Second Circuit Denies Enforcement of Arbitral Award on Forum non Conveniens Grounds

On December 14th, 2011, the United States Court of Appeals for the Second Circuit dismissed a suit seeking confirmation of an international arbitration award on the ground of *forum non conveniens* in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*.

By doing so, the Court followed its own 2002 precedent in *In re Arbitration between Monegasque de reassurances S.A.M. v. NAK Naftogaz of Ukraine.*

Facts

In *Figueiredo,* the dispute had arisen out of a consulting agreement entered into by Figueiredo and a Peruvian public entity, pursuant to which Figueiredo was to prepare engineering studies on water and sewage services in Peru. After a fee dispute arose, arbitral proceedings were commenced in Peru, and eventually lead to a 2005 award ordering the Peruvian party to pay more than USD 21 million. Figueiredo had designated itself as a Peruvian domiciliary in the agreement, but later claimed that it was a Brazilian corporation.

Under Peruvian law, a statute prevents governmental entities to pay more than 3% of their budget each year to satisfy judgments. The Peruvian party began to pay the award, but at a slow pace, as it respected the statutory cap.

In 2008, Figueiredo decided to seek enforcement in the United States, as the Peruvian Republic held there substantial assets resulting from the sale of bonds.

Judgment

The U.S. Court of Appeals dismissed the action on the ground that it was *forum non conveniens* in favor of the courts of Peru.

First, the court refused to consider that the fact that the assets located in the U.S. could only be attached by a U.S. court made the foreign court inadequate as, the court held, it would otherwise mean that the doctrine of forum non conveniens

could never be used in enforcement proceedings.

Second, the Court found that the Peruvian cap statute was a highy significant public factor warranting dismissal.

> *there is (…) 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.*

The court drew a parallel with its domestic case law on abstention in the U.S. federal system, insisting that deferring to litigation in another jurisdiction is appropriate where the litigation is intimately involved with sovereign prerogative.

Finally, the court insisted that the case was more closely connected to Peru, where the contract had been executed between two entities declaring to be domiciled in Peru, and performed.

Justice Lynch dissented.