NAFTA 2022 Advisory Committee

2013-2014 Report on U.S. Arbitration Developments

I. US Court Cases[1]

A. Supreme Court of the United States

1. *BG Group Plc v. Republic of Argentina,* 134 S.Ct. 1198 (2014)

Pre-condition to arbitration

The Supreme Court held that when reviewing an arbitration award rendered under an international treaty, U.S. courts should interpret and apply "threshold" provisions concerning arbitration within the U.S. law framework developed for interpreting similar provisions in ordinary contracts. Consequently, the Court decided that the local litigation requirement contained in the Argentina-UK bilateral investment treaty is a "procedural" pre-condition to arbitration, and thus a matter for arbitrators primarily to interpret and apply, subject to court review under a properly deferential standard.

B. Second Circuit

2. *Abu Dhabi Investment Authority v. Citigroup, Inc.,* 557 Fed.Appx. 66 (2d Cir. 2014)

Manifest disregard, Excess of powers

The U.S. Court of Appeals for the Second Circuit rejected the motion of Abu Dhabi Investment Authority (ADIA) to vacate an American Arbitration Association (AAA) award in favor of Citigroup in a $7.5 billion dispute. The Court held that ADIA did not meet the "high hurdle" of showing that the AAA panel demonstrated a "manifest disregard of the law" or exceeded its powers in ruling for Citigroup. ADIA had alleged that the panel wrongly applied New York law instead of Abu Dhabi law in manifest disregard of the law and excess of the panel's powers under the U.S. Federal Arbitration Act.

3. *Citigroup, Inc. v. Abu Dhabi Investment Authority,* 2013 WL 6171315 (S.D.N.Y. 2013)

Res Judicata, Previous arbitration

The U.S. District Court for the Southern District of New York denied Citigroup's request for an injunction against a second International Centre for Dispute Resolution (ICDR) arbitration brought by AIDA, ruling that the bank's objections should be decided by the arbitrators. Citigroup alleged that the second ICDR arbitration was an improper attempt to rehear claims that had been already decided, contrary to the doctrine of *res judicata.*

[1] Intra-NAFTA cases are marked with an *.

4. *Ometto v. Asa Bioenergy Holding AG,* 549 Fed.Appx. 41 (2d Cir. 2014)

Set aside, Arbitrator's failure to disclose his firm's involvement in related matters

The U.S. Court of Appeals for the Second Circuit denied a petition by Ometto to set aside two International Chamber of Commerce (ICC) awards on the ground that one of the arbitrators had failed to disclose that his law firm had advised clients on related corporate transactions where Abengoa (Asa Bioenergy) was a counterparty. The Court held that the arbitrator's carelessness did not reach the level of "willful blindness," referencing its *Applied Indus Materials v. Ovalar Makine* decision of 2007.

5. *Sonera Holding BV v. Cukurova Holding AS,* 750 F.3d 221 (2d Cir. 2014)

Enforcement, Refusal of recognition for lack of personal jurisdiction

In an action brought by Sonera for the enforcement of an arbitral award against Cukurova, the U.S. Court of Appeals for the Second Circuit, on appeal, found that the district court should have dismissed the action for lack of personal jurisdiction over Cukurova because Cukurova's "contacts with New York [were] insufficient to subject it to general jurisdiction." The Court of Appeals remanded the case to the district court and directed the court to dismiss the action for lack of personal jurisdiction.

6. *Blue Ridge Investments LLC v. Republic Of Argentina,* 735 F.3d 72 (2d Cir. 2013)

Enforcement of ICSID awards, Sovereign immunity, Interlocutory order

The U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling on sovereign immunity (see # 7 below), holding that because the award to be enforced was issued pursuant to the ICSID Convention, a treaty which contemplates the enforcement of awards against sovereigns who are parties to the Convention in the territories of other signatory States, Argentina had waived its sovereign immunity under two exceptions to the Foreign Sovereign Immunities Act (FISA): (i) the so-called implied waiver exception under 28 U.S.C. § 1605(a)(1) and (ii) the so-called arbitral award exception under 28 U.S.C. § 1605(a)(6).

7. *Blue Ridge Investments v. Republic of Argentina,* 902 F.Supp.2d 367 (S.D.N.Y. 2012)

Enforcement of ICSID awards

The U.S. District Court for the Southern District of New York held that (i) a defendant sovereign may not avoid an action to enforce an ICSID award by pleading lack of subject matter or personal jurisdiction, (ii) nothing in the ICSID Convention, in the federal legislation implementing the Convention, or in New York law prevents an assignee from enforcing an ICSID award, and (iii) the statute of limitations for enforcing an ICSID award in New York is properly borrowed from New York state law applicable to enforcement of a final money judgment from the court of another state, which is 20 years.

8. *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of The Lao People's Democratic Republic,* 997 F.Supp.2d 214 (S.D.N.Y. 2014)

Set aside under New York Convention

The U.S. District Court for the Southern District of New York granted a motion to vacate its earlier confirmation of a Malaysian arbitration award that was subsequently set aside by the Malaysian courts, finding that the extraordinary circumstances required to refuse to recognize the Malaysian set-aside judgment did not exist in this case.

9. *Variblend Dual Dispensing v. Seidel Gmbh & Co., KG,* 970 F.Supp.2d 157 (S.D.N.Y. 2013)

Agreement to arbitrate, Succession of obligation to arbitrate

The U.S. District Court for the Southern District of New York compelled arbitration in Geneva pursuant to a contract between the defendant and the plaintiff's predecessor in interest. The court held that when a contract generally transfers all rights, but not obligations, the obligation to arbitrate is nonetheless transferred.

10. *Yukos Capital SARL v. OAO Samaraneftegaz,* 963 F.Supp.2d 289 (S.D.N.Y. 2013)

Enforcement, Public policy, Due process

Granting summary judgment to enforce an arbitration award, the U.S. District Court for the Southern District of New York rejected arguments suggesting that the arbitration award was unenforceable (i) for lack of due process due to the mailing of notices to the defendant's management company rather than to defendant's corporate address, and (ii) due to alleged incompatibility with public policy of the United States against foreign tax fraud.

11. *Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción,* 962 F.Supp.2d 642 (S.D.N.Y. 2013)*

Enforcement of an award that was set aside by the court of the arbitration seat

The U.S. District Court for the Southern District of New York granted the petition of Corporación Mexicana de Mantenimiento Integral (COMMISA) to enforce an ICC award rendered against Pemex Exploracion y Produccion (PEP). The Court found that a Mexican court decision in 2011 setting aside the award violated basic notions of justice because "it applied a law that was not in existence at the time the parties' contract was formed."

COMMISA's parent company, Houston-based engineering company KBR, commenced a NAFTA Chapter 11 arbitration against Mexico claiming that "PEP and Mexican courts have harmed KBR and COMMISA by respectively seeking and declaring the annulment of the ICC Final Award." (See # II.6 below.)

C. Fifth Circuit

12. *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding,* 703 F.3d 742, 745 (5th Cir. 2012)

Enforcement, Refusal of recognition for lack of personal jurisdiction

The U.S. Court of Appeals for the Fifth Circuit held that, although personal jurisdiction is not specifically identified as a ground for non-recognition under the New York Convention, refusal of recognition for lack of personal jurisdiction is appropriate as a matter of constitutional due process.

13. *Covington Marine Corporation v. Xiamen Shipbuilding Industry Company,* 504 Fed.Appx. 298 (5th Cir. 2012)

Enforcement, Refusal of recognition for lack of personal jurisdiction

The U.S. Court of Appeals for the Fifth Circuit held that, as a matter of first impression, a petition for confirmation of an arbitral award pursuant to the New York Convention may be dismissed for lack of personal jurisdiction.

D. Sixth Circuit

14. *Venture Global Engn. v. Satyam Computer Services,* 730 F.3d 580 (6th Cir. 2013)

Set Aside, Fraud and violation of RICO as a ground

The U.S. Court of Appeals for the Sixth Circuit reinstated claims for fraud and violations of the RICO Act, 18 U.S.C. §§ 1961–1968, based on an alleged massive accounting fraud perpetrated by Satyam, and left open the possibility that a previous judgment enforcing an earlier arbitral award in Satyam's favor could be set aside as a result of the alleged fraud.

E. Seventh Circuit

15. *GEA Group AG v. Flex-N-Gate Corporation and Shahid Khan,* 740 F.3d 411 (7th Cir. 2014)

Discovery

The U.S. Court of Appeals for the Seventh Circuit held that a federal court has the power to allow discovery by a co-defendant even when the fruits of such discovery could be used by the other co-defendant in a pending foreign arbitration.

F. Ninth Circuit

16. *Oracle Am., Inc. v. Myriad Grp. A.G.,* 724 F.3d 1069 (9th Cir. 2013)

Arbitrability, Arbitrators to decide on arbitrability

The U.S. Court of Appeals for the Ninth Circuit held that the UNCITRAL Arbitration Rules delegate resolution of gateway questions of arbitrability to the arbitrator. Unlike the provisions of the BIT in *BG*

Group (see # 1 above), the arbitration clause at issue in this case contained no procedural preconditions to arbitration. Rather, the clause simply specified that any dispute arising out of or related to the license agreement would be resolved by arbitration.

17. *Modsaf of Islamic Rep. of Iran v. Cubic Def. Sys.*, 984 F.Supp.2d 1070 (S.D. Cal. 2013)

Enforcement, Attorneys' fees

The U.S. District Court for the Southern District of California, following the Ninth Circuit's instruction that federal law permits an award of attorneys' fees in an action under the New York Convention, awarded attorneys' fees to a party where the arbitral award debtor "simply ignored the validity of the [a]rbitration [a]ward and sought to avoid payment."

G. Eleventh Circuit

18. *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. 2014)

Discovery under 28 U.S.C. § 1782

The U.S. Court of Appeals for the Eleventh Circuit held that the contemplated suits by a company against its former employees in Ecuador, in connection with a foreign contract dispute, and with another entity, met the statutory requirements for the discovery order. The Court of Appeals decided that it need not address the issue of whether the language "international tribunal" in 28 U.S.C. § 1782 included arbitration proceedings commenced in Ecuador.

H. District of Columbia Circuit

19. *Commissions Import Export v. Republic of Congo,* 916 F.Supp.2d 48 (D.C. 2013)

Enforcement, Statute of Limitations

The U.S. Court of Appeals for the District of Columbia Circuit ruled that the three-year limit on enforcement of foreign arbitral awards under US federal law (the Federal Arbitration Act) does not prevent award creditors from benefiting from longer time limits for enforcement of foreign money judgments, in this case a foreign judgment enforcing the award, under DC law.

20. *Concesionaria Dominicana de Autopistas y Carreteras, SA v. Dominican State*, 926 F.Supp.2d 1, 3 (D.D.C. 2013)

Enforcement, Attorneys' fees

Citing *Cubic Defense Systems* (see # 17 above), the U.S. District Court for the District of Columbia ordered the Dominican Republic to pay the award creditor's attorneys' fees where the State had unjustifiably and "obstinately refused to participate in [the confirmation] action, resulting in a default and default judgment being enforced against it."

I. Federal Circuit

21. *Sanofi-Aventis Deutschland GmbH v. Genentech,* 716 F.3d 586, 588 (Fed. Cir. 2013)

Res Judicata, Preclusive effect of domestic judgment on foreign arbitration

The U.S. Court of Appeals for the Federal Circuit declined to enjoin a foreign arbitration holding that the parties are different and that "an injunction would frustrate the policies of [the US] in favor of enforcement of forum selection clauses in arbitration agreements."

II. NAFTA Cases (Tribunals seated in the US)

1. *Apotex Holdings Inc. and Apotex Inc. v. United States of America (2014)*

Dismissed for lack of jurisdiction, Res Judicata

Majority of the tribunal held in final award that an earlier arbitral ruling in a separate NAFTA case brought by the claimants should stand as "res judicata" with respect to whether the claimants' activity qualifies as a NAFTA-protected investment. (See # 2 below.)

2. *Apotex Inc. v. United States of America (2013)*

Dismissed for lack of jurisdiction, Notion of investment

Canadian company alleged that U.S. courts erred in interpreting federal law, and that such errors are in violation of NAFTA Article 1102 and Article 1105.

On June 14, 2013, the Tribunal issued an award dismissing all of the claims on the ground that Claimant's activity was not a NAFTA-protected investment.

3. *Detroit International Bridge Company v. Government of Canada*

Pending, Mexico and the U.S. filed submissions under Art. 1128 on the interpretation of the NAFTA

The claim concerns legislation passed by the Government of Canada that gives the Government of Canada authority over the construction, operation and ownership of international bridges.

4. *Eli Lilly and Company v. Government of Canada*

Pending, statement of defense of Canada filed on 30 June 2014

The dispute arises from a Canadian federal appellate court decision that invalidated the claimant's patent on a medicine; an appeal of that decision was dismissed by the Supreme Court of Canada.

5. *Mesa Power Group, LLC v. Government of Canada*

Pending, U.S. made submission pursuant to Art. 1128 on interpretation of the NAFTA

Mesa Power's claim concerns measures taken by the Government of Ontario, as they relate to the Feed-in Tariff (FIT) program enabled by the Green Energy and Green Economy Act.

6. *KBR, Inc. v. United Mexican States*

Pending, U.S. made submission pursuant to Art. 1128 on interpretation of the NAFTA

KBR and its Mexican subsidiary COMMISA (see # I.11 above) brought the NAFTA claim as part of their long-running efforts to collect on an ICC award rendered against Mexican State oil company Pemex in 2009. The NAFTA Tribunal issued its first procedural order on April 1, 2014, ruling on fundamental procedural issues.

III. Institutional Developments

A. Arbitration Rules and Guidelines

- IBA Guidelines on Party Representation in International Arbitration
- WIPO Revised Mediation, (Expedited) Arbitration and Expert Determination Rules
- UNCITRAL Transparency Rules for Treaty-Based Investor-State Arbitration
- UNCITRAL Arbitration Rules 2014
- ICDR International Dispute Resolution Procedures
- LCIA Arbitration Rules

B. Specialized Courts and Arbitration Facilities

- New York State, Justice Hon. Charles E. Ramos (Commercial Division of the Supreme Court, New York County) (Sept. 2013)
- Florida State, Eleventh Judicial Circuit of Florida (Dec. 2013)
- ICC The International Court of Arbitration's Secretariat Office in New York (2013)
- New York International Arbitration Center (2013)
- Atlanta Centre for International Arbitration and Mediation (opens in fall 2015)