

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

The YEAR IN REVIEW

AN ANNUAL SURVEY OF INTERNATIONAL LEGAL DEVELOPMENTS AND
PUBLICATION OF THE ABA INTERNATIONAL LAW SECTION

VOLUME 56 | 2022

International Legal Developments Year in Review: 2021

Introduction

JASON S. PALMER AND KIMBERLY Y. W. HOLST

Americas

Canada

Mexico

Asia/Pacific

China

South Asia/Oceania & India

Contracts, Transportation, Energy & Environment

International Contracts

International Energy, Natural

Resources and Environmental Law

International M&A and Joint

Ventures

International Transportation Law

Corporate & Supply Chain

International Tax

Cyber, Art & Technology

International Art and Cultural

Heritage

Dispute Resolution

International Arbitration

International Criminal Law,

International Courts, and Judicial

Affairs

International Litigation

Diversity & Inclusion

Women's Interest Network

Europe/Eurasia/Middle East/ Africa

Africa

Europe

Middle East

Russia/Eurasia

Human Rights & Corporate Social Responsibility

International Family Law

International Human Rights

Trade, International Organizations & Regulatory Practices

Customs Law

Export Controls and Economic

Sanctions

International Animal Law

International Trade

National Security Law

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

Published in Cooperation with SMU Dedman School of Law

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

YEAR IN REVIEW
BOARD OF PROFESSIONAL EDITORS

MARC I. STEINBERG
Editor-in-Chief, SMU Dedman School of Law

PATRICIA S. HEARD
Co-Executive Editor
SMU Dedman School of Law

BEVERLY CARO DURÉUS
Co-Executive Editor
SMU Dedman School of Law

EXTERNAL ADVISORY BOARD

WERNER F. EBKE
Chair
University of Heidelberg, Germany

RAQUEL ALDANA
University of California at Davis

ALBERT CHEN
University of Hong Kong

ROBERT E. LUTZ
Southwestern University

MADS ANDENAS
University of Oslo

DON S. DE AMICIS
*Georgetown University Law Center and
the International Law Institute*

WILLIAM B.T. MOCK, JR.
UIC School of Law

DOUGLAS W. ARNER
University of Hong Kong

MICHAEL A. FAMMLER
Baker & McKenzie
Frankfurt, Germany

JOHN E. NOYES
California Western School of Law

ROSS P. BUCKLEY
University of New South Wales
Sydney

HILARY K. JOSEPHS
Syracuse University

LAUREL S. TERRY
Pennsylvania State University
Dickinson Law

RICHARD M. BUXBAUM
University of California
at Berkeley

MARILYN J. KAMAN
Senior Judge, Minnesota

GEORGE WALKER
Queen Mary University of London

RODRIGO OLIVARES CAMINAL
Queen Mary University of London

SMU FACULTY ADVISORY BOARD

Co-Chair
CHRISTOPHER H. HANNA

Co-Chair
JOSEPH J. NORTON

MARTÍN CAMP
ANTHONY COLANGELO
JAMES COLEMAN
NATHAN CORTEZ
GRANT HAYDEN

CHRISTOPHER JENKS
JEFF KAHN
JOHN LOWE
GEORGE MARTINEZ
THOMAS MAYO

ORLY MAZUR
DANA NAHLEN*
MEGHAN RYAN
DAVID TAYLOR
JENIA IONTCHEVA TURNER

**ADJUNCT FACULTY*

CO-GENERAL EDITORS

KIMBERLY Y.W. HOLST
Arizona State University
Sandra Day O'Connor College of Law

JASON S. PALMER
Stetson University College of Law

**THE YEAR IN REVIEW IS EDITED BY THE EDITORIAL BOARD OF
THE INTERNATIONAL LAWYER**

**This year, the 2021-2022 student editorial board began, and the 2022-2023 student editorial board finalized,
the production of The Year in Review.*

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

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

THE INTERNATIONAL LAW REVIEW ASSOCIATION

An Association of *The International Lawyer* and *The Year in Review*
SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW
2022-2023 STUDENT EDITORIAL BOARD

President

SAMUEL W. CALKINS

Editor-in-Chief

The International Lawyer
JESSICA H. LEE

Managing Editor

The International Lawyer
JACOB C. SWANSON

Managing Editor

The Year in Review
MICHAEL VUONG

Senior Editor

Case Note & Comment
KAYLA M. BRIGHT

Online Executive Editor
ILRA Online
J. MASON CASTALDO

Administrative
Managing Editor
EMILY A. ADAMS

Staff Administrative
Assistant
TALIBRA FERGUSON

Associate Managing Editors

TAYLOR BANKS
HALEY CHAPA
VICTORIA R. FAZ
KARLEE MANSFIELD

RACHEL POST
AVERY STEEN
LAUREN VILLANUEVA

Online Articles Editor
MAYA DOKIC

Case Note & Comment Editors

CAROLYN DULL RIETIG
DANIELLE HARLAN
J. RILEY HOWARD

JACKSON A.K. SAWKO
SARAH YOUSSEF

Articles Editors

ABIGAIL ARNOLD
LAUREN BINGHAM
MADELEINE GRACE CALDERON
GRAYSON CIESZKOWSKI
CAROLINA CUPPETILLI

PATRICK DARBY
SANAA GHANIM
BRANDON I. GOLDBERG
ALIZABETH ADAM GUILLOT
JOSHUA D. HARPER
ERICA C. MELLON

HALEY M. PEVSNER
EMILY M. REESE
NICK SALINARO
ALEXANDER C. THOMPSON
CECILIA XI WANG

2021-2022 STUDENT EDITORIAL BOARD

President

DIVYA V. ADVANI

Editor-in-Chief

The International Lawyer
CEIJENIA J. CORNELIUS

Managing Editor

The International Lawyer
EMILY SHACKELFORD

Managing Editor

The Year in Review
MATTHEW GRIFFETH

Senior Editor

Case Note & Comment
SHAINA WEISBERG

Online Executive Editor
ILRA Online
MELANIE M. GRIFFIN

Administrative
Managing Editor
GOPIKA SHAH

Staff Administrative
Assistant
TALIBRA FERGUSON

Associate Managing Editors

TAYLOR NICOLE BELL
SYDNEY R. CARROLL
LEWIS "LUKE" COLLINS
DIANA LYNNE DIMON

BRANDON M. RAMIREZ
MARY K. SNAPP
AMY "ELIZABETH" VEALE
CAROLINE WILLIAMS
LOGAN C. WRIGHT

Online Articles Editors

LONDON J. DUTRA
SARA STEVES

AMBROSIA WILKERSON
NICOLE "NIKKI" WOOD

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

Case Note & Comment Editors

SYDNEY N. BROWN
RANDEE WILLIAMS KOELLER
IMELDA MENDEZ-LLANAS

TREY PROFFITT
MARY "MOLLY" SCHULTZ
VLADISLAVA WENDEL

Articles Editors

HECTOR ALVAREZ
ALEXA NICOL BALDERRAMA
JONATHAN BLAIR
ALEXANDER BLANCHET
ALDEN BURKE
MARY KATHRYN CRUSE
CAROLINE DOWNING

FLOY GAIDARSKI
AUSTIN GILLELAND
JAMES "REED" GREEN
RYAN KEMRITE
EVAN MERRITT
DEEPTI NATHAN
LEELA ORBIDAN

JACOB OSBORN
TRISTAN PRENTICE
BILAL SHERIFF
SAMANTHA STEVENSON
CELESTE SWANSON
JULIEN TAGNON
KENDALL VIATOR

Staff Editors

EMILY A. ADAMS
ABIGAIL ARNOLD
TAYLOR BANKS
LAUREN BINGHAM
KAYLA M. BRIGHT
MADELEINE GRACE CALDERON
SAMUEL CALKINS
J. MASON CASTALDO
HALEY CHAPA
GRAYSON CIESZKOWSKI
CAROLINA CUPPETILLI
PATRICK DARBY
MAYA DOKIC

CADDIE DULL
CHRISTIAN ALEXANDER FILSOUF
SANAA GHANIM
BRANDON I. GOLDBERG
ALIZABETH ADAM GUILLOT
DANIELLE HARLAN
JOSHUA D. HARPER
J. RILEY HOWARD
N. ANDREW KILLIAN
JESSICA H. LEE
KARLEE MANSFIELD
ERICA C. MELLON

HALEY M. PEVSNER
RACHEL POST
EMILY M. REESE
NICK SALINARO
JACKSON A.K. SAWKO
AVERY STEEN
JACOB C. SWANSON
ALEXANDER C. THOMPSON
LAUREN VILLANUEVA
MICHAEL VUONG
CECILIA XI WANG
SARAH YOUSSEF

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

	Alison Strongwater Martin E. Aquilina Vicky Li Willem den Hertog	
International Energy, Natural Resources, and Environmental Law	Jonathan McGowan José Sampaio Mariana Ardizzone Ricardo Alves Silva Sara Frazão	81
International M&A and Joint Ventures	Renata Antiquera Jason Saltzman Sydney Dennis-Birnbaum Francisco Ugarte Alejandra Daroch Luigi Pavanello Pawel Sikora Anton Dzhuplin Kristina Akalovich Natella Kortashvili Albert Garrofé Idoya Fernández Lola Tejero Mark Howard	93
International Transportation Law	James Henry Bergeron Attilio M. Costabel Andrew M. Danas Gregory C. Maddaleni Rebecca Fenneman	115
 Corporate & Supply Chain		
International Tax	Giovanna Bernal Paul D. Carman Wiebe de Vries Sunita Doobay Johan Myrén Michael Robinson Dave Sherwin	131
 Cyber, Art & Technology		
International Art and Cultural Heritage Law	Birgit Kurtz Maria Goretti Tai Lois E. Wetzel	149
 Dispute Resolution		
International Arbitration	Sergey Petrachkov Dmitry Kuptsov Saglar Ochirova	171

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

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

Julie Zorrilla

International Litigation	Jonathan I. Blackman	227
	Carmin D. Boccuzzi	
	Theodore J. Folkman	
	Phillip B. Dye, Jr.	
	Matthew D. Slater	
	Mark McDonald	
	Ari MacKinnon	
	Igor V. Timofeyev	
	Joseph R. Profaizer	

Diversity & Inclusion

Women's Interest Network	Julie King, Ed.	247
	Christine Korper, Ed.	
	Abiola Afolayan	
	Marie Elena Angulo	
	Michela Cocchi	
	Angela M. Gallerizzo	
	Dolly Hernandez	
	Margaret Kamm	
	Dana Katz	
	Kendra Muller	
	Sierra Paola	
	Vanessa Romero Rocha	
	Aina Serret	
	Sandhya Taneja	
	Catherine van Kampen	

Europe/Eurasia/Middle East/Africa

Africa	Anne Bodley	265
	Zachary Combs	
	Vanessa Suarez Galvès	
	Lucie Guégan	
	Charlotte Favaro	
	Sara Frazão	
	Laverne Lewis Gaskins	
	Tyler Holmes	
	Lincon Majogo	
	Myriam Mossi	
	Julien Naginski	
	Galindo Aliyo Ruhiyyah	
	Ricardo Alves Silva	
	Tania Tossa	
	Carneil Wilson	
	Chitalu Yalobi	
	José Diogo Sampaio	
Europe	Duncan Gorst	293
	Luigi Pavanello	
	Willem den Hertog	
	Jonathan A. McGowan	

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

100 THE YEAR IN REVIEW

[VOL. 56]

membership, use or enjoyment of facilities or infrastructure of educational, sport or recreational establishments.⁵⁵

**C. AMENDMENTS TO THE STOCK CORPORATIONS AND SECURITIES
MARKET REGULATIONS**

On April 13, 2021, a new law promoting transparency and reinforcing the responsibilities of market agents introduced several amendments to Law No. 18,045 on Securities Market and Law No. 18,046 on Corporations (New Law).⁵⁶ The New Law covers multiple topics related to market agents and pension advisors. Some of the most relevant amendments are: (1) the integration and interconnection, in real time, of local stock exchanges;⁵⁷ (2) the requirement to implement control policies, procedures, and systems intended to timely disclose material events and to avoid any leakages, increasing penalties, creating new sanctions, and expanding the list of people subject to these rules;⁵⁸ (3) the reinforcement of the oversight powers of the CMF, authorizing the commission to request information from subsidiaries of a listed corporation;⁵⁹ (4) the adoption of a thirty-day blackout period for certain insiders prior to the disclosure of the financial statements;⁶⁰ (5) the presumption of liability of directors of a corporation who approve related party transactions in contravention of the law;⁶¹ (6) changes to the regulation of independent directors and the audit committee, including the duty of said committee to provide its opinion on the company's policy of regular operations;⁶² and (7) the creation of the "anonymous whistleblower" to facilitate voluntary collaboration with investigations carried out by the CMF, being entitled to receive a percentage of the fines imposed by the CMF in the corresponding investigation.⁶³

IV. Italy

A. GOLDEN POWER ENFORCED IN ITALY

The Italian Government has been quite busy enforcing the Golden Power legislation in late 2021.⁶⁴ First, it blocked the acquisition of the Italian

⁵⁵. *See id.*

⁵⁶. *See* Law No. 21314, Establece Nuevas Exigencias de Transparencia y Refuerza Las Responsabilidades de los Agentes de los Mercados, Regular la Aseoría Previsional, y otras Materias que Indica, Abril 13, 2021, DIARIO OFICIAL [D.O.] (Chile), <https://www.bcn.cl/leychile/navegar?idNorma=1158144&tipoVersion=0> [<https://perma.cc/2SK5-MLXW>].

⁵⁷. *See id.* at art. 1.

⁵⁸. *See id.*

⁵⁹. *See id.* at art. 2.

⁶⁰. *See id.* at art. 1.

⁶¹. *See id.* at art. 4.

⁶². *See id.* at art. 1.

⁶³. *See id.*

⁶⁴. The power to prohibit or impose restrictions/conditions to an investment by foreign persons in certain industries deemed strategic for the Republic of Italy. *See* Legge 21/2012, as

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

2022]

M & A AND JOINT VENTURES 101

semiconductor manufacturer, LPE SpA, by the Chinese company Shenzhen Investment Holdings Co.⁶⁵ The second case, discussed below, “is far more intriguing and looks like a spy story.”⁶⁶

The Italian company involved is Alpi Aviation Srl (Alpi)—a company based in Northeast Italy operating in the light and ultralight aircrafts business and, more importantly, in the unmanned aerial vehicle (UAV) business, also known as the drones business—is a supplier of military UAVs to the Italian Department of Defense.⁶⁷ “In addition, Alpi has executed a joint venture with a state-owned company for the supply to Italian Department of Defense of other military products.”⁶⁸ As such, Alpi became subject to not only the Golden Power rules but also other quite stringent rules applicable to suppliers of military products, including mandatory communications as to the company and shareholders structure and any changes to the same, as well as sharp limitations and the need of specific authorizations for any kind of export of military products on a temporary basis.⁶⁹

While investigating an allegedly improper use of a small airfield belonging to the Italian armed forces, the Italian investigators, led by the Pordenone District Attorney Office, discovered that a seventy-five percent controlling participation in Alpi was sold in 2018 to a Hong Kong based company called Mars Information Technology Co. for a substantial price⁷⁰ (45 thousand Euros par value shares sold for 3.9 million Euros per share). Moreover, according to the Italian investigators⁷¹:

(i) [T]he two ultimate owners of the participation are two Chinese state owned companies, something that was not disclosed and masked by

amended and supplemented by Presidential Decree 85/2014, Prime Minister Decree 108/2014, Presidential Decree 35/2014, Presidential Decree 86/2014, EU Regulation 452/2019, Law Decree 105/2019 and Law Decree 23/2020. See *Italy's Enforcement Of 'Golden Power' Law Signals Potential Increase of Foreign Direct Investment Scrutiny*, GLOBALDATA (Feb. 22, 2022), <https://www.globaldata.com/italys-enforcement-golden-power-law-signals-potential-increase-foreign-direct-investment-scrutiny-says-globaldata/> [https://perma.cc/ZL28-EJF8].

65. See Giuseppe Fonte, *REFILE-Italy Vetoes Takeover of Semiconductor Firm By Chinese Company Shenzhen – Sources*, REUTERS (Apr. 9, 2021, 9:35 AM), <https://www.reuters.com/article/china-italy-semiconductors/refile-italy-vetoes-takeover-of-semiconductor-firm-by-chinese-company-shenzhen-sources-idUSL8N2M22LS> [https://perma.cc/3LA3-XEHX].

66. See Luigi Pavanello, *The Italian Government Enforces the Golden Power*, INTERNATIONAL M&A AND JOINT VENTURES COMMITTEE NEWSLETTER (AM. BAR ASS'N SECTION OF INT'L L.) Nov. 11, 2021, at 3–4, https://www.americanbar.org/content/dam/aba/administrative/international_law/newsletter/2021/2021-imajv-newsletter-fall.pdf [https://perma.cc/2HXB-BMG4] [hereinafter *M&A Newsletter*].

67. See *id.*

68. See *id.* at 3.

69. Legge 9 luglio 1990, n.185, G.U. July 14, 1990, n.163 (It.).

70. See Pavanello, *supra* note 66.

71. See Gabriele Carrer, *Italian Drone Maker Under Investigation After Chinese Takeover*, DECODE 39 (Sep. 2, 2021), <https://decode39.com/1906/alpi-aviation-gdf-china/> [https://perma.cc/2DPN-ZPFV].

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

102 THE YEAR IN REVIEW

[VOL. 56]

means of an elaborate corporate “smoke screen,” and (ii) it was the intention of the new management of Alpi to transfer the production to Wuxi, the alleged center of the research and development of the Chinese artificial intelligence.⁷²

This means that the transaction was not an investment in Italy, but rather an acquisition of know-how and a transfer of technology from Italy to China.⁷³ Last but not least, in 2019, Alpi had illegally exported a drone to the Shanghai Import Fair by declaring in the customs documentation that it was a radio-controlled plane.⁷⁴

Currently, there are six persons under criminal investigation (three Italians and three Chinese nationals) for (1) failure to request the mandatory prior authorization required by the Golden Power legislation before implementing the share transfer, (2) failure to provide true and accurate information and documentation in respect of the transaction, and (3) violation of the laws and regulation regarding Department of Defense suppliers and experts of military products and equipment.⁷⁵

In addition to the criminal investigation, an administrative file is now before the Italian Government for an alleged violation of the Golden Power rules and regulations because it appears that no prior authorization has been filed or requested and required information and documentation was not filed, has been purposely filed late, or has been filed incomplete or unclear.⁷⁶

The sanction that could be imposed and enforced by the Government, pursuant to Articles I and II of Law Decree 21/2020, could be quite stiff, namely: (1) declaring the whole transaction, including any resolution, agreement, or deed executed in connection therewith, null and void;⁷⁷ (2) suspending voting rights;⁷⁸ (3) imposing the parties to restore—at their cost and expense—the status *quo ante*, that is, in this case, the shareholding and corporate situation of Alpi before the implementation of the voided transaction;⁷⁹ (4) imposing a fine of up to twice the value of the voided transaction (in the Alpi case, up to nearly 8 million Euros) with a minimum of at least one percent of the sales generated by the companies involved as resulting from the latest financial statements;⁸⁰ and (5) imposing sanctions upon the company (in this case, Alpi) who had approved the transactions.⁸¹ At the time of the writing of this article, the Italian Government had not

72. See Pavanello, *supra* note 66 at 3.

73. Carrer, *supra* note 71.

74. See *id.*

75. Pavanello et al., *supra* note 66 at 3.

76. *Id.*

77. See Stefano Crosio et al., *Italy Enacts New Anti-Raider Rules to Protect Strategic Assets*, JD SPURA (Dec. 4, 2017), <https://www.jdsupra.com/legalnews/italy-enacts-new-anti-raider-rules-to-84037/> [<https://perma.cc/BN2X-E5MX>].

78. See *id.*

79. See Pavanello, *supra* note 66, at 3.

80. See *id.*

81. See *id.*

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

2022]

M & A AND JOINT VENTURES 103

issued its decision. But, on March 11, 2022, the Italian Government decided to declare the whole transaction null and void,⁸² thereby imposing the return to the status *quo ante*, which is the harshest of the sanctions available under the law.⁸³ It is not clear whether any monetary sanctions have been imposed (from 8 up to 280 million Euros),⁸⁴ although it seems quite likely in light of the sanction imposed.⁸⁵

The decision is in line with the Golden Power policy pursued by the Draghi-led Italian Government, which has exercised the Golden Power four out of the six times, enforcing the same since the enactment of the legislation.⁸⁶ It is a clear indication of the government's willingness to protect Italian "strategic assets" from foreign acquisitions.⁸⁷

V. Poland

A. THE NEW FORM OF CAPITAL COMPANY

The provisions introducing the new form of capital private company—a simple joint-stock company (JSC)—to the Polish Commercial Companies Code entered into force on July 1, 2021.⁸⁸ A key goal of the amended act was to fill the gap in the Polish legal system resulting from the lack of adequate, available forms of doing business, which would fully respond to the practical requirements of start-up companies and special purpose

82. Giuseppe Fonte, Angelo Amante, & Gavin Jones, *EXCLUSIVE Italy Annuls Sale of Military Drones Firm to Chinese Investors, Sources Say*, REUTERS (Mar. 10, 2022), <https://www.reuters.com/world/exclusive-italy-annuls-sale-military-drones-firm-chinese-groups-sources-say-2022-03-10/>.

83. GIOVANNI B. SANDICCHI, LATHAM & WATKINS, *ITALY'S LIQUIDITY DECREE EXTENDS FOREIGN INVESTMENT REGULATION IN RESPONSE TO COVID-19* 1–3 (2020), <https://www.lw.com/thoughtLeadership/Italys-Liquidity-Decree-Extends-Foreign-Investment-Regulation-in-Response-to-COVID-19>.

84. See Ferigo Foscari et al., *COVID-19: Italy Expands Golden Power Review of Foreign Investments*, WHITE & CASE (Apr. 10, 2020), <https://www.whitecase.com/publications/alert/covid-19-italy-expands-golden-power-review-foreign-investments>.

85. See *id.*

86. See *Italy Extends Vetting Powers to Protect Key National Assets*, REUTERS (May 9, 2022), <https://www.reuters.com/business/finance/italy-extends-vetting-powers-protect-key-national-assets-2022-05-09/>.

87. See Giuliana Lampo, *Italy's Exercise of Foreign Investment Screening Power against Chinese Takeover: An Assessment under International Law*, 1 ITALIAN REV. OF INT'L AND COMP. L. 433, 435–37 (2021).

88. See *A Simple Joint-Stock Company: A New Type of a Company*, ECOVIS (June 24, 2021), <https://www.ecovis.com/poland/blog/a-simple-joint-stock-company-a-new-type-of-a-company/> [<https://perma.cc/5T9X-M2GG>]; Ustawa z dnia 19 lipca 2019 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw [Act of July 19, 2019 amending the Act – Code of Commercial Companies and certain other acts] (Dz.U. 2019, item 1655).

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

Europe

DUNCAN GORST, LUIGI PAVANELLO, WILLEM DEN HERTOOG, AND
JONATHAN A. MCGOWAN

This article reviews some of the most significant international legal developments made in Europe in 2021.

I. Major Decisions of the Court of Justice of the European Union

In two major and controversial cases, the Court of Justice of the European Union (CJEU) has addressed intra-EU investment arbitration in the context of ad hoc agreements to arbitrate between EU Member States and investors from EU Member States, as well as arbitrations under the Energy Charter Treaty.

In *Republic of Poland v. PL Holdings S.à r.l.*,¹ the CJEU held that ad hoc arbitration agreements that are identical to investor-state arbitration clauses in intra-EU bilateral investment treaties (BIT) are contrary to EU law.² In February 2020, the Supreme Court of Sweden had requested a preliminary ruling from the CJEU on whether the CJEU's previous ruling in *Slovak Republic v. Achmea*³ required it to set aside two arbitral awards rendered under Poland's BIT with the Belgium-Luxembourg Economic Union.⁴ The CJEU held that allowing an EU Member State to conclude an ad hoc arbitration agreement with the same content as an invalid arbitration clause in an intra-EU BIT would circumvent the EU Member State's obligations under Article 4(3) of the Treaty on European Union and Articles 267 and 344 of the Treaty on the Functioning of the European Union.⁵ This finding is based on the fact that such ad hoc arbitration agreements would have the same effects as an arbitration clause in a BIT.⁶ First, ad hoc arbitration agreements would maintain the effects of an invalid provision in a BIT.⁷ Second, this was not an isolated case as ad hoc agreements could be adopted in a multitude of cases, which would repeatedly undermine the autonomy of EU law.⁸ Third, the legal basis of an arbitral tribunal's jurisdiction cannot

1. See Case C-109/20, *Republic of Poland v. PL Holdings Sàrl*, ECLI:EU:C:2021:875.

2. *Id.*

3. See Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.

4. See Agreement Between BLEU (Belgium-Luxembourg Economic Union) and Poland about the Protection and the Protection of Investments (1987).

5. See *PL Holdings Sàrl*, ECLI:EU:C:2021:875, ¶¶ 46–47.

6. *Id.* ¶ 48.

7. See Case C-109/20, *Republic of Poland v. PL Holdings Sàrl*, ECLI:EU:C:2021:875, ¶ 48.

8. *Id.* ¶ 49.

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

294 THE YEAR IN REVIEW

[VOL. 56]

depend on the conduct of the parties to the dispute.⁹ Finally, ad hoc arbitration agreements would, as was the case in *Achmea*,¹⁰ remove from the EU judicial system disputes which may concern the application and interpretation of EU law.¹¹ The CJEU also held that EU Member States have a positive obligation to challenge the validity of any arbitration clause in a BIT or ad hoc arbitration agreement.¹²

In *Republic of Moldova v. Komstroy LLC*,¹³ the CJEU held that Article 26 of the Energy Charter Treaty (ECT) is not applicable to intra-EU investment arbitration disputes.¹⁴ The Paris Court of Appeal had requested a preliminary ruling from the CJEU relating to setting aside proceedings brought by Moldova with respect to an UNCITRAL arbitral award.¹⁵ The Paris Court of Appeal had requested the preliminary ruling to determine whether a claim arising from a contract for the sale of electricity could constitute an “investment” under the ECT.¹⁶ After the European Commission and several EU Member States intervened in the proceedings, the CJEU took the request for preliminary ruling as an opportunity to also decide on the applicability of the arbitration provisions in the ECT to intra-EU investment arbitration disputes. The CJEU held, drawing parallels to *Achmea*,¹⁷ that Article 26(2)(c) of the ECT, which provides for the resolution of disputes under the ECT by arbitration, is not applicable to intra-EU disputes.¹⁸

First, the CJEU considered that Article 26(6) of the ECT provides that an arbitral tribunal must decide the issues in dispute in accordance with the ECT and the principles of international law.¹⁹ The CJEU held that as the ECT is an act of EU law,²⁰ the arbitral tribunal is required to interpret and apply EU law.²¹ Second, the CJEU held that an arbitral tribunal is not a court or tribunal of an EU Member State within the meaning of Article 267 of the TFEU and may not, therefore, refer questions to the CJEU for a preliminary ruling.²² Third, the CJEU examined whether the full effectiveness of EU law could be guaranteed by subjecting the award to review by the courts of the EU Member State. As French law—the law of the forum in this case—foresees only a limited review of arbitral awards,²³ a

9. *Id.* ¶ 51.

10. See *Achmea*, ECLI:EU:C:2018:158.

11. See *PL Holdings Srl*, ECLI:EU:C:2021:875, ¶ 52.

12. *Id.*

13. See Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655.

14. *Id.* ¶ 87.

15. *Id.* ¶ 56.

16. *Id.* ¶ 68.

17. See *Achmea*, ECLI:EU:C:2018:158.

18. See *Komstroy LLC*, ECLI:EU:C:2021:655, ¶ 66.

19. *Id.* ¶ 48.

20. *Id.* ¶ 23.

21. *Id.* ¶¶ 48–50.

22. *Id.* ¶¶ 51–53.

23. *Id.* ¶ 57.

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

2022]

EUROPE 295

risk exists that the ECT excludes the full effectiveness of EU law in a dispute between an investor of one EU Member State and another EU Member State that is heard by an arbitral tribunal applying EU law.²⁴

II. New Dual Use Regulation issued in the European Union

A. OVERVIEW

With Regulation (EU) 2021/821 of the European Parliament and of the Council of May 30, 2021 (the “Regulation”) the European Union has revised and set up an EU common regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items.²⁵ The Regulation both substitutes for and updates the existing prior EU legislation.²⁶

According to the Regulation, “dual-use items” means items, including software and technology which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical, or biological weapons or their means of delivery, including all items which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.²⁷

Similar to the previous legislation, the Regulation is centered around the principle that the export outside the EU of a dual use item requires prior authorization. In light of this principle, the Regulation aims to harmonize and control a common dual used items regime through:

1. Common export control rules, including a common set of assessment criteria and common types of authorizations (individual, global, and general authorizations);²⁸
2. A common EU list of dual-use items;²⁹
3. Authorization for the export of cyber-surveillance items;³⁰
4. Controls on brokerage and technical assistance services relating to dual-use items and their transit through the EU;³¹
5. Imposition of specific control measures and compliance to exporters, such as record-keeping and registers;³² and
6. Set up of a network of authorities supporting the exchange of information and the consistent implementation and enforcement of controls throughout the EU.³³

24. *Id.* ¶ 62.

25. Council Regulation 428/2009, 2009 O.J. (L134) 1 (EC).

26. Council Regulation (CE) 428/2009.

27. Art. 2(1) of Reg. (EU) 2021/821.

28. Arts. 4, 5, 9, and 10 of Reg. (EU) 2021/821.

29. Annex I of Reg. (EU) 2021/821.

30. Art. 5 of Reg. (EU) 2021/821.

31. Art. 6 of Reg. (EU) 2021/821.

32. Art. 27 of Reg. (EU) 2021/821.

33. Art. 23–26 of Reg. (EU) 2021/821.

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

296 THE YEAR IN REVIEW

[VOL. 56]

Dual-use items may be traded freely within the EU, except for some particularly sensitive items, whose transfer within the EU remains subject to prior authorization.³⁴

B. DUAL-USE EXPORT AUTHORIZATIONS

There are four types of export authorizations in place in the EU export control regime:³⁵

1. EU General Export Authorizations (EUGEAs)

According to the Regulation, EUGEAs allow exports of dual-use items to certain destinations under certain conditions.³⁶ The Regulation lists the following EUGEAs:³⁷

1. Exports to Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland, Liechtenstein, United Kingdom, and the United States of America;
2. Export of certain dual-use items to certain destinations;
3. Export after repair/replacement;
4. Temporary export for exhibition or fair;
5. Telecommunications;
6. Chemicals;
7. Intra-group technology transfers; and
8. Encryption.

2. National General Export Authorizations (NGEAs)

NGEAs may be issued by EU Member States if they are consistent with existing EUGEAs and do not refer to items listed in Annex IIg of the Regulation.³⁸

3. Global Licenses

Global licenses can be granted by competent authorities to one exporter and may cover multiple items to multiple countries of destination or end users.³⁹

34. Annex IV of Reg. (EU) 2021/821.

35. Article 12 of Reg. (EU) 2021/821.

36. Annex II of Reg. (EU) 2021/821.

37. §§ A–H of Annex II of Reg. (EU) 2021/821.

38. Arts. 12.2, 12.3, 12.4, 12.5, and 12.7 of Reg. (EU) 2021/821.

39. Art. 12. and 12.7 of Reg. (EU) 2021/821.

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

2022]

EUROPE 297

4. Individual Licenses

Individual licenses can be granted by competent authorities to one exporter and cover exports of one or more dual-use items to one end-user or consignee in a third country.⁴⁰

This new Regulation has upgraded and strengthened the EU's export control toolbox to respond effectively to evolving security risks and emerging technologies and, hopefully, will allow the EU to effectively protect its interests and values.

III. The Hague Court of Appeal Refuses to Suspend Establishment of Dutch Ultimate Beneficial Owner (UBO) Register

As described last year,⁴¹ the Dutch government has started establishing the UBO-register, required under Article 30 of the 4th EU Anti-Money Laundering Directive (the "Directive").⁴² The Act implementing the Directive into Dutch law⁴³ specifies that the UBO's full name, month and year of birth, country of domicile and nationality as well as the nature and extent of the UBO's economic interest in the legal entity concerned can be accessed by any member of the public.⁴⁴

This public availability is seen as a grave threat to the privacy of the individuals concerned, exposing them to all kinds of unwanted attention and far worse, such as extortion and kidnapping. For that reason, a Dutch Stichting, a foundation and non-profit corporate entity under Dutch law, called *Stichting Privacy First*, took the Dutch government to court in *Kort Geding* (Provisional Proceedings).⁴⁵ Stichting Privacy First demanded that the State be ordered to stop the registration of UBOs or suspend it pending the answer by the Court of Justice of the European Union (CJEU) of

40. Arts. 12.2, 12.3, 12.4, 12.5, and 12.7 of Reg. (EU) 2021/821.

41. James Henry Bergeron et al., *Europe*, 55 THE YEAR IN REVIEW 397, 398 (2021).

42. Council Directive (EU) 2015/849 of May 20, 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, art. 30, 2015 O.J. (L 141), 73, 96–97.

43. Wet van 24 juni 2020 tot wijziging van de Handelsregisterwet 2007, de Wet ter voorkoming van witwassen en financieren van terrorisme en enkele andere wetten in verband met de registratie van uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten ter implementatie van de gewijzigde vierde anti-witwasrichtlijn (Implementatiewet registratie uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten) 6/24/2020, Stb. (Staatsblad (Dutch Government Gazette) 2020, 231.

44. Laid down in articles 21 and 22 Handelsregisterwet 2007 (Dutch Trade Register Act, Hrw) (Wet van 22 maart 2007, houdende regels omtrent een basisregister van ondernemingen en rechtspersonen, Stb. 2007, 153, last changed on 27-9-2020).

45. Gerechtshof Den Haag 18 maart 2021, KG 2021, 1232 m.nt. Redactie (Stichting Privacy First/De Staat Der Nederlanden (Ministerie van Financiën, Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) (Neth.).

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

298 THE YEAR IN REVIEW

[VOL. 56]

prejudicial questions, which was to be asked by the *Voorzieningenrechter* (Provisional Measures Judge) on the legality of these matters.⁴⁶

In a March 18, 2021, decision of the Hague *Voorzieningenrechter*,⁴⁷ the claims were denied. The Judge found that the Dutch State could not be ordered to breach its duties under the Directive.⁴⁸ And although the Judge did see cause, specifically in view of the critical EDPS advice,⁴⁹ to ask prejudicial questions, he refrained from doing so, because the *Tribunal d'arrondissement* of Luxembourg had already asked “largely corresponding” prejudicial questions on November 13, 2020.⁵⁰

Privacy First appealed to the Hague Court of Appeal.⁵¹ This Court gave its decision on November 16, 2021.⁵² The claims were denied yet again.

Although the Court of Appeal agreed with Privacy First that a national court can suspend a national measure based on a European law if there is serious doubt as to the validity of that law, it refrained from doing so and cited the *Zuckerfabrik*⁵³ and *Atlanta*⁵⁴ decisions. According to the Court of Appeal, there was a simpler way to stave off the “irreparable damage” required under the decisions cited for suspension of the Dutch implementation of the Directive.⁵⁵ Article 30, Section 9 of the Directive provides for an exemption to public access of the UBO’s data if such access “would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence, or intimidation.”⁵⁶ Article 51b, Section 3 *Handelsregisterbesluit* (Trade Register Decree) stipulates that the Trade Register “immediately” blocks access to the public when a request for such an exemption is made, until the request has been

46. For the doubtfulness of this legality, reference was made to a very critical advice of the European Data Protection Supervisor (EDPS) of 18 March 2017 (Official Journal of the European Union, 2017/ C 85/04) [hereinafter *Official J. of the E.U.*].

47. *Voorzieningenrechter* Den Haag 18 maart 2021, KG 2021, 1232 m.nt. Redactie (Stichting Privacy First/De Staat Der Nederlanden (Ministerie van Financiën, Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) ECLI:NL:RBDHA:2021:2457 (Neth.).

48. *Id.*

49. See Reg. (EU) 2021/821, *supra* note 46.

50. *Id.*

51. Gerechtshof Den Haag 16 november 2021, Hof 2021, 200.293.732/01 m.nt. Redactie (de stichting Stichting Privacy First/ de publiekrechtelijke rechtspersoon Staat Der Nederlanden (Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) (Neth.).

52. *Id.*

53. CJEU 21 February 1991, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61988CJ0143>.

54. CJEU 9 November 1995, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0465>.

55. Gerechtshof Den Haag 16 november 2021, Hof 2021, 200.293.732/01 m.nt. Redactie (de stichting Stichting Privacy First/ de publiekrechtelijke rechtspersoon Staat Der Nederlanden (Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) (ECLI:NL:GHDHA:2021:2176) (Neth.).

56. *Handelsregisterbesluit*, Stcrt. 2008, 12.

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

2022]

EUROPE 299

judged and decided upon in the highest instance.⁵⁷ This will presumably be long enough for the CJEU to give its decision, especially because this Hague Court of Appeal decision will probably give rise to a high number of such requests.

All eyes, or at least the Dutch and Luxembourg one, are now on the CJEU, whose decision on the legality of public access of the UBO register is awaited some time in 2022.⁵⁸

IV. ALI-ELI Principles for a Data Economy: Data Transactions and Data Rights

The American Law Institute (ALI) has drafted model laws since 1923, most notably the Model Penal Code (MPC) which is the standard for criminal laws throughout the United States.⁵⁹ Its sister organization, the European Law Institute (ELI), performs a similar service for the European Union in the harmonization of laws.⁶⁰ In 2016, these two organizations came together to begin a joint project addressing the emerging legal field of trade in a data economy.⁶¹ In addition to members of ALI and ELI, the project team included representation from the European Parliament, United Nations Commission on International Trade Law (UNCITRAL), and various other organizations and academic institutions.⁶²

The result was a 293-page document with forty Principles setting out a detailed framework for future legal development in the field.⁶³ Similar to the MPC, the *Principles for a Data Economy* (Principles) include language drafted to be used in future legislation and comments on the language to provide clarity of intent.⁶⁴ Additionally, the Principles include written illustrations in the comments to offer real world context.⁶⁵ The Principles address four main aspects of a data economy: data contracts, data rights, third party aspects of data activities, and multi-state issues.⁶⁶

57. *Id.*

58. Dutch Court of Appeal rules Ultimate Beneficial Owners can request shielding of data, <https://privacyfirst.eu/court-cases/705-dutch-court-of-appeal-rules-ultimate-beneficial-owners-can-request-shielding-of-data.html> (last visited Mar. 24, 2022).

59. See generally MODEL PENAL CODE (AM. L. INST.) <https://www.ali.org/publications/show/model-penal-code/>.

60. See generally EUROPEAN L. INST., available at www.europeanlawinstitute.eu.

61. ALI-ELI Principles for a Data Economy: Data Transactions and Data Rights, 3, (2021), <https://principlesforadataeconomy.org> [hereinafter *Data Transactions and Data Rights*].

62. *Id.* at 4.

63. *Id.* at 1.

64. *Id.* at 14.

65. *Id.*

66. *Id.* at 22.

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

300 THE YEAR IN REVIEW

[VOL. 56]

A. DATA CONTRACTS

In addressing contracts relating to the trade of data, the Principles address the complexities of cross border agreements as well as the difficulties of trading a changing commodity.⁶⁷ Freedom of contract is a core principle in both the United States and European common law, with limitations imposed by the Uniform Commercial Code (UCC) and Principles of European Contract Law (PECL).⁶⁸ The Principles provide both general guidance and sample language for data contracts.⁶⁹ The Principles address two categories of data contracts: Contracts for the Supply or Sharing of Data and Contracts for Services with Regard to Data.⁷⁰ In regard to Supply or Sharing of Data, five Principles are provided addressing contracts for the transfer of data, contracts for the simple access to data, contracts for the exploitation of a data source, contracts for authorization to access, and contracts for data pooling.⁷¹ For Contracts for Services with regard to Data, four Principles address this: contracts for the processing of data, data trust contracts, data escrow contracts, and data marketplace contracts.⁷²

B. DATA RIGHTS

The data rights addressed in the Principles are the legally protected interests as they relate to the data, but do not include the broader issue of intellectual property rights.⁷³ The Principles propose the recognition of a "new data specific class of rights" known as "data rights."⁷⁴ This is more complex than rights assigned through contract as there may be no contract between the parties or the contract may be silent as to the rights of the data.⁷⁵ This is primarily focused on the data collected by equipment through usage and addresses what rights, if any, the final owner or user of the equipment has to the data, referred to as Co-Generated Data.⁷⁶ Six Principles outline the Rights with Regard to Co-Generated Data: Co-Generated Data, General Factors Determining Rights in Co-Generated Data, Access or Porting with Regard to Co-Generated Data, Desistance from Data Activities with Regard to Co-Generated Data, Correction of Co-Generated Data, and Economic Share in Profits Derived from Co-Generated Data.⁷⁷

67. *Data Transactions and Data Rights*, *supra* note 47, at 48.

68. *Id.* at 50-51.

69. *Id.* at 9.

70. *Id.* at 56, 95.

71. *Id.* at 56-94.

72. *Id.* at 95-124.

73. *Data Transactions and Data Rights*, *supra* note 47, at 125.

74. *Id.* at 126.

75. *Id.*

76. *Id.*

77. *Id.* at 134-166.

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

2022]

EUROPE 301

An alternative approach to data rights is that of the public interest.⁷⁸ For example, if a mechanic needs access to data for a repair, the data on the equipment would arguably be available under the above-mentioned rights; however, the mechanic would not have access to other data for training or comparative purposes.⁷⁹ Principles twenty-four through twenty-seven outline the limited scope in which data should be shared in the public interest, as well as protecting the privacy rights and trade secrets of the data.⁸⁰

C. THIRD PARTY ASPECTS OF DATA ACTIVITIES

While the first Part focused on data rights between parties in a contract and the second Part focused on a party with data rights' relationship with a party controlling the data, the third Part focuses on the third parties in relation to data.⁸¹ Data is often passed from one controller to another.⁸² These third parties who hold, transmit, or have access to the data need protection in addition to owing a duty to the involved parties.⁸³ This Part has ten Principles and divides the third party rights into three sections: Protection of Others against Data Activities, Effects of Onward Supply on the Protection of Others, and Effects of Other Data Activities on the Protection of Third Parties.⁸⁴

D. MULTI-STATE ISSUES

The cross-border nature of data transfer and storage leads to a natural complexity on choice-of-law and forum.⁸⁵ Principle 38 points to existing choice-of-law rules of the forum State if there is a clear rule.⁸⁶ If there is not a clear rule, Principle 39 establishes that the State with the most significant relationship to the legal issue in question shall be the applicable law, laying out a series of factors in determining the significant relationship.⁸⁷ Principle forty establishes that the storage location of the data is only a factor if the storage is part of the legal dispute.⁸⁸

78. *Id.* at 167.

79. *Data Transactions and Data Rights*, *supra* note 47, at 168.

80. *Id.* at 167–184.

81. *Id.* at 186.

82. *Id.* at 207.

83. *Id.*

84. *Id.* at 185–243.

85. *Data Transactions and Data Rights*, *supra* note 47, at 244.

86. *Id.* at 244–251.

87. *Id.* at 251–255.

88. *Id.* at 255.