I. Introduction

International commercial arbitration has increasingly gained popularity as a preferred form of international dispute resolution. The adoption of international treaties, also known as Conventions, with high participation among nations has created an environment in which parties, often including the state actors themselves, are comfortable entering into arbitration agreements with other parties to the treaties because of an established degree of legitimacy. The New York Convention has resulted in what is likely the most effective, successful type of private international law convention that exists.\(^1\) The United States, New York especially, serves an important role as a common forum for enforcing arbitral awards involving parties foreign to the United States.

The New York Convention relies on the national courts of signatory countries to enforce international arbitral awards.\(^2\) Article V of the New York Convention provides courts with a list of exceptions through which enforcement may be refused.\(^3\) An additional wrinkle complicating enforcement is the doctrine of *forum non conveniens*, which has been used by courts in the United States to deny being the jurisdiction to enforce an arbitral award based on the existence of a more convenient, adequate alternative forum.\(^4\)

There has been concern over recent decisions involving the use of *forum non conveniens* by United States courts that are refusing enforcement of international arbitral awards under this doctrine. While some courts, such as the D.C. Circuit, have aligned their decisions regarding this

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\(^1\) *Fifty years of the New York Convention on Arbitral Awards: Success and Controversy*, Practical Law UK Articles 3-384-4388

\(^2\) *Id.*

\(^3\) *Id.*

doctrine with the pro-enforcement spirit of the New York Convention, others have not. The Second Circuit’s 2-1 decision in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru* in 2011 has been termed “astonishing and inexcusable” because of its application of the *forum non conveniens* doctrine.\(^5\)

This circuit split leaves unanswered questions as to the legitimacy of the use of *forum non conveniens* as a defense against the enforcement of a foreign arbitral award in the United States. This paper will explore the basic foundations of the New York Convention and the framework of *forum non conveniens* analysis. Additionally, this paper will look to the D.C. and Second Circuits for their conflicting treatment of the doctrine. Finally, this paper will discuss the implications of the split and reveal which approach is preferential.

### II. The New York Convention, Briefly

An arbitral award is of little use if there is no power to enforce the award. According to some commentators, “enforcement of awards resulting from properly conducted arbitrations has an advantage over court judgments because of multi-lateral treaties, also known as conventions.”\(^6\) There are multiple possible sources of governing law that can be applicable to enforcement of arbitral awards including the Federal Arbitration Act (FAA), state arbitration law, and international agreements such as the Panama Convention and the New York Convention. In the United States, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter the “New York Convention” or “Convention”) governs the recognition and enforcement of foreign arbitral awards arising out of

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other treaty-signatory nations, of which there are over one hundred and forty.\(^7\) There must be a written agreement creating a commercial legal relationship that contains an agreement to arbitrate in a signatory country to qualify for coverage by the New York Convention, so this is often specified in arbitration agreements where at least one of the parties is in a country that is a signatory to the Convention.\(^8\) Chapter 2 of the FAA implements the New York Convention\(^9\), giving it the power and effect of federal law.\(^10\) The New York Convention applies to the enforcement of arbitral awards in the United States when either at least one party is not a citizen of the United States or when all parties are citizens of the United States but there is a reasonable relation between more or more foreign states.\(^11\)

### A. Article III. Recognition and Enforcement of Arbitral Awards

Article III of the New York Convention is the backbone of the Convention and provides that “[e]ach 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.”\(^12\) This section of the Convention entitles signatory countries to recognize and enforce Convention awards in accordance with their local rules of procedure.\(^13\) Article III is key to the functioning of the treaty because it essentially confirms that, by signing onto the Convention, a signatory country agrees to enforce awards in

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\(^8\) Constable, *supra*, at 12, 15.


\(^10\) *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998) (“The New York Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts”).

\(^11\) *Enforcing Arbitration Awards in the US*, Practical Law Practice Note 9-500-4550

\(^12\) Convention Done at New York June 10, 1958, T.I.A.S. No. 6997 (Dec. 29, 1970)

their own country when parties from other signatory countries are involved, but may do so according to their own procedural rules.

B. **Article V. Exceptions to Enforcement**

In adopting the New York Convention, the United States added a second chapter to the FAA. Chapter 2 of the FAA specifies that a “court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.” Article V of the New York Convention contains a list of the grounds that might justify non-enforcement of an arbitral award. These enumerated defenses have traditionally been considered to be exhaustive.

Recognition and enforcement of the award may be refused under Article V(1): (a) if the party seeking the refusal of enforcement proves the agreement was invalid in the jurisdiction issuing the award or under the law chosen in the arbitration clause, or if the party against whom enforcement is sought is incapacitated; (b) for failure to give proper notice; (c) if the award exceeds the scope of the agreement; (d) if the award has not yet become binding; or (e) if the Tribunal was improperly constituted. Under Article V(2), recognition and enforcement of an arbitral award may also be refused if: (a) an authority in the country in which recognition and enforcement is sought finds that the subject matter of the case is not arbitrable under the law of the forum, or (b) if the award violates the public policy of the country of enforcement.

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16 Park & Yanos, *supra*, at 264.
18 *Id.*
Article V's provisions carve out the few exceptions to the pro-enforcement spirit of the New York Convention and may be considered “the exclusive list of specific factual circumstances on which refusal to enforce a foreign arbitral award may be justified.”19 Listing a clear set of uniform rules and exceptions applicable to all signatories speaks to the importance of consistent and predictable treatment of foreign arbitral awards for the Convention to serve its purpose. Even the broadest exception, the public policy exception of Article V(2)(b), which invites judicial discretion in deciding whether to enforce an award contrary to national policy, “is invoked very sparingly, and mostly to affirm awards regardless of public policy objections.”20 Therefore, the exceptions explicitly listed in the Convention should be the complete list of circumstances in which refusal to enforce an arbitral award is permissible. However, the forum non conveniens doctrine has become another possible exception in the United States that places arbitral awards at a greater risk of non-enforcement.

III. The Forum Non Conveniens Doctrine

Forum non conveniens is at its core a common-law doctrine that allows a court to dismiss a case in favor of a more convenient alternative forum. The power to decline jurisdiction under this doctrine is one that is inherent to the federal court.21 The principle of forum non conveniens is that “a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”22 The basic approach to applying forum non conveniens is

20 Id.
22 Gilbert, 330 U.S. at 507.
that a court must determine whether the alternative forum is: (1) available; (2) adequate; and (3) more convenient in light of the public and private interests involved.  

*Forum non conveniens* has been summarized as the doctrine whereby jurisdiction will not be exercised if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff. In other words, forum non conveniens allows courts to dismiss a case if the party invoking the defense can prove that an adequate alternative forum exists, which is typically satisfied when the defendant is “amenable to process” in that other jurisdiction. It is important to note that availability of a possible alternative forum does not automatically signal adequacy. If the remedy offered by the alternative forum is clearly unsatisfactory, such as a jurisdiction in which the subject matter in dispute is not litigable, the alternative forum may be deemed inadequate, failing this initial requirement.

Assuming that the first requirement is satisfied, the party invoking a *forum non conveniens* defense to dismiss an enforcement action must then establish that a balancing of public and private interest factors strongly favors dismissal. A federal court has discretion to

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23 Deb v. SIRVA, Inc., 832 F.3d 800, 806 (7th Cir. 2016).
26 See Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 78 F.R.D. 445 (Del.1978) (court refuses to dismiss, where alternative forum is Ecuador, it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted).
27 “Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.” Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).
28 “Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness too in having the trial of
dismiss a case on the ground of forum non conveniens when an alternative forum has jurisdiction to hear case, and trial in the chosen forum would “establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems.”

Ultimately, a court may choose to decline jurisdiction if convenience and justice would be better served should the action be brought in another forum where it would have been appropriate for it to be brought. This process resembles a 28 U.S.C.A. § 1404(a) Change of Venue proceeding, except rather than resulting in transfer within the federal court system, it is typically a transfer to a court outside of the United States.

A court is not required to first establish jurisdiction in order to make a forum non conveniens determination. Although the New York Convention establishes jurisdiction in the United States as a signatory state through the FAA, a court maintains authority to reject that jurisdiction “for reasons of convenience, judicial economy and justice.” Forum non conveniens, then, does not create a jurisdictional issue but instead involves the court deliberately abstaining from exercising jurisdiction. This allows courts to review a forum non conveniens case without having to first establish jurisdiction because in dismissing a case in favor of an adequate alternative forum, the court is relieving itself of jurisdiction so the other established forum can take on the proceedings. If a case is properly dismissed for reasons of forum non conveniens, the United States has not dismissed the claim on the merits, since the alternative

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30 See 9 U.S.C. §§ 203, 204.
31 In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 497 (2d Cir. 2002).
32 Id. at 498.
forum will just be in charge of enforcing the already established arbitral award rather than the United States.

The standard of review for *forum non conveniens* depends on the court reviewing the matter. The district court exercises discretion when making the *forum non conveniens* determination and the court may be reversed on appeal when there has been a clear abuse of discretion. A district court abuses its discretion when its decision rests on an “error of law or a clearly erroneous factual finding, or its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” While the procedural aspects of *forum non conveniens* are mostly consistent across the courts, there is concern as to the “extent to which forum non conveniens applies to actions under the New York and other arbitration conventions, particularly comparatively routine procedures such as confirming an arbitration award.”

**IV. The D.C. Circuit’s Standard for Applying *Forum Non Conveniens*: *TMR Energy Ltd. v. State Property Fund of Ukraine***

The D.C. Circuit’s treatment of the *forum non conveniens* doctrine has been consistent with the pro-enforcement spirit of the New York Convention. *TMR Energy* is the leading case for this issue in the D.C. Circuit. It is noteworthy that this case was decided by the D.C. Circuit in 2005 by a panel that included current Chief Justice of the Supreme Court, John Roberts. This could have an impact on the outcome of the decision should the *forum non conveniens* issue be taken up by the Supreme Court.

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34 Monegasque, 311 F.3d at 498.
35 Basic features of forum non conveniens, 1 Litigation of International Disputes in U.S. Courts § 6:1.
A. Background and Procedural History

In 1991, following Ukrainian independence from a dissolved Soviet Union, a Ukrainian state-owned oil enterprise, Lisichansk Oil Refining Works (LOR), entered into a joint venture with a Swiss company to make upgrades to an oil refinery in eastern Ukraine.\textsuperscript{36} The Swiss company later transferred its interest in the joint oil venture, which was known as Lisoil, to TMR Energy Limited (TMR), a Cyprian corporation.\textsuperscript{37}

TMR then entered into two different contracts with LOR in 1993. One contract gave each TMR and LOR a 50% stake in the Lisoil venture. The other contract consisted of an agreement between TMR and LOR in which TMR would finance and support upgrades to several refining units at LOR’s refinery in exchange for LOR providing crude or partially processed oil products to be refined by the upgraded units.\textsuperscript{38} Under the agreement, Lisoil would own some of the refined oil and TMR would be paid out of the proceeds of the sales of that oil.\textsuperscript{39} Later that year, LOR was transformed into a joint stock company called Linos as part of the implementation of Ukraine’s privatization plan following its separation from the Soviet Union.\textsuperscript{40} Ukraine’s privatization plan resulted in the creation of the State Property Fund of Ukraine (SPF), which retained a 67% share in Linos on behalf of the State of Ukraine.\textsuperscript{41}

Linos was able to meet LOR’s obligations under the 1993 agreement until 1997 when Linos stopped providing Lisoil its share of the oil due to financial difficulties, rendering Lisoil

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
unable to repay TMR. Linos refused to provide Lisoil the oil as agreed upon despite TMR’s repeated requests to do so.

In 1999, the SPF declared that they had succeeded to LOR’s 50% interest in Lisoil and entered into a contract with TMR in which they each agreed “not to undertake any actions that may damage the interests of [Lisoil,] ... not [to] abet such actions by a third party and not to [be] inactive in the event of such actions.” Following this 1999 contract, TMR asked the SPF to have Linos turn over the refined oil to Lisol that LOR promised to deliver in the 1993 contract, but the SPF continually refused to pressure Linos, turn the oil over itself, or find some other solution.

On May 24, 2000, TMR sent the SPF a letter stating that TMR would initiate arbitration proceedings as provided in the 1999 contract if the dispute was not settled by June 3, 2000. The parties did not resolve the dispute in time and on July 4, 2000, TMR initiated arbitration proceedings in Sweden against Linos, the SPF, and the State of Ukraine.

At the hearing in the case against the SPF, the arbitrators held that the SPF had breached both the 1993 contract as LOR’s successor-in-interest and the 1999 contract it entered itself, and awarded TMR $36.7 million in damages, plus interest and costs. TMR filed a petition for confirmation of the award in the United States District Court for the District of Columbia in January 2003.
The SPF then appealed the judgment in favor of TMR claiming the district court should have dismissed the case based on either a lack of personal jurisdiction since the SPF did not have the requisite minimum contacts with the United States or because the District of Columbia is a forum non conveniens. The SPF also contended that the district court should have refused confirmation of the arbitration of the award because the arbitrators’ determination of liability exceeded the scope of the arbitration agreement and violated public policy.

B. The D.C. Circuit’s Examination of the Forum Non Conveniens Doctrine

The SPF argued that the district court abused its discretion because it failed to consider the relevant public and private interest factors favoring dismissal. However, the D.C. Circuit noted that these factors need not be weighed at all if no other forum available to the plaintiff can grant the relief the plaintiff sought in its chosen forum.

The D.C. Circuit also noted that, as the defendant, the SPF had the burden to show that there was another adequate forum for the plaintiff’s case, which the SPF attempted to do by pointing out that TMR had already filed actions against it to enforce the arbitration award in the courts of the Ukraine and Sweden. The court acknowledged TMR’s response that only a court of the United States can attach the commercial property of a foreign nation located in the United States.

50 Id at 298.
51 Id.
52 Id. at 303.
53 Id.
54 Id.
55 See 28 U.S.C. § 1609 (foreign state immune from attachment except as provided in § 1610), 1610(a)(6) (permitting attachment of “property in the United States of a foreign state ... used for a commercial activity in the United States” upon judgment entered by court of the United States or of a state “based on an order confirming an arbitral award rendered against the foreign state”).
Critically, the D.C. Circuit rejected the SPF’s contention that the district court should have dismissed the action because the SPF did not have any assets in the United States against which a judgment could be enforced. The court held that “even if the SPF currently has no attachable property in the United States, however, it may own property here in the future, and TMR's having a judgment in hand will expedite the process of attachment.” The court also stated that the possibility that a judgement may go unenforced is not a factor to consider when determining whether a particular court is an inconvenient forum in which to defend. Ultimately, the D.C. Circuit affirmed the district court’s refusal to dismiss the action based upon the doctrine of forum non conveniens because there is no other forum in which TMR could reach the SPF’s property, if any, in the United States.

V. The Second Circuit’s Standard for Applying Forum Non Conveniens: Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru

The Second Circuit’s standard for applying the doctrine of forum non conveniens is particularly significant because it includes the state of New York, which is one of the leading jurisdictions for the recognition and enforcement of both foreign arbitral awards and foreign money judgments.

It is also important to note that Figueiredo Ferraz came just a few years after a controversial Second Circuit decision of Monegasque de Reassurances v. NAK Naftogaz of

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56 Id. at 303.
57 Id.
58 Id.
59 Id. at 304.
60 Robinson, supra, at 64; see also Martin L. Roth, Note, Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach, 92 Cornell L. Rev. 573, 584 (2007) (observing that “the vast majority of arbitration enforcement actions are filed in New York”).

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Ukraine ("Monde Re")\textsuperscript{61} that has been seen as posing a "significant threat to the enforceability of arbitral awards under the New York Convention."\textsuperscript{62} In that case, the Second Circuit upheld a ruling by the U.S. District Court for the Southern District of New York that held that the "New York Convention did not prevent a court from setting aside an award because litigating in the chosen forum would represent a significant hardship to the objecting party."\textsuperscript{63} In Monde Re, the court "interpreted forum selection as the type of domestic ‘procedure’ that Article III allows courts to observe in recognition and enforcement proceedings."\textsuperscript{64} This is significant because it was the first published decision by a U.S. Court refusing acting counter to the pro-enforcement directive of the New York Convention on the grounds of \textit{forum non conveniens}, and it opened the floodgates to future defenses against that directive.\textsuperscript{65}

Before delving into the case, it is notable that Figueiredo Ferraz concerns countries that are signatories to both the New York Convention and the Panama Convention; but, for the purposes of this paper, the same general principles apply to each Convention in the discussion and analysis to follow. Therefore, discussion of the Panama Convention has been omitted because it was modeled on the New York Convention and does not add enough substance to warrant its own discussion in the context of this case.\textsuperscript{66}

\textbf{A. Background and Procedural History}

\textsuperscript{62} Ivanova, \textit{supra}, at 907.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 396 (2d Cir. 2011).
In 1997, Figueiredo Ferraz, a Brazilian engineering corporation, entered into an agreement with the Republic of Peru, specifically the Peruvian Ministry of Housing, Construction and Sanitation, and Peruvian Water Treatment Program, (hereafter “the Ministry”) to perform studies on water and sewage services in Peru.\(^{67}\) The agreement provided that the parties agreed to be subject to “the competence of the Judges and Courts of the City of Lima or the Arbitration Proceedings, as applicable.”\(^{68}\) Sometime after the agreement, a fee dispute arose and Figueiredo Ferraz commenced arbitration proceedings against the Ministry in Peru, in which Figueiredo Ferraz was awarded just over $21 million, which included principal damages plus interest and cost of living adjustments.\(^{69}\) The Ministry appealed to the Court of Appeals in Lima on the ground that, under Peruvian law, the arbitration was an “international arbitration,” which would have limited recovery to the amount of the contract, but was denied because Figueiredo Ferraz had done enough to designate itself a Peruvian domiciliary.\(^{70}\)

The Ministry began making payments to Figueiredo Ferraz despite a lack of confirmation of the arbitration award or a judgment in a Peruvian court.\(^{71}\) However, due to a Peruvian statute imposing a limit of three percent of a governmental entity’s budget on the amount of money it may pay to satisfy judgments against it, the Ministry had only paid Figueiredo Ferraz $1.4 million in payments at the time the briefing for the case was done.\(^{72}\) In January 2008, Figueiredo Ferraz filed a petition in the Southern District of New York pursuant to the FAA, the New York

\(^{67}\) Id. at 384.
\(^{68}\) Id. at 387.
\(^{69}\) Id.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id. at 387-388.
Convention, and the Panama Convention to confirm the award and obtain a judgment for $21,607,003.\textsuperscript{73}

In response to the Ministry’s motion to dismiss, Figueiredo Ferraz alleged that Peru had “substantial assets in New York, resulting from the sale of bonds,” the existence of which were acknowledged by Peru.\textsuperscript{74} In September 2009, the Ministry’s motion to dismiss was denied by the district court in part because, under Peruvian law, the Republic of Peru and the Ministry are not separate entities, making the Republic of Peru is subject to the award despite not explicitly signing the agreement, and because dismissal was not appropriate under \textit{forum non conveniens}, among other reasons.\textsuperscript{75} The Second Circuit noted that the district court did not clearly seem to consider whether the statute imposing the three percent cap might have been relevant to the Ministry’s payment obligation because the court never reached the question of whether the award should be confirmed.\textsuperscript{76}

The Ministry filed an interlocutory appeal and moved for leave to appeal the district court’s determinations concerning multiple issues, including the \textit{forum non conveniens} determination, which was granted by the Second Circuit.\textsuperscript{77} The \textit{amicus curiae} brief submitted for the United States contended that the District Court did not err in declining to dismiss on grounds of \textit{forum non conveniens}.\textsuperscript{78}

\textsuperscript{73} Id. at 388.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 389.
B. The Second Circuit’s Examination of the *Forum Non Conveniens* Doctrine: Majority Opinion

The Second Circuit, in a 2-1 decision, declined to adhere to the D.C. Circuit’s *forum non conveniens* reasoning in *TMR Energy*. Instead, the Second Circuit held that the adequacy of an alternate forum depends on whether there are some of the defendant’s assets in the foreign forum, and not whether the exact assets located in the United States could be executed upon in the foreign forum. After briefly discussing personal jurisdiction, the majority opinion looked to the standard of review for a *forum non conveniens* claim. Here, rather than grant deference to the district court’s exercise of discretion in its balancing of the private and public interest factors, the majority performed its own *forum non conveniens* calculation. The exercise of its own calculation on this issue laid the basis for the grounds on which the Second Circuit overturned the district court.

The majority found that the District Court’s conclusion, that although Peruvian law does permit the execution of arbitral awards, “only a United States court may attach the commercial property of a foreign nation located in the United States,” citing *TMR Energy*, was in err. The majority explained that while it is true that only a United States court could attach a defendant’s particular assets located in the United States, that circumstance “cannot render a foreign forum inadequate.” The majority then cited to one of their recent cases wherein a *forum non conveniens* dismissal was upheld even though the plaintiffs sought a judgment in the United States in order to execute upon a foreign government’s assets located in the United States,

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79 Id. at 390.
80 Id.
something that could not have been dismissed according to its interpretation of TMR Energy’s reasoning.\textsuperscript{81}

The majority finds further support for its rejection of TMR Energy by addressing what constitutes an adequate alternative forum. The majority determines that adequacy of an alternative forum is “assessed in the context of a suit to obtain a judgement and ultimately execution on a defendant's assets.”\textsuperscript{82} Therefore, it is not whether the precise assets the plaintiff seeks to attach exist in the alternative forum, but whether there are some assets belonging to the defendant in that forum. Additionally, the availability of identical remedies is not required in both forums for the alternative forum to meet the adequacy requirement, even if the plaintiff may recover less in the alternate forum.\textsuperscript{83} As a result, the majority is in disagreement with the D.C. Circuit in TMR Energy because, in that case, the foreign defendant’s precise asset only being attachable in the United States rendered the alternate forum inadequate, which the majority held is not enough.

After establishing that (1) an alternative forum was available in Peru and (2) that forum was adequate, despite the possibility of a lesser recovery in Peru, the majority moved onto the balancing of the public and private interests, the final step in making a forum non conveniens determination. The Court considered both the Ministry’s contention that the three percent cap statute was so relevant it was perhaps decisive to warrant the forum non conveniens determination and Figueiredo Farraz’s response that the cap statute could not warrant dismissal under forum non conveniens because that would be “contrary to the United States’ public policy

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\textsuperscript{81} Id.
\textsuperscript{82} Id. at 391.
\textsuperscript{83} See Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 159 (2d Cir. 1980) (alternate forum not inadequate although plaintiff might recover only $570,000 there, rather than $8 million in the United States).
in favor of international arbitration.” The majority sided with the Ministry, finding that the cap statute was a “highly significant public factor” that warranted dismissal under forum non conveniens. The majority found that there was a particular public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments, represented here by the three percent cap. The rate at which public funds may be dispersed, according the majority, is litigation that is “intimately involved with sovereign prerogative,” and should therefore be decided by “tribunals empowered to speak authoritatively” on the subject, the Peruvian courts.

Figueiredo Ferraz attempted to convince the Second Circuit that the United States’ interest in favoring the enforcement of arbitration agreements in international contracts was enough to render forum non conveniens dismissal unwarranted, but the majority did not agree. The majority reasoned that while it was true that enforcement is normally the favored policy of the United States, the “significant public factor of the Peru’s cap statute” was enough for the policy of enforcement to give way. Significantly, the majority is weighing the public policy of a foreign country against the public policy of the United States.

Finally, the majority opinion dispensed with the District Court’s finding that the Ministry should not be able to prevail based on forum non conveniens because it was a signatory to the Convention, thereby assuming the risk that any award rendered against it might be enforced in another signatory country like the United States. The majority argued that Figueiredo Ferraz

84 Figueiredo, 665 F.3d at 391.
85 Id.
86 Id. at 392.
87 Id.
88 Id.
89 Id.
90 Id. at 392-393.
took the more significant risk of having their award subject to Peru’s cap statute.\textsuperscript{91} As a result, Figueiredo should not have been surprised that the balancing worked out in favor of the Ministry considering the interests at stake.

C. The Second Circuit’s Examination of the \textit{Forum Non Conveniens} Doctrine: Dissenting Opinion

Judge Lynch’s dissent, twice as long as the majority ruling, argued that applying \textit{forum non conveniens} in this context was in violation of the United States’ obligations under the Convention. He also argues that even if dismissal based on the doctrine of forum non conveniens was acceptable under the Convention, the doctrine would not apply to the facts of \textit{Figueiredo}.

Judge Lynch’s first point on dissent focuses on the availability of forum non conveniens in arbitration enforcement proceedings under the Convention. His analysis begins with a recap of the concerns that lead to the drafting of the New York Convention, namely fear that countries would refuse to enforce an international arbitration agreement.\textsuperscript{92} Judge Lynch looks to the Supreme Court’s language in \textit{Scherk v. Alberto–Culver Co.}, in which the Supreme Court stated that a “parochial refusal by the courts of one country to enforce an international arbitration agreement” not only undermines business confidence, but also “invite[s] unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.”\textsuperscript{93} Judge Lynch suggests that by acceding to the treaties, the United States has made the doctrine of forum non conveniens inapplicable to enforcement proceedings that they govern because it is not listed as a defense to enforcement in the Convention.\textsuperscript{94}

\textsuperscript{91} \textit{Id.} at 393.
\textsuperscript{92} \textit{Id.} at 395-396.
\textsuperscript{93} \textit{Id.} at 396.
\textsuperscript{94} \textit{Id.} at 397.
Further support for the dissent can be found in the draft Restatement (Third) of the U.S. Law of International Commercial Arbitration, Section 5-21(a), which states outright that “an action to enforce a [New York or Panama] Convention award is not subject to a stay or dismissal on forum non conveniens grounds.” Additionally, the accompanying Reporters’ Note explained that “the Convention grounds for nonrecognition and nonenforcement are meant to be exclusive,” meaning that under obligations arising from the Convention courts may not “employ inconvenience” as a basis to dismiss “an action for enforcement of an award that is otherwise entitled.” Given this, a number of commentators have found the United States to be in breach of its treaty obligations under the New York Convention. Judge Lynch finished his commentary on this issue by declaring that he would have concluded “that the doctrine of forum non conveniens is not available at all in an action such as this one” should this have been an issue of first impression, and that he hopes other courts will use his observations to give further thought to the issue.

The essentials of Judge Lynch’s second major point on dissent can be boiled down to a warning that courts should be wary of “applying expansively or in novel ways that suggest that enforcement plaintiffs should be referred back to the very courts they sought to avoid in resorting to arbitration.” In his view, a summary proceeding to confirm an arbitration award does not merit forum non conveniens application at all because the doctrine is a “neutral procedural rule that selects a forum based on convenience” and should not be used to “steer parties to the forum

95 Id.
96 Id.
98 Figueiredo, 665 F.3d at 399.
99 Id.
100 Id. at 402.
that is likely to apply the substantive law” favored by one party or another, or the one the judges in the forum court think is best.\textsuperscript{101} In this case, Figueiredo Ferraz selected a United States court with the “narrow intent of enforcing its arbitration award against Peru's assets in the United States,” as the Convention entitles it to do.\textsuperscript{102} Therefore, for Judge Lynch, the facts of this case do not warrant \textit{forum non conveniens} treatment even if it were available as an exception to enforcement of an arbitral award under the Convention.

VI. Implications of the Split

A. Reduced Confidence in the United States’ Willingness to Enforce Foreign Arbitral Awards

As a major international center of arbitration, any decision enabling a court in New York to punt on enforcing an arbitral award to a foreign forum is likely to have a considerable effect in the world of international commercial arbitration. Consistency and predictability is essential in this realm, since commercial actors around the world need to be able to anticipate how a particular issue will be resolved by national courts.\textsuperscript{103} A party bringing a claim in the United States does so intentionally, purposefully avoiding the alternate foreign forum they are being sent to for fear of non-enforcement or insufficient recovery. When a questionable \textit{forum non conveniens} defense is successful in the United States, confidence in the United States’ willingness to act as an enforcer of arbitral awards suffers because it erodes predictability.

The Second Circuit’s decision allowing a finding that an alternate forum is “adequate,” even when the party seeking enforcement may be forced to recover less than they could have

\textsuperscript{101} \textit{Id.} at 403.
\textsuperscript{102} \textit{Id.} at 405.
recovered in the United States, may encourage parties seeking to avoid enforcement to simply find a way to play up the inconvenience of having to travel to New York, where they may have substantial assets as in *Figueiredo*, in favor of moving the proceeding to a forum that protects their assets with vigor.

The overall functionality of the New York Convention scheme “rests on the need for a strong presumption of the enforceability of awards, subject only to the most limited due process grounds.” Unanticipated or inconsistent judicial inquiry into other putative defects would be likely to impair confidence in the system of the New York Convention as a whole. As a purported leader in the world of international commercial arbitration, the United States has a delicate position that should be used to bolster confidence that arbitral awards will be enforced rather than erode it. There is no doubt a vital public interest that is served by the United States following through with its international commitments, including recognizing and enforcing international arbitral awards. Ideally, this should normally be compelling enough to outweigh the other public and private interest factors favoring dismissal, but after the *Figueiredo* decision, this is now an unfortunate uncertainty for parties seeking to have their arbitral awards enforced in this country.

**B. Forum Non Conveniens May be an Impermissible Defense to Enforcing a Foreign Arbitral Award Under the New York Convention**

As Judge Lynch’s Dissent in *Figueiredo* points out and Matthew H. Adler notes in his criticism of the *Figueiredo* decision, *forum non conveniens* is not an expressly stated exception

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104 Rau, *supra*, at 12.
105 Park & Yanos, *supra*, at 290.
In his analysis, Adler finds

“the Second Circuit's willingness to carve out an additional exception to enforcement in the field of international arbitration…particularly startling given the United States Supreme Court's recent holding in *Hall Street Associates v. Mattel, Inc.*, in which the Court found that the only exceptions to enforcing a domestic arbitration award are those listed expressly in sections 10 and 11 of the FAA.”

Seeing as the FAA incorporates the New York Convention, it would make logical sense that the only permissible exceptions to enforcement would be those that appear in the text, as is the case with domestic arbitration awards.

Since the text of the New York Convention has been agreed upon by the other signatories to the Convention, allowing an American procedural rule to be added as an additional exception is not something the other signatories bargained for. Instead, the Second Circuit’s decision has made it appropriate, for now, for courts to decline enforcement for a reason that was not agreed upon by the other signatories to the treaty. Commentators have raised concerns with gleaning an additional exception to enforcement out of Article III of the New York Convention because it is “questionable whether *forum non conveniens* is in fact properly characterized as ‘procedural’ within the meaning of Article III,” which contemplates application of localized procedural rules only to “recognize arbitral awards as binding and enforce them,” and not to deny recognition and

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enforcement of arbitral awards. This perversion of Article III may have dire consequences unless the courts realize the need to preserve the narrow grounds for refusal to enforce arbitral awards to those outlined in Article V of the New York Convention. Though perhaps hyperbolic, one commentator posited that a failure to recognize that the doctrine of forum non conveniens should not be considered a “procedural” exception within the meaning and spirit of the treaty is “practically certain” to “lead to the demise” of the treaty’s “basic guarantees—reliability and efficiency in international arbitration.”

VII. Conclusion

There was a recent opportunity for this split to be clarified, but the Supreme Court passed on a potential chance to do so. On January 9, 2017, the U.S. Supreme Court denied the Government of Belize’s request to review the District of Columbia Circuit’s decisions confirming three international arbitration awards rendered against Belize. Review by the U.S. Supreme Court could have resolved the split between the D.C. and Second Circuits regarding the application of the forum non conveniens doctrine as a challenge to the enforcement of foreign arbitral awards in the United States. It is possible that the Belize case was not the right vehicle for appropriate resolution of this particular issue, which may be a reason the Supreme Court denied certiorari.
While the Second Circuit rejected the argument noted in Judge Lynch’ dissent that *forum non conveniens* is altogether unavailable as a basis for dismissal in an action to confirm an arbitral award under the New York Convention, the D.C. Circuit left this question open in *TMR Energy*. Additionally, the D.C. Circuit’s ruling did not necessarily create a rule that a foreign forum is always inadequate when a party seeks to attach assets located in the United States.

The current split implies that the Second Circuit is seemingly more willing to reject jurisdiction because of a loosely adequate alternative forum under *forum non conveniens* than the D.C. Circuit’s more pro-petitioner approach. Parties seeking to enforce an international arbitral award under the New York Convention will therefore be more likely to have the United States broker the enforcement of their award in the D.C. Circuit compared to in the Second Circuit.

Based on the review provided in this paper, it appears obvious that the D.C. Circuit’s pro-enforcement approach is preferable to the Second Circuit’s skirting of the United States’ obligation under the New York Convention. However, until the Supreme Court clarifies which approach is appropriate, parties will benefit from bringing their claim in the D.C. Circuit as opposed to the Second Circuit if they expect the assertion of a *forum non conveniens* defense. For now, the unresolved split means that the jurisdiction in which foreign arbitration award enforcement actions are brought will be critical when there may be a party seeking to utilize *forum non conveniens* as a defense.