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Ensuring jurisdiction over treaty party's judgments

In drafting legislation to implement Hague Convention, State Department weighs excluding forum non conveniens.

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May a defendant assert a forum non conveniens defense when a judgment creditor, pursuant to an international convention, seeks to enforce a judgment rendered by a treaty party's court that had jurisdiction based on an exclusive choice-of-court agreement? The State Department is currently considering that issue in drafting legislation to implement the 2005 Hague Convention on Choice of Court Agreements. U.S. litigants have an important stake in this issue because the convention would enhance the utility of such agreements and facilitate recognition and enforcement of the resulting judgments. In addition, ambiguity on this issue could significantly influence how other treaty partners perceive the effectiveness of U.S. implementation of the convention. The secretary of state's Advisory Committee on Private International Law will consider this important question, among others relating to implementation of the convention, when it meets in Washington on October 11. 77 Fed. Reg. 52784 (August 30, 2012) (notice of meeting).

THE PRACTICE
Commentary and advice on developments in the law

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Article 5(2) of the Hague Convention expressly requires a court in a convention state that has jurisdiction under the convention to enforce an exclusive choice-of-court agreement. Such a court may "not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State." Ronald Brand and Paul Herrup conclude that Article 5(2) "will eliminate declination of jurisdiction on the basis of" forum non conveniens (FNC) for exclusive choice-of-court agreements within the convention's scope. The 2005 Hague Convention on Choice of Court Agreements: Documents and Commentary 83 (2008).

In its provisions on recognition and enforcement of judgments, the 2005 Hague Convention includes no express provision comparable to Article 5(2). This omission probably occurred because civil-law negotiators, whose law does not include FNC, assumed the doctrine to be entirely inapplicable in enforcement proceedings. Further, the text of the 2005 convention can be fairly read to exclude application of the doctrine. Article 8(1) establishes the obligation of courts of convention states to enforce judgments entered by courts of other convention states based on an exclusive choice-of-court agreement. That provision provides that an enforcing court may refuse to recognize or enforce a judgment "only on the grounds specified in this Convention." Brand and Herrup interpret the "only" in this context to mean that the "grounds of refusal specified in the Convention are exhaustive" and that a ground not "explicitly specified in the Convention,…is not to be found, and not to be had."

Despite the foregoing clarity of the 2005 Hague Convention, new concerns have arisen about whether courts of the United States might, nonetheless, apply FNC in proceedings to enforce judgments from other convention states. The issue is presented by a recent and controversial split decision of the U.S. Court of Appeals for the Second Circuit, *Figueiredo Ferraz e Engenharia de Projecto Ltda. v. The Republic of Peru*, 665 F.3d 384 (2d Cir. 2011), relating to

enforcement of an international arbitral award under an international treaty.

In summary, the Second Circuit in *Figueiredo* was asked by a Brazilian company to enforce an arbitral award that was issued in a proceeding in Peru against a Peruvian governmental agency and then upheld by a Peruvian appellate court. The party seeking enforcement relied upon the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention), which is closely modeled on the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, on which the plaintiff also relied. Enforcement was sought against proceeds that the Republic of Peru received from bonds that the republic—not the defendant Peruvian agency—sold in New York. The district court refused to dismiss on grounds of FNC or international comity.

The Second Circuit requested that the United States present its views on "aspects of the appeal that might have implications for the conduct of the foreign relations of the United States." The court expressly asked whether dismissal on FNC grounds might "run counter to U.S. treaty obligations" and thus "implicate foreign relations." In response, the United States supported reversal and remand so that the district court could reconsider under the proper standard whether there was subject-matter jurisdiction under the Foreign Sovereign Immunities Act in view of the relationship of the Peruvian agency to the republic against whose assets enforcement was sought. If, contrary to the U.S. position, both the agency and republic were proper defendants, then, based on a rather cursory analysis, the U.S. amicus brief pronounced that FNC is "an available ground for dismissal in proceedings brought pursuant to the Panama Convention." Brief at 21. Importantly, the amicus brief then supported affirming the district court because neither FNC nor international comity required dismissal.

Despite extensive criticism of the Second Circuit precedent on which it relied, the majority held that both conventions allow consideration of FNC because they permit application of "procedural laws" in enforcement proceedings and "FNC is a doctrine 'of procedure.' " In his dissent Judge Gerard Lynch emphasized that he views the binding Second Circuit precedent on the FNC point as incorrectly decided. In particular, Lynch referred to the "rather technical and distinctly American use" of "procedure" and questioned whether a treaty "drawn from a variety of legal traditions" intended to have FNC severely affect enforceability of international arbitral awards. He also relied on the American Law Institute's draft Restatement (Third) of the United States Law of International Commercial Arbitration, which takes the position that, since the grounds for nonenforcement are exclusive, FNC is inapplicable in enforcing arbitral awards under both the New York and Panama conventions.

Having determined that FNC may be applied, the Second Circuit majority held that the district court committed legal error in not considering as a dispositive public-interest factor a Peruvian statute that limited annual recovery against the defendant agency. Lynch's careful dissent emphasized the "unprecedented" approach to finding FNC, the "tight" nexus of the action with the United States since the plaintiff "identified specific assets in the United States against which it hopes to levy" and the position against a comity rationale in the U.S. amicus brief. He warned that the majority's reasoning will "distort the law of FNC in this Circuit and undercut the transnational effort (in which the United States is an active participant) to promote commercial arbitration." (For a detailed scholarly analysis that views the majority's reasoning as "astonishing and inexcusable" while urging a more nuanced approach for certain arbitral awards, see Alan Rau, "The Errors of Comity: *Forum Non Conveniens* Returns to the Second Circuit," 23 Amer. Rev. Int'l Arb. 1, 17 (2012).)

Article 14 of the 2005 Hague Convention specifies that the "procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested State" unless the convention provides otherwise. The official report to the 2005 treaty specifies that Article 14 "does not of course cover the grounds on which recognition or enforcement may be refused" since those grounds are "governed exclusively by the Convention." Trevor Hartley and Masato Dogauchi, Explanatory Report at ¶ 215. Brand and Herrup add that Article 14 "displaces local procedural law which might require a different result in a given case" from the result reached by applying the limited grounds for refusal specified in articles 8 and 9 of the Convention.

Despite this apparent clarity of the Hague Convention on the inapplicability of FNC to recognition and enforcement proceedings, *Figueiredo* and the United States' amicus brief raise concerns about whether a court might somehow apply the same approach as the Second Circuit majority when FNC is invoked to resist enforcing judgments within the 2005 treaty's scope. Accordingly, the State Department asked stakeholders whether the draft implementing legislation should include an express provision precluding application of FNC to enforcement. In response, several bar groups and commentators have urged that the department include an express provision on the point in the implementing legislation. For example, the International Section of the New York State Bar Association reasoned that, when the enforcing court has jurisdiction, such a provision would fulfill the "overall purpose of the Convention to promote mutual recognition, private parties' expectations for global enforcement and the vmutual enforcement of judgments among the Convention's Contracting States."

To this end, the proposed provision could specify that recognition or enforcement of a judgment within the scope of the convention shall not be declined "on the ground that the matter should be heard in a court of another country or state, including on the ground of forum non conveniens." While Article 5(2) of the convention does not refer to FNC, inclusion of an express reference to the doctrine in the U.S. implementing legislation would promote domestic transparency, avoid ambiguity for our courts and for affected U.S. or foreign litigants, and align U.S. law more closely with the approach of other likely convention states.

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