

NAFTA 2022 Advisory Committee

Report on International Arbitration-Related Developments in the United States, 2015-2016

1. Decisions of International Arbitral Tribunals Seated in the US Relating to Canada or Mexico

1.1 NAFTA

- 1) ***Mobil Investments Canada Inc. & Murphy Oil Co. v. Government of Canada, ICSID Case No. ARB(AF)/07/4, Award (Feb. 20, 2015)***

Violation of NAFTA Article 1106: performance requirements

The Tribunal had found in its Decision on Liability and on Principles of Quantum, issued on May 22, 2012, that a Canadian province's local R&D spending requirement for investors constituted a performance requirement in violation of NAFTA Article 1106. In its 2015 Award, the Tribunal decided on damages, awarding the claimants a total of over CDN\$ 17 million and interest.

- 2) ***Detroit International Bridge Co. v. Government of Canada, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2, 2015), Award on Costs (Aug. 17, 2015)***

Dismissed for lack of jurisdiction, waiver requirement, costs awarded to Canada

The Tribunal held that it lacked jurisdiction because the claimant did not adequately waive its right to parallel proceedings under NAFTA Article 1121. The tribunal found that the claimant was pursuing litigation in a US federal court with respect to the same measures as those alleged to breach NAFTA Chapter 11. Finding that the claimant chose to take a risk by commencing arbitration without abandoning its national court claims, and was partially unsuccessful in the arbitration, the tribunal applied the "costs follow the event" approach and ordered the claimant to bear two thirds of Canada's reasonable legal costs and all the costs of the arbitration.

- 3) ***Mesa Power Group LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016)***

Dismissed for lack of jurisdiction, and on the merits

The claimant alleged that a provincial regulatory scheme for renewable energy violated several provisions of NAFTA. The Tribunal ruled in favor of Canada, holding that it did not have jurisdiction over certain government acts and that the other acts did not rise to the level of a breach of the minimum standard of treatment under NAFTA Article 1105.

1.2 CAFTA-DR

- 4) ***Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Jurisdiction (May 31, 2016)**

Dismissed for lack of jurisdiction, statute of limitations

The Tribunal held that it lacked jurisdiction as the claimant's claims were time-barred under DR-CAFTA Article 18.10.1.

2. US Court Decisions Relating to Canada or Mexico

- 5) ***Jolie Design & Décor, Inc. v. Kathy van Gogh*, 2016 U.S. Dist. LEXIS 77246 (E.D. La. June 13, 2016)**

Excess of Powers

The U.S. District Court for the Eastern District of Louisiana granted the petitioner's request to confirm an arbitral award and rejected the Canadian respondent's request to vacate the award because the arbitrator allegedly exceeded his authority. The Court held that the arbitrator did not exceed his authority by adjudicating on the existence of a contract as the respondent had submitted the issue for his consideration.

3. Other U.S. Court Decisions Concerning Issues of Importance

3.1 District of Columbia Circuit

- 6) ***Commissions Import Export, S.A., v. The Republic of the Congo*, 118 F. Supp. 3d 220 (D.D.C. July 30, 2015)**

Recognition of a foreign judgment recognizing a foreign arbitral award; limitation period

On remand from the U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit"), *Commissions Import Export, S.A., v. The Republic of the Congo*, 757 F.3d 321, 333 (D.C. Cir. 2014), the U.S. District Court for the District of Columbia ("DC District Court") applied the District of Columbia's Uniform Foreign-Country Money Judgments Recognition Act ("Recognition Act") to recognize a final judgment of the English Commercial Court, by which that court had recognized an ICC arbitral award issued in Paris, France, under the New York Convention. The DC District Court found that the English court's exercise of personal and subject matter jurisdiction over the Congo satisfied the requirements of both English law and the U.S. Foreign Sovereign Immunities Act. Consistent with an earlier decision of the Court of Appeals in the same case, the DC District Court also found that it was not contrary to the public policy of the District of Columbia to enforce a foreign judgment that itself enforces a foreign

arbitral award, even where an action to enforce the arbitral award in the U.S. is time barred under the U.S. Federal Arbitration Act (“FAA”) implementing the New York Convention.

7) *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, 795 F.3d 200 (D.C. Cir. Aug. 4, 2015)

Enforcement of award rendered under a Bilateral Investment Treaty (“BIT”); jurisdiction under the U.S. Foreign Sovereign Immunities Act (“FSIA”); defenses under the New York Convention

The DC Circuit affirmed a decision of the DC District Court confirming an award against Ecuador rendered in The Hague under the U.S.-Ecuador BIT. *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, 949 F. Supp. 2d 57 (D.D.C. 2013). The DC Circuit held (1) by agreeing to the arbitration provision in the U.S.-Ecuador BIT, Ecuador made a standing offer to American investors to arbitrate disputes involving “investments” as defined in the BIT, which included “a claim to money or a claim to performance having economic value, and associated with an investment”; (2) in order to maintain its jurisdiction over a foreign State under the FSIA’s so-called arbitration exception, the court must first resolve the factual question of whether an arbitration agreement exists; (3) Ecuador’s argument that Chevron’s claims were not covered by the scope of the BIT’s arbitration clause, however, was not capable of rebutting the presumption of the existence of an arbitration agreement based on the BIT’s offer of arbitration and its acceptance by Chevron’s notice of arbitration; (4) in any event, Ecuador failed to demonstrate that Chevron had not made an “investment” under the BIT; (5) Ecuador’s New York Convention defense under Article V(1)(c) failed for the same reason; and (6) Ecuador’s defense under Article V(2)(b), that enforcement would violate the public policy to uphold forum-selection clauses in agreements between sophisticated parties, was misplaced because the claims before the arbitral tribunal were based on the BIT, rather than on the parties’ contract containing a forum selection clause referring disputes to Ecuadorian courts.

8) *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112 (D.D.C. Nov. 20, 2015)

Enforcement of investment treaty award under Article V of the New York Convention

The DC District Court confirmed an ICSID Additional Facility award rendered in France on the basis of the Canada-Venezuela BIT in favor of Gold Reserve, Inc. (“GRI”). The Court denied Venezuela’s request to deny enforcement rejecting its challenges to the award. In particular, the Court rejected Venezuela’s arguments that (1) GRI did not qualify as an “investor” that had made an investment in Venezuela under the BIT; (2) the arbitral tribunal had improperly allocated unequal hearing time to the

parties; and (3) awarding damages to GRI, rather than to its Venezuelan subsidiary, amounted to an implicit award of punitive damages that was contrary to public policy.

9) *BCB Holdings Ltd. and The Belize Bank Ltd. v. Government of Belize*, 2016 U.S. App. LEXIS 8914 (D.C. Cir. May 13, 2016)

Enforcement of award under Article V of the New York Convention, tolling of limitation period

The DC Circuit affirmed a decision of the DC District Court to enforce an LCIA award rendered in London, England, against the Government of Belize (“GOB”). *BCB Holdings Ltd. v. Gov’t of Belize*, Civil Action No. 14-1123 (D.D.C. June 24, 2015). The DC District Court rejected GOB’s three defenses under Article V of the New York Convention against enforcement of the award, holding: (1) a challenge brought under Article V(1)(a) must be brought against the agreement to arbitrate itself, not against the contract as a whole; (2) while foreign tax liability is not an arbitrable subject matter, the arbitral award enforced the parties’ contract, and not enforce Belize’s tax laws; (3) GOB did not satisfy the substantial burden of establishing a specific U.S. public policy that could outweigh the strong U.S. policy favoring enforcement of awards. On appeal, the DC Circuit held that the Petitioners’ failure to initiate the enforcement action within the FAA’s three-year limitations period did not bar the action. The DC Circuit found that the limitations period was tolled until a Belizean statute criminalizing award enforcement was declared unconstitutional.

10) *Newco Ltd. v. Government of Belize*, 2016 U.S. App. LEXIS 8917 (D.C. Cir. May 13, 2016)

Enforcement of award, public policy

The DC Circuit affirmed a decision of the District Court confirming an arbitral award rendered in Miami against GOB. The DC Circuit rejected GOB’s request to deny enforcement on the basis of a public policy interest in international comity, finding that such an interest did not override the emphatic federal policy favoring enforcement. Citing *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303-04 (D.C. Cir. 2005), the DC Circuit also rejected GOB’s forum non conveniens objection. The DC District Court had confirmed the award, finding GOB’s sole objection – the award was not yet binding due to pending annulment proceedings in Belize – had become moot since the Belizean court had issued a final decision holding the request for enforcement was “well founded.” *Newco Ltd. v. Government of Belize*, 2015 U.S. Dist. LEXIS 174968 (D.D.C. Aug. 7, 2015). The DC District Court also had found that the Belizean court may not have the authority to set the award aside in the first place: although the arbitrators applied Belizean substantive law, the award was made in the U.S. and under U.S. procedural law. The

terms “under the law of which” in Article V(1)(e) of the New York Convention refers to the procedural law governing the arbitration.

11) *Diag Human v. Czech Republic - Ministry of Health*, 2016 U.S. App. LEXIS 9770 (D.C. Cir. May 31, 2016)

Subject matter jurisdiction under the FSIA; applicability of the New York Convention

The DC Circuit reversed a decision of the DC District Court that had refused to enforce an award against the Czech Republic Ministry of Health for lack of subject matter jurisdiction. *Diag Human v. Czech Republic - Ministry of Health*, 64 F. Supp. 3d 22 (D.D.C. 2014). The DC Circuit held that subject matter jurisdiction existed under the FSIA’s arbitration exception because Diag Human satisfied its burden of showing that the parties’ relationship at the time of the events giving rise to the dispute was “commercial” in nature and that the New York Convention accordingly could govern the enforcement of the award.

12) *Getma International v. Republic of Guinea*, 2016 U.S. Dist. LEXIS 75019 (D.D.C. June 9, 2016)

Enforcement of annulled award

The DC District Court rejected a petition to enforce a foreign arbitral award that had been set aside. The parties had submitted their dispute to arbitration under the Arbitration Rules of the Common Court of Justice and Arbitration (“CCJA”), an institution established in Abidjan, Côte d’Ivoire, by the Organization for the Harmonization of Business Law in Africa (“OHADA”) based on a treaty concluded among certain West and Central African States. Under those Arbitration Rules, the CCJA both administers arbitral proceedings and reviews resulting awards. In the instant case, the CCJA had set aside the award finding that the arbitrators had violated the applicable arbitration rules by soliciting increased arbitrator fees from the parties. The DC District Court held that although the New York Convention did confer upon courts the discretion to enforce an annulled award, that discretion was narrowly confined, and Getma did not satisfy the high standard of showing that non-enforcement would violate the most basic U.S. notions of morality and justice.

3.2 Second Circuit

13) *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. Feb. 13, 2015)

Ex parte recognition of ICSID award

The U.S. District Court for the Southern District of New York denied Venezuela’s motion to vacate a judgment entered by the Court *ex parte* recognizing an ICSID award against Venezuela. The Court, however, stayed enforcement of the judgment pending resolution of ICSID annulment proceedings

initiated by Venezuela in the meantime. In support of its motion, Venezuela argued that recognition of an ICSID award against a foreign sovereign was governed by the FSIA, in particular its provisions on prior service of process upon the foreign sovereign, and thus was not permissible on an *ex parte* basis. The Court rejected that argument reasoning that the enabling statute for the ICSID Convention (22 U.S.C. § 1650a), which was passed prior to the FSIA, did not specify the procedures applicable to converting an ICSID award to a federal judgment. The Court also explained that ICSID awards are subject to review only within ICSID itself, and not by national courts; as such, “ICSID awards are more secure from attack than awards from other arbitral institutions.” Citing earlier cases in which the same Court had enforced ICSID awards on an *ex parte* basis, the Court found that Article 54(1) of the ICSID Convention provided that Contracting States “with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of a court of a constituent state.” Accordingly, it was appropriate for the Court to rely on the procedures provided by New York state law to enforce a final judgment of a state court, in particular by simple registration under CPLR § 5401, without the need to bring an action on the judgment.

14) *Micula v. Government of Romania*, 2015 U.S. Dist. LEXIS 102907 (S.D.N.Y. Aug. 5, 2015), 2015 U.S. Dist. LEXIS 119906 (S.D.N.Y. Sep. 3, 2015)

Ex parte recognition of ICSID award; motion for reconsideration

Swedish nationals Ioan and Viorel Micula, and three companies owned by them, had obtained a favorable ICSID award against Romania, which they sought to enforce in the United States. Viorel Micula first petitioned the U.S. District Court for the District of Columbia *ex parte* for recognition of the ICSID award. That Court, however, denied the petition on the ground that ICSID award may not be recognized in summary *ex parte* proceedings. *Micula v. Government of Romania*, 104 F. Supp. 3d 42 (D.D.C. Apr. 16, 2015). Thereafter, Ioan Micula and the Micula’s companies petitioned the U.S. District Court for the Southern District of New York (“Southern District”) for recognition, also *ex parte*. The Southern District issued a judgment granting the petition and later amended the judgment to include Viorel Micula as an intervenor. Citing *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015), the U.S. District Court for the Southern District of New York rejected Romania’s subsequent motion to vacate *ex parte* judgments converting an ICSID award against Romania into a judgment.

15) PDV Sweeny, Inc., et al. v. ConocoPhillips Co., 2015 U.S. Dist. LEXIS 116175 (S.D.N.Y. Sept. 1, 2015)

Motion to vacate an arbitral award

The U.S. District Court for the Southern District of New York denied PDV Sweeney's petition to vacate an ICC partial award rendered against it in New York, and granted the cross-petition of ConocoPhillips to confirm the partial award as well as the final award rendered in the same case. The Court found that it had jurisdiction to confirm the awards under both the Inter-American Convention (also known as the Panama Convention) and the New York Convention, because the arbitration involved parties from the United States and Venezuela. The Court, however, rejected PDV Sweeney's attempt to found jurisdiction over its petition to vacate on the Inter-American Convention because that Convention did not does not provide for vacating or modifying awards. While a motion to vacate could be sought under the FAA or the non-statutory ground of "manifest disregard of the law", PDV Sweeney had failed to raise any of the FAA grounds, and did not prove that the arbitrators acted in manifest disregard of the law.

16) VRG Linhas Aereas S/A v. Matlinpatternson Glob. Opportunities Partners II L.P., 605 Fed. Appx. 59 (2d Cir. July 1, 2015)

Refusal to enforce an arbitral award in the absence of an agreement to arbitrate

The U.S. Court of Appeals for the Second Circuit denied enforcement of a Brazilian award, finding the respondents did not agree to arbitrate the subject of the award. The respondents had only signed an addendum to their indirect subsidiary's agreement with the petitioner; the self-contained addendum referred only to a non-compete clause in the subsidiary's agreement without incorporating all the agreement terms, and the addendum did not require reference to that agreement, which was the only agreement relevant to the dispute containing an arbitration clause.

17) Zurich American Insurance Co. v. Team Tankers A.S., 811 F.3d 584 (2d Cir. Jan. 28, 2016)

Enforcement of arbitral award

The U.S. Court of Appeals for the Second Circuit affirmed the District Court's decision to confirm the arbitral award, and rejected the respondent's contention that the arbitrator was guilty of misbehavior for failing to disclose his illness, as required by the arbitral rules. The Court noted that "parties may not expand by contract the FAA's grounds for vacating an award."

18) *InterDigital Communities, Inc. v. Huawei Inv. & Holding Co.*, 2016 U.S. Dist. LEXIS 21848 (S.D.N.Y. Feb. 17, 2016)

Stay of enforcement pending annulment action at seat of arbitration

The U.S. District Court for the Southern District of New York granted the respondent's motion to stay the enforcement proceeding until the court at the seat of arbitration decided on the respondent's action to annul the award. The Court noted that "the courts of the country in which or under whose law the arbitration award was made have primary jurisdiction to determine the enforceability of the arbitration award."

19) *Crescendo Maritime Company v. Bank of Communications Co. Ltd.*, 2016 U.S. Dist. LEXIS 21824 (S.D.N.Y. Feb. 22, 2016)

Personal jurisdiction, enforcement of awards

The U.S. District Court for the Southern District of New York granted the petitioner's request to confirm three arbitral awards issued in London against the respondent, Bank of Communications, rejecting its arguments that 1) the Court lacked jurisdiction; 2) the Court should dismiss based on *forum non conveniens*; and 3) the tribunal exceeded its power by allowing a third party to join the arbitral proceedings. With respect to its jurisdiction, the Court found that it had *quasi in rem* jurisdiction because the respondent had assets in New York, even though those assets had no relationship to the underlying dispute. The Court declined to dismiss the petition on *forum non conveniens* grounds finding that the petitioner's choice of New York was motivated by genuine convenience given that the respondent held assets there. As to the tribunal's joinder of a third party to the arbitration, the Court found that no violation of any procedural rules had been shown.

20) *National Indemnity Company v. IRB Brasil Resseguros S.A.*, 2016 U.S. Dist. LEXIS 30871 (S.D.N.Y. Mar. 10, 2016)

Enforcement of arbitral awards, evident partiality

The U.S. District Court for the Southern District of New York granted the petitioner's request to confirm three awards. The Court rejected the respondent's argument that concurrent service by the presiding arbitrator as a party-appointed arbitrator in another unrelated arbitration between different parties constituted "evident partiality" and found no other grounds for vacating the awards.

21) *Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 U.S. Dist. LEXIS 80151 (S.D.N.Y. June 20, 2016)

Insurer bound by insured's agreement to arbitrate, enforcement of award

The respondent, an insurance company, moved to dismiss a petition to confirm an arbitral award for lack of jurisdiction. The respondent argued that it was not bound by an agreement to arbitrate between the petitioner and a company insured by the respondent. The U.S. District Court for the Southern District of New York rejected the respondent's argument and confirmed the arbitration award, holding that the respondent "knew when it extended insurance that it would be assuming subrogation rights, and taking over the rights of its insureds"

22) *GE Transportation (Shenyang) Co. v. A-Power Energy Generation Systems*, 2016 U.S. Dist. LEXIS 81367 (S.D.N.Y. June 22, 2016), 2015 U.S. Dist. LEXIS 158230 (S.D.N.Y. Nov. 23, 2015)

Enforcement, alter-ego liability, preliminary injunction to freeze assets with pending confirmation of the arbitral award

The U.S. District Court for the Southern District of New York granted the petitioner's request to confirm an arbitral award against the respondent, but rejected the request as against entities related to the respondent under a theory of alter-ego liability, noting that they were not parties to the action and that such a determination would be inappropriate in the context of an action to confirm an award.

Earlier, the Court had granted the petitioner's *ex parte* motion for a preliminary injunction to freeze assets of the respondent and its alter ego, finding that the petitioner demonstrated (1) it would suffer an actual and imminent injury absent a preliminary injunction, and (2) the petitioner was likely to succeed on the merits of the pending confirmation of the arbitral award.

23) *Leeward Construction Company v. American University of Antigua - College of Medicine*, 2016 U.S. App. LEXIS 11570 (2d Cir. June 24, 2016)

Enforcement of arbitral award, reasoned award

Affirming the District Court's decision to enforce an arbitral award, the U.S. Court of Appeals for the Second Circuit rejected the respondent's argument that the tribunal failed in its obligation to produce a reasoned award. The Court held that a reasoned award must "set forth basic reasoning of the arbitral panel on the central issue . . ." and concluded that the tribunal's award satisfied the standard by providing "key factual findings supporting its conclusions."

3.3 Third Circuit

24) *Calbex Mineral Ltd., v. ACC Resources Co., L.P.*, 90 F. Supp. 3d 442 (W.D. Pa. 2015)

Summary judgment to enforce an arbitral award

The U.S. District Court for the Western District of Pennsylvania granted the petitioner's motion for summary judgment to enforce a China International Economic & Trade Arbitration Commission ("CIETAC") award issued in Beijing, holding that enforcement of the award against the respondent was not precluded by the arbitration panel's consideration, without notice, of a prior award rendered in an arbitration between the same parties by the CIETAC's Shanghai sub-commission because the respondent failed to show any resulting prejudice.

3.4 Fourth Circuit

25) *Terra Holding GmbH v. Unitrans International, Inc.*, 124 F. Supp. 3d 745 (E.D. Va. 2015)

Enforcement of arbitration agreement; arbitrability

The U.S. District Court for the Eastern District of Virginia compelled the parties to arbitrate their dispute, holding that the question of arbitrability is generally an issue for judicial determination, except where the agreement "clearly and unmistakably" provides that the arbitrator shall determine what disputes the parties agreed to arbitrate. In this instance, the Court found the high standard was met, because the arbitration clause both included expansive language and incorporated a specific set of rules. Accordingly, the Court found it appropriate, under the FAA and the New York Convention, to order the parties to proceed to arbitrate both the preliminary issue of arbitrability and their entire dispute in the event the arbitrators determine that the dispute is subject to the arbitration clause.

26) *Bayer Cropscience AG v. Dow Agrosciences LLC*, 2016 U.S. Dist. LEXIS 5571 (E.D. Va. Jan. 15, 2016)

Enforcement of arbitral award

The U.S. District Court for the Eastern District of Virginia granted the petitioner's request to confirm an ICC award rendered in a patent licensing dispute. The Court rejected the respondent's contention that the award violated public policy against double patenting, finding that reassessing the validity of the patents in question would force the Court to analyze the case on its merits.

- 27) ***Research & Development Center “Teploenergetika,” LLC v. EP International, LLC and Worldwide Vision, LLC*, 2016 U.S. Dist. LEXIS 55843 (E.D. Va. Apr. 26, 2016)**

Enforcement of arbitral award

The U.S. District Court for the Eastern District of Virginia granted the petitioner’s request to enforce three arbitral awards from the International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (“ICAC”). The Court rejected the respondents’ argument that they were unable to present their case due to security concerns at the place of hearing. The court noted that videoconferencing was permitted by the arbitral institution, and could have been used by the respondents to fully present their case.

3.5 Fifth Circuit

- 28) ***Growtech Partners v. Accenture LLP*, 118 F. Supp. 3d 920 (S.D. Tex. 2015)**

Refusal to compel arbitration

The U.S. District Court for the Southern District of Texas denied the defendant’s motion to compel arbitration in India, finding that the defendant had waived its right to compel arbitration by its action: the plaintiff had initiated arbitration in India, and the defendant had refused to participate in the arbitration and implied that it would pursue costly legal remedies if plaintiff persisted in the arbitration. The plaintiff subsequently commenced the present court action, and would be prejudiced if required to return to India to participate in the arbitration.

- 29) ***Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F. 3d 1010 (5th Cir. 2015)**

Enforcement of arbitral award; public policy

The U.S. Court of Appeals for the Fifth Circuit reversed the District Court’s decision denying enforcement of a Philippine arbitral award on public policy grounds. The Court held that (1) applying Philippine law to a Filipino seaman in a Philippine arbitration was not in itself a cause for refusing enforcement, even if U.S. choice-of-law principles would lead to the application of another nation’s law; and (2) U.S. public policy does not necessarily disfavor lesser remedies under foreign law despite the strong U.S. public policy of protecting seamen.

3.6 Sixth Circuit

- 30) *Intel Capital (Cayman) Corp. et al. v. Shan Yi*, 2015 U.S. Dist. LEXIS 153495 (E.D. Mich. Nov. 13, 2015)**

Proper notice under Article V(1)(b) of the New York Convention

The U.S. District Court for the Eastern District of Michigan confirmed a Hong Kong award rendered under the UNICITRAL Arbitration Rules, rejecting the respondent's motion to deny enforcement for lack of proper notice under Article V(1)(b) of the New York Convention. The Court found the respondent had been properly served because the petitioners and the arbitrator had made a reasonable attempt to trace him by hiring a consulting firm and by emailing him.

3.7 Eighth Circuit

- 31) *AVR Communications, Ltd. et al. v. American Hearing Systems d/b/a Interton, Inc.*, Case No. 14-2313 (8th Cir. July 14, 2015)**

Subject matter jurisdiction; res judicata

The U.S. Court of Appeals for the Eighth Circuit affirmed the District Court's decision to confirm an Israeli arbitral award. The respondent argued that the arbitration agreement did not cover the specific claims. The Court declined to enter into a review of the scope of the arbitration agreement, because it did not pertain to subject matter jurisdiction and the issue had already been fully reviewed by courts in Israel, which had found that the claim fell within the scope of the parties' arbitration agreement. The Court also found that the Israeli court judgments had preclusive effect and thus prevented the respondent from relitigating the issue.

3.8 Ninth Circuit

- 32) *Intel Capital (Cayman) Corp. v. Hsia*, 2015 U.S. Dist. LEXIS 145191 (N.D. Cal. Oct. 16, 2015)**

Enforcement of arbitral award

The U.S. District Court for the Northern District of California confirmed the foreign arbitral award, finding that the respondents had failed to meet their substantial burden to establish two "narrowly construed" defenses, violation of due process and violation of public policy, under Article V of the New York Convention.

- 33) *Baysand Inc. v. Toshiba Corp.*, 2015 U.S. Dist. LEXIS 157442 (N.D. Cal. Nov. 19, 2015)**

Enforcement of arbitration agreement; arbitrability

The U.S. District Court for the Northern District of California held that an arbitrator should determine the arbitrability of the plaintiff's claims, finding that incorporation in the arbitration clause of the ICC Arbitration Rules, which provide that the arbitral tribunal shall decide on any "plea concerning the existence, validity or scope of the arbitration agreement," was "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability, as was the broad language of the arbitration clause, which expressly covered "disputes 'in connection with' the interpretation and performance of the agreements." The Court also found that the defendant's assertion of arbitrability of the claims was "not wholly groundless," and accordingly ordered the action stayed pending the arbitrator's determination of the claims' arbitrability.

3.9 Tenth Circuit

- 34) *CEEG (Shanghai) Solar Science & Technology Co. v. Lumos LLC*, 2016 U.S. App. LEXIS 13192 (10th Cir. July 19, 2016)**

Notice of Arbitration

Affirming the decision of the District Court, the U.S. Court of Appeals for the Tenth Circuit dismissed the petition to enforce an arbitral award issued in China, holding that the respondent had not received proper notice of the arbitration under Article V(1)(b) of the New York Convention. The Court found that although the parties' pre-arbitration correspondence had been in English, the petitioner's notice of arbitration was in Chinese, which prevented the respondent from immediately realizing its nature and caused the respondent to miss the deadline to participate in appointing the arbitral tribunal.