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THE MISAPPLICATION AND MISINTERPRETATION OF FORUM NON CONVENIENS

Mohita K. Anand*

I. INTRODUCTION

Forum non conveniens is a legal doctrine that is applied in common law judicial systems. It occurs when courts seized of a case decline to exercise jurisdiction in the belief that justice would be better served if the trial occurred in another court.¹ *Forum non conveniens* began in the United States in the nineteenth century with courts allowing discretionary dismissal when parties and the subject matter were unrelated to the forum.² This doctrine has developed into a two step analysis, which requires proof that an alternative forum is available and follows with a balancing of private and public interests to determine whether a trial court should exercise its discretion to stay or dismiss in favor of a foreign forum.³ In *Monegasque de Reassurances S.A.M (Monde Re) v. Nak Naftogaz of Ukraine* (“*Monde Re v. Naftogaz*”) and *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Republic of Peru* (“*Figueiredo Ferraz v. Republic of Peru*”), however, the United States Court of Appeals misinterpreted and misapplied the doctrine of *forum non conveniens*. The Court of Appeals allowed the doctrine to be used as a defense to the enforcement of arbitral awards, thus complicating the criteria for the enforcement of future international arbitration awards.

II. DISCUSSION ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The parties as well as the Court of Appeals in both *Monde Re v. Naftogaz* and *Figueiredo Ferraz v. Republic of Peru* heavily relied upon the interpretation of Article III and Article V in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). The United States Supreme Court defined the role of the New York Convention as encouraging the recognition and enforcement of commercial arbitration agreements in international contracts as well as unifying the standards by which arbitration agreements are to be observed.⁴ Thus, in an effort to fulfill that goal, Article III of the New York Convention requires the recognition and enforcement of arbitral awards in accordance with procedural rules.

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¹ Ronald A. Brand & Scott R. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (2007).

² *Id.* at 37.

³ *Id.*

⁴ *In the Matter of the Arbitration Between: Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine and State of Ukraine* 311 F.3d 488, 494 (2002).

Article III of the Convention states:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.⁵

The New York Convention further expresses the reasons for denying the enforcement of an award in Article V:

- (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

⁵ 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the New York Convention, UNCITRAL, *available at* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html.

- (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.⁶

III. IN THE MATTER OF THE ARBITRATION BETWEEN: MONEGASQUE DE REASSURANCES S.A.M. (MONDE RE) V. NAK NAFTOGAZ OF UKRAINE

A. Background

On January 16, 1998, AO Gazprom, a Russian company, entered into a contract with AO Ukragazprom, a Ukrainian company.⁷ The contract provided for Ukragazprom to transport natural gas by pipeline across Ukraine to various destinations throughout Europe. As consideration to the contract, Ukragazprom was entitled to withdraw 235 million cubic meters of natural gas. According to Gazprom, however, Ukragazprom breached the contract by making additional unauthorized withdrawals of natural gas. Gazprom sought and received reimbursement for the value of the improperly withdrawn gas from its insurer, Sogaz Insurance Company (“Sogaz”).⁸ Sogaz was then to be reimbursed by the Appellant, Monegasque De Reassurances S.A.M. (“Monde Re”) due to a reinsurance agreement.⁹ As a result, Monde Re asserted its right to pursue an arbitration claim regarding the excessive gas withdrawal and filed a claim against Ukragazprom with the International Commercial Court of Arbitration in Moscow, Russia on April 22, 1999.¹⁰ In July 1999, Nak Naftogaz of Ukraine (“Naftogaz”) assumed the rights and obligations of Ukragazprom.¹¹ In May 2000, the dispute was presented to three arbitrators who awarded 88 million dollars to Monde Re for the payment it made to Sogaz.¹² Dissatisfied with the outcome, Naftogaz filed an appeal in the Moscow City Court. The Moscow City Court declined to cancel the award, which was later affirmed by the Supreme Court of the Russian Federation.¹³

⁶ *Id.*

⁷ *Monegasque*, 311 F.3d at 491.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 492.

B. District Court's Decision

Before the Moscow City Court and the Supreme Court of the Russian Federation decided on the case, Monde Re filed a petition for confirmation of the arbitral award in the United States District Court for the Southern District of New York against Ukraine and Naftogaz. Monde Re claimed that Naftogaz was acting as an agent, instrumentality, or alter ego of Ukraine, and thus sought to confirm the award against both parties.¹⁴ Monde Re pleaded three causes of action in the petition. The first contention based on the arbitral award, sought confirmation of the award and entry of judgment against Naftogaz. Second, based on the belief that Ukraine controls Naftogaz and is responsible for its obligations under the award, Monde Re requested confirmation and judgment against Ukraine. The last contention pleaded in the petition, sought confirmation and judgment against Ukraine on the allegation that Ukraine and Naftogaz acted as joint venturers.¹⁵

On January 22, 2001, Naftogaz moved to dismiss the petition due to the lack of personal jurisdiction. On the same day, Ukraine separately moved for dismissal of the petition based on the district court's lack of subject matter or personal jurisdiction.¹⁶ The District Court granted Ukraine's motion to dismiss Monde Re's petition on the grounds of *forum non conveniens* on December 4, 2001.¹⁷ The Court used the two step analysis, beginning with a determination as to the availability of an alternative forum based on the arbitration exception to the Foreign Sovereign Immunities Act. This Act states that a party may bring an action or may confirm an award pursuant to an arbitration agreement between a sovereign state and a private party if the award is or may be governed by a treaty or any other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards.¹⁸ The Court held the applicability of *forum non conveniens* to cases arising under the Convention, and thus determined Ukraine as an adequate alternative forum.¹⁹

The District Court then assessed whether the parties' private interests and public interests favored adjudication in the United States. The District Court found that the private interest factors weighed heavily in favor of dismissal due to extensive discovery and an evidentiary hearing that would be required because the necessary witnesses were not within the court's subpoena power and the necessary documents were written in the Ukrainian language.²⁰ The District Court then turned to an analysis of the public interest factors, finding that "Ukraine has a great interest in applying its own laws, especially with respect to establishing the ownership interest of Naftogaz."²¹ The District Court dismissed the case.²² Monde Re subsequently filed an appeal.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 493.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

C. Court of Appeals' Decision

Monde Re filed an appeal on the basis that the doctrine of *forum non conveniens* cannot be applied to a proceeding that is to confirm an arbitral award.²³ This argument is dependent upon the Convention's requirement that each signatory must recognize arbitral awards and enforce them according to the procedural rules of the territory in which the award is relied upon. Applying Article V of the Convention, the enforcement of an award is subject only to those seven defenses listed, which does not include *forum non conveniens*.²⁴ As a signatory of the Convention, Monde Re contended that a United States court must recognize and enforce any arbitral award as a treaty obligation, without consideration of whether the court is a convenient forum for the enforcement proceeding.²⁵

The Court of Appeals disagreed with Monde Re's arguments. The Court of Appeals noted that the proceedings for enforcement of foreign arbitral awards are subject to the rules of procedure that apply in the courts where enforcement is sought. An exception to this rule is that "substantially more onerous conditions...than are imposed on the recognition or enforcement of domestic arbitral awards" may not be imposed.²⁶ The Court of Appeals further relied on the Supreme Court's classification of *forum non conveniens* as "procedural rather than substantive."²⁷

The Court of Appeals rejected Monde Re's argument that Article V of the Convention set forth the only grounds for refusing to enforce a foreign arbitral award.²⁸ The Court argued that signatory nations are free to apply different procedural rules so long as the rules in Convention cases are not more burdensome than those procedural rules set forth in domestic cases. If this requirement is met, the Court argued that whatever rules of procedure for enforcement are applied by the enforcing state are acceptable, without reference to any other provision of the Convention.²⁹ Thus, *forum non conveniens*, a procedural rule, may be applied in domestic arbitration cases, brought under the provisions of the Federal Arbitration Act, and consequently applied under the provisions of the Convention.³⁰

In applying *forum non conveniens*, the Court used the two step analysis: determining the existence of an alternative forum and then balancing public and private interests. The Court began the analysis with a determination of the level of deference owed to the plaintiff's choice of forum. The Court measured this degree by a sliding scale:

²³ *Id.* at 495.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 496.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

U.S. forum was motivated by forum-shopping reasons – such as...the inconvenience and expense to the (respondent) resulting from litigation in that forum – the less deference the (petitioner’s) choice commands, and, consequently, the easier it becomes for the (respondent) to succeed on a forum non convenience motion by showing that convenience would better be served by litigating in another country’s courts.³¹

The Court noted that Monde Re’s reasoning for bringing the case forth in the United States was unclear and found that the jurisdiction provided by the Convention was the only link between the United States and the parties. The Court granted little deference to Monde Re’s choice of forum. The Court then moved to determine the existence of an alternative forum; *forum non conveniens* may not be granted unless an adequate alternative forum exists. The Court rejected Monde Re’s argument that Ukraine is an inadequate forum due to general corruption throughout the political system. It held that Gazprom, a Russian company, voluntarily conducted business with Ukragazprom, a Ukrainian company, and thus would have anticipated a possibility of litigation in Ukraine.³² Therefore, the Court found Ukraine to be an appropriate alternate forum.

The second step in determining the application of *forum non conveniens* requires a balancing of factors.³³ Private interest factors relate to the convenience of the litigants, such as the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling, and the cost of attendance of willing witnesses.³⁴ The Court contended that to determine Ukraine’s liability, litigation would require the attendance of witnesses beyond the subpoena power of the district court and the availability of pertinent documents in the Ukrainian language.³⁵ The Court held that the private interest factors favored the application of *forum non conveniens* and the dismissal of the case.³⁶

The other set of factors to be applied are the public interest factors, which include administrative difficulties, imposition of jury duty upon those who bear no relationship to the litigation, the local interest in resolving local disputes, and the problem of applying foreign law.³⁷ The Court found that because issues governed by the law of Ukraine and Russia were previously raised, Ukrainian courts were better suited than United States courts to determine the legal issues. In addition, the Court held that local courts should determine the localized matters.³⁸ Consequently, the Court determined that the public interest factors also weighed in favor of dismissal of the case.³⁹

³¹ *Id.* at 498.

³² *Id.* at 499.

³³ *Id.* at 500.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 501.

³⁹ *Id.*

D. Conclusion

The Court of Appeals found that the judgment of the district court was properly concluded. It affirmed the district court's dismissal of the proceeding and application of the *forum non conveniens* doctrine favoring a forum in Ukraine.⁴⁰

E. Implications

The Court of Appeals in *Monde Re v. Naftogaz* misinterpreted and misapplied the doctrine of *forum of non conveniens*. Its interpretation of Article III of the New York Convention allowed *forum non conveniens* to be used as a means to deny enforcement of an arbitral award. The procedural component to Article III, however, relates to formalities of an application to confirm or enforce an award, such as fees and the structure of the request.⁴¹

Further, the decision in *Monde Re v. Naftogaz* reinforced the cautiousness that courts must use when applying *forum non conveniens*, especially when enforcing arbitration awards under the New York Convention. It has been discussed that courts must not immediately dismiss such cases to an alternative forum due to a lack of an existing nexus with the United States.⁴² The New York Convention is to assure transacting businesses that arbitration clauses and arbitral awards will be enforced and that rules of procedural fairness will be observed.⁴³ The purpose of the Convention is to aid foreign courts in enforcing arbitration awards wherever assets are available, free of prejudice, or not subject to local rules that tend to make enforcement of awards difficult in courts.⁴⁴ The consideration of the doctrine of *forum non conveniens* as a grounds for refusal under Article V threatens the reliability and efficiency of international arbitration as can be seen in the latter case.⁴⁵

IV. FIGUEIREDO FERRAZ V. REPUBLIC OF PERU

A. Background

In *Figueiredo Ferraz v. Republic of Peru*, an agreement was entered into in 1997 by Appellee, Figueirdo Ferraz Consultoria E Engenharia de Projeto Ltda. ("Figueiredo"), a Brazilian corporation, and the Programa Agua Para Todos, an instrumentality of the Peruvian government. The Republic of Peru ("Republic"), the Ministry of Housing, Construction and Sanitation ("Ministry"), and the Programa Agua Para Todos ("Program") collectively act as Appellants.⁴⁶

⁴⁰ *Id.*

⁴¹ Matthew H. Adler, *Figueiredo v. Peru: A Step Backward for Arbitration Enforcement*, Northwestern Journal of Int'l Law and Business Ambassador (2012) available at: http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2286.

⁴² *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. The Republic of Peru, Ministerio de Vivienda, Construccion y Saneamiento, Programa Agua Para Todos*, U.S. App. 1,49 (2011).

⁴³ *Id.* at 50.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Figueiredo*, U.S. App. at 2.

Pursuant to this agreement, Figueiredo was to prepare engineering studies on water and sewage services for Appellants in Peru.⁴⁷ The agreement provided: “The parties agree to subject themselves to the competence of the Judges and Courts of the City of Lima on Arbitration Proceedings, as applicable.”⁴⁸

After a fee dispute arose, Figueiredo commenced arbitration against the Program.⁴⁹ In January 2005, the arbitral tribunal rendered an award (“Award”) against the Program for over \$21 million in damages, \$5 million of which was principal and the remainder of which was accrued interest and cost of living adjustments.⁵⁰ As a result, the Ministry appealed the decision in the Court of Appeals in Lima. It challenged the Award and sought nullification on the ground that, under Peruvian law, the arbitration was an “international arbitration” involving a non-domestic party. Therefore, recovery should have been limited to the amount of the contract.⁵¹ In October 2005, the Lima Court of Appeals denied the appeal and ruled that because Figueiredo designated itself as a Peruvian domiciliary in the agreement and in the arbitration, the arbitration was not an “international arbitration,” but a “national arbitration” involving only domestic parties.⁵² The Court found the Award permissible.

A Peruvian statute established a limit to the annual amount that any state agency could pay on a judgment to three percent of that agency’s annual budget.⁵³ It states:

Should there be requirements in excess of the financing possibilities expressed above, the General Office of Administration of the corresponding sector shall inform the judicial authority of its commitment to attend to such sentences in the following budgetary exercise, to which end it is obliged to destine up to 3% of the budgetary allotment assigned to the division by the source of ordinary resources.⁵⁴

Although, Figueiredo had not confirmed the arbitration award in a Peruvian court or obtained a judgment in Peru, the Program began making payments on the Award. As a consequence of the three percent cap, the Program had paid just over \$1.4 million of the \$21 million award at the time the case was heard.⁵⁵

B. District Court’s Decision

In January 2008 Figueiredo filed a petition in the Southern District of New York to confirm the Award and obtain a judgment for \$21,607,003.⁵⁶ Figueiredo sought to seize \$21 million on account in New York because of the Peruvian government’s sale of bonds.⁵⁷ In September 2009, the District Court denied the Appellants’ motion to dismiss. The District Court

⁴⁷ *Id.* at 3.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² *Id.*

⁵³ *Id.* at 5.

⁵⁴ *Id.*

⁵⁵ *Id.* at 7.

⁵⁶ *Id.*

⁵⁷ *Id.*

recognized that although the Panama Convention establishes jurisdiction in the United States, “there remains the authority to reject that jurisdiction for reasons of convenience, judicial economy, and justice.”⁵⁸ When considering the adequacy of an alternative forum, the District Court concluded that although Peruvian law permits execution of arbitral awards, “only a U.S. court ‘may attach the commercial property of a foreign nation located in the U.S.’”⁵⁹ The District Court ruled that the Program and the Republic were not separate entities under Peruvian law. Thus, dismissal of the case was inappropriate under the *forum non conveniens* doctrine. Accordingly, Peru was subject to the Award despite not having signed the consulting agreement.⁶⁰ Appellants subsequently filed an interlocutory appeal based on the ground of *forum non conveniens*.⁶¹

C. Court of Appeals’ Decision

The Court of Appeals heavily relied upon the precedent case of *Monde Re. v. Naftogaz*, which upheld a dismissal of a case based on *forum non conveniens*.⁶² The Court applied the two step analysis to determine the applicability of the *forum non conveniens* doctrine, beginning with the determination of the existence of an alternate forum. The District Court concluded that although Peruvian law permits execution of arbitral awards, “only a U.S. court ‘may attach the commercial property of a foreign nation located in the U.S.’”⁶³ The Court of Appeals, however, dismissed this reasoning and held that because only a United States court may attach a defendant’s particular assets located in that country, such as Peru’s assets located in New York, it does not render a foreign forum inadequate.⁶⁴ According to the court, if this were the case, no suit with the objective of executing open assets located in the United States could ever be dismissed.⁶⁵

In addition, when determining the adequacy of an alternate forum and execution on a defendant’s assets, adequacy of the forum is dependent upon whether some of the defendant’s assets are present in the forum, not whether the precise assets located in the United States can be executed in the forum. Further, adequacy of the alternate forum is not dependent upon “identical remedies.”⁶⁶ Even though a plaintiff may recover less in an alternate forum, that forum is not rendered inadequate.⁶⁷ According to the *Piper* Court, however, an alternative forum would be inadequate if the remedy available in the foreign forum would be considered no remedy at all.⁶⁸ Thus, the Court of Appeals determined the existence of an alternative forum available in Peru.

The Court of Appeals proceeded to the next step in the analysis, a balancing of the private and public factors. The Court, in accordance with the Appellants, deemed the three percent cap under the statute to be a highly significant public factor that warranted the dismissal

⁵⁸ *Id.* at 13.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 9.

⁶² *Id.* at 14.

⁶³ *Id.* at 13.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 16.

⁶⁷ *Id.*

⁶⁸ *Id.* at 17.

of the case under the *forum non conveniens* doctrine.⁶⁹ The Court observed that the statute serves the public interest.⁷⁰ The Court found that the *forum non conveniens* doctrine weighed heavily against exercising jurisdiction in the United States due to a number of other factors such as:

- (1) the underlying claim arising from a contract executed in Peru,
- (2) a corporation claiming to be a Peruvian domiciliary,
- (3) the suit to be against an entity that appears to be an instrumentality of the Peruvian government, and lastly
- (4) the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the award.⁷¹

Despite the favored policy of enforcing arbitral awards, the Court gave much significance to Peru's cap and found that both the public and private factors weighed in favor of the application of the *forum non conveniens* doctrine. The Court held that *forum non conveniens* was applicable. Due to the doctrine's procedural law nature, the Court held that the doctrine may act as a bar to the enforcement of an arbitral award despite its nonappearance as a limitation in Article V of the New York Convention.⁷²

D. Conclusion

In conclusion, the Second Circuit Court of Appeals dismissed the petition on grounds of *forum non conveniens*. The Court, however, conditioned the dismissal of the petition on Appellants' consent to continue the suit in Peru. The Court included a waiver that subject the parties to the further condition that should, for any reason, the courts of Peru decline to entertain a suit in determining the enforcement of the Award, the lawsuit may then be reinstated in the District Court.⁷³

E. Implications

In *Figueiredo Ferraz v. Republic of Peru* the Court's decision in allowing *forum non conveniens* to defeat the enforcement of a New York Convention awards complicates and weakens the United States policy regarding arbitration awards. The Court of Appeals' decision in using the *forum non conveniens* doctrine as a defense undermines the expectations under which the parties have formed their contract.⁷⁴ Further, the Supreme Court in *Scherk v. Alberto – Culver Co.* stated:

⁶⁹ *Id.* at 19.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 39.

⁷³ *Id.* at 22.

⁷⁴ *Id.* at 29.

Uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any business transaction.⁷⁵

The agreement between the Program and Figueiredo in this case specified that all disputes would be resolved by the courts of Lima. Specifying the forum in the agreement served as an essential component to the freedom of the contract for the parties. It further created a sense of order and predictability to the business transaction.

The Restatement (Third) of the U.S. law of International Commercial Arbitration states: “An action to enforce a New York or Panama Convention award is not subject to stay or dismissal on forum non conveniens ground.”⁷⁶ The accompanying Reporters’ Note explains:

Considering that the Convention grounds for nonrecognition and nonenforcement are meant to be exclusive, it would be incompatible with the Convention obligations for a court of Contracting State to employ inconvenience as an additional basis for dismissing an action for enforcement of an award that is otherwise entitled, as a matter of treaty obligation, to enforcement.⁷⁷

The Restatement and its accompanying note clearly object to the use of *forum non conveniens* to stay or dismiss arbitral awards. Yet, in the present case, the Court of Appeals misapplied and misinterpreted Article V of the New York Convention in its holding that the *forum non conveniens* acted as a procedural law. Ultimately, the Court of Appeals breached its international obligations under the New York Convention by allowing one of its courts to refuse to recognize and enforce a New York Convention award for a reason other than one stated in Article V. The application of *forum non conveniens* in this case further defied another major goal of the Convention of creating a uniform standard through which agreements to arbitrate may be observed and arbitral awards would be enforced in signatory countries.⁷⁸

V. COMPARISON BETWEEN MONDE RE V. NAFTOGAZ AND FIGUEIREDO FERRAZ V. REPUBLIC OF PERU

The Court of Appeals through their decisions in *Monde Re v. Naftogaz* and *Figueiredo Ferraz v. Republic of Peru* essentially weakened international arbitration. The *Figueiredo* Court heavily relied upon the binding precedent of *Monde Re*, despite the few similarities present between both cases. In *Monde Re v. Naftogaz*, Monde Re brought forth a suit not only against Naftogaz but also against the Ukrainian government. In a similar fashion, in *Figueiredo v. Peru*, Figueiredo brought forth an arbitration award against the Program and sought enforcement in

⁷⁵ *Id.* at 30.

⁷⁶ *Id.* at 39.

⁷⁷ *Id.*

⁷⁸ *Id.* at 38.

New York against the Republic of Peru.⁷⁹ Both the *Monde Re* Court and the *Figueiredo* Court created a new exception to the enforcement of arbitral awards by applying the doctrine of *forum non conveniens*, thus contradicting the principles of the New York Convention. The numerous substantial differences between *Figueiredo* and *Monde Re* could have allowed the Second Circuit to abandon *Monde Re v. Naftogaz* as precedent.

Monde Re v. Naftogaz affirmed a District Court's dismissal based on *forum non conveniens*, while in *Figueiredo v. Peru*, the majority reversed the District Court's decision to maintain jurisdiction. The *Figueiredo* Court almost exclusively relied on Peru's interest in applying its statute to determine the dismissal of the case.⁸⁰ The majority in *Figueiredo* defied the Court's opinion in *Iragorri v. United Technologies Corporation*. The *Iragorri* Court held:

The decision to dismiss a case on forum non conveniens ground lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been clearly abused. In other words, our limited review encompasses the right to determine whether the district court reached an erroneous conclusion on either the facts or the law, or relied on an incorrect rule of law in reaching its determination. Accordingly, we do not, on appeal, undertake our own de novo review simply substituting our view of the matter for that of the district court.⁸¹

The *Figueiredo* Court failed to establish that the District Court's discretion had been clearly abused. Many argue that the *Figueiredo* Court significantly lowered the threshold for the application of *forum non conveniens* and increased the opportunity for second guessing of district courts and their ability to retain jurisdiction over enforcement proceedings.⁸²

Further, *Monde Re* is distinguishable in another respect to *Figueiredo*. In *Monde Re*, the Court concluded when analyzing the private factors that additional evidence was required to determine Ukraine's liability. To the contrary, the *Figueiredo* Court held that no additional discovery of documents was required for the Court to decide on the case. As a result, this significant difference between *Monde Re* and *Figueiredo* presents a ground for the *Figueiredo* Court to dismiss reliance upon *Monde Re*'s outcome.

In *Monde Re*, *Monde Re* attempted to impute the defendant's contractual liability to its sovereign Ukraine. Due to the relevant witnesses and documents located in Ukraine, the Court concluded the existence and importance of private interests, which weighed heavily in favor of dismissal.⁸³ In *Figueiredo*, the majority failed to suggest that the District Court erred in its finding that the issue could not be properly resolved in the Southern District of New York without undue inconvenience to either party or to the court.⁸⁴ Rather, the majority argued that the three percent cap under the statute was a highly significant factor that justified overturning the District Court's decision.

⁷⁹ Charles H. Brower II, *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings* Kluwer Law Int'l available at <http://kluwer.practicesource.com/blog/2012/december-surprise-new-second-circuit-ruling-on-forum-non-conveniens-in-enforcement-proceedings/>.

⁸⁰ *Id.*

⁸¹ *Figueiredo*, U.S. App. at 46.

⁸² Brower, *supra* note 80.

⁸³ *Figueiredo*, U.S. App. at 47.

⁸⁴ *Id.* at 48.

In addition, the majority held that when substantive law is favorable to one of the parties, the law serves as a public interest factor that contributes to the *forum non conveniens* balance.⁸⁵ Thus, the Court held Peru's statute to serve as a substantive law that favored Peru, and as a result significantly contributed as a public interest factor that contributes to the *forum non conveniens* balance. By giving importance to the public factor of Peru's statute, the Court created a new reason for parties to avoid arbitration enforcement. Litigants might argue that it is "inconvenient" for them to travel and protect their assets.⁸⁶

The Supreme Court held that whether an alternative forum's substantive law is more or less favorable to the party seeking dismissal should not be a considered factor when deciding the *forum non conveniens* motion.⁸⁷ This reasoning was implemented in *Monde Re*, where the Court indicated that the outcome was not premised upon the fact that United States law was less favorable to the defendants than Ukrainian law by stating that "Ukrainian law specially provides for the execution of judgments against government properties."⁸⁸

The vast number of differences between *Monde Re v. Naftogaz* and *Figueiredo Ferraz v. Republic of Peru* gives rise to questions regarding the *Figueiredo* Court's reliance upon *Monde Re* as precedent. *Monde Re* held, and *Figueiredo* followed, the principle that when enforcing arbitral awards under the New York Convention, courts must consider *forum of non conveniens*.⁸⁹ The misinterpretation and misapplication of *forum non conveniens* in the United States diverges from the structure and purpose of arbitration law and has ultimately weakened U.S. arbitration.

⁸⁵ *Id.*

⁸⁶ *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings*, supra note 81.

⁸⁷ *Figueiredo*, U.S. App. at 48.

⁸⁸ *Id.* at 49.

⁸⁹ *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings*, supra note 81.