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Recent Developments in the Forum Non Conveniens Defense To the Enforcement of International Arbitral Awards

ARBITRATION

FORUM NON CONVENIENS



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After a party prevails in an international arbitration, it faces the often difficult challenge of enforcing the award. Since an unsuccessful party will often seek to nullify the award, a prevailing party, particularly one from the United States, will try to enforce its award in U.S. courts, thereby avoiding the possibility that it will be subject to the "hometown" justice of the foreign court. The unsuccessful party will likely resist enforcement by raising various defenses including jurisdiction and forum non conveniens, i.e., the enforcement proceeding should more appropriately be held in another forum.

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Forum non conveniens is not listed as an exception to enforcement in the N.Y. Convention [1] by which contracting states agree to "recognize and enforce" foreign arbitration awards. Nevertheless, parties have been invoking this defense increasingly in recent years, and in December 2011, the U.S. Court of Appeals for the Second Circuit expansively applied the doctrine to dismiss an award enforcement case. See *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) (80 U.S.L.W. 801). Despite this decision, recent case law indicates that courts are not very likely to dismiss an arbitral award enforcement request based on this doctrine. This case law also underscores that parties should negotiate dispute resolution provisions with an eye towards potential arbitration award enforcement and the forum non conveniens defense.

[1] The N.Y. Convention is formally known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 53. The implementing legislation for the N.Y. Convention is the Federal Arbitration Act, *9 U.S.C. §§201-08* (1970).

Forum Non Conveniens as a Procedural Defense to Award Enforcement

Under the doctrine of forum non conveniens, a court has discretion to dismiss a pending lawsuit in favor of a different forum for reasons of judicial economy, convenience, and justice. A court first dismissed an arbitral award enforcement case on this basis in 2002, over three decades after the United States ratified the N.Y. Convention in 1970. See *In re Arbitration Between Monegasque De Reassurances S.A.M v. Nak Naftogaz of Ukraine ("Monde Re")*, 311 F.3d 488 (2d Cir. 2002). The Second Circuit determined that it could refuse to enforce an award for forum non conveniens even though the N.Y. Convention did not list the doctrine as an exception to enforcement because Article III of the Convention allows enforcing courts to apply their own rules of procedure. Id. at 495-96. The Second Circuit relied on the U.S. Supreme Court's classification of forum non conveniens as procedural. Id. at 497. The Second Circuit's rationale was criticized for misreading the Convention's Article III reference to rules of procedure as something beyond the formalities of an enforcement action like the fees or manner of filing, which are issues that determine "how recognition will be granted, not whether [it] will be granted." [2] While the Monde Re decision was controversial, it was an extreme case with parties that had little or no connection to the United States and it would have required U.S. courts to apply foreign contract law. [3]

[2] See, e.g., William Park, Respecting the N.Y. Convention, 18 ICC Int'l Ct. of Arb. Bull., no. 2, 7 (2007).

[3] In the case, a Russian company sought to enforce an award that it had obtained against a Ukrainian company based on a contract that called for performance in Ukraine. Monde Re, 311 F.3d Id. at 491. Before the enforcement action was filed in the United States, however, the Ukrainian company challenged the award in Russian court on the basis of Russian and Ukrainian contract law. Id. at 492.

December 2011 Decision Broadly Construing Forum Non Conveniens

The Second Circuit's 2002 Monde Re decision was the only case dismissing a petition to enforce a foreign arbitral award for forum non conveniens until the Second Circuit's December 2011 split decision in Figueiredo Ferraz E *Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011). [4] The Second Circuit majority expansively applied the forum non conveniens doctrine's three-part inquiry addressing the degree of deference owed to the plaintiff's choice of forum, the adequacy of alternative fora, and the balance of public and private factors.

[4] One award enforcement case also contained dicta indicating that the court was inclined to dismiss on forum non conveniens. *See Termorio S.A. E.S.P. v. Electricifadora del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87 (D.D.C. 2006), aff'd, 487 F.3d 928 (D.C. Cir. 2007). The court dismissed a breach of contract claim for lack of jurisdiction and an action to enforce a Columbian arbitral award because it had already been set aside in Columbia, but the court noted that the complaint would also have been dismissed on forum non conveniens because neither party had any connection to the United States and all sources of proof for the breach of contract claim would be in Columbia. Id. at 104.

The Figueiredo court expansively applied the first factor, the degree of deference owed to the plaintiff's choice forum. A private Brazilian company had sought to enforce a Peruvian arbitral award against the Peruvian government. [5] Instead of conducting a detailed analysis of how close the nexus was between the enforcement action and the United States, the court noted in one sentence that the District Court was correct to give reduced deference to the plaintiff's choice of forum because the plaintiff was from Brazil. Figueiredo, 665 F.3d at 390. While prior courts, including the court in Monde Re, had given less deference to a foreign plaintiff's choice of the United States as a forum, they had analyzed the deference factor on a sliding scale, also taking into account other factors such as the defendant's inconvenience in litigating in the United States. See, e.g., Monde Re, 665 F.3d at 498.

[5] The company sought award enforcement against the Peruvian government under the Panama Convention, and in the alternative, under the New York Convention. The formal name for the Panama Convention is the Inter-American Convention on Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245. Figueiredo, *665 F.3d at 403*. The conditions for award enforcement under the Panama Convention are nearly identical to those of the New York Convention.

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The Figueiredo court also applied the second factor of the adequacy of alternative fora expansively, finding that Peru was an adequate alternate forum as long as some assets were reachable in Peru. Figueiredo, 665 F.3d at 391. It did so even though courts previously had held that the inability to recover a full award in a foreign court supported the U.S. being a proper forum for enforcement. See *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005).

The Figueiredo court also added international comity as a public interest factor to be added to the list of public and private interest factors to be balanced and gave it considerable weight. Courts in the award enforcement context had previously confined their analysis to the factors enunciated in Supreme Court jurisprudence. See, e.g., Monde Re, 311 F.3d at 500; *Thai-Lao Lignite Co. v. Government of the Lao People's Republic*, No. 10 Civ. 5256(KMW), 2011 BL 215961, at *11-12 (S.D.N.Y. Aug. 3, 2011); *Saty am Computer Services Ltd. v. Venture Global Engineering LLC*, No. 06-CV-50351-DT, 2006 BL 152523 (E.D. Mich. July 13,

2006); *Satyam Computer Services Ltd. v. Venture Global Engineering LLC*, No. 06-CV-50351-DT, 2006 BL 114070 (E.D. Mich. Sept. 5, 2006). These private interest factors included considerations such as the relative ease of accessing evidence and proceeding to trial, while public interest factors included issues associated with court congestion, the "local interest in resolving local disputes," and challenges associated with applying foreign law. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947). In Figueiredo, the plaintiff brought the action in the United States, in part, because a Peruvian statute would limit the amount the company could recover from the government if it sought enforcement in Peru. Figueiredo, 665 F.3d at 386. The Second Circuit's addition of international comity as a significant public interest factor was to respect Peru's budgetary policy of limiting recovery against the government. Id.

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The vigorous dissent in Figueiredo, however, emphasized that the forum non conveniens determination runs counter to both the Panama Convention and the N.Y. Convention, which aim to promote the enforcement of international arbitral awards by reducing the obstacles to award enforcement. Figueiredo, 665 F.3d at 396 (Lynch, J., dissenting). Citing the draft Third Restatement of the U.S. Law of International Commercial Arbitration, the dissent maintained that forum non conveniens is inapplicable to enforcement proceedings because the N.Y. and Panama Conventions clearly limit the grounds for refusing to recognize an arbitral award. Id. at 397.

The Figueiredo dissent also argued that even if forum non conveniens could be applied in the award enforcement context, the majority applied the doctrine too expansively. The dissent noted that majority's decision was unprecedented because it reversed the district court's discretionary decision to retain jurisdiction in contrast to Monde Re. Figueiredo, 665 F.3d at 403. T he dissent was especially concerned about the reliance on international comity as a public interest factor because it was not consistent with the factors typically considered by courts that relate to the balancing of conveniences between the parties. Id. at 407. In addition, the dissent questioned the majority's reasoning to afford little deference to the plaintiff's choice of forum on the first forum non conveniens factor: in Figueiredo the plaintiff identified "substantial assets" in New York thereby creating a tight nexus between the action and the United States and distinguishing it from Monde Re, where jurisdiction through the N.Y. Convention was the parties' only link to the United States. Id. at 404. The dissent emphasized that even without such a nexus, a plaintiff's decision to bring an enforcement action in the United States because of the ease of enforcement should not make the choice illegitimate. Id. at 405. Rather, decisions to afford little deference to a chosen forum should be limited to when a party chooses a forum that presents "logistical obstacles" for the defendant, or where the plaintiff is motivated by a desire to harass the defendant, neither of which were present in Figueiredo. Id.

Forum Non Conveniens Post-Figueiredo

The Figueiredo majority's broad application of forum non conveniens seemed to portend that courts would begin increasingly dismissing enforcement actions on the basis of forum non conveniens. But, the four cases, in the little more than a year that has elapsed since the December 2011 Figueiredo decision, do not indicate that such an increase is likely, even though one court did dismiss on this ground. There are several implications and recommendations that arise from these and other recent arbitral award enforcement cases.

First, forum non conveniens merely gives the courts discretion to dismiss a case. It remains difficult to get a case dismissed on this ground provided that the parties or the matter have some connection to the United States. The one post-Figueiredo case that was dismissed for forum non conveniens was a district court case within the Second Circuit that had extreme facts similar to Monde Re, with parties having virtually no connection to the United States. See *Prodprogramma-Impuls Ltd. v. Bank of India*, No. 12 Civ. 3036 (LLS), 2012 BL 308792, at *3-4 (S.D.N.Y. June 25, 2012). The parties in Prodprogramma were from Russia and India. They had no connection to the United States, the plaintiff had not identified any assets owned by the defendant in the United States, and the award was the result of an arbitration in England. Id at *4. Moreover, the plaintiff in Prodprogramma sought to enforce its arbitral award against a third party entity that the plaintiff asserted was an alter ego of a party. Therefore, in order to enforce the award, the court would have had to determine whether it was proper under Indian law to enforce alter ego liability. Id.

Second, courts in the Second Circuit have not followed Figueiredo's analysis on the first forum non conveniens factor, which considers the amount of deference that should be afforded to the plaintiff's choice of forum. While the court in Figueiredo limited its analysis on this factor and considered only the plaintiff's foreign status, post-Figueiredo courts in the Second Circuit have continued to follow the approach that takes other factors into account as well. In Prodprogramma, for example, in addition to considering the plaintiff's foreign status, the court looked at whether there were legitimate reasons for why the plaintiff would enforce its award in the United States. Prodprogramma, 2012 BL 308792 at *4. Similarly, a N.Y. district court considered factors other than the plaintiff's foreign status when deciding how much deference to give to the plaintiff's forum

choice. *Sonera Holding B.V. v. Çukurova Holding A.S.,* No. 11 Civ. 8909 (DLC), 2012 BL 230517, at *8-9 (S.D.N.Y. Sept. 10, 2012). There, a foreign plaintiff sought to enforce an award against a foreign defendant for assets that the defendant owned in the United States. Even though the plaintiff had not yet identified any specific assets belonging to the defendant in the United States, the court in Sonera found that seeking to enforce an award against a defendant's assets in the United States is an "entirely legitimate purpose" for bringing an enforcement action in United States court. Id. It further noted, echoing the Figueiredo dissent, that "it would be contrary to American law to find that the motives of [the plaintiff] can be impugned when it seeks to enforce an international arbitral award simply because it is a foreign company." Id. at *9. These cases indicate that litigants facing a forum non conveniens defense would be well-advised to highlight any connections to the U.S. forum, even if minimal, such as the defendant having assets within the United States.

Third, courts do not appear to be following Figueiredo in considering international comity an important public interest factor that supports dismissal. Courts outside of the Second Circuit have not even considered international comity among the public interest factors to be considered in a forum non conveniens analysis. See *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, No. 11-1602 (JEB), 2012 BL 237168, at *5 (D.D.C. Sept. 14, 2012). [6] In fact, the one district court case in the Second Circuit to even acknowledge the Figueiredo-introduced international comity factor gave it little weight and instead conflated it with the Gulf Oil public interest factor that the court would need to apply foreign law if it heard the case. See *Skanga Energy & Marine Ltd. v. Arevenca*, 875 F. Supp. 2d 264, 274 (S.D.N.Y. 2012). Therefore, while litigants seeking to enforce an award would be well-advised to prepare for arguments that an award should not be enforced in the United States out of respect for some foreign law or policy, such an argument would be unlikely to prevail.

[6] Outside the award enforcement context, international comity also is not considered a public interest factor. See*Farhang v. Indian Institute of Technology* , No. C-08-02658, 2012 BL 9179, at *11-12 (N.D. Cal. Jan. 12, 2012) (rejecting forum non conveniens defense to breach of contract complaint brought by Indian entity without considering international comity).

Fourth, courts give deference to the will of the parties as expressed in dispute resolution agreement forum selection clauses. Where a forum selection clause designates a place for award enforcement, which does not appear to have been the case in either Monde Re or Figueiredo, courts even in the Second Circuit have given deference to the clause. For example, the Southern District of New York refused to dismiss an award enforcement case on the basis of forum non conveniens, in part because of a dispute resolution clause that provided for enforcement "in any court having jurisdiction over the award." *Sonera Holding B.V. v. Çukurova Holding A.S.*, No. 11 Civ. 8909 (DLC), 2012 BL 230517 at *11 (S.D.N.Y. Sept. 10, 2012). The only connection that the parties had to the United States was that an affiliate of the defendant conducted business in the United States. Id. at *4-5. In fact, deference to a forum selection clause actually led the Second Circuit to dismiss an award enforcement case on the basis of improper venue. In the 2012 case, the parties had agreed that Bulgaria would be the exclusive forum for confirming arbitral awards against the Bulgarian government. *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 11-1705-cv, 2012 BL 217085, at *1 (2d Cir. Aug. 24, 2012). Relying on the rationale in Monde Re and Figueiredo that forum non conveniens is procedural and applies to award enforcement cases, the court in Zeevi held that enforcing forum selection clauses was also procedural. The court thus enforced the forum selection clause, deemed the proper venue to be Bulgaria and dismissed the case. [7] Id. at *4. Based on this case law regarding forum selection, it seems that parties can increase their chances of defeating a forum non conveniens claim by specifying the preferred forum as the United States or another country where a party anticipates enforcing the award or by stating that enforcement can occur anywhere. A party can increase their chances of succeeding on a forum non conveniens claim by opposing such a forum selection clause or by excluding specific fora.

[7] After the Second Circuit's December 2011 Figueiredo decision, there was concern that the doctrine of forum non conveniens would be applied to cases arising under the Hague Convention on Choice of Court Agreements ("Hague Convention"), June 30, 2005, 44 I.L.M. 1294 undermining U.S. commitments under this treaty by which the signatories agree, inter alia, that recognition of judgments may not be refused on procedural grounds. The Uniform Law Commission adopted recommended U.S. implementing legislation for the Hague Convention explicitly stating that forum non conveniens is inapplicable in cases arising under the Hague Convention. See Uniform Choice of Court Agreements Convention Implementation Act, Uniform Law Commission, July 18, 2012.

Although there have been few instances where an award enforcement case has been dismissed on the ground of forum non conveniens, parties on both sides of an arbitration award need to understand the defense to better prepare for award enforcement.