Bermann on Figueiredo Ferraz v. Republic of Peru

George A. Bermann is the Gellhorn Professor of Law & Jean Monnet Professor of European Union Law at Columbia University School of Law, and the Chief Reporter for the ALI Restatement (Third) of the US Law of International Commercial Arbitration.

The recent decision of the Second Circuit panel in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru* is sadly misguided.

It is regrettable, but understandable, that the panel felt bound by the Second Circuit's 2002 decision in *In re Arbitration between Monegasque de reassurances S.A.M. v. NAK Naftogaz of Ukraine*, making forum non conveniens stays or dismissal available to defeat actions to enforce New York Convention awards. I say regrettable because, as is clear from the position taken by the ALI Restatement of the US Law of International Commercial Arbitration, exercising a purely discretionary ground like forum non conveniens to deny enforcement of a Convention award is essentially inconsistent with U.S. treaty obligations. The common argument, embraced by the panel majority, that doctrines like forum non conveniens are "saved" by Article III of the New York Convention, which provide that enforcement under the Convention shall be in accordance with the rules of the forum where enforcement is sought, is bogus. When the Convention drafters "saved" forum procedure, they undoubtedly contemplated purely procedural rules such as those governing pleadings, time limitations, evidentiary rules and the like. The drafters were not about to supplant all those rules by a Convention that is silent on the procedures applicable to actions to enforce Convention awards. That would result in a bizarre procedural vacuum. But forum non conveniens is not, in any event, a rule of that sort. It doesn't determine "how" an adjudication shall be conducted. It determines "whether" an adjudication shall be conducted." And it was precisely the purpose — indeed the *core* purpose — of the Convention to ensure that timely applications for the enforcement of Convention awards would be entertained as a matter of international treaty obligation, subject only to the defenses limitatively set out in the Convention.

The *Monegasque* decision of the Second Circuit may indeed have left the panel in

Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru no choice but to entertain the forum non conveniens claim.

But there is still more to regret in this decision, and it is nothing that adherence to *Monagesque* required. In effect, the court used the forum non conveniens doctrine to give effect to a Peruvian ceiling on damages that the court had no business vindicating. The statute purported to limit to three percent of an agency's annual budget the amount of money that an agency of the Peruvian government could pay out annually to satisfy a judgment against it. The majority gave Peru's interest, as reflected in the statute, dispositive weight in the interest balancing that forum non conveniens entails, and it did so without the parties even having designated Peruvian law as the law governing their relationship.

To the extent that an arbitral award grants relief in excess of that allowed by Peruvian law means that the award was, at worst, legally erroneous if judged under Peruvian law. But legal error — even egregious legal error — is decidedly not a ground for denying enforcement of an award under the Convention. Quite frankly, what the decision does, without of course so saying, is to give effect to the public policy of Peru as a basis for denying enforcement of the award, despite the fact that the Convention by its own clear terms entitles a court to deny enforcement of an award on public policy ground only to the extent that enforcement would be "contrary to the public policy *of the country where enforcement is sought*," viz. the United States, not the public policy of some other jurisdiction.

In so deciding, the majority also disrespected the clear holding of the U.S. Supreme Court in the foundational *Piper Aircraft Co. v. Reyno* decision to the effect that little if any weight should be given, in a forum non conveniens analysis, to whether resort to the doctrine would result in application of a different body of law, and even lead to a different substantive result, than the body of law that would have been applied and the result that would have obtained had the U.S. court retained jurisdiction.

But the decision is not to be entirely regretted, for the simple reason that it elicited a dissenting opinion by Judge Gerard Lynch that is nothing less than brilliant in its demonstration, not only that forum non conveniens is an unwelcome presence under the Conventions, but also that it was in any event folly to apply that doctrine in the circumstances of this case. As Judge Lynch observed

in dissent, the net effect of the judgment is perversely to send the parties for enforcement back to a Peruvian court when it is all but certain that they had selected arbitration as their dispute resolution mechanism precisely to avoid the Peruvian court's jurisdiction and when they had reason to believe that the resulting award would win enforcement in a U.S. court, unless one of the stated grounds for denying enforcement could be established.