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Resolutions, Declarations, and Other Documents

- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Dec. 12, 2008)

[Click here](#) for document (approximately 38 pages)

The United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea on December 12, 2008. The opening for signature of the Convention was authorized by the General Assembly to take place on September 23, 2009 in Rotterdam, the Netherlands. According to the United Nations Commission on International Trade Law (UNCITRAL) press release, the aim of the Convention is to “create a contemporary and uniform law providing for modern door-to-door container transport including an international sea leg, but not limited to port-to-port carriage of goods.” Furthermore, “[t]here are many innovative features contained in the Convention,” meant to harmonize and unify this area of law.

The Convention was negotiated by Member States and UNCITRAL observers from April 2002 to January 2008, and numerous drafts have been prepared. The most obvious beneficiaries of this Convention will be shippers, “particularly those in developing and least-developed countries, which are consumers of transportation services.”

Amsterdam Declaration on Transparency & Reporting (Global Reporting Initiative, Dec. 17, 2008)

[Click here](#) for document (approximately 2 pages)

The members of the Global Reporting Initiative (GRI) have issued the Amsterdam Declaration on Transparency and Reporting, calling on governments to “extend and strengthen the global regime of sustainability reporting.” According to the GRI, “the root causes of the current economic crisis would have been moderated by a global transparency and accountability system based on the exercise of due diligence and the public reporting of ESG [environmental, social and governance] performance.” As a result, governments need to rebuild the existing economic framework by: 1) “Introducing policy requiring companies to report on ESG factors or publicly explain why they have not done so; [2] Requiring ESG reporting by their public bodies – in particular: state owned companies, government pension funds and public investment agencies; [3] Integrating sustainability reporting within the emerging global financial regulatory framework being developed by leaders of the G20.”

Statement on Human Rights, Sexual Orientation and Gender Identity - French-Dutch-sponsored Declaration Read in General Assembly by Argentina (Dec. 18, 2008)

[Click here](#) for document (approximately 2 pages)

France and the Netherlands sponsored the Statement on Human Rights, Sexual Orientation, and Gender Identity. In the 13 point Statement, the two countries reaffirm the principle of universality of human rights, as enshrined in the Universal Declaration of Human Rights whose 60th anniversary was celebrated in 2008, article 1 of which proclaims that “all human beings are born free and equal in dignity and rights.” Furthermore, the Statement emphasizes “that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as set out in article 2 of the Universal Declaration of Human Rights and article 2 of the International Covenants on Civil and Political, Economic, Social and Cultural Rights, as well as in article 26 of the International Covenant on Civil and Political Rights.”

This is a non-binding document that has received much attention especially given the recent legal developments both in the U.S. (see for example the current debate on gay rights in California) and abroad (see for example the Report on the Situation of Fundamental Rights in the EU recently adopted by the European Parliament, recommending mutual recognition of same-sex partnerships).

Judicial and Similar Proceedings

Warrant of Arrest for Al Bashir (I.C.C. March. 4, 2009)

[Click here](#) for document (approximately 8 pages)

After much controversy, the International Criminal Court (ICC) has issued an arrest warrant for Sudanese President Omar Hassan Al Bashir on March 4, 2009. The Tribunal has found that there are reasonable grounds to believe that he is criminally responsible as an “indirect perpetrator, or as an indirect co-perpetrator, under article 25(3)(a) of the [Rome] Statute, for:

- i. intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, within the meaning of article 8(2)(e)(i) of the Statute;
- ii. pillage as a war crime, within the meaning of article 8(2)(e)(v) of the Statute;
- iii. murder as a crime against humanity, within the meaning of article 7(l)(a) of the Statute;
- iv. extermination as a crime against humanity, within the meaning of article 7(l)(b) of the Statute;
- v. forcible transfer as a crime against humanity, within the meaning of article 7(1)(d) of the Statute;
- vi. torture as a crime against humanity, within the meaning of article 7(l)(f) of the Statute; and
- vii. rape as a crime against humanity, within the meaning of article 7(1)(g) of the Statute;

According to the Pre-Trial Chamber I, the arrest warrant is necessary to “ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes.”

U.S. v. Canada (London Court of International Arbitration, Feb. 23, 2009)

[Click here](#) for document (approximately 149 pages)

The London Court of International Arbitration (LCIA) has ruled in favor of the U.S., holding that Canada had breached the 2006 Softwood Lumber Agreement (SLA) with the U.S. because it failed to calculate quotas properly between January and June 2007. As a result, the Court ordered that Canada remedy the breach within 30 days, and that Eastern provinces of Canada pay an additional 10% duty on lumber exports to the U.S., until C\$68.26 million has accumulated.

The SLA Agreement came into force on October 12, 2006, and sets out the guidelines pertaining to trade in softwood lumber between the U.S. and Canada. The Agreement also specifies the method in which possible disputes among the parties will be settled. According to the Agreement, the settlement of disputes will take place according to the LCIA Rules.

The agreement states that Canada will apply export measures to exports of softwood lumber from softwood lumber producing regions of Canada to the United States when the price of lumber is below U.S. \$355 per thousand board feet. On the other hand, the United States agreed not to initiate trade remedies proceedings or take other actions that would restrict trade in softwood lumber products from Canada, to revoke the countervailing and antidumping duty orders that had been in place for five years, and to return the estimated duties it had collected over that period on Canadian softwood lumber imports.

Dancap Prod. Inc., v. Key Brand Entm't, Inc. (Ct. of Appeal Ontario, Canada, Feb. 13, 2009)

[Click here](#) for document (approximately 9 pages)

The Court of Appeal for Ontario issued a decision emphasizing its deferential view toward arbitration clauses relating to jurisdiction, thus reaffirming Canada’s approach to the principle of competence/competence.

Dancap Productions, Inc. (Dancap), a U.S. company, and Key Brand Entertainment, Inc., a Canadian company, executed a preliminary Term Sheet describing the general terms of a participation agreement pertaining to Key Brand's acquisition of theatrical assets, including two Toronto theatres. According to the Term Sheet, Dancap would "obtain an equity position in Key Brand and membership on its board, as well as the right to manage the theatres pursuant to separate management agreements to be concluded in the future."

In addition to the Term Sheet, the parties entered into an Additional Rights Agreement (ARA), which "set[s] out the parties' agreement to negotiate in good faith towards the conclusion of the management agreements [and] contains an arbitration clause requiring that '[a]ny dispute, controversy or claim arising out of or relating to' the agreement (except for equitable claims) be submitted to arbitration." Finally, the ARA notes that exclusive jurisdiction is either the state or United States District courts in California. The Term Sheet lacks both an arbitration clause and a forum selection clause.

The dispute arose when Key Brand, after acquisition of the assets and prior to the finalization of the management agreements, sold the Toronto theatres to the Mirvish Enterprises Limited (Mirvish). Dancap commenced an action for damages and injunctive relief in Ontario under the Term Sheet. Key Brand, claiming that the majority of Dancap's allegations fell under the ARA arbitration and forum selection clauses, moved to stay the action. The lower court dismissed Key Brand's motion, holding "that Dancap's claims arose solely under the Term Sheet and not under the ARA and that the ARA arbitration and forum selection clauses did not apply." Key Brand then obtained an order from the Federal District Court in California requiring Dancap to submit to arbitration the core issue in the Ontario action.

Relying on a recent decision by the Supreme Court of Canada, *Dell Computer Corp. v. Union des Consommateurs*, the judge stated that "[w]hatever the law may be in the United States, I am persuaded that the motion judge erred in ruling on the scope of the arbitration clause rather than leaving the issue to the arbitrator."

Commission of the European Communities v. Sweden & Commission of the European Communities v. Austria (E.C.J. March 3, 2009)

[Click here](#) for Sweden document (approximately 8 pages); [click here](#) for Austria document (approximately 7 pages)

The European Court of Justice (ECJ) issued two separate judgments against Sweden and Austria regarding their continuous failure to adopt necessary legal measures to eliminate incompatibilities with EU law arising out of bilateral investment agreements (BIA). According to the facts, both countries had entered into numerous BIAs with third countries prior to becoming members of the EU. The BIAs contained "a clause under which each party guarantees to the investors of the other party, without undue delay, the free transfer, in freely convertible currency, of payments connected with an investment." Upon accession, both countries received letters from the Commission wherein the Commission noted that "bilateral agreements could impede the application of restrictions on movements of capital and on payments which the Council of the European Union might adopt under Articles 57(2) EC, 59 EC and 60(1) EC." Nevertheless, neither Sweden nor Austria, according to the Commission, took steps to implement appropriate legal remedies for the possible impediment. The Court held that Austria (Case C-205/06) and Sweden (C-249/06), "by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with [third countries] ha[d] failed to fulfil [their] obligations under the second paragraph of Article 307 EC."

Austria argued that an additional clause in a BIA could eliminate potential incompatibilities by leaving room for possible EU law changes; however, the Court was not persuaded: "While acknowledging that such a clause should, in principle, as the Commission admitted at the hearing, be considered capable of removing the established incompatibility, it is common ground that, in the cases referred to by the Commission, the Republic of Austria has not taken any steps, within the period prescribed by the Commission in its reasoned opinion."

Both countries argued that so far there has been no actual impediment created through these agreements. However, the Court, siding with the Commission, held that "[i]n order to ensure the effectiveness of [EC treaty] provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately with regard to the States to which they relate, which may include some of the States which have signed one of the agreements at issue with the Republic of Austria."

Mike Campbell (Pvt) Limited et al. v. Zimbabwe (Southern African Development Community, Nov. 28, 2009)

[Click here](#) for document (approximately 60 pages); [click here](#) for SADC Treaty (approximately 21 pages); [click here](#) for SADC Protocol (approximately 36 pages)

The Tribunal of the Southern African Development Community (SADC), established by Article 9 of the SADC Treaty, handed down its decision in Mike Campbell (Pvt) Limited et al. v. Republic of Zimbabwe, holding that Zimbabwe could not rely on its national law to circumvent its treaty obligations.

The SADC was established under the Treaty of the Southern African Development Community. Article 16 of the Treaty is specifically dedicated to the functions of the Tribunal. According to Article 16, the Tribunal is empowered "to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and the subsidiary instruments made thereunder, and to adjudicate upon such disputes as may be referred to it." With respect to jurisdiction, the Tribunal is mandated to hear "all disputes and applications referred to the Tribunal, in accordance with the Treaty and the Protocol, which relate to the interpretation and application of the Treaty." According to Article 15(1) of the Protocol, the Tribunal is authorized to adjudicate "disputes between States, and between natural and legal persons and States" only after local remedies have been exhausted.

The issue in this case centers on Zimbabwe's Land Reform Programme, executed through section 16B of the Constitution of Zimbabwe (Amendment 17), and the related attempt by the government of Zimbabwe to redistribute the land between the inhabitants. The case was brought by 79 white farmers whose land was expropriated under the Programme. They claimed that Amendment 17 racially discriminated against them by only targeting white Zimbabwean farmers, and that the Amendment deprived them of fair access to the courts. The farmers filed an application with the Tribunal challenging the Government's acquisition of agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe. The farmers also filed an application for an interim measure asking the Tribunal to "restrain[] the Respondent from removing or allowing the removal of the Applicants from their land, pending the determination of the matter." Simultaneously, they brought an action before the Supreme Court of Zimbabwe, which had not adjudicated the matter; a factor the Respondent argued resulted in the Tribunal's lack of jurisdiction.

The Tribunal was quick to point out that Amendment 17 "ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land" and that as a result this remedy was ineffective. Furthermore, the Tribunal noted that it had "jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application. Moreover, the Respondent cannot rely on its national law, namely, Amendment 17 to avoid its legal obligations under the Treaty."

The Tribunal concluded that 1) it had jurisdiction to hear the case, 2) the applicants were denied access to the courts in Zimbabwe, 3) that the applicants were discriminated against on the ground of race, and 4) that fair compensation was to be paid to them for the land taken.

Citigroup Global Markets, Inc. v. Bacon (5th Cir. March 5, 2009)

[Click here](#) for document (approximately 16 pages)

The U.S. Court of Appeals for the Fifth Circuit held that "[i]n the light of the Supreme Court's clear language that, under the FAA [Federal Arbitration Act], the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."

According to the facts of the case, an arbitration panel ordered Citigroup to pay plaintiff Debra Bacon \$256,000 for losses she suffered when her husband through forgery withdrew funds from her Citigroup Individual Retirement Accounts. Upon discovery of the fraud, Bacon submitted a claim in arbitration against Citigroup seeking reimbursement for the unauthorized withdrawals. She was granted \$218,000 in damages and \$38,000 in attorneys' fees by the arbitration panel. Relying on § 10 of the FAA, Citigroup asked the court to vacate the award. The district court sided with Citigroup and vacated the judgment on the basis that the arbitrators had manifestly disregarded the law. The Court of Appeals had to determine whether manifest disregard of the law "remains a valid ground for vacatur of an arbitration award in the light of the Supreme Court's recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1403 (2008)."

According to the lower court, the following three factors led to the conclusion that the arbitration panel manifestly disregarded the law: “1) Bacon was not harmed by the withdrawals because her husband used the money for her benefit and subsequently promised to pay her back; 2) Bacon’s claims were barred by Texas law, which permits such claims only if the customer reports the unauthorized transaction within thirty days of the withdrawal; and 3) Texas law requires apportionment among the liable parties, which, in this case, includes Bacon’s husband.”

In finding for Bacon, the Court of Appeals noted that the “notion that arbitration awards should generally be upheld barring some sort of procedural injustice” was embraced by both the Congress and the courts. Only in a limited number of circumstances, which are enumerated in §§ 10 and 11 of the FAA, will an award be “vacated, modified, or corrected when the action is one brought under the Act.” Citing *Hall*, the Court found that “§§ 10 and 11 provide the exclusive regimes for review under the FAA,” and since the ground on which the lower court vacated the arbitral award was not mentioned in those sections, the decision to vacate the award was in error.

At first glance this case appears to deal only with domestic legal issues. But since the FAA sets out guidelines relating to the relationship between U.S. courts and arbitral awards, a decision wherein a U.S. court upholds an arbitral award despite possible disregard of the law by the arbitration tribunal, has both national and international significance.

Briefly Noted

Arbitration (Scotland) Bill (Jan. 29, 2009)

[Click here](#) for document (approximately 48 pages)

Scotland enacted the new Arbitration Bill of 2009 meant to facilitate arbitration proceedings in the country and replace some of the outdated arbitration related legislation. According to the Scottish Government announcement, “[t]he aim is that in future anyone in Scotland, or anyone seeking to do business in Scotland, will be able to find in one place the principles governing the law of arbitration in Scotland in language which can be readily understood.”

The Bill is replacing the domestic arbitration law, which was derived mostly from case law that was not codified into statute. Furthermore, the previous law was unclear or inaccessible and did not “reflect modern practice on arbitration.” This ambiguity and lack of uniformity has led to “gaps in the law and difficulties in establishing exactly what the law is, particularly compared to other jurisdictions where it has been codified.” The result is that compared to other countries, “Scotland is not considered an attractive venue within which to conduct arbitration,” a notion the government hopes will change with the Bill.

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