Recognition and Enforcement of International Arbitration Awards in the United States and the Doctrine of Forum Non Conveniens

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Ⅰ. Introduction

The doctrine of forum non conveniens allows a court, despite having jurisdiction over a case, to dismiss or stay the proceedings if it believes that the case would be more appropriately heard in a different jurisdiction. This principle is exercised at the court's discretion to ensure convenience for the parties involved and to achieve justice. It is recognized in the case law of both federal and state courts in the United States.

A petition seeking confirmation of an international arbitral award to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") applies is governed by Section 207 of Chapter II of the Federal Arbitration Act[1]. However, the issue arose as to whether applying the doctrine of forum non conveniens to such a petition would violate the obligation under Article III of the New York Convention, which stipulates that "each 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." The grounds for refusal of recognition and enforcement under Article V of the New York Convention are exhaustively listed and do not include forum non conveniens. Although the Second Circuit Court of Appeals has historically permitted the application of this doctrine to petitions for confirmation of international arbitral awards, this position has faced significant criticism within the United States. Recently[2], however, a judgment by the Second Circuit Court of Appeals reaffirmed its previous stance, indicating no change in its approach.

In Japan, the jurisdictional provisions of Article 46, Paragraph (4) of the Arbitration Act (following

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[1] 9 U.S. Code § 207 - Award of arbitrators; confirmation; jurisdiction; proceeding
Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The 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 said Convention.

[2] Restatement of The U.S. Law of International Commercial and Investor–State Arbitration § 4.27.

the enactment of the Act on the Arrangement of Related Laws to Promote the Use of Information and Communication Technology in Civil Procedures (Act No. 53 of 2023), Article 48, Paragraph (4) of the Arbitration Act), as stipulated by Article 3, Paragraph (3) of the same Act, also apply to the petitions for the enforceability order of foreign arbitral awards to which the New York Convention applies. Additionally, pursuant to Article 10 of the Arbitration Act, the provisions of the Code of Civil Procedure concerning international jurisdiction are also applied mutatis mutandis to the proceeding unless contrary to the nature thereof. The jurisdiction specified in Article 46, Paragraph (4) of the Arbitration Act is exclusive, and it is generally unnecessary to restrict it by applying the provisions concerning international jurisdiction. However, despite the absence of relevant Japanese judicial precedent, it may be necessary to consider whether the application of Article 3-9 of the Code of Civil Procedure (dismissal without prejudice due to special circumstances), which essentially serves the same function as the doctrine of forum non conveniens, is permissible. This issue requires careful examination.

Ⅱ. Monegasque De Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine and State of Ukraine Case[3]

1. Background

An agreement for the transportation of natural gas was concluded between AO Gazprom, a Russian company, and AO Ukragazprom, a Ukrainian company. Under this agreement, Ukragazprom had the right to receive 235 million cubic meters of natural gas as compensation for transporting gas by pipeline across Ukraine to various destinations of Europe. Gazprom alleged that Ukragazprom had withdrawn more gas than stipulated in the agreement without authorization and sought compensation for the excess. Gazprom's insurance company, Sogaz, provided the compensation, which was subsequently reimbursed by Monde Re, a Monaco-based company, under a reinsurance agreement.

Monde Re asserted its right to arbitrate the dispute instead of Gazprom and filed its claim with the International Commercial Arbitration Court of Arbitration in Moscow, Russia. Subsequently, Naftogaz assumed the rights and obligations of Ukragazprom. With the agreement of two out of three arbitrators, an arbitral award was issued, awarding in excess of $88 million to Monde Re. Naftogaz appealed to the Moscow City Court, but the arbitral award was upheld. The Supreme Court of the Russian Federation later affirmed this ruling.

[3] In re Arb. between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 496 (2d Cir. 2002).

2. Judgment of the United States District Court for the Southern District of New York

Before the rulings of the Moscow City Court and the Supreme Court of the Russian Federation, Monde Re filed its petition for confirmation of the arbitral award in the United States District Court for the Southern District of New York. Monde Re sought confirmation of the arbitral award against Naftogaz and the State of Ukraine. Monde Re argued that the State of Ukraine should be held liable based on theories of an agent, instrumentality, or alter ego of the State of Ukraine, complete control by the State of Ukraine and joint venture with the State of Ukraine.

Naftogaz moved for dismissal on the grounds of lack of personal jurisdiction. The State of Ukraine, on the other hand, moved for dismissal based on several arguments: immunity under the Foreign Sovereign Immunities Act leading to a lack of subject matter and personal jurisdiction, the doctrine of forum non conveniens, and failure to state a claim upon which relief could be granted.

The District Court dismissed Monde Re's petition based on the doctrine of forum non conveniens.By reason of mootness, the District Court did not make a determination regarding the personal jurisdiction over Naftogaz.

3. Judgment of the Second Circuit Court of Appeals

The Court of Appeals affirmed the judgment of the District Court and dismissed Monde Re's petition.

The Court of Appeals has determined that the recognition and enforcement of arbitral awards under the New York Convention is subject to the rules of procedure of the territory where the arbitral award is relied upon. These rules includes the doctrine of forum non conveniens. The grounds for refusal of recognition and enforcement under Article V of the New York Convention are considered substantive matters. The drafters of the New York Convention envisaged that different procedural rules could be applied by the courts of contracting states, provided that these rules do not impose more stringent conditions than those applicable to the recognition or enforcement of domestic arbitral awards. There is no dispute that the doctrine of forum non conveniens applies to domestic arbitral awards. In response to the argument that applying this doctrine undermines the objectives of the New York Convention, the Court of Appeals contended that if the parties had no resource but litigate, at any cost, the enforcement of an arbitral award in a petitioner's chosen forum unrelated to the parties, contract, or award itself, it would be highly inconvenient overall and might chill international trade.

Furthermore, the Court of Appeal determined that both the Court of Appeal and the District Court

could bypass the issue of jurisdiction and proceed directly to address the doctrine of forum non conveniens raised by the State of Ukrainian.

Furthermore, the Court of Appeals determined that the District Court's decision to dismiss Monde Re's petition based on the doctrine of forum non conveniens did not constitute an abuse of discretion, considering the following factors.

(a) The degree of deference on the forum selected by the petitioner and the adequacy of alternative forum.

The motivation of Monde Re, a Monaco-based company, for bringing in enforcement proceedings in the United States is not apparent. The only link between the parties and the United States is jurisdiction provided by the New York Convention. Therefore, little deference needs to be given to the foreign applicant's choice of the U.S. forum. Ukraine has been identified as an adequate alternative forum. Monde Re's claims regarding corruption within the Ukrainian judicial system were deemed lacking in concrete evidence. Furthermore, Monde Re's alleged involvement of Ukrainian state-owned enterprises and Monde Re's alleged impossibility of execution on the assets of the State of Ukrainian or Naftogaz in Ukraine were also found to be unsubstantiated.

(b) Private Interest Factors and Public Interest Factors

The private interest factors and public interest factors have been thoroughly considered in the context of Monde Re's petition for confirmation of an arbitral award against the State of Ukraine, which is not a party to the arbitration agreement. The evidence and witnesses relevant to the theory of holding the State of Ukraine accountable are located in Ukraine, rendering litigation in the United States inefficient. Consequently, the private interest factors strongly support dismissal under the doctrine of forum non conveniens.

Furthermore, jurisdiction provided by the New York Convention is the only link between the parties and the United States. The application of Ukrainian law is necessary to establish liability against the State of Ukraine, which is not a party to the arbitration agreement. Therefore, the Ukrainian courts are deemed more suitable for resolving these issues. As a result, public interest factors also support dismissal under the doctrine of forum non conveniens.

Ⅲ. Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, Ministry of Housing,

Construction and Sanitation and Programa Aqua Para Todos Case[4]

1. Background

This case involves Figueiredo Ferraz E Engenharia de Projeto Ltda., a Brazilian company, initiating arbitration proceedings against the Peruvian government. Figueiredo entered into a consulting agreement with Programa Agua Para Todos, a Peruvian government agency, pursuant to which Figueiredo wad to prepare engineering studies on water and sewage services in Peru. However, due to Programa's breach of contract, Figueiredo sought damages and commenced arbitration in Peru. The arbitration tribunal rendered an award in favor of Figueiredo, ordering Programa to pay more than $21 million in damages.

The Ministry of Housing, Construction and Sanitation of Peruvian government has appealed to the Court of Appeals in Lima seeking the nullification of an arbitral award. In this lawsuit, the Ministry argued that the arbitral should be considered "international arbitration" under Peruvian law, and thus, the recovery amount should be limited to the amount of the contract. However, the Lima Court of Appeals denied the appeal, ruling that since Figueiredo had designated itself a Peruvian domiciliary in the agreement, the arbitration was deemed "national arbitration." Consequently, the court determined that the full amount awarded in the arbitration must be paid.

Figueiredo received a payment of $1.4 million from Programa, equivalent to 3 percent of Programa's annual budget, as dictated by Peruvian statute regarding the limits for satisfaction of court judgments. Without seeking confirmation or execution of the arbitral award from a Peruvian court, Figueiredo proceeded to file a petition in the United States District Court for the Southern District of New York. This petition was against the Republic of Peru, the Ministry of Housing, Construction, and Sanitation, and Programa (collectively “the Peruvian government”). Figueiredo argued that the Peruvian government has substantial assets in New York resulting from the sale of bonds. The petition sought confirmation of the arbitral award pursuant to the Federal Arbitration Act provisions implementing the Inter-American Convention on International Commercial Arbitration (the "Panama Convention") or alternatively the New York Convention.

2. Judgment of the United States District Court for the Southern District of New York.

The District Court denied the motion filed by the Peruvian government, which was based on various grounds, including the lack of subject-matter jurisdiction, the doctrine of forum non conveniens,

[4] Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011).

and principles of international comity.

The District Court determined that the Republic of Peru, although not a party to the agreement, is considered to be an integral part of Programa and that jurisdiction was proper under the Foreign Sovereign Immunities Act.

The District Court acknowledged that there is limited deference to a foreign plaintiff's choice of a U.S. forum. However, considering that only U.S. courts have the authority to seize commercial property of foreign governments located within the United States, it determined that Peru does not constitute an adequate alternative forum. After evaluating both private and public interest factors, the District Court concluded that the public interest argument put forth by the Peruvian government—specifically, the payment cap equivalent to 3% of the annual budget of a Peruvian government agency—does not provide sufficient grounds for dismissing the case.

Furthermore, the District Court determined that the Peruvian government, by becoming a signatory to the Panama Convention, assumed the risk of having arbitral awards enforced in the United States, and therefore could not seek dismissal based on the doctrine of forum non conveniens.

3. Judgment of the Second Circuit Court of Appeals

The Peruvian government, dissatisfied with the decision to deny the motion for dismissal based on the doctrine of forum non conveniens and international comity, moved for leave to appeal an interlocutory appeal to the Court of Appeals, which was granted.

The Court of Appeals reviewed whether there was an abuse of discretion and subsequently reversed the District Court's decision. The case was reversed and remanded with directions for the District Court to dismiss the petition based on the doctrine of forum non conveniens. Judge Lynch provided a detailed dissenting opinion regarding both the applicability of the forum non conveniens doctrine in arbitration enforcement proceedings and its application to the specific case at hand.

The Court of Appeals determined that the adequacy of an alternative forum relies on whether the defendant are amenable to service of process and litigation regarding the subject matter is permissible there, and whether there are some assets of the defendant in the alternative forum when the defendant's assets are ultimately executed upon. This determination does not depend on whether the precise assets located in the forum can be executed upon in the alternative forum.

The Court of Appeals agreed with the Peruvian government's argument, determining that the

payment cap of 3% of the annual budget of Peruvian government agencies is a significant public interest factor and a decisive reason for dismissing the case. The court recognized the public interest in respecting measures taken by sovereign states to limit payment caps resulting from judgments. It concluded that Peruvian courts are the authoritative bodies empowered to make determinations regarding the interpretation and application of the statute that impose such caps. Given that the contract was concluded in Peru, the claimant is a Peruvian domiciliary, the respondent is the Peruvian government, and the work in question was conducted in Peru, the public interest justifies applying Peruvian statute that limits payment caps. This strongly supports dismissal under the doctrine of forum non conveniens. The Court of Appeals viewed this Peruvian statute as representing a public interest that takes precedence over the general U.S. policy favoring the enforcement of international arbitral awards.

The Court of Appeals determined that the Panama Convention envisions that arbitral awards will be enforced according to the procedural rules of the contracting state where enforcement is sought. Furthermore, the court found that Figueiredo assumed a more significant risk of having collection of an arbitral award subject to the cap statute by entering into a contract with a Peruvian government agency.

IV. Olin Holdings Ltd. v. State of Libya Case [5]

1. Background

This case arises from a dispute involving Olin Holdings Limited, a Cyprus company, and the expropriation of its dairy factory located in Tripoli, Libya. The dispute stems from an investment treaty arbitration proceeding initiated by Olin against the State of Libyan under the 2004 Bilateral Investment Treaty ("BIT") between Libya and the Republic of Cyprus. Prior to the arbitration proceedings, Olin had initiated litigation in Libyan courts against the State of Libyan, seeking compensation, but the claim was not upheld.

The Tribunal of the International Chamber of Commerce ("ICC") in Paris issued a partial award, affirming its jurisdiction based on Olin's claims that prior litigation proceedings did not preclude relief through arbitration. Subsequently, the Tribunal, considering Olin's assertions, determined that the State of Libya had violated the BIT by expropriating Olin's investment. Consequently, the Tribunal rendered a final arbitral award, ordering Libya to compensate Olin with €18,225,000 and to cover the arbitration and legal costs.

[5] Olin Holdings Ltd. v. State of Libya, No. 22-825 (2d Cir. 2023).

Olin has filed a petition against the State of Libyan in the State Supreme Court of New York, seeking confirmation of a final award. However, at the request of the State of Libyan State, the case has been removed to the United States District Court for the Southern District of New York.

2. Judgment of the United States District Court for the Southern District of New York

The District Court confirmed the final award and entered the judgment.

The State of Libyan argued that the District Court should independently review the Tribunal's decision on jurisdictional because the State of Libya had not "clearly and unmistakably" agreed to submit the issue of arbitrability to the arbitrators. However, the District Court determined that it must review the Tribunal's decision on jurisdiction with "considerable deference." This decision was based on the fact that the State Libya's objection was deemed a "procedural gateway issue," which is typically reserved for arbitrators to decide. Furthermore, the District Court found that even if the State Libya's interpretation was correct and the jurisdictional decision was considered a determination of arbitrability, the intent to submit arbitrability to the arbitrators was "clearly and unmistakably" recorded. Specifically, it noted that the State of Libya and Olin had agreed to resolve their disputes under the ICC Rules, which include provisions for arbitrators to decide on their own jurisdiction. Based on this standard of review, the District Court confirmed that the Tribunal's partial and final awards were manifestly reasonable.

Furthermore, the State of Libya filed a motion to dismiss based on the doctrine of forum non conveniens. The District Court denied the State of Libya's motion to dismiss on the grounds of forum non conveniens. It was determined that the State of Libya failed to demonstrate that the public interest factors and private interest factors were sufficient to justify the dismissal.

3. Judgment of the Second Circuit Court of Appeals

The State of Libyan appealed, but the Court Appeals affirmed the District Court's judgment and demined all claims made by the the State of Libyan.

The State of Libyan contends that the initiation of litigation by Olin terminated the offer to arbitrate, thereby disputing the existence of an arbitration agreement. Moreover, the State of Libya argues that it did not "clearly and unmistakably" agree to delegate the issue of arbitrability to the arbitrators, and therefore, the District Court's failure to conduct an independent review of arbitrability was erroneous. However, the Court of Appeals determined that the BIT constitutes an offer to arbitrate, and that a written arbitration agreement was established through the investor's submission of a request for arbitration. As a result, the Court of Appeals concluded that Libya's objection pertains

merely to the validity of the arbitration agreement. Even if the State of Libya's objection were not deemed a "procedural gateway issue," the BIT presupposes the application of ICC Rules, which include a provision for arbitrators to decide issues of arbitrability. Consequently, the State of Libya had "clearly and unmistakably" agreed to delegate arbitrability to the arbitrators, as evidenced by its conduct in the arbitration proceedings. Therefore, an independent review was deemed unnecessary.

The State of Libyan argued that the Tribunal's decision on jurisdiction was unreasonable and that the local court erred in not denying the confirmation of the arbitral award based on Article 5(1)(c) of the New York Convention. However, the Court of Appeals determined that the Tribunal's decision was based on a reasonable interpretation of the language of the BIT, and therefore, it did not fall under the grounds for refusal of recognition and enforcement enumerated in the New York Convention.

The State of Libyan further contended that the District Court improperly denied its motion to dismiss based on the doctrine of forum non conveniens. However, the Court of Appeals, assuming that the doctrine of forum non conveniens applies to petitions for confirmation of arbitral awards to which the New York Convention applies, referenced the requirements of this doctrine. The Court of Appeals ultimately concluded that the District Court properly denied the Satr of Libya's motion to dismiss on the grounds of forum non conveniens.

V. Comparison with Japanese Law

In the United States, foreign arbitral awards and U.S. arbitral awards that are not considered domestic awards are subject to the New York Convention as international arbitration awards. The U.S. has both federal and state arbitration laws. Actions seeking confirmation of international arbitration awards under the New York Convention can be filed in both federal and state courts. However, the New York Convention, its implementing legislation (Chapter 2 of the Federal Arbitration Act), and other federal laws apply, with state laws being applicable only to the extent that they are not preempted by federal law.

Chapter 2 of the Federal Arbitration Act broadly recognizes the defendant's right to remove actions from state courts to federal courts[6], although some cases are resolved in state courts. For actions

[6] 9 U.S. Code § 205 - Removal of cases from State courts
Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the

seeking confirmation of international arbitration awards not covered by the New York or Panama Conventions[7], Chapter 1 of the Federal Arbitration Act and other federal laws apply, with state laws being applicable only to the extent that they are not preempted by federal law. Chapter 1 of the Federal Arbitration Act contains basic procedural provisions for enforcing arbitration agreements and confirming or vacating arbitral awards. These provisions are also applied to Chapter 2 of the Federal Arbitration Act as long as they do not conflict with it or the New York Convention[8].

Actions seeking confirmation of arbitral awards require personal jurisdiction in accordance with applicable laws and constitutional standards. Chapter 2 of the Federal Arbitration Act contains provisions only for subject-matter jurisdiction[9] and venue[10]. The plaintiff can assert any form of

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United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

[7] International arbitral awards that are not subject to the New York Convention or the Panama Convention refer to those arbitral decisions rendered in countries that are not signatories to either of these conventions. As these awards do not meet the reciprocity requirement, they are not covered under either treaty. In the context of the New York Convention and the Treaty of Friendship, Commerce, and Navigation between Japan and the United States, there exists a relationship of general law and special law, where the special law takes precedence. Consequently, the provisions of Chapter 1 of the Federal Arbitration Act may become applicable.

[8] 9 U.S. Code § 208 - Application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States. This chapter applies to the extent that this chapter is not in conflict with chapter 4.

[9] 9 U.S. Code § 203 - Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

[10] 9 U.S. Code § 204 - Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

legal jurisdiction (personal, in rem, or quasi in rem) permitted by the chosen forum. Consent typically meets constitutional and statutory standards. In practice, however, the doctrine of forum non conveniens is rarely applied. Since actions seeking confirmation of arbitral awards generally involve simplified procedures with minimal fact-finding, significant inconvenience is rare.

The jurisdiction for the petitions for enforceability orders in Japan, as stipulated by Article 46, Paragraph (4) of the Arbitration Act, is limited to ordinary jurisdiction, special jurisdiction (including the place of arbitration and the location of assets), the Tokyo District Court and the Osaka District Court, as well as agreed jurisdiction. This means that when applied to international jurisdiction, there typically are no issues, and no further restrictions are necessary. However, in situations where the place of arbitration is in Japan without agreement, the location of assets and ordinary jurisdiction are abroad, and agreed jurisdiction is not in Japan, or where the location of assets is in Japan but foreign law is applicable, and evidence and witnesses are located abroad, and a foreign arbitral award is confirmed by a foreign court and entered as a final and binding judgment without appeal, recognized and enforced as a final and binding foreign judgment in Japan[11], there may be room to invoke the doctrine of forum non conveniens. This would be through the application of Article 3-9 of the Code of Civil Procedure, which essentially serves the same function as the doctrine of forum non conveniens, allowing for dismissal of a suit under special circumstances. Although there are no related Japanese judicial precedents at present, if with the vitalizing activity in arbitration in Japan, arbitration-related cases increased, this could potentially become a significant issue in the future.

[11] In the judgment of Tokyo District Court, September 6, 1969, 242 Hanrei Times 263, the court examined the requirements for recognizing a final and binding judgment from a foreign court. Specifically, it reviewed a final and binding judgment from a California court that confirmed an arbitral award by the American Arbitration Association. After evaluating the criteria for recognition of foreign judgments, the Tokyo District Court permitted enforcement based on the California court's judgment.