal Republic is fully liable. The Fund will be administered by the Financial Market Stabilization Authority (FMSA), a public-law institution established by the FMStG. Potential beneficiaries of the Fund's measures are financial sector companies incorporated in Germany as well as German subsidiaries of foreign financial sector companies. Under certain circumstances even special purpose vehicles can benefit from the measures. The types of stabilization measures provided for are guarantees, recapitalizations and assumptions of risk.

C. Insolvency Law

The Financial Market Stabilization Act also brought a far reaching modification concerning insolvency laws that relates to the definition of over-indebtedness as grounds for insolvency under the German Insolvency Code. Prior to this Act, the management of a company was required to file for insolvency if the company was over-indebted, in particular if its liabilities exceeded its assets. This standard has been amended. A company which is technically over-indebted but nonetheless expected to be able to successfully restructure and carry on its business is no longer required to file for insolvency.

---

28. Gesetz zur Begrenzung der mit Finanzinvestitionen verbundenen Risiken [Risk Limitation Act], Aug. 12, 2008, BGBl. I, at 1666.

29. Gesetz zur Modernisierung der Rahmenbedingungen für Kapitalbeteiligungsgesellschaften [Law on the Modernization of Framework Conditions for Venture Capital and Equity Investments], Aug. 12, 2008, BGBl. I at 1672.

30. Gesetz zur Umsetzung eines Maßnahmenpakets zur Stabilisierung des Finanzmarktes (Finanzmarktstabilisierungsgesetz–FMStG) [Financial Market Stabilization Act], Oct. 17, 2008, BGBl. I 1982.

D. Intellectual Property

On September 1, 2008, the Act on Improving the Enforcement of Intellectual Property Rights[31] came into force. The Act transposes the European Union Enforcement Directive.[32] The Directive requires the Member States to harmonize measures, remedies, and procedures to protect against infringements of intellectual property rights and is designed to combat piracy and counterfeiting. By amending the existing German acts and providing virtually identical measures and remedies for patent infringements, utility models, trademarks, copyrights, plant varieties, and semiconductor products the German Act lives up to this mandate. Additionally, the Act allows for a simplified destruction procedure in the sense of the European "Anti-Piracy-Regulation" (EC No. 1383/2003).[33]

E. Telecommunication/Data Protection

On January 1, 2008, the Act Reforming Telecommunications Surveillance and other Undercover Investigations and Transposing Directive 2006/24/EC[34] came into force. The Act transposes the European Directive 2006/24/EC[35] pursuant to which providers of telephone services must save data of customers' phone calls, including time, place and the name of the recipient, for a six-month period. But records on certain calls, i.e. to and from pastoral advisors and attorneys, are exempted. Only the communication data, not the content of the communication must be stored. The data can be accessed by law enforcement authorities only on the basis of a judicial warrant. Other reform measures include an enhanced catalogue of offences for which telephone surveillance can be ordered, a ban on surveillance of communication relating to the private sphere of individuals and the requirement to inform persons subjected to surveillance of the measures after certain periods.

IV. Italy

A. Immigration

In February 2008, Italy adopted new provisions[36] that limit the right of EU citizens and their family members to enter and stay in Italy. The new law amended Presidential Decree No. 30 issued February 6, 2007.[37] Under the new law, Italian authorities can expel an

31. Gesetz zur Verbesserung der Durchsetzung im gewerblichen Rechtsschutz [Act on Improving the Enforcement of Intellectual Property Rights], July 7, 2008, BGBl. I, at 1191 (F.R.G).

32. Council Directive 2004/48 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157) 16-25 (EC), *available at* http://eur-lex.europa.eu/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf.

33. Council Regulation 1383/2003, 2003 O.J. (L 196) 7 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0007:0014:EN:PDF.

34. Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie [The Act Reforming Telecommunications Surveillance and other Under Cover Investigations and Transposing Directive], Dec. 21, 2007, BGBl I, 3198 (F.R.G).

35. Council Directive 2006/24, 2006 O.J. (L 105) 54 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_105/l_10520060413en00540063.pdf.

36. Decree-Law No. 32, passed February 28, 2008, Gazz. Uff. No. 52, published March 1, 2008 (Italy).

37. Presidential Decree No. 30, passed Feb. 6, 2007, Gazz. Uff. No. 72, published Mar. 27, 2007.

EU citizen "for imperative questions regarding public policy and public security."[38] Public policy is imperatively questioned when an EU citizen compromises the protection of human dignity or the fundamental human right to public safety through his or her conduct. The law does not automatically attach when an EU citizen is convicted of a crime. In deciding whether to expel a convicted EU citizen, the court must consider the following factors: how long the convict has been in Italy; the convict's age; his or her family and the family's economic situation; and his or her health. The court must also consider how the convict "is integrated into Italian territory," and the strength of the convict's ties to his or her country of origin.[39]

Italy implemented a directive on a specific procedure for admitting third-country nationals for the purposes of scientific research.[40] The implementing legislation[41] grants a new type of visa to third-country nationals who intend to stay more than three months in Italy for research purposes. The law also grants a residence permit to family members of the researcher for the same length of time.

In May 2008, Italy enacted urgent measures related to public security.[42] This law amended and added to the penal code. In the area of immigration, the law creates a separate offense for committing the predicate crime while illegally present in Italian territory. This additional offense attaches equally to EU and non-EU citizens. The new law also criminalizes lodging foreigners on one's property when the foreigners do not have valid visas or permits. It also criminalizes renting or selling property to foreigners who lack visas or permits. The new measures integrate Presidential Decree No. 30, issued February 6, 2007,[43] pursuant to which EU and non-EU citizens are subject to deportation if convicted of a crime carrying a sentence of over two years of imprisonment.

B. Financial

Italy implemented[44] Directive 2005/60/CE[45] on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and Directive 2006/70/CE[46] which sets forth implementing measures. As part of the new law, Italy appointed the Financial Intelligent Unit (FIU) at the Bank of Italy as the entity responsible for receiving disclosures of information that concern potential money laundering or terrorist financing.

The following entities are subject to the new provisions: (a) credit and financial institutions; (b) trust or company service providers; (c) real estate agents; (d) other natural or legal persons trading in goods, for payments made in cash in an amount of €15,000 or more; (e) collection agencies; and (f) casinos. These entities have a duty to apply customer

38. *Id.* art. 20 (1).

39. *Id.* art. 20 (3).

40. Council Directive 2005/71, 2005 O.J. (L 289) 15, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:289:0015:0022:EN:PDF.

41. Decree-law No. 17, passed Jan. 9, 2008, Gazz. Uff. No. 31, published Feb. 6, 2008 (Italy).

42. Decree-law No. 92, Gazz. Uff. No. 122, passed May 23, 2008, published May 26, 2008, *coordinated with*, Law No. 125, Gazz. Uff. No. 173, passed July 24, 2008, published July 25, 2008.

43. Presidential Decree No. 30, passed Feb. 6, 2007, Gazz. Uff. No. 72, published Mar. 27, 2007.

44. Decree-law No. 231, passed Nov. 21, 2007, Gazz. Uff. No. 290, published Dec. 14, 2008.

45. Council and European Parliament Directive 2005/60, 2005 O.J. (L 309) 15 (EC).

46. Commission Directive 2006/70, 2006 O.J. (L 214) 29 (EC).

due diligence measures in the following situations: (1) when setting up a business relationship; (2) when executing occasional transactions amounting to €15,000 or more; (3) when they suspect money laundering or terrorist financing; and (4) when they doubt the authenticity or adequacy of previously acquired customer identification data.

Auditors, external accountants, tax advisors, notaries, and even lawyers are also subject to the due diligence rules when the services they provide involve payments or transactions amounting to €15,000 or more and any time they suspect money laundering or terrorist financing or harbor doubts regarding previously obtained client identification data.

The above entities and professionals also must keep a record of documents and information for future investigations. In addition, they must promptly inform the FIU of any suspicious activities in which their clients are engaging. Non-compliance can result in the imposition of penalties.

The new financial law drastically limits the use of cash for transactions of €12,500 or more.[47] Instruments payable to the bearer and checks made payable for amounts greater or equal to €12,500 can no longer be cashed or negotiated. Checks can be still negotiated if made for an amount of less than €12,500. But the holder needs to ask the bank, in writing, to cash them.

V. Poland

A. Presidential Refusal to Nominate Judges Not a Justiciable Controversy

In a recent ruling, the Polish Constitutional Tribunal dismissed a challenge to President Lech Kaczynski's refusal to nominate nine Common Court judges whose candidacies had been submitted by the National Council of the Judiciary (*Krajowa Rada Sadownictwa* (KRS)).

Poland's 1997 Constitution adopted a "direct appointment system"[48] for appointing judges that consists of two-steps:[49] 1) judges are appointed "by the President of the Republic on the motion of the KRS;"[50] 2) pursuant to statute,[51] the KRS must "examine and evaluate"[52] the qualifications of judicial candidates for courts within its purview. The Act on the Organization of the Common Courts,[53] in turn, lays down the substantive requirements the KRS is to consider in fulfilling its mandate.

The instant case arose in connection with a 2006 motion submitted by the KRS to the President regarding the appointment of candidates to various Common Courts. The President refused to appoint nine specific candidates (four to the Provincial court

47. As modified by art. 32 of Law No. 133, passed Aug. 6, 2008, Gazz. Uff. No. 195, published Aug. 21, 2008.

48. *See* European Commission for Democracy Through Law (Venice Commission), *Judicial Appointments*, at 4, Opinion No. 403/2006, CDL-AD(2007)028 (June 22, 2007), *available at* http://www.venice.coe.int/docs/2007/CDL-AD(2007)028-e.pdf.

49. Dziennik Ustaw [Journal of Laws] No. 98, item 1070 (2001), art. 51 (Pol.).

50. Konstytucja Rzeczypospolitej Polskies [Constitution] art. 179 (1997).

51. Dziennik Ustaw [Journal of Laws] No. 100, item 1082 (2001).

52. *Id.* art. 2.

53. Dziennik Ustaw [Journal of Laws] No. 98, item 1070 (2001).

(*okregowe*) and five to the District court (*rejonowe*)).[54] This refusal soon garnered international attention.[55] In January 2008, and for the first time in Poland's constitutional history,[56] the President issued, without comment, a formal Decision (*Postanowienie*) documenting his refusal to appoint the candidates. Shortly thereafter, the President held a meeting with the KRS where he maintained that he had a constitutional "prerogative" to refuse to appoint particular candidates.[57]

In an equally unprecedented move, the First President of the Supreme Court (also an *ex officio* member of the KRS)[58] lodged an application with the Constitutional Tribunal requesting adjudication under Article 189 of the Constitution. That article provides that the Tribunal is to resolve any "dispute over authority between central constitutional organs of the State."[59]

The First President of the Supreme Court[60] maintained that the President's refusal to appoint the nine judicial candidates was tantamount to issuing a "negative" finding as regards their merits as candidates. He argued that because the power to "assess" candidates is vested exclusively in the KRS, the President's refusal constitutes a de facto negative opinion and, as such, comprised a Presidential encroachment upon the exclusive sphere of the KRS in violation of the constitutional separation of powers.

In a case of first impression, the Constitutional Tribunal side-stepped the underlying political conflict and found the request "inadmissible" as a matter of law because no actual "dispute" had arisen within the meaning of the Constitution or the Constitutional Tribunal Act.

The Court then painstakingly parsed Article 189 and, pointing to the limited constitutional scholarship addressing that point, analyzed a series of conditions precedent for determining the existence of a cognizable dispute. The Court concluded that they were all lacking in the matter before it, thus there was no bona fide dispute. The Court found that both the KRS and the President had merely performed their respective constitutional duties within the distinct spheres allocated to them. The Court pointed out the limited parameters of the role constitutionally assigned to the KRS, noting that it was limited to submitting a list of candidates for consideration by the President. The Court also noted that the decision to appoint is a constitutional prerogative that lies with the President. Accordingly, the Court concluded that his right to *refuse* to appoint is the obverse side of that same prerogative. In exercising it, the President did not encroach upon the KRS's exclusive sphere of assessing and proposing.

---

54. Postanowienie prezydenta rzeczypospolitej polskiej, No. 1130-1-08'w sprawie powolania do pelnienia urzedu na stanowisku sedziego [Decision of the President Concerning the Appointment of Judges], Jan. 3, 2008, (M.P. Nr 4, poz. 38), *available at* http://www.nettax.pl/dzienniki/mp/2008/4/poz.38.htm. Monitor Polski [Official Gazette of Rep. of Pol.] No. 4, item 38 (2008), *available at* http://www.nettax.pl/dzienniki/mp/2008/4/poz.38.htm.

55. Int'l Comm'n of Jurists, Submission to the U.N. Human Rights Council Universal Periodic Review of Pol. (Nov. 2007), *available at* http://www.icj.org/news.php3?id_article=4226&lang=en.

56. Marek Domagalski, *The Constitutional Tribunal will Consider the Refusal to Nominate (Odmowa nominacji zajmie sie Trybunal)*, Rzeczpospolita, Feb. 29, 2008, *available at* www.rp.pl.

57. Spotkanie Prezydenta RP z Krajowa Rada Sadownictwa [President Meets with the KRS], Jan. 30, 2008, *available at* http://www.prezydent.pl/x.node?id=1011848&eventId=15027860.

58. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIES art. 178.

59. *Id.*

60. K 108, 97/5/A/2008, June 23, 2008.

B. Construction Law

On January 1, 2009,[61] an amendment to the Construction Law came into force, the objective of which is to adapt Polish law to European Union law requirements. Pursuant to this amendment, newly constructed buildings as well as existing buildings (not including those listed as historical preservation buildings) must be provided with a certificate of energy characteristics. The certificate shall describe the amount of annual energy usage required for the building, expressed in kWh/m^2. Each buyer or tenant shall be entitled to review the certificate of energy characteristics prior to purchasing or leasing the building. If the certificate contains false information, it would be regarded as a "physical defect," as defined in the Civil Code's provisions on warranties. The amendment also requires building owners to carry out periodic inspections of technical conditions and energy efficiency of heating systems in buildings.

C. Business Law

On July 8, 2008,[62] the Constitutional Tribunal ruled that the Large Area Facilities Act[63] was unconstitutional. The Act required occupants of retail facilities in excess of 400 square meters to obtain a permit to conduct retail operations. This law had significantly impeded the building of new trade facilities, which resulted in a slowdown in the developing of chain stores in Poland.

D. Public Road Infrastructure Law

The Special Regulations on Preparation and Realization of Investments in Public Roads Act[64] was amended on July 25, 2008.[65] The most fundamental change introduced by the Amendment is the introduction of measures that would allow for issuance of a single permit covering various aspects related to the realization of road projects. The purpose of the Amendment was to shorten the time period involved in issuing permits from five to three months and to reduce bureaucratic entanglements. The Amendment also provides that, from the day a permit for the realization of a road project becomes valid, the State Treasurer (or an appropriate municipal body) assumes ownership of the property and all limited rights (i.e., pledge, mortgage, servitude) associated with the property expire. The Amendment gives owners an incentive to vacate and deliver expropriated properties by increasing the compensation to be paid by five percent of the property value, if possession is delivered within thirty days from the day the decision becomes valid. Owners of buildings and flats are also granted an additional 10,000 Polish *zloty* (PLN) for extra costs connected in relocation costs, taxes, and fees incurred.

---

61. Act of June 26, 2008 is amended by the Construction Law (Official Journal [*Dziennik Ustaw*] of August 8, 2008, no. 145, item 914, which amends the Construction Law Act of July 7, 1994 (unified content—Official Journal of Aug. 17, 2006, no. 156, item 1118). *See* Dziennik Ustaw [Journal of Laws] No. 145, item 914 (2008) *amending* Dziennik Ustaw [Journal of Laws] No. 156, item 1118 (1994).

62. Judgment of the Constitutional Tribunal, Case No. K 46/07, Dziennik Ustaw [Journal of Laws] No. 123, item 803 (2008).

63. Dziennik Ustaw [Journal of Laws] No. 127, item 880 (2007).

64. Dziennik Ustaw [Journal of Laws] No. 80, item 721 (2003).

65. Dziennik Ustaw [Journal of Laws] No. 154, item 958 (2008).

E. Civil Law/Foreign Exchange Law

Legislation introduced in late October of 2008[66] would repeal the requirement of Article 358 of the Civil Code to settle domestic transactions exclusively in PLN. Presently, in principle, payment obligations to be fulfilled on Polish territory must be satisfied and paid exclusively in PLN, even though they could be benchmarked in foreign currencies. Pursuant to the amendment, in commercial transactions, payments may be made and settled in foreign currencies. But even if an obligation to be fulfilled is expressed in a foreign currency, payment may be still be made by the obligor in PLN unless the contract, judgment, or specific regulation reserves payment in the foreign currency. Furthermore, if a debtor is delinquent in a payment expressed in foreign currency, the creditor may demand payment in its PLN equivalent, calculated according to overage exchange rate announced by National Bank of Poland. This will enable Polish companies to conclude contracts in foreign currencies.

VI. Spain

A. Antitrust

Royal Decree 261/2008 February 22,[67] which approves the Defence of Competition Regulation, develops both substantive and procedural questions contained in Act 15/2007 of July 3.[68] The most outstanding aspect of this Regulation is the implementation of a leniency program. Under this program, the Spanish National Competition Commission (CNC) may now waive or reduce fines for companies or natural persons involved in a cartel when enough evidence is provided to the CNC that: 1) an inspection can be carried out by the CNC; 2) there is proof that there has been an infringement of the Competition Act; or 3) if the evidence gives significant added value to that already held by the CNC.

The company or natural person involved in the cartel must submit to the CNC a formal application with the relevant evidence in order to initiate the procedure for reducing the fine. Confidentiality is crucial when dealing with the filing of a fine exemption or reduction by both the applicant and the CNC. To be eligible for the fine exemption or reduction, the applicant must cooperate fully, continuously, and diligently with the CNC during the course of the proceeding. Cartels are considered highly damaging to competition. They are punishable with fines of up to ten percent of the total turnover of the infringing company in the financial year immediately prior to the year the fine is imposed.

66. Act of Oct. 23, 2008 (amending the Civil Code and the Foreign Exch. Law). The Act has until now been adopted by the lower chamber of the Polish Parliament. It needs to be adopted by the higher chamber of the Parliament and then signed by the President of the Republic of Poland. Upon completion of the enactment procedure, the Act shall be published in the Official Journal, and it will come into force within thirty days as of the publication.

67. Real Decreto (B.O.E. 2008, 261).

68. Ley Ordinaria (B.O.E. 2007, 15).

B. Commercial Law

The extensive development of new technologies has also created legal uncertainties requiring legal reforms that enhance consumer protection. Act 22/2007 of July 7,[69] implements Directive 2002/65/EC[70] concerning long-distance marketing of consumer financial services. It provides a strict regime in terms of the information that consumers must receive before entering into a contract. The financial services provider must supply the consumer with information regarding: 1) the identity, core business, and contact information of the supplier; 2) the identity, role, and address of its representative and intermediaries involved; 3) information regarding where the supplier is registered; and 4) details of the pertinent supervisory authority where an authorization is required by the supplier.

In addition, the following forms of information regarding the financial service must be provided: 1) a description of the main features of the financial service; 2) the final price that the consumer is to pay to the provider for the service, including fees, taxes, and expenses; and 3) terms of payment and delivery. A distance contract must contain information such as the right to cancel the contract for whatever reason within a fourteen calendar day period from the date the contract is executed. The period is increased to thirty calendar days for life insurance. Certain types of financial services contracts may not be cancelled when the price depends on fluctuations in the financial markets.

The law offers additional guaranties to consumers to protect them against the fraudulent use of credit cards used for the payment of financial services, as well as unrequested services and communications. Finally, the law guarantees court protection for consumers and promotes the use of out of court claims when requested by the consumer.

C. Labor

As part of the trend towards broadening the definition of "employee" and the assimilation of professionals as employees, Law 20/2007 of July 11[71] approves the Statute regarding Autonomous Work. It defines and regulates the professional regime for independent contractors. It establishes a list of rights and duties, as well as rules relating to the prevention of labor risks, protection of minors, and some economic guaranties. It also regulates the figure of the economically dependent worker. This is a worker who, notwithstanding his apparent autonomy, carries out his activities with a strong and almost exclusive economic dependence on the business or client who contracts him. Furthermore, this law establishes the collective rights of all autonomous workers and the general principles related to social protection. It also contains measures intended to promote autonomous work.

69. Ley Ordinaria (B.O.E. 2007, 22).

70. Council and European Parliament Directive 2002/65, 2002 O.J. (L 271) 0016 (EC).

71. Ley Ordinaria (B.O.E. 2007, 20) (Spain).

D. Intellectual Property

Law 55/2007 dated December 28[72] regulates cinematographic and audiovisual activities carried out in Spain. Among other things, the law regulates the rating of films and includes a series of measures and incentives to promote cinematography and audiovisual works. Its purpose is to improve conditions within the Spanish film industry, but there is some skepticism as to whether this objective can be met in light of the failure of previous legislative efforts in this regard.

E. Accounting

Law 16/2007 of July 4[73] passed with a view to harmonize Spanish law with international accounting rules and corporate law in the EU. It came into force on January 1, 2008. The law requires that annual accounts include two new documents in addition to the balance sheet, the profit and loss account, and the notes to the accounts: a statement of changes in equity for the period, and a cash flow statement, which, unlike the statement of changes in equity for the period, is to be formulated by those companies that may not present an abbreviated balance sheet, statement of changes in equity for the period, and notes to the accounts. Furthermore, it provides a definition of elements of the annual accounts, such as assets, liabilities, equity, income, and expenses.

As per the valuation criteria, the law clarifies the scope of the principle of prudence, develops the valuation rule of the acquisition price or historical cost for liabilities, and includes the obligation of using the operational currency or currencies of the economic environment in which the company operates. It also introduces "fair value" as criteria for valuing certain financial instruments and gives a new accounting treatment to goodwill. The law introduces some important changes regarding the obligation of presenting consolidated accounts, which arises in those cases in which a company controls or may control, directly or indirectly, another company or companies. The obligation of contracting the auditors annually once the initial term of the contract has concluded is replaced by the possibility of contracting them for up to three years. Finally, some modifications of the Corporation Tax Law, approved by the Royal Decree Law 4/2004 of March 5,[74] are made in order to adapt its provisions to the new accounting framework.

VII. Switzerland-Developments in Swiss Commercial Law

A. Financial Markets/Banking

On February 1, 2008, an Ordinance Regarding the Preliminary Enactment of Organizational Regulations of the Financial Market Statute became effective. It deals with the establishment of the new supervisory authority for financial markets.[75]

72. Ley Ordinaria (B.O.E. 2007, 55).

73. Ley Ordinaria (B.O.E. 2007, 16) (rectifying law passed on Nov. 23, 2007).

74. Real Decreto (B.O.E. 2004, 4) (rectifying law passed on Mar. 5, 2004).

75. *See* Verordnung uber die vorzeitige Inkraftsetzung von organisatorischen Bestimmungen des Finanzmarktaufsichtsgesetzes [Organizatioinal Rules of the Financial Market Supervision Act], Jan. 16, 2008, AS 269 (2008), *available at* http://www.admin.ch/ch/d/gg/cr/2007/20072823.html.

In the area of banking law, the banking ordinance has been revised effective April 1, 2008. According to the new law, securities dealers who receive money from their clients for securities trades are now subject to the banking statute, they were previously exempted. Active securities dealers must apply for a permit within one year.[76]

The Federal Banking Commission changed its anti-money laundering ordinance to implement the proposals of the Financial Action Task Force (FATF), effective July 1, 2008. Further, the Federal Banking Commission released a circular, effective May 1, 2008, enumerating instructions to avoid any abuse of the markets and defining accepted market practices for securities trades. The circular explicitly lists all behaviors that violate the supervisory laws or article 6 of the Stock Exchange Act.[77]

In the field of self-regulation, the Swiss Bankers' Association amended its code of conduct as to the standard of care of banks (CDB 08), effective July 1, 2008. CDB 08 aims at regulating the start of a business relationship between a bank and a client.[78]

Finally the new capital market supervision law (FINMAG) became effective on January 1, 2009. This law integrates the supervision of banks, insurance companies, and other financial intermediaries into one regulating authority, the FINMA.[79]

B. Intellectual Property Rights

The revision of the copyright law became effective on July 1, 2008. It deals mainly with the implementation of the WIPO-Agreements into national law. Switzerland's participation in the international harmonization of copyright law and the respective adjustment of the protection level should assist the global fight against copyright piracy.[80] On the same day, changes to the Federal Patent Act became effective. They aim at fostering Switzerland's position as a place of research, development, and science. They adjust the patent law to the technical progress that has been achieved in the past years in international developments. The specific rules it adopts are intended to guarantee patent protection for biotechnological inventions.[81]

C. Tax

On January 1, 2009, the first provisions of the Corporate Tax Reform II became effective. They have the dual purpose of avoiding double taxation, on the one hand, and the

76. Fed. Dep't of Fin., Subordination of the Customer's Currency Traders Under the Bank Act (Mar. 14, 2008), *available at* http://www.efd.admin.ch/aktuell/medieninformation/00462/index.html?lang=de&msg-id=17808.

77. Press Release, Fed. Banking Comm'n, FBC Adopted Amendments to the SFBC Money Laundering Ordinance (Jan. 28, 2008), *available at* http://www.ebk.admin.ch/e/aktuell/index.html.

78. *See* Swiss Bankers Ass'n, Revised Due Diligence Agreement: Switzerland Maintains its Leadership in the Fight Against Money Laundering, CDB 08 (Apr. 7, 2008), http://www.swissbanking.org/en/home/richtlinienundempfehlungen.htm.

79. Fed. Dep't of Fin., Full Implementation of the Financial Supervision Act (Oct. 15, 2008), http://www.efd.admin.ch/aktuell/medieninformation/00462/index.html?lang=de&msg-id=22004.

80. Press Release. Fed. Dep't of Justice & Police, The Adjustments of the Copyright in the Digital Age Come into Force (May 5, 2008), *available at* http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2008/2008-05-21.html.

81. Press Release, Fed. Dep't of Justice & Police, Revised Patent Act Comes into Force (May 21, 2008), *available at* http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2008/2008-05-210.html.

imposition of taxes reducing substance on the other. Economic double taxation of corporate profits distributed to individual shareholders by way of dividends (i.e. taxation of a tax on profits at the corporate level and income tax at the shareholder level) shall not be abolished altogether but be reduced to a level that is competitive with others adopted internationally.[82]

82. FED. DEP'T OF FIN., UNTERNEHMENSSTEUERREFORM II [CORPORATE TAX REFORM II] (2007), http://www.efd.admin.ch/themen/00796/00800/01132/index.html?lang=de.