

Client Alert

27 June 2024

International Arbitration Update No. 19

Global arbitration-related updates for Japanese corporations

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Following our previous update on certain developments in the international arbitration space, this client alert will summarize a number of recent developments that may impact Japanese parties.

We will continue to collaborate closely with our global offices to provide updates from around the world that we view as potentially impacting Japanese corporations.

In this client alert, we will cover three topics germane to dispute resolution developments in the enforcement of foreign judgments and in Brazil and Canada.

1. Hague Judgments Convention enters into force

The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 (the "**Convention**") entered into force on 1 September 2023.

The Convention is intended to do the following:

- Provide a single, minimum global framework for the free circulation and enforcement of judgments on civil or commercial matters across jurisdictions.
- Create a common framework for the mutual recognition of civil or commercial court judgments among contracting states through a uniform set of core rules. Here, goals include reducing transactional and litigation costs in cross-border matters and promoting international access to justice.
- Bind contracting states in connection with the recognition and enforcement of judgments from other contracting states, subject to certain defences relating to public policy, fraud, insufficient notice and other matters.

In some jurisdictions, the Convention will present a very minimal departure from the existing regime for the recognition and enforcement of foreign judgments under national law. In other jurisdictions, however, the Convention will significantly increase the number of judgments eligible for recognition and enforcement. If widely ratified, it will provide a relatively streamlined mechanism for the recognition and enforcement of a significant number of foreign civil or commercial judgments.

The enforcement rules in the Convention do not differ substantially from Japan's foreign judgment enforcement rules under Article 118 of the Civil Procedure Code. With this being said, the rules in the Convention are far more specific than those in Japan's Civil Procedure Code, which should lead to greater predictability in enforcement.





With respect to the present status of the Convention in certain countries¹:

- The Convention is now binding on EU member states (except Denmark) and Ukraine, and will enter into force for Uruguay on 1 October 2024.
- The UK, the US, Russia, Israel, Montenegro, North Macedonia and Costa Rica have signed but not yet ratified the Convention.

The Convention does not apply to certain categories of judgments, including those relating to criminal, revenue, customs or administrative matters. Certain civil and commercial matters are also excluded, including family law, insolvency, intellectual property, certain antitrust matters and arbitration.

At present, it is not evident whether Japan will sign and ratify the Convention, and no other Asian jurisdictions are currently signatories.

2. Brazilian Court of Appeal finds clause appointing extinct arbitral institution to be valid

In commercial contracts, the dispute resolution clause is pivotal. It will outline how parties should respond in a dispute and the preferred dispute resolution process. It is reflective of the understanding between the parties of what should happen in the case of a disagreement.

When a dispute resolution clause includes arbitration as the preferred method of dispute resolution, the clause is often referred to as an "arbitration agreement." If incorrectly or poorly drafted, however, the arbitration agreement may become "pathological," i.e., it may lead to disputes over the interpretation of the arbitration agreement, may result in the failure of the arbitral clause or even the unenforceability of an award.

In *União de Lojas Leader SA v. RB Capital Renda I Fundo de Investimento Imobiliár*,² the parties entered into a lease agreement in 2007 which named CIMA as the competent arbitral institution. In 2020, the lessee found itself unable to make the required payments and the lessor terminated the agreement, charging a termination fee.

The lessee argued that the termination fee was unenforceable because the institution named in the arbitration clause had ceased to exist in 2015, rendering the clause void and transferring jurisdiction to the courts.

The Rio de Janeiro Court of Appeal held that the extinction of CIMA did not void the arbitration clause. Here, the clause was still valid and enforceable, albeit incomplete, meaning that the parties would have to elect a different arbitral institution or tribunal.

3. Canadian court finds text message emoji sufficient to agree to a contract

Around the world, there are differing rules as to what amounts to a binding contract. While there is variance on the specific elements that constitute a binding contract, however, two common foundations are that: (i) an offer is made; and (ii) the offer is accepted.

¹ See the following link for the present status of the Convention in various jurisdictions: [HCCH | #41 - Status table](#)

² [RB v. Leader, Decision of the State Tribunal of Rio de Janeiro, 10 May 2023 \(jusmundi.com\)](#)



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In the modern era, the expansion of the internet as a business tool has created tensions with laws that still assume the existence of written contracts signed in hardcopy by both parties, or, at most, contracts that were the result of exchanged letters or telegrams.

In *South West Terminal Ltd v. Achter Land & Cattle Ltd*,³ a grain company representative sent a picture of a proposed contract for the purchase of flax to a farm producer by text message, alongside text stating "Please confirm flax contract." The farm producer responded with a "thumbs up" emoji.

When the farm producer failed to deliver the flax, the grain company issued proceedings for breach of contract.

While the farm producer claimed that the "thumbs up" emoji was merely an acknowledgement that the text message had been received, the Saskatchewan court disagreed.

Finding that a valid and binding contract had been concluded, the judge said that the court "cannot (nor should it) attempt to stem the tide of technology and common usage" of emojis.

If you would like to discuss any of the issues raised in this alert, please contact us.

³ *South West Terminal Ltd v Achter Land*, 2023 SKKB 116