

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

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International Legal Developments Year in Review: 2023

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**ANDERS FORKMAN, MARTIN AQUILINA, LUIGI PAVANELLO &
RON LEHMANN***

This Article reviews significant international legal developments made in the areas of international contracts law and policy in 2023.

I. Introduction

This Article reviews significant international legal developments made in the areas of international contracts law and policy in 2023. In Section II, the article discusses a case where a Canadian court not only confirmed the existence of a contract for the sale of goods concluded through an exchange of text messages, it also found that a “thumbs-up” emoji (👍) constituted a valid signature. Section III describes the new Swedish Direct Investment Act. Contrary to most other EU Member States, Sweden previously lacked a screening system that prevents investments in domestic companies if they involve risks from a security policy perspective. Section IV discusses the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgements and the implications of its adoption. Finally, Section V describes the judicial reform in Israel. Although not strictly pertaining to contractual law matters, this judicial reform has the potential to significantly impact the legal environment in Israel and the due process of law in determining the legality of applicable legislation.

II. Canada: Contract Formation through Text Messages

A. BACKGROUND

In a recently issued decision, the King’s Bench Court of Saskatchewan not only confirmed the formation of a contract for the sale of goods through an exchange of text messages, it also found that a “thumbs-up” emoji (👍) constituted a valid signature.¹

* The authors are Martin Aquilina, Aquilina Law Professional Corporation, Ottawa, Canada (Section II); Anders Forkman, Advokatfirman Vinge KB, Malmö, Sweden (Section III); Luigi Pavanello, PLLC Legal, Vicenza, Italy (Section IV) and Ron Lehmann, Fischer FBC & Co, Tel Aviv, Israel (Section V). Anders Forkman, Advokatfirman Vinge KB, Malmö, Sweden, authored the Introduction (Section I) and edited the article.

1. *South West Terminal Ltd. v. Achter Land & Cattle Ltd.* (2023), 116 Sask. R. 63, ¶ 37 (Can.) [hereinafter *South West Terminal*], <https://images.assettype.com/barandbench/>

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Union.⁷⁶ With the entry into force for the European Union, the Convention binds the individual Member States and with Italy due its ratification of the Treaty on the Functioning of the European Union with Law no. 130 dated August 2008.⁷⁷

The Convention generally applies to the recognition and enforcement of judgments in civil or commercial matters, including consumer and individual employment contracts.⁷⁸ However, certain matters are expressly excluded from its application, including those on the status and legal capacity of natural persons, family law matters, insolvency, privacy, intellectual property,⁷⁹ arbitration and related proceedings,⁸⁰ and provisional remedies.⁸¹ Finally, pursuant to Article 18(1) of the Convention, contracting states may also decide and declare in their ratification documents that the Convention does not apply to other specific matters.⁸²

The conditions upon which a judgment may be recognized pursuant to the Convention are set forth in Article 5.1. and namely:

- (a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
- (b) the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;
- (c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
- (d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
- (e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
- (f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

76. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012 (O.J. 326) art 216.

77. Legge 2 agosto 2008, G.U. Aug. 8, 2008, n.185 (It.).

78. *The Convention*, *supra* note 73, at art. 1.

79. *Id.* art. 2(1).

80. *Id.* art. 2(2).

81. *Id.* art. 3(1)(b).

82. *Id.* art. 18(1).

target company, the management and control of the target company and circumstances relating to the investor and can be combined with a penalty.⁶⁶

The screening authority may impose administrative fines for infringements of the FDI Act amounting up to SEK 100 million.⁶⁷ Fines can be imposed for a variety of breaches of the provisions of the FDI Act, such as failure to report an investment, providing false or misleading information, closing a transaction prior to, or contrary to, a final decision, or violating the conditions decided by the screening authority.⁶⁸ Decisions by the screening authority to prohibit an investment or to impose conditions may be appealed to the Swedish Government.⁶⁹ Injunctions and administrative fines may be appealed to the Stockholm Administrative Court.⁷⁰

The FDI Act also applies to the screening system under the Protective Security Act⁷¹ (the latter has a narrow scope of application). The same transaction may thus trigger filing obligations under both the FDI Act and the Protective Security Act.⁷²

IV. Italy: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgements

The 2019 Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters (the Convention) dated July 2, 2019,⁷³ has finally become effective. Although it has been signed by various countries, including Israel, Montenegro, Russia, the United States and Uruguay, it only applies to the European Union and Ukraine for the time being.⁷⁴ It became effective on September 1, 2023. Pursuant to Article 28, the Convention “shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.”⁷⁵

The European Union has exclusive external competence in this area and expressed its consent to be bound by the Convention in August 2022 pursuant to art. 216, par. 2 of the Treaty on the Functioning of the European

66. *Id.*

67. *Id.* §§ 31–32.

68. *Id.* § 31.

69. *Id.* § 39.

70. § 39 LAG (SFS 2023:560) (Swed.).

71. SÄKERHETSSKYDDSLAG (Svensk författningssamling [SFS] 2018:585) (Swed.).

72. *See id.*

73. *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, Hague Conf. on Priv. Int’l L. (HCCH) (July 2, 2019), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> [<https://perma.cc/8FRC-KMSK>] [hereinafter *The Convention*].

74. 41: *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HCCH (Jan. 12, 2024), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> [<https://perma.cc/A5WR-HBEN>] [hereinafter *Convention Recognition*].

75. *The Convention*, *supra* note 73, at arts. 24, 28–29.

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(g) the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with (i) the agreement of the parties, or (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

(h) the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;

(i) the judgment ruled against the defendant on a contractual obligation secured by a right in rem in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right in rem;

(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and – (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated. This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

(l) the judgment ruled on a counterclaim – (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.⁸³

It is clear the conditions for the recognition and enforcement of the judgments are quite numerous and detailed.⁸⁴ However, it should be noted that notwithstanding the provisions of Article 5.1 mentioned above, a judgment ruling “on rights in rem in immovable property (real property) shall be recognised and enforced if and only if the property is

83. *Id.* art. 5(1)(a)–(l).

84. See *The Convention*, *supra* note 73, at art. 5(1).

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situated in the State of origin.”⁸⁵ In short, it applies the worldwide rule that cases on real property can only be decided by the courts located where the property is situated.⁸⁶

The grounds upon which the recognition and enforcement of the judgment are limited are commonplace since they basically align with the grounds upon which most states now refuse recognition and enforcement (e.g., public policy, fraud, lack, or improper of service of documents) and specifically:

- (a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim—(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
- (b) the judgment was obtained by fraud;
- (c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;
- (d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;
- (e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or
- (f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.⁸⁷

It should be further noted that the above grounds for refusal are not mandatory, allowing courts to exercise discretion in their judgments.⁸⁸

In short, a judgment may be recognized and enforced under the Convention if any of the criteria set forth in Article 5.1. are met, with the sole exception, in certain cases, of real property.⁸⁹ Judgments in this matter,

85. *Id.* art. 6.

86. *Id.*

87. *Id.* art. 7(a)–(f).

88. *See id.*

89. *Id.* art. 5(1)(i).

are recognized if, and only if, the real property is situated in the state from which the judgment was issued.⁹⁰

Another important feature of the Convention is that it provides minimum requirements for recognition and enforcement and does not prevent or limit the recognition and enforcement of judgments under national law, bilateral, regional or other international treaties,⁹¹ with the exception of real property as regulated by Article 6 of the Convention.⁹² As it has been noted, the Convention provides a “floor” rather than a “ceiling” in the recognition and enforcement of foreign judgments.

With regard to relations with the Brussels Ibis Regulation,⁹³ it should be pointed out that the current rules are preserved and fully effective and enforceable, while any subsequent ones, in their field of application, are intended to prevail over the Convention with the sole exception of the provisions of Article 6. Summarily, Brussels Ibis in its current formulation will be applicable and operational to the decisions regulated by it, while any subsequent rule adopted must still guarantee compliance with the provisions of Art. 6 of the Convention concerning actions on real property.⁹⁴

Although the 2019 Hague Convention on the recognition and enforcement of foreign judgments only applies to the EU and Ukraine, it is definitively a useful tool to have judgments circulating abroad.⁹⁵ Hopefully more countries will ratify it in the future and be fully part of the same.

V. Israel: The Judicial Reform

The proposed judicial reform in Israel, promoted by the governing coalition, ignited a fierce debate in Israeli society for much of 2023.⁹⁶ The reform proposals laid bare strongly divergent views of the role of the executive and judicial branches of the Israeli legal system.⁹⁷ While advocates of the reform contend that it will enhance democracy in Israel, opponents express deep concerns that the reform will grant excessive power to the executive branch, compromise principles of checks and balances, and threaten minority rights.⁹⁸

The proposed reform encompasses several key changes, including:

90. *The Convention*, *supra* note 73, at art. 5(1)(i).

91. *Id.* arts. 15, 23.

92. *Id.* art. 6.

93. Regulation (EU) 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the recognition and enforcement of judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, 7.

94. *The Convention*, *supra* note 73, at art. 6.

95. *See Convention Recognition*, *supra* note 74.

96. *The Reform to Correct the Judicial System*, MY ISR., <https://legal-reform.org.il/the-reform/> [<https://perma.cc/U9ZR-Q658>] (last visited Nov. 28, 2023).

97. *Id.*

98. JERUSALEM INST. JUST., INTRODUCTION TO THE 2023 ISRAELI JUDICIAL REFORM 3 (2023), <https://jij.org/wp-content/uploads/2023/03/Booklet-Judicial-Reform.pdf>.

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Europe

EDITOR: DARA BROWN;
AUTHORS: HAIDER ALI, SEBASTIAAN BENNINK,
AND LUIGI PAVANELLO*

This Article discusses significant legal developments in European Law from 2023.

I. The Foreign Subsidies Regulation

In July 2023, the European Union (EU) implemented its inaugural antitrust measure aimed at addressing foreign subsidies, the Foreign Subsidies Regulation (FSR).¹ This landmark regulation mandates that companies operating within the EU and receiving foreign subsidies must formally inform the European Commission (EC or “the Commission”) of such subsidiaries, especially before quantitatively determined merger and acquisition (M&A) transactions, joint-ventures and public procurement bids.²

In October 2023, pre-transaction notification requirements of the FSR went into effect, including an implementing regulation with new notification obligations for transactions above specific thresholds.³ The implementation of these additional components coincided with the launch of an investigation

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1. See Commission Regulation 2023/1441 O.J. (L 177) 1 (EU); see also Communication from the Commission 2023/C 246/02 O.J. (C 246) 2 (EC). The European Commission adopted the FSR’s Implementing Regulation on July 10, 2023. See Commission Regulation 2023/1441 2023/144, at 1. The Implementing Regulation introduced filing requirements and provided helpful instructions and clarifications to the FSR. See *id.* annex I at 20–44. In addition, a detailed communication from the European Commission clarifies procedural rules, notably regarding transmission of documents to the European Commission. See EC FSR Communication, 2023/C 246/02.

2. See Commission Regulation 2023/1441, annex I, at 28–33, 38.

3. See Sarah Blazek, *The EU Foreign Subsidiaries Regulation*, ABA (Nov. 10, 2023), [https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/the-eu-foreign-subsidies-regulation/#:~:text=The%20European%20Union%20\(EU\)%20Foreign,public%20procurement%20procedures%E2%80%9494became%20applicable.\[https://perma.cc/7PYQ-ZMYW\]](https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/the-eu-foreign-subsidies-regulation/#:~:text=The%20European%20Union%20(EU)%20Foreign,public%20procurement%20procedures%E2%80%9494became%20applicable.[https://perma.cc/7PYQ-ZMYW]).

restrictions while codifying previously existing agency guidance to ensure U.S. companies cannot provide support to advanced Chinese semiconductor manufacturing while avoiding unintended impacts; and expanding license requirements for semiconductor manufacturing equipment to apply to additional countries beyond the PRC and Macau, to twenty-one other countries for which the United States maintains an arms embargo.¹⁴⁰

The third rule expands the number of entities added to the U.S. Entity List, to which the export of certain technology is prohibited.¹⁴¹ This update adds to this list thirteen entities involved in developing artificial intelligence that threatens U.S. national security and foreign policy objectives.¹⁴²

Whereas the aftermath of the 2022 controls showed the U.S. willingness to cooperate with its allies to limit the Chinese semiconductor industry, the aftermath of the 2023 controls shows that the United States is still very much inclined to take necessary steps unilaterally to put a hold to the further development of that industry. For a successful outcome, however, ongoing support from U.S. allies, such as the Netherlands and Japan, is paramount.

III. The European Court of Justice

In recent years, the EU has issued a significant number of directives to combat money laundering, illegal profits, and the financing of terrorism.¹⁴³ But in November 2022, the European Court of Justice (ECJ) established a significant roadblock to the availability of personal data that could arguably be used to help combat such crimes.¹⁴⁴

The ECJ implemented this roadblock in the joined cases *WM v. Luxembourg Business Registers* and *Sovim v. Luxembourg Business Registers*.¹⁴⁵ The cases concerned the implementation of Article 30(5)(c) of EU Directive 2015/849 into Luxembourgish law, as amended by Directive 2018/843 (the Fifth Anti-Money Laundering Directive or 5AMLD).¹⁴⁶ The 5AMLD established the Luxembourgish Register of Beneficial Ownership (RBO), and in doing so, prescribed that *any* member of the public could access personal information regarding a beneficial owner registered within the RBO.¹⁴⁷

140. *Id.*

141. *Id.*

142. *Id.*

143. See *EU Context of Anti-Money Laundering and Countering the Financing of Terrorism*, EUROPEAN COMM'N, https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en [<https://perma.cc/B55C-CFX2>] (last visited Apr. 9, 2024).

144. Case C-37/20, *WM v. Lux. Bus. Regs.*, 2022 EUR-Lex CELEX LEXIS 912 (Nov. 22, 2022) (joined cases C-37/20 and C-601/20).

145. *Id.* ¶¶ 83–88.

146. *Id.* ¶¶ 3–19.

147. See Laurent Fessmann et al., *Luxembourg: Access to the Register of Beneficial Owners*, BAKER MCKENZIE (Feb. 3, 2023), <https://insightplus.bakermckenzie.com/bm/investigations-compliance-ethics/luxembourg-access-to-the-register-of-beneficial-owners> [<https://perma.cc/ZZ7B-8KQ3>].

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After scrutinizing the pertinent evidence, the ECJ convened in the Grand Chamber,¹⁴⁸ and articulated its position that the public access to beneficial owners' data, as found in business registers across the EU, infringed upon the fundamental rights to life and privacy protections stipulated in Articles 7 and 8 of the Charter of the European Union Fundamental Rights.¹⁴⁹

The ECJ noted that the risk of violating one's fundamental rights is heightened by the fact that once information is published, it can be freely accessed, stored, and disseminated without an opportunity to "defend themselves effectively against abuse."¹⁵⁰

It is noteworthy that in recent years, numerous international organizations and institutions beyond the European Union, such as the United Nations, International Monetary Fund, and European Central Bank, among others, have identified the combat against money laundering, illicit profits, terrorism financing, and sanctions avoidance schemes as a strategic imperative for ensuring stability in the global economy. In contrast to the ECJ's ruling in *Luxembourg Business*, these entities contend that providing public access to registry data enables individuals and entities, including the press, to act as watchdogs in the market, thereby exposing and addressing abuses.

Nonetheless, the ECJ has been very clear that this system of public access to data is not necessary to fight money laundering or related crimes. Similarly, the ECJ has observed that the safeguards provided by the EU Directive,¹⁵¹ are ineffective. In summary, the European Court of Justice (ECJ) asserted that the responsibility to combat money laundering, illegal profits, and terrorism financing rests with public authorities and financial institutions, rather than individual citizens or other private entities.

148. The Grand Chamber is composed of fifteen out of the twenty-seven justices of the European Court of Justice when, inter alia, the matter is deemed of particular importance. *See Court of Justice*, COURT OF JUSTICE OF THE EUROPEAN UNION, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ [<https://perma.cc/PAA4-CJAT>] (last visited Apr. 9, 2024).

149. *See* Case C-37/20, *WM v. Luxembourg Bus. Regs.* 2022 EUR-Lex CELEX LEXIS 912, ¶¶ 83–88.

150. *Id.* ¶ 43.

151. *See* Directive 2018/843, arts. 36, 38, 2018 O.J. (L 156) 43 (EU).