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## *U.S. Supreme Court Leaves Unresolved Circuit Split on Forum Non Conveniens Defense in Foreign Arbitration Award Enforcement Actions*

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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 that country. By denying Belize’s petitions for *certiorari*, the Supreme Court declined to resolve a split between the D.C. and Second Circuits regarding the application of the *forum non conveniens* doctrine as a defense to challenge the enforcement of foreign arbitral awards in the United States.

With two key jurisdictions having adopted opposite positions on this issue, the Supreme Court’s decision to deny review leaves parties seeking to enforce foreign arbitral awards in the United States with an important strategic decision regarding the jurisdiction in which to bring an enforcement action.

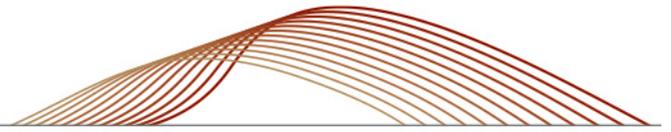
### **Overview of the Belize Cases**

The *certiorari* petitions arose from three agreements the Government of Belize negotiated between 2002 and 2005.

The first agreement was negotiated in 2005 between Belize and Belize Telecommunications Limited (“Belize Telecom”), the largest private telecommunications provider in Belize. The agreement granted Belize Telecom an exclusive license, a guaranteed rate of return on investments, and preferential tax treatment. In 2008, the new Belize government repudiated the agreement, and Belize Telecom’s successor, Belize Telemedia Limited, initiated arbitration in the London Court of International Arbitration (“LCIA”). The arbitral tribunal found the agreement to be valid and enforceable, and awarded Belize Telemedia declaratory relief and damages. Belize Telemedia then assigned the monetary portion of its award to Belize Social Development Limited (“BSDL”).

Belize challenged the award as unenforceable in the Belize Supreme Court (a trial court), which issued a preliminary injunction against the award’s enforcement. Belize then nationalized Belize Telemedia and dismissed the lawsuit, thereby terminating the local court proceedings in Belize.

The second agreement—also negotiated in 2005 and also providing for preferential tax treatment—was between Belize (on the one hand) and BCB Holdings Limited (a Belizean financial services company) and Belize Bank Limited (collectively, “BCB Holdings”) on the other. This agreement was likewise repudiated by the new Belize government in 2008, and resulted in arbitration proceedings



before a (different) LCIA arbitral tribunal. That tribunal also found the underlying agreement to be valid, and awarded damages against Belize.

BCB Holdings then sought to enforce the arbitration award in Belize, which is not a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). The Belize Supreme Court enforced the award, but the Belize Court of Appeals reversed that decision, refusing enforcement. The Caribbean Court of Justice (“CCJ”)—the highest appellate court for the member-states of the Caribbean Community of Sovereign States—affirmed the Court of Appeals’ decision, accepting Belize’s argument that the underlying agreement was void because it lacked the requisite consent of Belize’s parliament and, therefore, was contrary to Belize’s public policy.

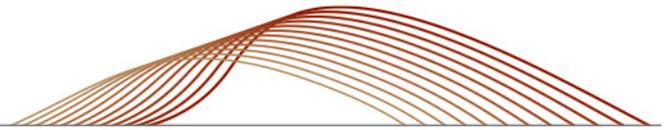
The third agreement was concluded in 2002 between Belize and Newco Limited, under which Newco received a 30-year concession to operate and develop Belize’s international airport. The government of Belize repudiated the agreement less than a year later, and the parties submitted their dispute to arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules in Miami, Florida. The arbitral tribunal awarded Newco damages for Belize’s breach of the agreement.

The prevailing parties in all three cases (BSDL, BCB Holdings, and Newco) sought to enforce their respective arbitral awards in the United States by filing suits in the U.S. District Court for the District of Columbia seeking confirmation of the awards under the Federal Arbitration Act (“FAA”) and the New York Convention.<sup>1</sup> The district court, in separate decisions, confirmed the three awards.<sup>2</sup> On each occasion, the court rejected Belize’s challenges to enforcement, including its invocation of the *forum non conveniens* defense, reasoning that the doctrine’s application was foreclosed by the D.C. Circuit’s precedent in *TMR Energy Ltd. v. State Property Fund of Ukraine*.<sup>3</sup> Specifically, the district court concluded that, under *TMR Energy*, there is no alternative forum to the United States where a petitioner may seek to “attach the commercial property of a foreign nation located in the United States.”<sup>4</sup> The D.C. Circuit subsequently affirmed the district court’s confirmation of the three underlying awards and endorsed its rejection of the *forum non conveniens* defense under *TMR Energy*.<sup>5</sup>

## **The Current Standards for Applying *Forum Non Conveniens* in Foreign Arbitral Award Enforcement Actions in the D.C. and Second Circuits**

To dismiss an action on the basis of *forum non conveniens*, the party invoking that defense must establish that (1) an adequate alternative forum for the dispute is available and, if so, (2) a balancing of private and public interest factors strongly favors dismissal.<sup>6</sup> As the Supreme Court explained, although the first requirement would ordinarily be satisfied “when the defendant is ‘amenable to process’ in the other jurisdiction,” the other forum may not be an adequate alternative if, for example, “the alternative forum does not permit litigation of the subject matter of the dispute.”<sup>7</sup>

In *TMR Energy*, the D.C. Circuit examined the *forum non conveniens* doctrine and held that no adequate alternative forum is available to a petitioner seeking enforcement of a foreign arbitral award against assets located in the United States, because “only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States.”<sup>8</sup> The D.C. Circuit emphasized that even if a defendant did not currently have any attachable property in the United States, dismissal on *forum non conveniens* grounds would still be inappropriate because that



defendant may acquire such property in the future, and “having a judgment in hand will expedite the process of attachment.”<sup>9</sup>

The U.S. Court of Appeals for the Second Circuit has adopted a different approach to this issue. In *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*,<sup>10</sup> the Second Circuit, in a 2-1 decision, rejected the D.C. Circuit’s *forum non conveniens* analysis in *TMR Energy*. The Second Circuit reasoned 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 precise assets located in the United States could be executed upon in the foreign forum.<sup>11</sup> The court noted that, to the extent *TMR Energy* “considered a foreign forum inadequate because the foreign defendant’s precise asset in this country can be attached only here,” it disagreed with the D.C. Circuit.<sup>12</sup>

Moving to the second step of the *forum non conveniens* analysis—a balancing of public and private factors—the Second Circuit majority observed that the proposed alternative forum, Peru, limited by statute the amount of money that a Peruvian government entity could pay annually to satisfy a judgment.<sup>13</sup> The court described that statute as “a highly significant public factor warranting FNC [*forum non conveniens*] dismissal, and held that this factor “tips the FNC balance decisively against the exercise of jurisdiction in the United States.”<sup>14</sup>

Dissenting in *Figueiredo*, Judge Lynch emphasized that the broad application of *forum non conveniens* would “dramatically undermine” the U.S.’s obligations under applicable international treaties to enforce foreign arbitral awards, since “many if not most of the disputes subject to international arbitration involve foreign parties engaged in disputes whose center of gravity is outside of the United States.”<sup>15</sup> Judge Lynch also expressed skepticism as to whether *forum non conveniens* should even be available as a defense to enforcement of international arbitral awards because it is not set forth as such in the New York Convention (or analogous treaties).<sup>16</sup>

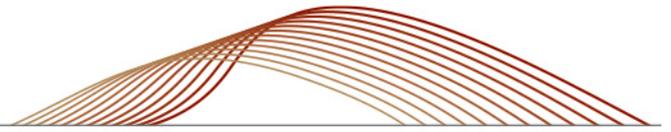
## **Belize’s Petition for *Certiorari* and the Views of the U.S. Solicitor General**

The Government of Belize sought *certiorari* in all three cases.<sup>17</sup> Belize argued that the Supreme Court’s intervention was needed to resolve the conflict between the D.C. and the Second Circuits, and to clarify the application of *forum non conveniens* defense in cases involving enforcement of foreign arbitral awards.<sup>18</sup> On March 28, 2016, the Supreme Court invited the U.S. Solicitor General to file a brief expressing the U.S. Government’s position as to whether *certiorari* should be granted in the *BSDL* case.<sup>19</sup>

The Solicitor General’s *amicus* brief recommended that review be denied, in essence, on three grounds.

First, the Solicitor General argued that it was unclear whether the D.C. Circuit in *TMR Energy* intended to create a categorical rule that a foreign forum is *always* inadequate where a petitioner seeks to attach assets in the United States. The Solicitor General noted that, unlike the Second Circuit in *Figueiredo*, the D.C. Circuit was not faced with a situation where public interest considerations (such as a state-imposed cap on annual payments of judgments) would weigh in favor of dismissal despite the presence of assets in the United States.

Second, the Solicitor General noted the existence of the predicate question—the one highlighted by Judge Lynch in his *Figueiredo* dissent—namely, whether *forum non conveniens* is “altogether unavailable as a basis for dismissal in an action to confirm an arbitral award under the New York Convention.” As the Solicitor General observed,



the Second Circuit rejected that argument, but the D.C. Circuit in *TMR Energy* left that question open.<sup>20</sup>

Third, the Solicitor General emphasized that this case was a “poor vehicle” to resolve any apparent circuit split, because there was another reason why no adequate alternative forum existed. Specifically, the CCJ in the *BCB Holdings* case refused enforcement based on Belizean public policy. Therefore, the Solicitor General observed, even if the Supreme Court decided the issue presented in Belize’s favor, BCB would not have an adequate alternative forum to litigate the underlying dispute.

For their part in opposing *certiorari*, the enforcing parties relied on the D.C. Circuit’s reasoning in *TMR Energy*, and argued further that *forum non conveniens* is not available at all in enforcement actions under the New York Convention. The enforcing parties contended that, because *forum non conveniens* is not one of the enumerated grounds under Article V of The New York Convention, and because the FAA provides 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,”<sup>21</sup> the doctrine cannot be used as a defense to refuse enforcement. In addition, the enforcing parties cited the draft Restatement (Third) of International Commercial Arbitration (as did the *Figueiredo* dissent), which commented that a proceeding to “enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on *forum non conveniens* grounds.”<sup>22</sup>

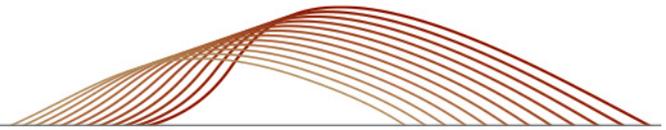
The Supreme Court considered all three *certiorari* petitions at the same conference and, on January 9, 2017, denied the petitions. As is customary, the Supreme Court did not comment on its decision, and no justice wrote separately, either concurring with or dissenting from the denial of *certiorari*.

## Conclusions

The Supreme Court’s decision to decline consideration of the question presented in Belize’s petitions leaves in place divergent applications of the *forum non conveniens* doctrine by U.S. federal courts in foreign arbitral award enforcement actions. Under the D.C. Circuit’s approach, a party seeking to confirm a foreign arbitral award is likely to surmount the *forum non conveniens* defense as long as that party is seeking to enforce that award against present or future assets located in the United States. The Second Circuit, by contrast, does not view that factor as sufficient to demonstrate that no other adequate alternative forum exists, but will instead consider other private and public interest factors in determining whether dismissal in favor of another forum is warranted.

Although the Solicitor General’s *amicus* brief argued that the D.C. Circuit in *TMR Energy* was not faced with the kind of public interest factor the Second Circuit found dispositive in *Figueiredo*,<sup>23</sup> it is not certain that the D.C. Circuit, absent unusual facts, would ever proceed to the second prong of the *forum non conveniens* analysis, at which such a factor could be considered. As the Solicitor General acknowledged, the D.C. District Court in the *BSDL* case read *TMR Energy* as setting forth a categorical rule and the D.C. Circuit appears to have endorsed that reading in *BCB Holdings* and *Newco*, albeit in non-precedential decisions.<sup>24</sup>

The justices’ refusal to clarify and resolve the courts’ disagreement buttresses (at least for the time being) D.C.’s pro-petitioner approach to recognizing and enforcing foreign arbitral awards under the New York Convention. Unless and until the Supreme Court addresses this divergence—or whether the *forum non conveniens* defense is available at all under the New York Convention—the D.C. Circuit will offer a comparative advantage to a party seeking to enforce an international arbitral award where that party expects the assertion of an otherwise viable *foreign non conveniens* defense.



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- <sup>1</sup> The FAA incorporates the New York Convention in its entirety, including its provisions regarding confirmation and enforcement of foreign arbitral awards. *See* 9 U.S.C. §§ 201-207.
- <sup>2</sup> *See Belize Social Dev. Ltd. v. Gov't of Belize*, 5 F.Supp.3d 25 (D.D.C. 2013); *BCB Holdings Ltd. v. Gov't of Belize*, 110 F.Supp.3d 233 (D.D.C. 2015); *Newco Ltd. v. Gov't of Belize*, 156 F.Supp.3d 79 (D.D.C. 2015).
- <sup>3</sup> 411 F.3d 296 (D.C. Cir. 2005).
- <sup>4</sup> *Belize Social Dev. Ltd.*, 5 F. Supp. 3d at 34 (quoting *TMR Energy*, 411 F.3d at 303); *see also BCB Holdings Ltd.*, 110 F.Supp.3d at 246-47 (quoting same). The district court in the *Newco* case only addressed Belize's *forum non conveniens* argument in passing, summarily dismissing it as being without merit. *See Newco Ltd.*, 156 F.Supp.3d at 83 n.4.
- <sup>5</sup> *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 105 (D.C. Cir. 2015); *BCB Holdings Ltd. v. Gov't of Belize*, 650 Fed. Appx. 17, 19 (D.C. Cir. 2016); *Newco Ltd. v. Gov't of Belize*, 650 Fed. Appx. 14, 16 (D.C. Cir. 2016).
- <sup>6</sup> *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)); *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 429 (2007).
- <sup>7</sup> *Piper Aircraft Co.*, 454 U.S. at 254 n.22 (citations omitted).
- <sup>8</sup> 411 F.3d at 303. Notably, the D.C. Circuit unanimous panel included then-Judge (and current Chief Justice) Roberts.
- <sup>9</sup> *Id.*
- <sup>10</sup> 665 F.3d 384 (2d Cir. 2011).
- <sup>11</sup> *Id.* at 391.
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.* at 387.
- <sup>14</sup> *Id.* at 392. The Second Circuit reached this decision even though the United States, in an *amicus* brief submitted at the court's invitation, argued that the district court properly declined to dismiss the action on *forum non conveniens* grounds. *See id.* at 389.
- <sup>15</sup> *Id.* at 397-98 (Lynch, J., dissenting).
- <sup>16</sup> *Id.* Judge Lynch noted that prior Second Circuit precedent, *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002), recognized *forum non conveniens* as a proper basis for declining to recognize and enforce an arbitral award under the New York Convention, but expressed his view that this case may have been wrongly decided. 665 F.3d at 989-99 (Lynch, J., dissenting).
- <sup>17</sup> Belize's petition in *BSDL* case (No. 15-830) was filed on December 22, 2015, and its petitions in the *BCB Holdings* (No. 16-136) and *Newco* (No. 16-135) cases were filed on July 26, 2016.
- <sup>18</sup> Belize argued that the Court's review was particularly crucial, because the D.C. Circuit is the default jurisdiction for such enforcement actions. *See* 28 U.S.C. § 1391(f)(4) ("A civil action against a foreign state . . . may be brought . . . in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.").
- <sup>19</sup> At the time of the Supreme Court's request, Belize had not yet filed its *certiorari* petitions in the other two cases, but they were filed by the time the Solicitor General submitted his *amicus* brief on December 7, 2016.
- <sup>20</sup> *See U.S. Amicus Br.* at 11 (No. 15-830) (citing *TMR Energy*, 411 F.3d at 304 n.\*). The Solicitor General noted that, in an *amicus* brief submitted in *Figueiredo*, the United States took the position that the doctrine of *forum non conveniens* is a rule of procedure that may properly be considered as a ground for dismissal under the materially identical Inter-American Convention on International Commercial Arbitration (the "Panama Convention"). *Id.* at 11 n.2.

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<sup>21</sup> 9 U.S.C. § 207.

<sup>22</sup> Rest. Int'l Comm. Arb. § 4-29(a) (Tentative Draft No. 3, 2013); *see also Figueiredo*, 665 F.3d at 398 (Lynch, J., dissenting) (citing the 2010 draft of the Restatement).

<sup>23</sup> *See* U.S. *Amicus* Br. at 11 (No. 15-830).

<sup>24</sup> *Id.*; *BCB Holdings*, 650 Fed. Appx. at 19; *Newco*, 650 Fed. Appx. at 16.