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Forum Non Conveniens as Bar to Enforcement

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In international arbitration, securing a favourable award is often only the first step for investors to obtain relief in what can be lengthy and protracted post-award proceedings. Recent cases illustrate the numerous mechanisms available to losing parties, from an increasing number of annulment petitions in investment arbitrations to attempts to bar or delay the enforcement of awards in domestic courts.

Two US courts illustrate the divergent practices that can arise when parties seek to resist enforcement of awards rendered under the New York or Panama Conventions on forum non conveniens grounds. While the US Court of Appeals for the Second Circuit ruled that forum non conveniens can bar enforcement of foreign arbitral awards, the US Court of Appeals for the District of Columbia Circuit reached the opposite conclusion. This circuit split has been brewing for some time and it may finally be ripe for resolution by the US Supreme Court, which is currently considering a petition for certiorari from a recent relevant decision.

Despite the Second Circuit's endorsement of forum non conveniens, the use of this doctrine is arguably inappropriate and incongruous in the context of enforcement proceedings – a position that appears to be gaining traction, as indicated not only by recent contrary case law in the DC Circuit, but also by views expressed by the international arbitration community.

Enforcement of foreign awards in domestic courts

The enforcement of most foreign arbitral awards is governed by the New York and the Panama Conventions. Under the New York Convention, each signatory must recognise arbitral awards 'and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'.¹ Likewise, the Panama Convention provides that execution of foreign awards may be ordered 'in accordance with the procedural laws of the country where it is to be executed'.²

This language appears to recognise the innocuous proposition that local procedural rules will govern the means by which a court enforces an award. Yet, in the United States, parties seeking to resist enforcement of foreign awards have invoked this provision to dismiss enforcement actions on forum non conveniens grounds. Under this doctrine, courts may dismiss proceedings on the basis that there are better venues than the United States to attach assets.

While this article focuses solely on the use of forum non conveniens, it is only one of multiple doctrines that losing parties have seized upon in attempts to resist enforcement of foreign awards.

In *Compañía CI v Peru*,³ for example, Peru filed a bankruptcy claim against Compañía CI in an Argentine court, arguing that an award on costs was enforceable under the ICSID Convention, thereby rendering the award cognisable in the bankruptcy proceedings. Compañía CI countered that the award was not enforceable on public policy grounds – an exception to enforcement that does not exist under the ICSID Convention, but does exist under the Argentine Code of Procedure.

While the appellate court ultimately rejected the argument in this particular context, it referenced the 'public policy' exception in dicta, leaving open the possibility that, in other circumstances, such an exception could bar enforcement of an ICSID award, despite the fact that this exception is absent from the language of the Convention.

Forum non conveniens as bar to enforcement (Second Circuit)

The US Court of Appeals for the Second Circuit first ruled that forum non conveniens can bar enforcement of foreign arbitral awards in 2002, in *In re Arbitration between Monegasque de Reassurances SAM v Nak Naftogaz of Ukraine (Monde Re)*,⁴ and more recently in the 2011 case *Figueiredo Ferraz E Engenharia de Projeto Ltda v Republic of Peru (Figueiredo)*.⁵

In *Monde Re*, the respondent, a Ukrainian-owned entity, argued that the enforcement proceedings should be dismissed on forum non conveniens grounds, on the basis that Ukraine would be a more appropriate alternative forum.

In concluding that forum non conveniens could bar enforcement of New York Convention awards, the Second Circuit in *Monde Re* reasoned syllogistically. It first pointed to the New York Convention's language, directing states to enforce arbitral awards 'in accordance with the rules of procedure of the territory where the award is relied upon'.⁶ It then noted that, in domestic arbitration cases, the US Supreme Court classifies forum non conveniens as a procedural, rather than a substantive, objection. From this, the Court concluded that the doctrine 'may be applied in domestic arbitration cases brought under the provisions of the Federal Arbitration Act [...] and it therefore may be applied under the provisions of the [New York] Convention'.⁷

The Second Circuit also rejected the contention that the application of the forum non conveniens doctrine flouts the intent of the New York Convention and runs the risk of invalidating its purpose. Adopting the reasoning of the district court, the Second Circuit stated that '[f]orcing the recognition and enforcement in Mexico, for example, in a case of an arbitral award made in Indonesia, where the parties, the underlying events, and the award have no connection to Mexico, may be highly inconvenient overall and might chill international trade if the parties had no recourse but to litigate, at any cost, enforcement of arbitral awards in a petitioner's chosen forum'.⁸

Turning to the merits of the application of forum non conveniens, the Second Circuit found that little deference should be given to the petitioner's choice of forum because the jurisdiction provided by the New York Convention appeared to be 'the only link between the parties and the United States' and because litigating the issues in the United States would be inconvenient.⁹ The Court also remained unconvinced by the allegations of corruption and bias in Ukrainian courts.

In the 2011 *Figueiredo* case, the Second Circuit reaffirmed the position that forum non conveniens can bar enforcement of foreign arbitral awards. The case involved an enforcement proceeding under the Panama Convention, which provides that execution of international arbitration awards may be ordered ‘in accordance with the procedural laws of the country where [the award] is to be executed’.¹⁰ The respondent, Peru, argued that the case should be dismissed on forum non conveniens grounds in favour of an alternative forum in Peru, notwithstanding the fact that Peru had substantial assets in New York.

As in *Monde Re*, the majority in *Figueiredo* concluded that forum non conveniens applied to the enforcement proceedings because it was a procedural rule. The majority also rejected the district court’s determination that forum non conveniens was inappropriate because ‘only a United States court “may attach the commercial property of a foreign nation located in the United States”’¹¹ – a proposition the district court had derived from a DC Circuit case on the same issue, discussed in more detail below. Thus, the majority reversed the district court and directed the case to be dismissed on forum non conveniens grounds.

Judge Lynch submitted a detailed dissent in *Figueiredo*, arguing that *Monde Re* was wrongly decided and that the use of forum non conveniens in the context of New York Convention enforcement actions was inappropriate. His dissent set out a number of arguments – many of which have gained traction in the international arbitration community – identifying the fundamental flaws in the Second Circuit’s approach.

First, Judge Lynch argued that, because forum non conveniens was not included as a listed defense to enforcement in either the New York or the Panama Conventions, ‘the United States has made the doctrine inapplicable to enforcement proceedings that they govern’.¹² Relatedly, Judge Lynch acknowledged that, given the discretionary nature of forum non conveniens, ‘its application in these circumstances would seem to dramatically undercut the treaty drafters’ efforts to foster confidence in the reliability and efficacy of international arbitration’.¹³

Second, Judge Lynch explained that allowing forum non conveniens to bar enforcement of an arbitral award undermines the express goal of ‘unify[ing] the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries’,¹⁴ particularly given that forum non conveniens does not exist as a doctrine in civil law countries. Lynch argued that such an inconsistency would be highly problematic, allowing countries to shirk their voluntarily undertaken international treaty obligations.

Finally, Judge Lynch opined that *Monde Re* was wrongly decided.¹⁵ He explained that, even though forum non conveniens is ‘procedural’ for federal preemption purposes, ‘there is little reason to think that the drafters of the treaties, who were drawn from a variety of legal traditions, considered what impact this rather technical and distinctly American use of the term might have on the enforceability of international arbitration awards’.¹⁶

Rejection of forum non conveniens as bar to enforcement (DC Circuit)

In contrast to the Second Circuit’s approach, the Court of Appeals for the District of Columbia Circuit, as well as its lower courts, has repeatedly rejected the use of forum non conveniens as a bar to enforcement of foreign arbitral awards.

In the 2005 case of *TMR Energy Ltd v State Property Fund of Ukraine (TMR Energy)*,¹⁷ the DC Circuit upheld the district court’s refusal to dismiss an enforcement action on forum non conveniens

grounds. The respondent argued that the proceedings should be dismissed for forum non conveniens on the basis that proceedings were already ongoing in Sweden and Ukraine, which were adequate fora in which to enforce the award.

In upholding the district court’s ruling, the DC Circuit declined to rule on the petitioner’s argument that the doctrine of forum non conveniens had ‘no place in an action to enforce an arbitration award’.¹⁸ Rather, it held on the merits that ‘only a court of the United States [...] may attach the commercial property of a foreign nation located in the United States’.¹⁹ In the court’s view, the forum non conveniens analysis failed ‘[b]ecause there is no other forum in which TMR could reach [respondent’s] property, if any, in the United States’.²⁰

Three separate but related decisions from the DC District Court – all involving attempts by the government of Belize between 2013 and 2016 to prevent enforcement of the same arbitral awards, all of which the DC Circuit affirmed as well as affirming another similar case – confirm that *TMR Energy* effectively bars the use of forum non conveniens in enforcement proceedings to attach existing or potential US assets.

First, in *Belize Social Development Ltd v Government of Belize*,²¹ the DC District Court addressed the forum non conveniens motion on the merits, instead of explicitly ruling on whether the doctrine constitutes an available ground to bar enforcement under the New York Convention. In rejecting the respondent’s motion, the court cited *TMR Energy* for the proposition that there could be no adequate alternative forum since ‘only a court of the United States [...] may attach the commercial property of a foreign nation located in the United States’.²² After the DC Circuit affirmed the ruling, the respondent filed a petition for certiorari on 22 December 2015, which remains pending before the US Supreme Court.²³

Second, in *BCB Holdings Ltd and Belize Bank Ltd v Government of Belize*,²⁴ the DC District Court took the same approach as that adopted in *Belize Social Development*, pointing to the same language and analysis from *TMR Energy* to reject the respondent’s forum non conveniens motion.²⁵ The DC Circuit again affirmed this approach in May 2016, finding that dismissing the petition on forum non conveniens grounds was ‘squarely foreclosed by [its] precedent’.²⁶ As in *TMR Energy*, the court again held that ‘the doctrine of forum non conveniens does not apply to actions in the United States to enforce arbitral awards against foreign nations’.²⁷

Third, the very same day, the DC Circuit again confirmed the unavailability of forum non conveniens as a bar to enforcement in *Newco Ltd v Government of Belize*²⁸ – another enforcement proceeding brought under the New York Convention involving the same respondent state as in *Belize Social Development* and *BCB Holdings*, but relating to different awards. As in *BCB Holdings*, the DC Circuit rejected the forum non conveniens petition as ‘squarely foreclosed’ by *TMR Energy*.²⁹

Finally, in June 2016, in *Belize Bank Ltd v Government of Belize*³⁰ – another attempt by Belize to prevent enforcement of the same awards at issue in *Belize Social Development* and *BCB Holdings* – the DC District Court again rejected Belize’s argument that the petition should be dismissed on forum non conveniens grounds, holding that this argument ‘is foreclosed by the decisions in *Belize Social Development* and *BCB Holdings*’.³¹ Absent contrary direction from Congress or the US Supreme Court, the DC Circuit will likely affirm this decision and continue this line of authority.

Views of the international arbitration community

Members of the international arbitration community have criticised the Second Circuit’s approach for over a decade.

In a 2005 article, for example, the International Commercial Disputes Committee of the New York City Bar (ICDC) argued that the Second Circuit's position overrode the constitutional guarantee of due process owed to the plaintiff by opting to ensure a convenient forum for the defendant – a policy preference which is not guaranteed by the Constitution.³² The ICDC challenged the Second Circuit's assumption that forum non conveniens is procedural at all for the purposes of the New York Convention, noting that the 'procedural' language the Circuit relied on 'was intended to deal only with the issue of how awards are to be enforced under the treaty, not whether such awards are to be enforced'.³³

The ICDC further argued that the enumerated grounds for non-enforcement set out in Article V of the New York Convention are the exclusive grounds, rendering non-enforcement on other grounds inappropriate.³⁴ More generally, the ICDC argued that the Second Circuit's position disregards the US Supreme Court's decision in *Scherk v Alberto-Culver Co.*,³⁵ where the Court reasoned that the purpose of the New York Convention 'was to encourage the recognition and enforcement of commercial arbitration agreements [...] and to unify the standards by which [...] arbitral awards are enforced'.³⁶ The one exception the ICDC endorsed was the application of forum non conveniens where an enforcement proceeding is brought against an entity that was not a party to the underlying arbitration.

More recently, in the latest draft of the Third Restatement of International Commercial Arbitration,³⁷ leading scholars and practitioners of international arbitration also expressed the view that forum non conveniens should not be permitted to bar enforcement under the New York Convention. The current draft of the Third Restatement takes a position similar to that expressed by Judge Lynch in the *Figueiredo* dissent, stating that '[a]n action to confirm a US Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on forum non conveniens grounds'.³⁸

The comments and notes to the draft reiterate that forum non conveniens cannot apply to New York or Panama Convention enforcement proceedings, stating that to do so 'would run afoul of the Conventions' requirement that, absent a specific Convention defense to enforcement, Contracting States confirm and enforce such awards'.³⁹ The draft is still tentative, but the relevant section of the draft was approved by the American Law Institute membership at its 2013 annual meeting.

Practical consequences

Until the potential applicability of a forum non conveniens defence to enforcement is definitively resolved – either by Congressional amendment to the Federal Arbitration Act or through clarification by the US Supreme Court – parties seeking enforcement must take this conflicting case law into account in selecting a forum and strategy for enforcement. Where parties are constrained to a particular forum because of the location of assets or jurisdictional issues, however, inconsistency and unfairness may be the result.

Notes

- 1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards article 3, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].
- 2 Inter-American Convention on International Commercial Arbitration article 4, 30 January 1975, S. Treaty Doc. No. 97-12, 1438 U.N.T.S. 249 [hereinafter Panama Convention].
- 3 Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCCom.] [National Court of Commercial Appeals of the Federal Capital], sala A, 18/8/2015, 'CCI – Compañía de Concesiones de Infraestructura S.A. s/ pedido de quiebra (por República de Perú),' La Ley [L.L.] (2016-A-211) (Arg.), summary in English available at Leandro Javier Caputo & Ignacio J. Minorini Lima, First Argentine Court Judgment on the Recognition of an ICSID Award, Kluwer Arbitration Blog (15 March 2016), <http://kluwer-arbitrationblog.com/2016/03/15/first-argentine-court-judgment-on-the-recognition-of-an-icsid-award/>.
- 4 311 F.3d 488 (2d Cir. 2002). A 1998 unpublished order from the Ninth Circuit also upheld the district court's dismissal of a New York Convention enforcement proceeding on forum non conveniens grounds. However, the basis for the Circuit's determination in that case was the petitioner's failure to preserve the issue for appeal, so the court did not reach the merits of whether forum non conveniens would be appropriate in the circumstances. See *Melton v Oy Nautora Ab*, 161 F.3d 13 (9th Cir. 1998) (mem.).
- 5 665 F.3d 384 (2d Cir. 2011).
- 6 *Monde Re*, 311 F.3d at 494.
- 7 *Id.* at 496.
- 8 *Id.* at 496–97 (quoting *In re Arbitration between Monegasque de Reassurances SAM v Nak Naffogaz of Ukraine*, 158 F. Supp. 2d 377, 383 (S.D.N.Y. 2001)).
- 9 *Id.* at 499.
- 10 Panama Convention, article 4.
- 11 *Figueiredo*, 665 F.3d at 390 (quoting *Figueiredo Ferraz E Engenharia de Projeto Ltda v Republic of Peru*, 655 F. Supp. 2d 361, 375–76 (D.D.C. 2009)).
- 12 *Id.* at 397 (Lynch, J., dissenting).
- 13 *Id.*
- 14 *Id.* at 397–98 (quoting *Scherk v Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).
- 15 *Id.* at 398–99.
- 16 *Id.*
- 17 411 F.3d 296 (D.C. Cir. 2005).
- 18 *Id.* at 304.
- 19 *Id.* at 303.
- 20 *Id.* at 304.
- 21 5 F. Supp. 3d 25 (D.D.C. 2013) (mem.), *aff'd*, 794 F.3d 99 (D.C. Cir. 2015).
- 22 *Id.* at 34 (quoting *TMR Energy*, 411 F.3d at 303).
- 23 *Belize Soc. Dev. Ltd v Gov't of Belize*, 794 F.3d 99 (D.C. Cir. 2015), petition for cert. filed, 84 U.S.L.W. 3361 (U.S. 22 December 2015) (No. 15-830).
- 24 110 F. Supp. 3d 233 (D.D.C. 2015) (mem.), *aff'd*, No. 15-7063, 2016 WL 3042521 (D.C. Cir. 13 May 2016).
- 25 *Id.* at 247.
- 26 *BCB Holdings Ltd and Belize Bank Ltd v Gov't of Belize*, No. 15-7063, 2016 WL 3042521, at *2 (D.C. Cir. 13 May 2016).
- 27 *Id.* (emphasis added).
- 28 No. 15-7077, 2016 WL 3040824 (D.C. Cir. 13 May 2016) (mem.).
- 29 *Id.* at *2.
- 30 No. 14-cv-659 (APM), 2016 WL 3198228 (D.D.C. 8 June 2016) (mem.), appeal filed, No. 16-7089 (D.C. Cir. 18 July 2016).

- 31 Id. at *4.
- 32 International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards* (2005), www.nycbar.org/pdf/report/ForeignArbitral.pdf.
- 33 Id. at 19.
- 34 Id. at 18.
- 35 417 U.S. 506, 520 n.15 (1974).
- 36 International Commercial Disputes Committee of the Association of the Bar of the City Of New York, *supra* note 32, at 21.
- 37 Restatement (Third) of the Law of International Commercial Arbitration (Am. Law Inst., Tentative Draft No. 3, 2013).
- 38 Id. section 4-29(a); see also Gary B Born, *International Commercial Arbitration*, section 22.03(B)(2) at 2984-85 (2d ed. 2014) (citing Judge Lynch's 'well-reasoned dissent' in *Figueiredo* and stating that forum non conveniens should not apply to enforcement proceedings because it 'is not, properly considered, a matter of "procedure,"' but rather, a rule that reflects 'substantive policies and discretionary judgments').
- 39 Restatement (Third) of the Law of International Commercial Arbitration, section 4-29 cmt. b (Am. Law Inst., Tentative Draft No. 3, 2013); see also Born, *supra* note 38, at section 22.03(B)(2) at 2984-85 (expressing the view that the US courts that have denied enforcement on the basis of forum non conveniens have done so based on an incorrect interpretation of the New York Convention, and one that is 'inconsistent with the Convention's objectives and very far from what Article III was meant to accomplish'); Linda J Silberman, 'Civil Procedure Meets International Arbitration: A Tribute to Hans Smit', 23 *Am. Rev. Int'l Arb.* 439, 447 (2012).



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