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Perspectives on the New York Convention under the Laws of the United States Forum Non Conveniens as a Stopper to Enforcement

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The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is the engine that makes international arbitration an effective mechanism to resolve disputes. The purpose of the New York Convention is to encourage and simplify the recognition and enforcement of foreign arbitral awards. In the case of Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru ("Figueiredo case"), the court stated that since arbitrators have no power to enforce their awards, an arbitral award must first be recognized, that is, reduced to a court judgment, which can be enforced against the debtor's assets (Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 395 (2d Cir. 2011)).

The Forum Non Conveniens Doctrine under the New York Convention: A Refusal Outside of Article V's Scheme

Under the New York Convention, recognition and enforcement of foreign arbitral awards may be refused only upon proof of one of seven specified grounds. The *forum non conveniens* doctrine is not one of them.

Nonetheless, in the *Figueiredo* case, the United States Court of Appeals for the Second Circuit dismissed an action to enforce an award against the government of Peru based on the application of this doctrine. In relying upon a discretionary, common law doctrine to refuse enforcement of a valid award, the *Figueiredo* decision has been criticized as inconsistent with the United States' treaty obligations under the New York Convention. Figueiredo Ferraz e Engenharia de Projeto Ltda. ("Figueiredo"), a Brazilian company, obtained a $21.6 million arbitral award in Peru against the Programa Agua Para Todos ("Program"). Peru's Ministry of Housing, Construction and Sanitation ("Ministry") appealed the award and a Peruvian appellate court dismissed the appeal. Figueiredo requested the enforcement of the award before the Southern District of New York under both the New York and Panama Conventions (this post focuses on the analysis under the New York Convention). The respondents opposed the enforcement on several grounds, including the forum non conveniens doctrine, and relied on a Peruvian mandatory law on the basis of which the agencies of the Peruvian government may not exceed 3% of the government's annual budget to comply with judgments and awards. The district court refused to apply the *forum non conveniens* doctrine. The respondents appealed. On appeal, the Second Circuit held that the Peruvian statutory cap must be considered in a *forum non conveniens* analysis:

> A principal public interest factor to be weighed in assessing the [forum non conveniens] claim is a Peruvian statute that limits the amount of money that an agency of the Peruvian government may pay annually to satisfy a judgment. […] We agree with the Appellants that the cap statute is a highly significant public factor warranting FNC dismissal (Id. at 386 and 392.).

The *forum non conveniens* doctrine allows courts to decline to hear a case that would be more convenient to try in another forum, notwithstanding that the court has jurisdiction over the parties and the subject matter of the dispute. It is founded on the court's inherent authority to manage its own affairs in order to promote the orderly and efficient disposition of cases (Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)).

In the *Figueiredo* case, the Second Circuit held that Peru was an adequate alternate forum and the fact that Figueiredo might recover less in Peru than it would in the United States did not alter the conclusion that Peru was an adequate alternate forum. A plaintiff's choice is entitled to greater deference when the plaintiff has chosen its home forum (Koster v. Lumbermens Mut Cas. Co., 330 U.S. at 524). The assumption is less reasonable, however, when the plaintiff is foreign. (Piper Aircraft Co., 454 U.S. at 255-56). Because Figueiredo was a foreign plaintiff, its choice of a U.S. forum received reduced deference. The court must then consider private and public interests that affect the convenience of the parties and the court, and the expenses of holding the trial in the chosen forum (Norex Petroleum Limited v. Access Industries, Inc., et al., 416 F.3d at 153).

Private interest factors are those aspects of a case that affect the convenience of the litigants. In the *Figueiredo* case, the court noted that the underlying claim arose from a contract executed in Peru, by a company that claimed to be Peruvian, against an entity alleged to be an organ of the Peruvian government, for work done in Peru. Consequently, the appellate court held that the private interest factors favored dismissal.

Finally, the Second Circuit held that the Peruvian cap statute was a public interest factor to be weighed in its *forum non conveniens* analysis.

> [T]here is nonetheless a public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments." (Figueiredo, at 392).

And with that, the Second Circuit held that Peru was an adequate alternate forum.

The Figueiredo Decision: Consequences for Future Application of the New York Convention in the US

An application of the *forum non conveniens* doctrine as an additional ground for refusing to recognize or enforce arbitral awards is contrary to the United States' treaty obligations. The Second Circuit's reasoning that the *forum non conveniens* doctrine is authorized by Article III of the New York Convention is unfortunate.

The purpose of the *forum non conveniens* doctrine is to make trials "easy, expeditious and

inexpensive" (Gulf Oil Corp., 330 U.S. at 508.). Typically, actions to recognize and enforce arbitral awards are summary proceedings and are unlikely to impose a significant burden on a courts' ability to manage the docket, and thus the application of this doctrine to such a proceeding appears to be misguided.

The court applied the *forum non conveniens* doctrine broadly, as if it were dealing with the trial of a dispute on the underlying merits. The purpose of a recognition and enforcement action is to reduce the arbitral award to a court judgment that the plaintiff can enforce against the defendant's assets. There is nothing to suggest that Figueiredo's choice of a U.S. forum was motivated by reasons of forum-shopping or to harass or cause inconvenience to the defendants. It filed its enforcement action in a forum where the defendants held substantial and identifiable assets.

The Second Circuit also looked behind the award in deciding that private and public interest factors, especially the Peruvian cap statute, favored dismissal of Figueiredo's enforcement action. Had Figueiredo been seeking adjudication on the merits of the underlying dispute, a fulsome application of the *forum non conveniens* doctrine would be proper. The adjudication of the underlying dispute, however, had already taken place in Peru and resulted in the arbitral award in favor of Figueiredo upheld by the Peruvian courts. Figueiredo was seeking only to recognize and enforce the award. The fact that the contract and the project were located in Peru was not relevant to a summary proceeding to enforce the arbitral award. Moreover, the Peruvian statute does not fit within the US Supreme Court's account of public interest factors looked to when evaluating the application of the *forum non conveniens* doctrine:

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. (Gulf Oil, 330 U.S. at 508–09.)

The Second Circuit misapplied the *forum non conveniens* doctrine by considering the Peruvian statute in its analysis. It compounded its mistake by making this statute a dispositive factor warranting dismissal.

Courts which are bound by the *Figueiredo* decision to apply the *forum non conveniens* doctrine to arbitral enforcement actions should apply it narrowly and tailor the analysis to the purpose and summary nature of enforcement proceedings. Courts outside of the Second Circuit are not bound by the *Figueiredo* decision, of course. One day, a circuit split may place the issue before the Supreme Court for resolution if the Second Circuit itself does not first have the opportunity to readdress the matter. It seems likely then that the Supreme Court will hold that the *forum non conveniens* doctrine is not a recognized basis for refusing the recognition or enforcement of foreign arbitral awards under the New York Convention, and that its use would undermine the United

States policy favoring the enforcement of foreign arbitral awards.

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