

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
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International Legal Developments Year in Review: 2022

Introduction

JASON S. PALMER AND KIMBERLY Y. W. HOLST

Americas

Canada
Food, Agriculture & Cannabis
Latin America and Caribbean
Mexico

Asia/Pacific

South Asia/Oceania & India

Contracts, Transportation, Energy & Environment

International Contracts
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Environmental Law
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International Transportation

Corporate & Supply Chain

International Anti-Money Laundering
International Tax

Cyber, Art & Technology

International Art and Cultural
Heritage Law

Dispute Resolution

International Arbitration
International Courts and Judicial
Affairs
International Litigation

Diversity & Inclusion

Women's Interest Network

Europe/Eurasia/Middle East/ Africa

Africa
Europe
Middle East
Russia

Finance

International Investment and
Development

Human Rights & Corporate Social Responsibility

Immigration and Naturalization
International Family Law
International Human Rights
International Refugee Law

Trade, International Organizations & Regulatory Practices

Customs Law
Customs and Trade Law
Export Controls and Economic
Sanctions
International Animal Law
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 Vishnu Tallapragada
 Lakshmi Devi Somanath
 Neeraj Dubey
 Champaka Ladduwahetty

Contracts, Transportation, Energy & Environment

International Contracts	Andrew M. Danas 111
	Anders Forkman
	Willem den Hertog
	Luigi Pavanello
International Energy and Environmental Law	Judy Boyd 123
	Kira Xiaohan
	Mariana Ardizzone
	Ricardo Alves Silva
	Sara Frazão
International M&A and Joint Ventures	Kristian Wilson 135
	Kelly Ian I Lei
	Luigi Pavanello
	Jean Paul Chabaneix
	Fiorella Monge
	Anton Dzhuplin
	Kristina Akalovich
	Natella Kortiazhvili
	Sarah Schwartz
	Eduardo Baamonde
	Cristina Sánchez San Juan
	Timur Bondaryev
	Yana Babych
	Geoffrey M. Goodale
International Transportation Law	James Border 151
	Attilio M. Costabel
	Rebecca Fenneman
	Nicholas L. Webb
	Andrew M. Danas
	David French

Corporate & Supply Chain

International Anti-Money Laundering	Jeremy Glicksman 167
	Jamie Schafer
	Ramona Tudorancea
International Tax	Christie Galinski 189
	Samuel Parks
	Ryan Morris
	Michael Ding
	Yanping Wang
	Alba I. Joubert Pereira
	Vittoria Di Gioacchino

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	Luís Miranda Tupalishe Mulwafu Beverly Mumbo Emenyo Afi Nutakor Ricardo Silva Tania Tossa Andrew Gift Umali	
Europe	Luigi Pavanello Willem den Hertog	337
Middle East	Fatemah Albader Daniel Cooper Kelly Blount Rana Moustafa Essawy Rasha Sabkar Emilia Truluck Mohamed Zain Thamer Bourasli Narin Nosrati Habiba Bhour Natali Gbele Leen Budustour	343
Russia	Anna Numerova Kirill Nagorsky Kimberly D. Reed	365

Finance

International Investment and Development	Kira Xiaohan Lin	375
--	------------------	-----

Human Rights & Corporate Social Responsibility

Immigration and Naturalization	Eshigo P. Okasili	377
International Family Law	Robert G. Spector Melissa A. Kucinski	381
International Human Rights	Daniel L. Appelman Shauna Curphey Cailen LaBarge Corinne E. Lewis Larry C. Locker Linda S. Murnane Carlos de Miguel Perales Austin J. Pierce Wendy Taube Constance Z. Wagner Elizabeth M. Zechenter	399
International Refugee Law	Banke Olagbegi-Oloba Linda Strite Murnane Mustafa Aijazuddin	421

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

International Contracts

ANDREW M. DANAS, ANDERS FORKMAN, WILLEM DEN HERTOG,
AND LUIGI PAVANELLO*

This Article reviews significant international legal developments made in the areas of international contracts law and policy in 2022.

I. Introduction

This article describes some of the significant contract issues and legal developments that arose during 2022. The interpretation and enforceability of arbitration provisions in contracts under U.S. federal law is the subject of Section II, covering a number of U.S. Supreme Court and federal appellate court decisions. Once referred to as “midnight clauses” because lawyers typically did not discuss them until closing stages of contract negotiations, dispute resolution and, in particular, arbitration clauses are now firmly within the focus of experienced commercial lawyers. In the “Case of the Cigarette Excise Duty” the Swedish Supreme Court was tasked with determining carrier liability under international law relating to contracts for carriage of goods, as described in Section III.¹ The court discusses national case law and jurisprudence in a variety of states in order to reach its decision.² In Section IV, we are reminded of the far-reaching consequences of the war in Ukraine in a matter relating to legal representation of the Russian Federation in the Netherlands.³ Section V, finally, describes recent case law of the Italian *Corte di Cassazione* in relation to Incoterms.⁴

II. United States: Interpretation and Enforcement of Contractual Arbitration Provisions in U.S. Courts

Continuing the trend of recent years, the interpretation and enforceability of arbitration provisions in contracts under U.S. federal law remained the

* The authors are Andrew M. Danas, Grove, Jaskiewicz and Cobert, LLP, Washington D.C., USA (Section II); Anders Forkman, Advokatfirman Vinge KB, Malmö, Sweden (Section III); Willem den Hertog, denhertog legal, The Hague, The Netherlands (Section IV); and Luigi Pavanello, PLLC Legal, Vicenza, Italy (Section V). Anders Forkman, Advokatfirman Vinge KB, Malmö, Sweden, authored the Introduction (Section I) and edited the article.

1. Högsta Domstolen [HD] [Supreme Court] 2022-06-14 Ö 3379-21 (Swed.), <https://www.domstol.se/en/supreme-court/precedents-archive/case-t-3379-21/> [<https://perma.cc/R5GW-MT5F>] [hereinafter Högsta domstolen].

2. *Id.*

3. *See infra* Section IV.

4. *See infra* Section V.

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

120 THE YEAR IN REVIEW

[VOL. 57]

As to (3), that a number of firms have expressed objections to assisting Russian institutions and companies, does not mean that all of them have done so and if so, that would not stand in the way of the Dean appointing one, nor does the professional oath.⁸⁷ As to (4) through (7), they are not sufficiently made plausible to count as “serious grounds,” allowing her the denial of the application.⁸⁸

So, the complaint is allowed⁸⁹ and the Dean is ordered (implicitly) to appoint an attorney to assist the RF in the five proceedings before the *Hoge Raad*. Interestingly, the June 28, 2022, June Court of Appeal Decision was one in *Kort Geding* (summary proceedings), in which the appeal deadline is eight weeks, ending on Tuesday, August 23, 2022 (in the other four cases the deadline is the regular one of three months). The decision of the *Hof van Discipline* was given on Thursday, August 18, 2022, August and in proceedings in *cassatie* all complaints against the appealed decision must be brought within the deadline.⁹⁰ So, if another attorney was appointed in time, he had a very busy weekend.

V. Italy: Incoterms and the Italian Corte di Cassazione—A Rollercoaster Relationship

Since the European Court of Justice’s (ECJ) issuance of the seminal *Electrosteel* case,⁹¹ the Italian *Corte di Cassazione* (the Italian Supreme Court in civil and criminal matters) seemed to have a love-hate relationship with the Incoterms in determining jurisdiction pursuant to EU Regulation 1215/2012 (Bruxelles I bis).⁹²

The point is perfectly illustrated by two orders recently issued by the Italian *Corte di Cassazione* deciding two motions for lack of jurisdiction of the Italian courts on international supply agreements.

While lower courts and scholars thought that the *Electrosteel* case has placed a nail in the coffin on jurisdictional cases on Brussels I and Brussel I Bis litigation by (1) giving clear instructions and tests to be performed to ascertain which member state has jurisdiction or better which is competent as we Europeans like to say), and (2) granting substantial importance to Incoterms and their delivery terms in the jurisdiction determination process, the Italian *Corte di Cassazione* seems to have backed-off, at least in part, from its original majority opinion that the key element in determining jurisdiction is the place delivery and not the place of final destination.⁹³

87. *Id.* ¶ 4.16.

88. *Id.* ¶ 4.17.

89. *Id.* ¶¶ 4.18–4.19.

90. *Id.*

91. Case C-87/10, *Eurosteel Europe SA v. Edil Centro SpA*, 2011 E.C.R. I-5003.

92. Commission Regulation 1215/2012, 2012 O.J. (L 351) 1, 7 (EU).

93. Cass., sez. un., 20 giugno 2012, n. 10132 (It.); Cass., sez. un., 14 maggio 2007, n. 10941 (It.); Cass., sez. un., 15 maggio 2022, n. 15891 (It.).

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

2023]

CONTRACTS 121

The first order⁹⁴ concerns a case whereby a *decreto ingiuntivo* (motion for summary judgment in lieu of a complaint) was granted by the Court of Treviso against a British company based upon an Ex Works-delivery inserted in the seller documentation but lacking a formal acceptance by the buyer. The buyer filed a motion for lack of jurisdiction of the Italian court.⁹⁵ In the order the *Corte di Cassazione* held that the case should be dismissed the Treviso court lack jurisdiction on the ground that a party cannot unilaterally insert delivery terms in the contractual documentation without a clear and objective acceptance by the other party.⁹⁶ In its dicta while stating that Electrostee controls the matter and this case, based upon the aforementioned recent new jurisprudence, the court stated that (1) Incoterms regulate passage of risks and cost of transportation but cannot have an impact on the determination of jurisdiction and, moreover; (2) the criterion of the place of final destination/actual final delivery of the goods is a preferable criterion because it is highly predictable and allows (a) to meet a tight connection between the agreement and the court that will decide on it, because, at least in principle, the goods subject matter of the agreement will normally be located there after the execution of the agreement; and (b) the purpose of a purchase and sale agreement is that the goods will arrive at destination; (3) the place where the seller delivers the goods to an independent freight-forwarder is irrelevant because it cannot equally guarantee the needs of simplification, uniformity, and predictability of the decisions.⁹⁷

Needless to say, the decision has generated a lot of criticism by the scholars mainly because it (1) disapplies Electrostee, after having proclaimed adherence to it; and (2) shows a subtle mistrust of the Incoterms by some of the judges of the court, maybe generated by the fact that Incoterms are not issued by governmental body, but rather by a “private” organization.

The second case⁹⁸ is more aligned to the Electrostee case. Again, a lack of jurisdiction motion was raised against a *decreto ingiuntivo* issued by the Italian court of Trani by a Rumanian company claiming that Bucharest should have been the lawful form to hear the case and that the parties did not agree to jurisdiction clause.⁹⁹ The *Corte di Cassazione* dismissed the motion on procedural grounds.¹⁰⁰ But it reported in the order the entire holding of Electrostee case to explain which are the criteria that a court must take into account whether or not the place of delivery has been determined in the contractual documentation, noting that in light of the aforesaid ECJ jurisprudence the moving party has failed to provide evidence

94. Cass., sez. un., 28 giugno 2022, n. 20633, 1, 5 (It.).

95. *Id.*

96. *Id.*

97. *Id.*

98. Cass., sez. un., 20 luglio 2022, n. 22674 (It.).

99. *Id.* at 3.

100. *Id.* at 9.

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

122 THE YEAR IN REVIEW

[VOL. 57]

enabling to understand the main agreements reached by the parties and, consequently, also those that may clearly identify the agreed place of delivery.¹⁰¹

Only the future will tell the whether the Italian *Corte di Cassazione* will fully go back to Electrosteel or, on occasion, it will continue to drift away from it.

101. *Id.* at 7.

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International M&A and Joint Ventures

EDITOR: ANTON DZHUPLIN; AND

AUTHORS: KRISTIAN WILSON, KELLY IAN I LEI, LUIGI PAVANELLO,
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CRISTINA SÁNCHEZ SAN JUAN, TIMUR BONDARYEV, YANA BABYCH,
AND GEOFFREY M. GOODALE*

This article summarizes important developments during 2022 in international mergers and acquisitions (M&A) and joint ventures in British Virgin Islands, China, Italy, Peru, Russia, Spain, Ukraine, and the United States.

I. British Virgin Islands

A. INTRODUCTION

There were several significant international M&A transactions involving British Virgin Islands (BVI) companies in the first half of 2022. A number of deals focused on the technology sector, with notable deals including the \$200 million acquisition of Six Waves Inc., a game developer, by Stillfront Group and the acquisition by Gopher Investments of Finalto, the financial trading division of Playtech plc, for \$250 million.¹

After a strong start to the year, with the highest number of first quarter incorporations in four years,² the wider corporate market witnessed decline in the second quarter with a 17.85% decline in new incorporations

* Committee Editor — Anton Dzhuplin, a Partner at ALRUD Law Firm. British Virgin Islands — Kristian Wilson is a Partner at Bedell Cristin. China — Kelly Ian I Lei is a student at NYU School of Law. Italy — Luigi Pavanello is a Partner at PLLC Legal. Peru — Jean Paul Chabaneix is a Partner and Fiorella Monge is an Associate at Rodrigo, Elías & Medrano Abogados. Russia — Kristina Akalovich is a Senior Associate and Natella Kortiasvili is an Attorney at ALRUD. Spain — Sarah Schwartz is a Partner at Across Legal SLP, where Eduardo Baamonde and Cristina Sánchez San Juan are Lawyers. Ukraine — Timur Bondaryev is a Managing Partner and Yana Babych is a Senior Associate at Arzinger. United States — Geoffrey M. Goodale is a Partner at Duane Morris.

1. See *British Virgin Islands Reflects on a Successful H1 2022, with Highest Number of First-Quarter New Incorporations in Four Years*, BVI FIN. (Sept. 23, 2022), <https://bvifinance.vg/Newsroom/All-News/ArticleID/548/British-Virgin-Islands-Reflects-On-A-Successful-H1-2022-With-Highest-Number-Of-First-Quarter-New-Incorporations-In-Four-Years> [https://perma.cc/8HEU-YTKR].

2. *Id.*

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

2023]

M&A AND JOINT VENTURES 139

anti-monopoly authorities to require reporting obligation and conduct antitrust investigation if there is evidence that the consolidation restricts or could restrict competition, even though the consolidation does not meet the reporting standards;²⁴ (4) introducing a safe harbor rule: vertical monopolistic agreements are not prohibited if the parties' market share in the relevant market is under certain threshold and the conditions established by the enforcement agency are fulfilled;²⁵ and (5) permitting suspension of the calculation of the merger review period if (a) the parties fail to submit the required documents and materials and makes review impossible, or (b) new circumstances or facts that significantly affect the merger review occur and the review cannot proceed without verification, or (c) further evaluation is needed on the additional restrictive conditions for the concentration of business operators, and the company requests a suspension.²⁶

III. Italy

A. RUSSIAN ROULETTE CLAUSES

Under Italian law, notaries are entrusted in making the first evaluation of the lawfulness of the Certificate of Incorporation and By-Laws (*Statuto*) of an Italian company.²⁷ The Notarial District of Milan is one of the most important in Italy and whose decisions are very important and constitute a persuasive precedent in Italian corporate law. It established in its Decision no. 181, as amended,²⁸ of the Corporate Law Commission that it is now lawful to provide anti-deadlock (whether in the Board of Directors or in the shareholders meeting) provisions, including a Russian roulette clause in the By-Laws of an Italian company. These kinds of clauses are typically used in companies with only two shareholders, or in closely held companies.

It has been long debated whether Russian roulette clauses were legal or, if legal, whether they could be included in the By-Laws of a company. But after a recent seminal decision of the Court of Rome²⁹ on its validity, the Notarial District of Milan decided anti-deadlock and Russian Roulette provisions may be included in By-Laws of a company.

24. *Id.* at art. 10(26).

25. *Id.* at art. 18.

26. *Id.* at art. 11(32).

27. *The Deposit at a Notary in Italy of Public and Private Deeds or Agreements Signed Abroad*, NOTARY IN ITALY, <https://www.italy-advisor.it/notary-in-italy> [https://perma.cc/VK4V-A2J7] (last visited Mar. 29, 2023).

28. *Anti-deadlock Clause for the Repurchase or Forced Purchase of Shareholdings (so-called Russian Roulette Clause or Cowboy Clause)*, NOTARY COUNCIL OF MILAN, <https://www.consiglionotarile.milano.it/massime-commissione-societa/181/> [https://perma.cc/32YZ-52ZF] (last visited Mar. 15, 2023).

29. Daniel Joseph Giuliano & Chiara Sannasardo, *The Court of Rome Confirms that Russian-Roulette Clauses Can Be Included in Shareholders' Agreements in Order to Solve Deadlocks*, CONCURRENCES (Oct. 19, 2017) <https://www.concurrences.com/fr/bulletin/special-issues/mergers-joint-ventures/the-court-of-rome-confirms-that-russian-roulette-clauses-can-be-included-in> [https://perma.cc/2B32-J73G].

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

140 THE YEAR IN REVIEW

[VOL. 57]

Russian roulette clauses are those clauses whereby upon the occurrence of certain triggering events, a shareholder may commence a procedure whereby it has the right to determine the value of the respective equal participations giving to the counterpart the choice between (1) sell its participation to the shareholder that has set the value or (2) purchase the other party participation at the same price.³⁰

The Notarial District of Milan decision points out that this clause has only one mandatory limit, which needs not to be expressly stated. The value of the participation so determined must not be lower than the value determined by the law in case of withdrawal of shareholder from a company,³¹ as prescribed by the current majority jurisprudence and scholars.³²

It should also be noted that the decision of the Notarial District of Milan expressly mentions and allows the use of the Russian roulette clause and similar clauses for different purposes than deadlock solving. For example, as a right granted to a shareholder holding a certain percentage of capital or as special right to the holder of a certain category of shares upon the occurrence of certain triggering events.

In short, in Italian corporate law the Russian roulette clause (and similar clauses) went from a questionable validity to now being acceptable clauses used for several purposes besides the traditional one of anti-deadlock clause.

IV. Peru

A. MERGER CONTROL AND ENFORCEMENT TRENDS

Merger Control was introduced in Peru by means of Law 31112, the Merger Control Law (MCL) enacted in June 2021.³³ Under the law, all business concentration transactions in any sector or industry, including foreign transactions that have effects in Peru and transactions involving agents that have not previously carried out activities in the sector or industry under evaluation and which meet the thresholds set forth in the MCL, require the prior clearance of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), the Peruvian antitrust agency.

30. Daniel Joseph Giuliano & Chiara Sannasardo, *Russian Roulette: Take It or Leave it? It's Up to You* . . . , PORTOLANO CAVALLO (Oct. 21, 2019), <https://portolano.it/en/newsletter/portolano-cavallo-inform-corporate/russian-roulette-take-it-or-leave-it-its-up-to-you> [<https://perma.cc/GV3Z-PB7N>].

31. C.c. bk. 5, tit. V, art. 2437-ter, ¶ 2 (It.); C.c. bk. 5, tit. V, art. 2473, ¶ 3 (It.).

32. Court of Milan, order dated March 31, 2008, *Le Società*, 2008 1373 *et seq.*; Sbisà, *Dialogo con la giurisprudenza sulle clausole statutarie di trascinarsi (drag-along)*, *Contratto e Impresa*, 2015, 635 *et seq.* (that although relating to drag-along clauses, deal with the same legal issues).

33. Prior legislation on merger control was only applicable to the electricity industry. See Antimonopoly and Antiloligopoly Law of the Electricity Sector, Law 26876 (Nov. 19, 1997) (Peru).

THE YEAR IN REVIEW
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Europe

LUIGI PAVANELLO AND WILLEM DEN HERTOOG*

This Article discusses significant legal developments in European Law from 2022.

I. Italy

A. THE EUROPEAN COURT OF JUSTICE EXPLAINS THE MEANING OF THE WORD “DECISION” UNDER EU REGULATION 2201/2003

Case C-646/20, which was published on November 15, 2022,¹ addressed the interpretation of Council Regulation (EC) no. 2201/2003 (Regulation 2201/2003). Regulation 2201/2003, dated November 27, 2003,² concerns jurisdiction and the recognition and enforcement of judgments in matrimonial and parental responsibility matters and matters of parental responsibility. In its decision, the European Court of Justice set an important and fundamental precedent with respect to when an out-of-court divorce decree—specifically, that an out-of-court divorce decree constitutes a judgment under Regulation (EC) no. 1347/2000 (Regulation Brussels II-bis).³

The case involved a controversy between the *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht* (the Berlin Interior and Sport Department, which is in charge of overseeing and keeping the marital status register) and a German-Italian citizen.⁴ The Berlin Interior and Sport Department refused to acknowledge and file the German citizen’s marital status and would not register the divorce between the German-Italian citizen and his Italian wife obtained in Italy through the City of Parma’s *Ufficiale di Stato*

* Luigi Pavanello (Italy) is a partner at PLLC Legal in Vicenza, and Willem den Hertog (Netherlands) is the owner of Denhertog Legal.

1. At the time of drafting of this Article, only the German version (which was the language used in the proceeding) and the French version of the decision are available. See Case C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB*, ECLI:EU:C:2022:879 (Nov. 15, 2022).

2. Council Regulation 2201/2003, 2003 O.J. (L 338) 1–29 (EC).

3. No longer in force, as of July 31, 2022; Latest consolidated version: March 1, 2005; Repealed by Council Regulation (EU) 2019/1111 dated June 25, 2019, on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), a/k/a “Regulation Brussels-III.” See Council Regulation 1347/2000, 2000 O.J. (L 160) 19 (EC).

4. Case C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB*, ECLI:EU:C:2022:879, ¶ 25 (Nov. 15, 2022).

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

338 THE YEAR IN REVIEW

[VOL. 57]

Civile (Marital Status Registrar) without the previous exequatur and recognition of the divorce by the competent German Court.⁵

The facts of the case are simple: a German-Italian citizen married an Italian citizen in Berlin in 2013.⁶ In 2017, the couple appeared before the City of Parma's Marital Status Registrar to have their marriage dissolved pursuant to Italian law.⁷ Under Italian law, a couple may dissolve their marriage without the need for court proceedings before the local Marital Status Registrar if the following conditions are met: (1) There are no minor children, no disabled or seriously handicapped children, or no children that are not financially self-supporting; and (2) their will is freely expressed.⁸ After having obtained the divorce, one of the spouses sought to have the divorce registered in Berlin.⁹ But local German authorities refused to register the divorce on the grounds that it had not yet been recognized by a German court.¹⁰ After an appeal, the matter was brought before the locally-competent German Federal Court, which raised the following question to the European Court of Justice: Does the term "decision" as used in the Regulation Brussels II-bis regarding the recognition of a divorce include the divorce granted by a Marital Status Registrar of a Member State deriving from an agreement between the spouses and executed in accordance with the laws of such Member State?¹¹

The European Court of Justice, sitting in the Grand Chamber composition,¹² decided that the divorce decision issued by the Italian Marital Status Registrar, in accordance with the laws of Italy, was a "decision" in accordance with the Regulation Brussels II-bis, and it only concerned the dissolution of the marriage without any legal consequences on spousal maintenance, child support, or division of assets, and without the involvement of any minor or financially dependent offspring.¹³

Thus, according to the European Court of Justice, any divorce decision, whether issued by a court or out of court by an authority so empowered by

5. See *id.* ¶ 2.

6. See *id.* ¶ 25.

7. Decree Law no. 132 of September 12, 2014 – Urgent measures for de-jurisdictionalization and other measures to reduce the civil cases backlog (Gazzetta Ufficiale no. 212 of September 12, 2014) converted into law, with amendments, by Law no. 162 dated November 10, 2014, (Gazzetta Ufficiale no. 261 of November 10, 2014) ("Decree Law 132/2014"). See Legge 12 settembre 2014, n.132, G.U. Sept. 12, 2014, n.212 (It.).

8. *Id.* at art. 12.

9. Case C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB*, ECLI:EU:C:2022:879, ¶ 27 (Nov. 15, 2022).

10. See *id.* ¶ 29.

11. See *id.* ¶¶ 14, 30.

12. In this decision, fifteen judges out of twenty-seven agreed with the ruling. See *The Court of Justice of the European Union*, EUROPEAN PARLIAMENT, <https://www.europarl.europa.eu/factsheets/en/sheet/26/the-court-of-justice-of-the-european-union> [<https://perma.cc/U44H-8BCU>] (last visited Mar. 21, 2023); see Case C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB*, ECLI:EU:C:2022:879 (Nov. 15, 2022) (referencing Grand Chamber).

13. *Id.* ¶ 14.

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

2023]

EUROPE 339

the laws of an EU Member State, is a “decision” in accordance with Regulation Brussels II-bis and must be automatically recognized in the other EU Member States, except for the limitations set forth in the Regulation.¹⁴

II. Netherlands

A. ULTIMATE BENEFICIAL OWNER REGISTER

As described last year,¹⁵ and the year before that,¹⁶ the Dutch government has started establishing the Ultimate Beneficial Owner of companies (UBO) Register, which is required under Article 30 of the 4th EU Anti-Money Laundering Directive (the Directive).¹⁷ The Dutch Act¹⁸ that implements the EU Directive “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.”¹⁹

The public availability of the UBO Register is seen by some people “as a serious threat to the privacy of the individuals concerned, exposing them to all kinds of unwanted attention and far worse, such as and far worse, such as potential extortion and kidnapping.”²⁰ In prior litigation on this issue, the Dutch Courts refused to ask the Court of Justice of the European Union (CJEU) for a prejudicial decision because the Tribunal d’Arrondissement of Luxembourg had already done so.²¹ Since then, all eyes, or at least the Dutch and Luxembourg ones, were on the CJEU.²² The CJEU has now

14. *Id.*

15. Duncan Gorst et al., *Europe*, 56 ABA/ILS YIR 293, 297 (2022).

16. James Henry Bergeron et al., *Europe*, 55 ABA/ILS YIR 395, 398 (2021).

17. 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.

18. Gorst et al., *supra* note 15, at 297 (citing 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.)).

19. 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 Sept. 27, 2020).

20. Gorst et al., *supra* note 15, at 297.

21. *Id.* at 298; *see also* Directive (EU) 2015/849 of the European Parliament and of the Council, *supra* note 17.

22. *See Dutch Court of Appeal Rules Ultimate Beneficial Owners Can Request Shielding of Data*, PRIVACY FIRST (Nov. 16, 2021), <https://privacyfirst.eu/court-cases/705-dutch-court-of-appeal-rules-ultimate-beneficial-owners-can-request-shielding-of-data.html> [https://perma.cc/8GS2-7RN8].